

# INADEQUACY OF ANTI - COMPETITION ACTIONS IN COMPETITION LAW OF PAKISTAN



Academy 7451



A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR  
THE AWARD OF MASTER DEGREE IN CORPORATE LAW

By

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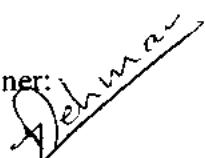
بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

## **INTERNATIONAL ISLAMIC UNIVERSITY, ISLAMABAD**

It is certified that we have gone through the thesis titled "INADEQUACY OF ANTI-COMPETITION ACTIONS IN COMPETITION LAW OF PAKISTAN" submitted by Mr. Saeed Khurshid Ahmad, student of LLM Corporate Law, Registration No. 274-FSL/LLMCL/S10, and we have come to the conclusion that the research work is up to the mark and fulfills all the requirements for the Master Degree in Law by the Faculty of Shariah & Law, International Islamic University Islamabad, and Viva voce exam has conducted and the candidate has successfully defended his thesis and is found fit for the award of LLM Degree in Law.

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## **DECLARATION**

I, Saeed Khurshid Ahmad having Registration No. 274-FSL/LLMCL/S10, Student of LL.M Corporate Law in International Islamic University, Islamabad, do hereby solemnly declare that the thesis titled “INADEQUACY OF ANTI-COMPETITION ACTIONS IN COMPETITION LAW OF PAKISTAN” is submitted in partial fulfillment of the requirements for the award of Master Degree in LL.M Corporate Law.

It is my original work and has not been submitted before, in this or other University, and Institution.

*Saeed Khurshid Ahmad*  
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## **DEDICATION**

**DEDICATED TO**

**My Beloved Parents & Family**

## **ACKNOWLEDGEMENT**

All praise is to Almighty Allah the creator of this universe who enabled me to accomplish this research work.

I would like to acknowledge my deep sense of gratitude to my respected Supervisor Dr. Asim Iqbal for continuously providing all possible support and guidance.

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Lastly, I would like to thank all those persons who directly and indirectly assisted me to complete this dissertation.

## **ABSTRACT**

Competition causes commercial firms to develop new products, services and technologies, which would give consumers to choose for better quality products at lower or reasonable price, so that consumer gets the right of choice and firms gets sufficient amount of profit. There are numbers of buyer and seller in a perfect competitive market and in any perfect market, no firm or individual can earn extraordinary profit without using attractive marketing strategies or better quality for ultimate result of consumer welfare. Since the economical behavior has been developed and entered into modern era as societies are tending to act in their self interest; there was a need to maintain check and balance for competition between the firms, companies and individuals. so that no one infringes other's rights in respect of competitive behaviors.

This thesis discusses the history of Competition Law in Pakistan that the society developed its approach to secure its rights against anti competitive behavior.

This thesis evaluates that competition law is implemented through relevant enactments in Pakistan along with a comprehensive range of discussion regarding existing laws and forums provided for Consumers Protection. This thesis provides an idea that different countries and communities such as U.S.A, U.K, India and EU have implemented Competition laws for the enforcement of Competition.

The thesis focuses the inadequacies in the existing competition law of Pakistan i.e. Competition Act, 2010 such as delay in providing justice, expensive justice, unavailability of compensation to complainant, double jeopardy, lack of confidentiality regarding undertakings, companies and firms, lack of provisions to execute the orders of Competition Commission of Pakistan, influence in composition

of Competition Commission, lack of decentralization system of justice and ignoring other fundamental rights enshrined under the Constitution of Islamic Republic of Pakistan, 1973 such as due process of law, fair prosecution and privacy of individual. This thesis provides a comparative study by discussing that other jurisdictions such as U.S.A, U.K, EU and India have tackled and managed such issues in technical and practical manner and implemented their competition laws in their jurisdictions to secure a consumer from anti competitive behavior to ensure a healthy competition in their societies.

The thesis ends with a conclusion and discusses that inadequacies as discussed in 3<sup>rd</sup> chapter may properly be addressed and combated in the Islamic Republic of Pakistan through legislators.

# **INADEQUACY OF ANTI – COMPETITION ACTIONS IN COMPETITION LAW OF PAKISTAN**

<b>TABLE OF CONTENTS</b>	<b>PAGE</b>
<b>EXAMINERS REPORT</b>	<b>III</b>
<b>DECLARATION</b>	<b>IV</b>
<b>DEDICATION</b>	<b>V</b>
<b>ACKNOWLEDGEMENT</b>	<b>VI</b>
<b>ABSTRACT</b>	<b>VII</b>
<b>TABLE OF CONTENTS</b>	<b>IX</b>
<b>LIST OF STATUTES</b>	<b>XII</b>
<b>LIST OF CASES</b>	<b>XIV</b>
<b>LIST OF ONLINE RESOURCES</b>	<b>XVII</b>
i. <b>WEBSITES</b>	<b>XVII</b>
ii. <b>WEB-LINKS</b>	<b>XVIII</b>
iii. <b>OTHER RESOURCES</b>	<b>XIX</b>
 <b>CHAPTER 1</b>	
<b>INTRODUCTION AND HISTORY</b>	<b>1</b>
1.1 <b>COMPETITION LAW HISTORY IN PAKISTAN</b>	<b>3</b>
1.2 <b>REASONS TOWARDS THE INEFFICIENCY OF MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ORDINANCE OF 1970 (MRTPO)</b>	<b>5</b>
a. <b>INEFFECTIVENESS</b>	<b>5</b>
b. <b>AMBIGUITIES</b>	<b>7</b>

c.	<b>OUTDATED INSTITUTIONS</b>	7
1.3	<b>JOURNEY TOWARDS NEW COMPETITION REGIME IN PAKISTAN</b>	8
<b>CHAPTER 2</b>	<b>EVALUATION OF COMPETITION LAWS</b>	<b>12</b>
2.1	<b>EXISTING LAWS &amp; FORUMS AGAINST ANTI COMPETITION AND CONSUMER PROTECTION IN PAKISTAN</b>	<b>12</b>
2.1.1	<b>COMPETITION ACT 2010 OF ISLAMIC REPUBLIC OF PAKISTAN</b>	<b>13</b>
2.1.2	<b>CONSUMER PROTECTION LAWS IN PAKISTAN</b>	<b>36</b>
	a. <b>ISLAMABAD CONSUMER PROTECTION ACT, 1995</b>	<b>38</b>
	b. <b>THE PUNJAB CONSUMER PROTECTION ACT, 2005</b>	<b>41</b>
2.2	<b>ANALYSIS OF LEGISLATIONS ON COMPETITION LAW IN DIFFERENT COUNTRIES</b>	<b>46</b>
2.2.1	<b>THE COMPETITION LAW OF THE U.S.A</b>	<b>47</b>
2.2.2	<b>THE COMPETITION ACT, 1998 OF THE U.K</b>	<b>49</b>
2.2.3	<b>E.U COMPETITION LAW</b>	<b>54</b>
2.2.4	<b>THE COMPETITION LAW OF INDIA</b>	<b>56</b>
<b>CHAPTER 3</b>	<b>INADEQUACIES IN THE EXISTING COMPETITION LAW OF PAKISTAN</b>	<b>66</b>
3.1	<b>DELAYED JUSTICE</b>	<b>67</b>
3.2	<b>EXPENSIVE JUSTICE</b>	<b>72</b>
3.3	<b>DOUBLE JEOPARDY</b>	<b>76</b>
3.4	<b>AWARD FOR DAMAGES, LOSS &amp; COMPENSATION TO THE COMPLAINANT</b>	<b>81</b>

c.	<b>OUTDATED INSTITUTIONS</b>	7
1.3	<b>JOURNEY TOWARDS NEW COMPETITION REGIME IN PAKISTAN</b>	8
<b>CHAPTER 2</b>	<b>EVALUATION OF COMPETITION LAWS</b>	12
2.1	<b>EXISTING LAWS &amp; FORUMS AGAINST ANTI COMPETITION AND CONSUMER PROTECTION IN PAKISTAN</b>	12
2.1.1	<b>COMPETITION ACT 2010 OF ISLAMIC REPUBLIC OF PAKISTAN</b>	13
2.1.2	<b>CONSUMER PROTECTION LAWS IN PAKISTAN</b>	36
a.	<b>ISLAMABAD CONSUMER PROTECTION ACT, 1995</b>	38
b.	<b>THE PUNJAB CONSUMER PROTECTION ACT, 2005</b>	41
2.2	<b>ANALYSIS OF LEGISLATIONS ON COMPETITION LAW IN DIFFERENT COUNTRIES</b>	46
2.2.1	<b>THE COMPETITION LAW OF THE U.S.A</b>	47
2.2.2	<b>THE COMPETITION ACT, 1998 OF THE U.K</b>	49
2.2.3	<b>E.U COMPETITION LAW</b>	54
2.2.4	<b>THE COMPETITION LAW OF INDIA</b>	56
<b>CHAPTER 3</b>	<b>INADEQUACIES IN THE EXISTING COMPETITION LAW OF PAKISTAN</b>	66
3.1	<b>DELAYED JUSTICE</b>	67
3.2	<b>EXPENSIVE JUSTICE</b>	72
3.3	<b>DOUBLE JEOPARDY</b>	76
3.4	<b>AWARD FOR DAMAGES, LOSS &amp; COMPENSATION TO THE COMPLAINANT</b>	81

<b>3.5</b>	<b>LACK OF CONFIDENTIALITY</b>	<b>86</b>
<b>3.6</b>	<b>LENIENCY</b>	<b>89</b>
<b>3.7</b>	<b>EXECUTION OF ORDERS AND CONTEMPT PROVISIONS</b>	<b>92</b>
<b>3.8</b>	<b>PRIVACY OF HOME, DUE PROCESS AND FAIR PROSECUTION</b>	<b>96</b>
<b>3.9</b>	<b>COMPOSITION OF COMMISSION</b>	<b>100</b>
<b>3.10</b>	<b>CENTRALIZED SYSTEM OF JUSTICE</b>	<b>102</b>
<b>3.11</b>	<b>CONSTITUTIONALITY</b>	<b>104</b>
<b>CHAPTER 4</b>	<b>CONCLUSION</b>	<b>107</b>
<b>BIBLIOGRAPHY</b>		<b>112</b>

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10. "CCP's Performance Termed Consistent by Global Review Despite Dwindling Resources". Available at <[http://www.cc.gov.pk/index.php?option=com\\_content&view=article&id=351:04-june-2014&catid=2:uncategorised](http://www.cc.gov.pk/index.php?option=com_content&view=article&id=351:04-june-2014&catid=2:uncategorised)>
11. Competition Commission of Pakistan, "Statutory Notification, S.R.O. 399 (I)/2008 Islamabad, dated 24 April, 2008, (Published in the Gazette of Pakistan Extraordinary, April 24, 2008). The Competition Commission (Appeal) Rules, 2007". Available at <[http://www.cc.gov.pk/images/Downloads/rules/cc\\_appeal\\_rules\\_2007.pdf](http://www.cc.gov.pk/images/Downloads/rules/cc_appeal_rules_2007.pdf)>
12. The Competition Commission of India, "Notification No. R-40007/6/ Reg – General/ Noti/ 04 – CCI, (Published In the Gazette of India, Extraordinary, Part III, Section 4, dated 22 May 2009, The Competition Commission of India (General) Regulations, 2009 (No. 2 of 2009)".
13. EU Competition Law, "Rules Applicable to Antitrust Enforcement, Volume I: General Rules. situation as at 1<sup>st</sup> July 2013". <[http://ec.europa.eu/competition/antitrust/legislation/handbook\\_vol\\_1\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/handbook_vol_1_en.pdf)>
14. The Competition Commission of India, "Notification No. R-40007/Reg – Recovery/ Noti/ 04 – CCI, (Published In the Gazette of India, Extraordinary, Part III, Section 4, dated 8<sup>th</sup> February 2011, The Competition Commission of India (Manner of Recovery of Monetary Penalty) Regulations, 2011 (No.1 of 2009)".

The basic criterion to weigh any legislation, in the scales of success and failure is its successful and smooth provision of due process and equal protection to the subjects of law.<sup>1</sup> Though it has been historically evidenced that social sciences especially the economic features in the society were not accurately addressed in relation with competition law even in the developed societies, but modernization in economical behavior with an impact of modern political philosophies directly developed the competition law in the recent years with establishing almost '120 systems<sup>2</sup>' to deal with competition law around the world. Due to its recent and massive development, its application cannot be limited to financial behaviors but obvious interaction of Competition law can surely be found in all sectors and aspects of social and economical behaviors.<sup>3</sup>

Historically, the competition law started with the first union movement of the 1880's in the United States that gave rise to the birth of Sherman Act,<sup>4</sup> the recent global union movement of the early 2000's, together with the growing liberalization of

<sup>1</sup> Dr. Wassim A. Manssouri, Dr. Tony G. Atallah and David Elliott, "A Guide For Legislative Analysis", by Westminster Foundation for Democracy, October 2011. This Document results from collaboration between Dr. Wassim A. Manssouri, Dr. Tony G. Atallah and David Elliott. Available at <<http://www.davidelliott.ca>>

<sup>2</sup> Richard Whish and David Bailey, "Competition Law", Seventh Edition, 2012. Published by Oxford University Press, Chapter 1: "Competition Policy and Economics", at Page 1: "There are now more than 120 systems of competition law in the world. In recent years competition law have entered into force in both China and in India, potentially bringing the benefits of competitive markets to an additional two and a half citizens of the world: a competition law will come into effect in Malaysia in 2012. There are new competition laws in contemplation, for example, in Hong Kong and the Philippines." The Author further mentioned to assess the number of systems of competition law in the world "A helpful way of accessing the competition laws of the world is through the website of the International Bar Association's Global Competition Forum, at [www.globalcompetitionforum.org](http://www.globalcompetitionforum.org); other useful sources are the websites of International Competition Network, [www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org); the OECD, [www.oecd.org](http://www.oecd.org); and UNCTAD, [www.unctad.org](http://www.unctad.org).

<sup>3</sup> Ibid.

<sup>4</sup> The Sherman Antitrust Act. 1890. accessible at <<http://www.ourdocuments.gov/doc.php?flash=true&doc=51>> accessed on 26/03/2014.

trade, stimulated a large number of emerging economies to adopt new competition laws.<sup>5</sup> Developed Competition laws not only address and regulate the practices and behaviors that are detrimental to society's competitive process including but not limited to competitive agreements, mergers, acquisitions and abusive behaviors towards monopolization and market dominance but also provide benefits of allocative efficiency<sup>6</sup>, productive efficiency<sup>7</sup> and dynamic efficiency<sup>8</sup> in the society.

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<sup>5</sup> Joseph Wilson, "Globalization and the Limits of National Merger Control Law" 1<sup>st</sup> Edition, 2003, Published by Kluwer Law International, at Page 62-64

<sup>6</sup> Richard Whish, Supra Note 1 at page 4 & 5, the Author told the benefits and added "under perfect competition, economic resources are allocated between different goods and services in such a way that it is not possible to make anyone better off without making someone else worse off: consumer surplus – the net gain to a consumer when buying a product is at its largest. Goods and Services are allocated between consumers according to the price they are prepared to pay, and, in the long run, price equals the marginal cost of production (cost for this purpose including a sufficient profit margin to have encouraged the producer to invest his capital in the industry in the first place, but no more). The achievement of allocative efficiency, as this phenomenon is known, can be shown analytically on the economist's model. Allocative efficiency is achieved under perfect competition because the producer, assuming he is acting rationally and has a desire to maximize his profits, will expand his production for as long as it is privately profitable to do so. As long as he can earn more by producing one extra unit of whatever he produces than it costs to make it, he will presumably do so. Only when the cost of producing a further unit (the 'marginal cost') exceeds the price he would obtain for it (the 'marginal revenue') will he cease to expand production. Where competition is perfect, a reduction in a producer's own output cannot affect the market price and so there is no reason to limit it; the producer will therefore increase output to the point at which marginal cost and marginal revenue (the net addition to revenue of selling the last unit) coincide. This means that allocative efficiency is achieved, as consumers can obtain the amount of goods or services they require at the price they are prepared to pay; resources are allocated precisely according to their wishes. A monopolist however can restrict output and increase his own marginal revenue as a consequence of doing so."

<sup>7</sup> Ibid., at page 5, the Author points out the benefit of competition as Productive efficiency and added "Apart from allocative efficiency many economists consider that under perfect competition goods and services will be produced at the lowest cost possible, which means that as little of society's wealth is expended in the production process as necessary. Monopolists, free from the constraints of competition, may be high cost producers. Thus competition is said to be conducive to productive efficiency. Productive efficiency is achieved because a producer is unable to sell above cost (if he did his customers would immediately desert him) and he will not of course sell below it (because then he would make no profit). In particular, if a producer were to charge above cost, other competitors would move into the market in the hope of profitable activity. They would attempt to produce on a more efficient basis so that they could earn a greater profit. In the long run the tendency will be to force producers to incur the lowest cost possible in order to be able to earn any profit at all: an equilibrium will be reached where price and the average cost of producing goods necessarily coincide. This in turn means that price will never rise above cost. If on the other hand price were to fall below cost, there would be an exit of capital from the industry and, as output would therefore decrease, price would be restored to the competitive level.

<sup>8</sup> Ibid. at page 5 and 6, The author points out another benefit of competition as Dynamic efficiency and added "A further benefit of competition, albeit one that cannot be proved scientifically and is not captured by the theory of perfect competition, is that producers will be more likely to innovate and develop new products as part of the continual battle of striving for consumer's business. Thus competition may have the desirable dynamic effect of stimulating important technological research and development. This assumption has been questioned. Some argue that only monopolists enjoy the wealth to innovate and carry out expensive research. Schumpeter was a champion of the notion that the

Pakistan is one of the few emerging republics with a competition law in place for more than three decades in the shape of the Monopolies and Restrictive Trade Practices Ordinance of 1970 (MRTPO) having strong provisions and the agency assigned to implement was 'the Monopolies Control Authority' (MCA).<sup>9</sup> The deficiency of skilled staff, changes in the national and global markets through improved trade from corner to corner and the rising presence and power of the multinational corporations (MNCs) has fashioned an urgent need to overhaul the competition regime in Pakistan.<sup>10</sup> Therefore, the Government of Pakistan annulled the MRTPO and executed a new Competition Act in its place.<sup>11</sup> Similarly, the MCA has been replaced by a new National Competition Commission.

Ayub Khan's era was an epoch of rapid economic development in Pakistan, which ultimately resulted in the concentration of wealth in the hands of twenty family groups.<sup>12</sup> These families controlled two thirds of the industrial assets, 80 percent of banking and 70 percent of insurance in Pakistan respectively and therefore, such rising centralization of market-shares in the hands of a few impelled the government

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motivation to innovate was the prospect of monopoly profits and that, even if existing monopolists earned such profits in the short term, outsiders would in due course enter the market and displace them. A 'perennial gale of creative destruction' would be sufficient to protect the public interest, so that short-term monopoly power need not cause concern. Empirical research tends to suggest that neither monopolists nor fierce competitors have a superior track record in this respect, but it would seem clear that the assertion that only monopolists can innovate is incorrect. It is important to acknowledge that in certain industries, particularly where technology is sophisticated and expensive, one firm may, for a period of time, enjoy very high market shares; however, in due course, a competitor may be able to enter that market with superior technology and replace the incumbent firm. In cases such as this, high market shares over a period of time may exaggerate the market power of the firm that is currently the market leader, but vulnerable to dynamic entry.

<sup>9</sup> Joseph Wilson, "At the Crossroads: Making Competition Law Effective in Pakistan Symposium on Competition Law and Policy in Developing Countries", Northwest Journal of International Law and Business, Volume 26, Issue 3, Spring 2006, accessible at: <<http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1635&context=njilb>> accessed on 20-03-2014.

<sup>10</sup> Ibid.

<sup>11</sup> Joseph Wilson, Supra note 5, at page 65. See also Competition Ordinance, 2007, Section 59 and Competition Act, 2010, Section 60. See Chapter 2 below.

<sup>12</sup> Joseph Wilson, Supra note 9, at page 567

to make a commission for comprehensive study into the trade, commerce, and industry of the country.<sup>13</sup> In 1963, the government established an Anti-Cartel Laws Study Group,<sup>14</sup> which in its report found that certain monopolies and lobbies existed in the country. On the basis of the Anti-Cartel Laws Study Group report, a draft anti-monopoly and anti-cartel law was published in the Gazette of Pakistan (Extraordinary) on June 28, 1969 for public comment.<sup>15</sup> On February 26, 1970, the Monopolies and Restrictive Trade Practices Ordinance, 1970 was promulgated and it came into force on August 17, 1971.<sup>16</sup> Section 8 of the MRTPO postulated the formation of the Monopoly Control Authority (MCA) for the execution of the MRTPO.<sup>17</sup> The MCA was established on the same day when MRTPO became operational.

The MRTPO was the first type of legislation linking to competition law in Pakistan. It was passed three years before the current Constitution of Pakistan, constitutional ground for such legislation was placed in Article 38(a),<sup>18</sup> which provides for stopping the concentration of capital and means of production and circulation in the hands of a few to the damage of popular interest.<sup>19</sup> The Article forbids concentration of power in case of depressing popular interest. Although general interest is not clear under the Constitution, yet it perhaps might cover

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<sup>13</sup> Ibid.

<sup>14</sup> Organization for Economic Cooperation and Development (OECD), "Global Forum on Competition, Roundtable on Bringing Competition into Regulated Sectors, Contribution from Pakistan", 9<sup>th</sup> February 2005, at page 2, accessible at <<http://www.oecd.org/competition/globalforum/GlobalForum-February2005.pdf>> accessed on 23/03/2014.

<sup>15</sup> Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (Pakistan) (Published in the Gazette of Pakistan, Extraordinary, Feb. 26, 1970)

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Constitution of Pakistan, 1973, Article 38 (a) The State shall: "Secure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants."

<sup>19</sup> Joseph Wilson, Supra note 9.

"consumer welfare" the very basis of competition laws.<sup>20</sup> Consumer welfare, a term devised by Judge Robert Bork, deals with the things that are worthy for consumers, such as "low prices, innovation, and choice among differing products." It should be distinguished that "consumer welfare" under Bork's definition also includes "manufacturer welfare" that is the advantage of increase to dealers of goods and services.<sup>21</sup> The MRTPO did not have purchaser welfare as its core objective. The state of affairs leading to its legislation encouraged the drafters to have distribution of fiscal power as the major purpose of the Ordinance.

## **1.2 REASONS TOWARDS THE INEFFICIENCY OF MONOPOLIES AND RESTRICTED TRADE PRACTICES ORDINANCE OF 1970 (MRTPO):**

These are some important factors which contributed towards the inefficiency of MRTPO and forced us to make new laws.

### **a. INEFFECTIVENESS:**

After the announcement of the MRTPO, the nationalization practice under the Economic Reform Order of 1972 was started, limiting the scope of the Ordinance and therefore, in the early 1970's, thirty-two large industrial units were nationalized, and all heavy industry was shifted to the public sector.<sup>22</sup> A Board of Industrial Management was formed to supervise the thirty-two nationalized industries and ten companies. All nationalized industries were released from the application of the

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<sup>20</sup>Robert H. Bork, "*The Antitrust Paradox: a policy at war with itself*", 1<sup>st</sup> Edition, 1978, Published by Basic Books, Inc., New York, at Page 61. "Competition" may be read as a shorthand expression, a term of art, designating any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree. Conversely, "monopoly" and "restraint of trade" would be terms of art for situations in which consumer welfare could be so improved, and to "monopolize" or engage in "unfair competition" would be to use practices inimical to consumer welfare.

<sup>21</sup> Ibid, at Page 62

<sup>22</sup> Joseph Wilson, *Supra* note 9 at page 568.

MRTPO provided under Section 25 of the Ordinance.<sup>23</sup> During such period, the attention of MCA's prosecution was on expansion of the shared equity of the industries as number of private undertakings which did not come across the "total value of assets" were transformed into public companies and resultantly, the Foreign Private Investment Act (FPIA) was publicized to provide for the promotion and protection of foreign private investment in the country in 1976.<sup>24</sup> This Act granted safeguard to foreign investment in "industrial undertakings" in Pakistan established after 1<sup>st</sup> September, 1954. While native undertakings, after nationalization, were released from the application of Section 25 of the MRTPO and foreign undertakings were not affected because of the FPIA.<sup>25</sup> There were practically no undertakings that came within the domain of the MRTPO. If we elaborate the role and objectivity of the MCA, it was placed with the Securities and Exchange Authority, as department of a newly formed Corporate Law Authority (CLA) in 1981.<sup>26</sup> The Chairman and Members of the CLA were also designated as Chairman and Members of the MCA for enforcement of laws under the MRTPO. The mandate of the CLA was to enforce the corporate laws and again the execution of MRTPO was shattered. The agenda of the MRTPO abridged its execution to zero percent in the first two decades. During the nationalization period, the government rejected the enforcement of MRTPO as it could discourage investment. Later, the organizational agenda under the CLA placed it in the ditches of time. Nonetheless, in 1994 the government separated the MCA with CLA and reinstated its sovereign position.<sup>27</sup> Whereas the MCA investigated hundreds of cases after 1994 the MCA remained ineffective in breaking them.

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<sup>23</sup> MRTPO – 1970. supra note 15.

<sup>24</sup> Joseph Wilson. Supra note 9.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid.

**b. AMBIGUITIES:**

In light of above discussion, there were few loopholes in the practical provisions of the MRTPO,<sup>28</sup> which includes:

- i. "MRTPO eliminated government entities from its application.
- ii. MRTPO does not distinct the investigation and trial functions of the Authority.
- iii. MRTPO does not offer compensatory instruments for customers or undertakings suffering from anti-competitive practices.
- iv. MRTPO seriously limited the ability of the Authority to impose fines.
- v. MRTPO does not call for pre-merger warning nor delivered any help to the merging parties when they took authorization from the MCA.<sup>29</sup>

**c. OUTDATED INSTITUTIONS:**

The MCA was an outdated body as the fundamental cause of pitiable performance of the MCA was that the MRTPO did not require any specialized credentials for the members of the MCA.<sup>30</sup> In addition to poor leadership, the MCA was seriously undermanned. The Chairman was assisted by only two members to carry out the functions of the Authority.<sup>31</sup> One of them was in charge of legal and administrative matters, while the other was the head of research and investigation side of the department.<sup>32</sup> There were twenty two(22) posts, of which eleven (11) were remained empty along with the posts of Chief and Registrar and in the same way four (4) positions remained vacant out of the six posts in the registration wing.<sup>33</sup> Further,

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<sup>28</sup> Ibid. at Page 583 to 589

<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> MRTPO-1970, supra note 15.

<sup>32</sup> Ibid.

<sup>33</sup> Joseph Wilson. Supra note 9.

Research and Investigation department had no economist for assistance in its work. Such lack of man power and staff affected the performance of the Authority. Resultantly, there was not any research, consumer backing or amounts investigation.<sup>34</sup> Thus industrial, social, and legal framework surrounding the MRTPO, coupled with its inadequate provisions and the institutional inability of the MCA reduced the efficiency of competition regime in Pakistan.

### 1.3

### **A JOURNEY TOWARDS NEW COMPETITION REGIME IN PAKISTAN:**

In the presence of liberal governments in decade of nineties (1990ies), Pakistan started the course to restructure its competition law. Though there were demands to mend the competition regime as early as 1993, the government actually became serious when there was a framework of various international organizations which came into existence. The government bowed to the International Monetary Fund and World Bank for financial and technical funding to reorganize Pakistan's largely nationalized economy.<sup>35</sup> As the country obtained these facilities, Pakistan prepared three national policies as Poverty Reduction Strategy Papers (PRSP), the Interim PRSP in 2001 (I-PRSP), the PRSP-I in 2003 and PRSP-II in 2009.<sup>36</sup> These documents were prepared with the vigorous participation of many international organizations and through regulatory reforms in PRSP-I, the government acknowledged strategies to reorganize the MCA and implement a new competition law.<sup>37</sup>

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<sup>34</sup> Ibid.

<sup>35</sup> Government of Pakistan, 'Poverty Reduction and Strategy Paper' (Country Report 04/24, IMF 2004) <<http://www.imf.org/external/pubs/ft/scr/2004/cr0424.pdf>> accessed on 22 March 2014.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid.

The MCA had ambiguous modifications using German and OECD models respectively. It was the first time when government gave thoughtful attention to this specific issue. Pakistan also desired to reform its economic structures through International Monetary Fund and World Bank aid. Further, numerous dynamics provide support the view that international organizations played a key role in the development course and the Government wished the technical support of the World Bank to make the new competition law and policies in 2005.<sup>38</sup> The World Bank involved a Brussels' law firm, to make a proposed law. This law firm developed a framework with which it was most familiar and such law was designed by the executive branch of the government which dodged<sup>39</sup> the country's legislature and publicized it as the Competition Ordinance of 2007<sup>40</sup>.

The Competition Ordinance of 2007 is greatly impressed by the European Union's law and its characteristics as under Section 3 and 4 two of the four substantive provisions were related to abuse of dominance and prohibited agreements which had resemblance with the Article 101 and 103 of the Treaty on the Functioning of the European Union.<sup>41</sup>

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<sup>38</sup> Joseph Wilson, "Crossing the Crossroads: Making Competition Law Effective in Pakistan", Loyola University Chicago International Law Review, Volume 8, Issue 2, Article 2. 2011, at Page 105, 106.

<sup>39</sup> Under Pakistan's 1973 Constitution, laws, called Acts, are to be passed by the Parliament. The executive branch may pass temporary legislation by issuing Ordinances through the office of the President.

<sup>40</sup> Competition Ordinance, 2007 (Pakistan) (Ordinance L II of 2007. Published in the Gazette of Pakistan, Extraordinary, Part 1 on 2 October 2007), [http://www.na.gov.pk/uploads/documents-1302737461\\_746.pdf](http://www.na.gov.pk/uploads/documents-1302737461_746.pdf) accessed on 20 March, 2014.

<sup>41</sup> Ibid., Competition Ordinance, 2007, an analysis of Competition Ordinance 2007 and Treaty on the Functioning of the European Union.

With the promulgation of Competition Ordinance of 2007, the MRTPO of 1970 was annulled and the MCA was abolished. The government worked out for establishing the Competition Commission of Pakistan (CCP) in place of the Monopolies Control Authority (MCA). Competition Ordinance of 2007, in relation with the universal developments and practices, concentrated on protecting competition and increasing consumer welfare and forbids four kinds of anti-competitive behaviors; abuse of domination; collusive agreements; deceptive marketing practices and mergers & acquisitions respectively.<sup>42</sup> The transformed viewpoint on the reasoning for competition law seemed clear with reduction of controls for wealth distribution converted into the idea of promoting competition for economic efficiency and growth of the country.

Under the Competition Ordinance of 2007, the Competition Commission of Pakistan was assigned and permitted to do three main tasks to protect and promote competition. Firstly, it was mandated to carry out law-enforcement actions by conducting inquiries into possible violations of the functional provisions and to order remedial measures to restore competition where violations were found and also to levy significant penalties on the violators.<sup>43</sup> Second, it was authorized to conduct research into the competitiveness of various areas of the economy. Third, it was also empowered to raise attentiveness about competition to all participants in the society and to suggest policy and legislative reviews to the government.<sup>44</sup> The Commission was given powers to gather information, conduct inspection, record evidence and make request to get help from other private and public agencies, give leniency, and

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<sup>42</sup> Joseph Wilson, *supra* note 9.

<sup>43</sup> The Competition Ordinance – 2007, *supra* note 40

<sup>44</sup> *Ibid.*

use wide range of powers for the recovery of penalties.<sup>45</sup> The orders of the Competition Commission of Pakistan were made appealable before the Supreme Court of Pakistan directly. The new law not only created existing management rather it is very much similar to the ones found in progressive legal jurisdictions in accordance with global best practices. It is also empowered significantly to enforce the law.<sup>46</sup>

In the constitutional and political history of Pakistan, competition laws have passed this journey to reach in this present shape "the Competition Act, 2010." These laws are valuable if loopholes and its contradiction with consumer protection laws are determined and resolved by the executive authorities.

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<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

**2.1 EXISTING LAWS AND FORUMS AGAINST ANTI COMPETITION & CONSUMER PROTECTION IN PAKISTAN**

Competition causes commercial firms to develop new products, services and technologies, which would give consumers to choose for better quality products in lower or reasonable price, so that consumers get the right of choice and companies also get sufficient amount of profit.<sup>47</sup> There are large number of buyers and sellers in a perfect competitive market where no firm can earn profit without using attractive marketing strategies or better quality and in result of such healthy competition, price will be lower as it is generally accepted that competition results in lower prices and ultimately less competition leads to higher prices.<sup>48</sup>

Anti competitive practices like dumping, exclusive dealing, price fixing, refusal to deal with vendors, dividing territories, limiting prices, regulations which place costly restriction on less wealthy firms, subsidies provided by the government, protection policy, tariff and quotas etc. impede the competition and badly effect the consumer interest (price, service, quality and choice). On the contrary, lack of excessive competition may harm the consumer interest through deception and inefficiency.<sup>49</sup> That is why, there was need of any legislative and regulatory body to restrict anti competitive practices and make healthy competition possible.

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<sup>47</sup> Richard Whish, *supra* note 1.

<sup>48</sup> *Ibid.*

<sup>49</sup> Such statement is taken after the analysis of the cases dealt by Competition Commission of Pakistan available at <<http://www.cc.gov.pk>>.

## 2.1.1

## THE COMPETITION ACT, 2010 OF ISLAMIC REPUBLIC OF PAKISTAN

The Competition Act, 2010 of Pakistan, an Act which prohibits the anti competitive behavior to promote and enhance healthy competition to increase the economic efficiency and protect consumer benefits, with regulating all matters and undertakings for free competition in relation with commercial and economic activities in the country.<sup>50</sup>

Section 2 of the Act defines the concept of important legal and economic terms related to Competition law such as acquisition<sup>51</sup>, agreement<sup>52</sup>, dominant position<sup>53</sup>, goods<sup>54</sup>, merger<sup>55</sup>, relevant market<sup>56</sup>, retailer<sup>57</sup>, services<sup>58</sup>, tribunal<sup>59</sup>,

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<sup>50</sup> The Competition Act, 2010, Act No. XIX of 2010 (Published in the Gazette of Pakistan Extraordinary, October 13, 2010). See Preamble.

<sup>51</sup> Ibid. Section 2 (a) "means any change of control of any undertaking by way of acquisition of shares, assets or any other means."

<sup>52</sup> Ibid. Section 2 (b) includes "any arrangement, understanding or practice whether or not it is in writing or intended to be legally enforceable."

<sup>53</sup> Ibid. Section 2 (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."

<sup>54</sup> Ibid. Section 2 (f) "includes any item, raw material, product or by-product which is sold for consideration."

<sup>55</sup> Ibid. Section 2 (h) "means the merger, acquisition, amalgamation, combination or joining of two or more undertakings or part thereof into an existing undertaking or to form a new undertaking; and expression merge means to merge, acquire, amalgamate, combine or join as the context may require."

<sup>56</sup> Ibid. Section 2 (k) "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 of all those products or services which are regarded as interchangeable or substitutable by the consumers 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 homogenous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those areas."

<sup>57</sup> Ibid. Section 2 (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>58</sup> Ibid. Section 2 (o) "service means service of any description whether industrial, trade, professional or otherwise."

<sup>59</sup> Ibid. Section 2 (p) "Tribunal means Competition Appellate Tribunal under section 43 of the Act."

undertaking<sup>60</sup>, wholesaler<sup>61</sup> and other provisions related to Competition Commission of Pakistan constituted under section 12 of the Act.

In a recent case titled "Pakistan Overseas Employment Promoters Association (POEPA) Versus G.C.C. Approved Medical Centers Administrative Office (GAMCA) & GCC Approved Medical Centers"<sup>62</sup>, decided on 29<sup>th</sup> of June 2012 by the Competition Commission of Pakistan, the Commission held that the services which are not free: are not rendered as a social services as 'no profit organization'; and are carried out for making profit; shall be considered the services to be engaged in economic activity with the implementation of the division of markets and equal allocation of consumers. And the service providers of the same come under the definition of "undertaking" as per the Competition Act, 2010.

Section 3 of the Act restrains any person for abusing dominant position<sup>63</sup> by practicing<sup>64</sup> prevention, restriction, reduction, or distortion regarding competition in the relevant market. Abuse of dominant position has not only unhealthy impact on economic activities but also discourages and discriminates human resources which are essential for a vibrant economy. In a Show Cause Notice issued by Competition

<sup>60</sup> Ibid. Section 2 (q) "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."

<sup>61</sup> Ibid, Section 2 (r) "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."

<sup>62</sup> "Pakistan Overseas Employment Promoters Association (POEPA) Versus G.C.C. Approved Medical Centers Administrative Office GAMCA & GCC Approved Medical Centers", 2013 CLD 748.

<sup>63</sup> The Competition Act 2010, supra note 21, Section 3 (1) "No person shall abuse dominant position."

<sup>64</sup> Ibid., Section 3(3) "The expression "practices" referred to in subsection (2) shall include, but are not limited to, (a) limiting production, sales and unreasonable increases in price or other unfair trading conditions. (b) price discrimination by charging different prices for the same goods or services from different customers in the absence of objective justifications that may justify different prices. (c) tie-ins, where the sale of goods or service is made conditional on the purchase of other goods and 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."

Commission of Pakistan, the same concept was emphasized when Institute of Chartered Accountants of Pakistan (ICAP) prohibited its members and chartered accountant firms from training non ICAP accountancy student.<sup>65</sup> Moreover, monopolistic firms exploit the consumers by determining the high price and such abuse also limits the right of choice of consumers.<sup>66</sup> On the same side, price discrimination policy prevails in the market, if abuse of dominant position is not controlled, resultantly undertaking charges different price for same goods and services from different customer without any justification of different prices.<sup>67</sup> Some of the firms/associations make cartel and determine the price at a level where new firm cannot bear its cost so it may drive out of the competitive market and strong firms may monopolize the market. This cartel adopts boycott policy and refuses to deal with any sector for production and / or sales in provision of goods or services.<sup>68</sup>

Section 4 of the Act prohibits entering into such agreements and / or decisions which restrict or impede or prevent the relevant market from competition.<sup>69</sup> Such

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<sup>65</sup> *Institute of Chartered Accountants of Pakistan(ICAP): In the Matter of Show Cause Notice No. 105/2012, dated 17<sup>th</sup> September, 2012, Decided on 10<sup>th</sup> January, 2013* CLD 1184.

<sup>66</sup> Ibid, the Commission held in the same that prohibition on accountancy firm foreclosed, shut out and precluded not only a large segment of the relevant market for non-ICAP students, but the most valuable segment i.e. accountancy firms were restricted in their choice and freedom to engage a trainee; while it deprived the non-ICAP students, both quantitatively and qualitatively, from gaining such experience, practically from the most prestigious segment of the training market which adversely impacts the accountancy firms as well as the value of the qualification offered by direct competitors of ICAP thereby restricting, preventing and reducing competition in the relevant market.

<sup>67</sup> *In re: M/s. Indus Motor Company Limited*, where the commission questioned the same that "The Indus Motor had the sole right to change price of the vehicle without notice to buyer at the time of delivery. This clause created uncertainty as to price and buyer was not sure of how much extra amount is to be paid at the time of delivery for getting what he or she has been promised even though the „consideration“ has already been paid. This lacuna has been removed by explicitly mentioning in the revised draft PBO that revision of prices would only be subject to a change, if any, in Government levies/taxes and/or currency fluctuation."

<sup>68</sup> [http://www.cc.gov.pk/images/Downloads/indus\\_motor\\_order.pdf](http://www.cc.gov.pk/images/Downloads/indus_motor_order.pdf) accessed on 20 October 2014.

<sup>69</sup> *In re: Pakistan Steel Mill*, the Competition Commission of Pakistan reiterated the same and held that PSM abused its dominant position in the low-carbon steel market by refusing to deal with customers like FFPL in violation of Section 3(3)(g) of the Ordinance. <http://www.cc.gov.pk/images/Downloads/PSM-Final-Order-March%202022-10.pdf> accessed on 20 October 2014.

<sup>70</sup> Competition Act, 2010, supra note 50, Section 4 (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

agreements include but are not limited to the fixing of sale price on a level where any association or firm may not bear its cost, as noticed by the Competition Commission of Pakistan in the matter of titled "*I-Link Guarantee Limited and Member Banks*"<sup>70</sup>; or fixing a purchase price at higher level<sup>71</sup> so it will be unaffordable. same as the landmark case of *Long Distance & International(LDI) telecommunication service operators (LDI operators)*<sup>72</sup>; or leading firms or undertakings make agreements in which they decide the proportion of goods by supplying in the respective market or they share or divide among themselves the market area and / or territories to target their sales whether or not with some conditions of settling goods or services and its types and quantities they produce or provide accordingly<sup>73</sup>, as highlighted by the

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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."

<sup>70</sup> *In re: I-Link Guarantee Limited and Member Banks*, the Competition commission of Pakistan gave an example of mutual co-ordination of competitors for fixing the price by quoting "Term 'prohibited agreement', was applied to a wide range of practices, whereby competitions co-ordinate among themselves to prevent, restrict or reduce competition in the market. Most glaring example of prohibited agreement was co-ordination among the competitors to fix the price. Such anti-competitive agreement aimed to reduce price competition, raise price or effect price in a favourable way for the undertaking (Association of Banks in the present case) involved and certainly had the object and effect of reducing competition in the market under S.4 of Competition Act, 2010.", 2012 CLD 1762.

<sup>71</sup> *In re: Long Distance & International Telecommunication service operators (LDI Operators)*, In the Matter of Proceedings under Section 30 of the Competition Act, 2010. Pursuant to the Order Dated 21-02-2013 of the Honorable Supreme Court of Pakistan in C.P.L.A. NO. 102-L/2013 (LDI Operators), in which Commission discussed agreement between Telecommunication Industry and International clearing House (ICH), established for incoming international telecommunication traffic in Pakistan. Commission held that "before the ICH Agreement was 1,946 million minutes, which decreased to 579 million minutes in February 2013 after the establishment of ICH. In this regard we would also like to refer to the increase in outgoing traffic in comparison to incoming traffic in Pakistan. We note that there is a decrease in volume of incoming international calls and increase in outgoing traffic. Outgoing represented 9% of total international traffic which has increased to 24% after ICH which demonstrate the demand shift and the burden being passed on to consumers in Pakistan and also explains that price elasticity played a role in generating volumes demand for consumers. Furthermore, demand shift may suggest either increase in grey traffic or is reflective of reduced economic activity in Pakistan" which negates the objective of "increase service choice for customers of telecommunication services at competitive and affordable rates". <

[http://www.cc.gov.pk/images/Downloads/ich\\_order\\_30\\_april\\_2013.pdf](http://www.cc.gov.pk/images/Downloads/ich_order_30_april_2013.pdf) accessed on 20 October 2014.

<sup>72</sup> Ibid.

<sup>73</sup> Competition Act 2010, supra note 50. Section 4 (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. (d) limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of any service. (e) collusive tendering or bidding

Commission in the matter of Show Cause Notices Issued to Wateen Telecom (Pvt.)

Limited & Defence Housing Authority in which the Commission held the act of the parties in violation of Section 4 of the Act when the “exclusive right granted to procure, provide, install, set up and establish telecommunication equipment/system and infrastructure in DHA appears to have the object of creating entry barriers for other service providers responsible for telecommunication and media service provision and restricting the choice of customers/residents in the DHA.<sup>74</sup>” Similarly such agreements shall also be void<sup>75</sup> which limit the technological development and investment in order to increase the production<sup>76</sup> or sales as well as the decision with mutual consent of undertakings about the bidding<sup>77</sup> and / or tendering.<sup>78</sup>

The Competition Act also provides some exemption with certain conditions in relation with the particular practice or agreement referred in Section 4 of the Act.<sup>79</sup> If the commission finds that in future, there is change in certain circumstances<sup>80</sup> where

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for sale, purchase or procurement of any goods or services. (f) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage. (g) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”

<sup>74</sup> *In re: Wateen Telecom (Pvt.) Limited & Defence Housing Authority* < [http://www.cc.gov.pk/images/Downloads/final\\_order\\_dha\\_wateen\\_22mar\\_11.pdf](http://www.cc.gov.pk/images/Downloads/final_order_dha_wateen_22mar_11.pdf) > accessed on 22 Oct 2014.

<sup>75</sup> Competition Act, 2010, supra note 50. Section 4(3). “Any agreement entered into in contravention of the provision in subsection (1) shall be void.”

<sup>76</sup> Ibid. Section 4 (2). See foot note 73

<sup>77</sup> *In re: (1) M/s China Harbour Engineering Company Limited (CHEC), (2) M/s Dredging International (DI), (3) M/s Jan De Nul N.V. (JDN) (4) M/s China International Water & Electric Corporation (CWE)*, while decided the matter, it was held by the Commission that collusive bidding / tendering is in violation of Section 4 (2) (e).

<sup>78</sup> Competition Act, 2010, supra note 50. Section 4 (2) see foot note 73.

<sup>79</sup> Ibid. Section 5 (1) “The Commission may grant an exemption from section 4, with respect to a particular practice or agreement, if a request for an exemption has been made to it by a party to the agreement or practice and the agreement is one to which section 9 applies. (2) The exemption under subsection (1) may be granted subject to such conditions as the Commission considers it appropriate to impose and has effect for such period as the Commission considers appropriate. (3) That period must be specified in the grant of the exemption. (4) An individual exemption may be granted so as to have effect from a date earlier than that on which it is granted. (5) On an application made in such a way as may be specified by rules made under section 55, the Commission may extend the period for which an exemption has effect; but, if the rules so provide, the Commission may do so only in specified circumstances.”

<sup>80</sup> Ibid., the circumstances as discussed. see footnote 79.

such exemption is not applicable, the Commission may cancel the exemption entirely or remove any condition or obligation or impose some more conditions.<sup>81</sup> For example, in case if commission finds that information provided is false or misleading, commission may cancel the exemption.<sup>82</sup> If any condition or obligation does not comply, commission may also block such exemption till specified period.<sup>83</sup> Further Section 8 also provides the procedure for blocking exemption by the Commission.<sup>84</sup> The Commission may grant individual or block exemption in respect of agreement as per the criteria set in Section 9 of the Act.<sup>85</sup> In a recent matter of “Application for Exemption of Joint Venture Agreement Between Messrs Metro Cash and carry”

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<sup>81</sup> Ibid, Section 6 (1). “If the Commission has reasonable grounds for believing that there has been a material change of circumstances since it granted an individual exemption, it may by notice in writing, (a) cancel the exemption; (b) vary or remove any condition or obligation; (c) impose one or more additional conditions or obligations. (2) If the Commission has reasonable suspicion that the information on which it based its decision to grant an individual exemption was incomplete, false or misleading in a material particular, the Commission may by notice in writing take any of the steps mentioned in sub-section (1). (3) Breach of a condition has the effect of canceling the exemption. (4) Failure to comply with an obligation allows the Commission, by notice in writing to take any of the steps mentioned in subsection (1). 5. The Commission may act under this section on its own initiative or on complaint made by any person.”

<sup>82</sup> Ibid., Section 6 (2)

<sup>83</sup> Ibid. Section 7 (1), “If agreements which fall within a particular category of agreements are, in the opinion of the Commission, likely to be agreements to which section 9 applies, the Commission may make a block exemption order giving exemption to such agreements. (2) A block exemption order may impose conditions or obligations subject to which a block exemption is to have effect. (3) A block exemption order may provide--(a) that breach 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 comply with an obligation imposed by the order, the Commission may, by notice in writing, cancel the block exemption in respect of the agreement; and (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. (4) 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>84</sup> Ibid. Section 8 (1). “Before making a block exemption order, the Commission must--- (a) publish details of its proposed order in such a way as the Commission thinks most suitable for bringing it to the attention of those likely to be affected; and (b) consider any representations about it which are made to the Commission. (2) A block exemption order may provide for a block exemption to have effect from a date earlier than that on which the order is made.”

<sup>85</sup> Ibid. Section 9 (1). “The Commission may grant individual or block exemption in respect of an agreement, which substantially contributes to---(a) improving production or distribution; (b) promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; or (c) the benefits of that clearly outweigh the adverse effect of absence or lessening of competition. (2) The onus of claiming an exemption under this Act shall lie on the undertaking seeking the exemption.”

International Holding B.V. and Thal Limited<sup>86</sup> the commission not only discussed the criteria of exemption but also granted the exemption to undertakings and held that

*"For an agreement to qualify for exemption under S.5 of Competition Act, 2010, it must meet the criteria as laid down in S.9 of said Act. Application of the undertakings had mentioned that the proposed joint venture would facilitate the growth of the wholesale business as the entities would be able to combine their resources and take advantage of the resulting economics of sale, thereby becoming more competitive and benefiting the consumers. Submission had merit to the effect that the parties would bring in not only their expertise in the wholesale business, but would also confine their assets in order to form the Joint Venture, which ultimately could result in reduced prices on account of economics of sale, providing increasing opportunities for local suppliers etc. Restrictions imposed by undertakings upon each other, would ensure efficiency; and were essential for the smooth operation of the Joint Venture so created. Parties having addressed the concerns, exemption was granted in terms of S.5 of the Competition Act, 2010, with direction to the Registrar of the Commission to issue the exemption certificate, with a condition that the non-compete obligation, would only continue to have effect during the life of Joint Venture under the agreement."*<sup>87</sup>

Section 10 of the Act discusses deceptive marketing practices and prohibits any undertaking to create hindrance for competition through deceptive marketing practices<sup>88</sup> e.g. distribution of false information to harm the business of other

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<sup>86</sup> *In the matter of "Application for Exemption of Joint Venture Agreement Between Messrs Metro Cash and carry International Holding B.V. and Thal Limited"*, CLD 2012 963

<sup>87</sup> Ibid.

<sup>88</sup> Competition Act, 2010, supra note 50. Section 10 Subsection (1): "No undertaking shall enter into deceptive marketing practices.

Subsection (2): The deceptive marketing practices shall be deemed to have been resorted to or continued if an undertaking resorts to (a) the distribution of false or misleading information that is

Undertakings are not allowed to enter into any Mergers by establishing dominant position in the relevant market to impede the competition, as per the Section 11 of the Act.<sup>92</sup> This section also requires undertakings to apply<sup>93</sup> through a pre merger application<sup>94</sup> for clearance from the Commission if they intends to acquire the share or assets of other undertakings or two or more undertakings have intension for merger.<sup>95</sup> Within thirty days after receiving the application of merger, commission shall decide the intended merger by determining the qualification of dominance as defined in section 3.<sup>96</sup> If commission fails to make such determination or decision in thirty days of this 1<sup>st</sup> phase, it shall be considered that commission has no reservation on the intended mergers.<sup>97</sup> In the 2<sup>nd</sup> phase, the Commission may ask concerned undertakings to provide the information for concluding necessary determination.<sup>98</sup> In Second Phase, within ninety (90) days<sup>99</sup>, if commission finds that undertakings would

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<sup>92</sup> Competition Act, 2010, supra note 50. Section 11 (1), "No undertaking shall enter into a merger which substantially lessens competition by creating or strengthening a dominant position in the relevant market."

<sup>93</sup> Ibid., Section 11 (2), "Notwithstanding the provisions contained in the Act where an undertaking, intends to acquire the shares or assets of another undertaking, or two or more undertakings intend to merge the whole or part of their businesses, and meet the pre-merger notification thresholds, stipulated in regulations prescribed by the Commission, such undertaking or undertakings shall apply for clearance from the Commission of the intended merger."

<sup>94</sup> Ibid, Section 11(3), "The concerned undertakings shall submit a pre-merger application to the Commission as soon as they agree in principle or sign a non-binding letter of intent to proceed with the merger.

Section 11 (4) Application referred to in subsection (3) shall be in the form and accompanied by a processing fee as may be prescribed by the Commission. The concerned undertakings shall not proceed with the intended merger until they have received clearance from the Commission."

<sup>95</sup> Ibid, Section 11(12). If undertakings do not comply this requirement as mentioned in Section 11 (1), (2), (3) & (4), the commission shall, after giving the opportunity of being heard, make appropriate orders under section 31.

<sup>96</sup> Ibid, Section 11(5). "The Commission shall by way of an order refer to in section 31, decide on whether the intended merger meets the thresholds and the presumption of dominance as determined in section 3. Such order shall be made within thirty days of receipt of the application."

<sup>97</sup>Ibid, Section 11(7). "Failure to make a determination within the prescribed period of thirty days for the first phase review shall mean that the Commission has no objection to the intended merger."

<sup>98</sup> Ibid, Section 11 (6). "If so determined, the Commission shall initiate a second phase review and for that purpose the Commission may require the concerned undertakings to provide such information, as it considers necessary to enable the Commission to make the necessary determination."

<sup>99</sup>*In re: Acquisition of 79% Shares of M/s Agritech Limited by M/s Fauji Fertilizer Company Ltd.* "It is important to note that the 90 working days commences: a) upon the party being notified that Commission has proceeded to the Phase 2 Review and b) upon receipt of all information required from

have intention to effect the competition in the market by abusing a dominant position or by getting a monopolistic position in the relevant market, the commission may reject the application of merger.<sup>100</sup> In case the commission fails to make any decision in the prescribed time under the Act i.e. ninety days, it will be ultimately considered that commission has no objection.<sup>101</sup> Despite the procedure as discussed above, the undertakings, in this phase, have to prove that their transaction of merger shall contribute effectiveness of the production or distribution of goods or services and such efficiency or effectiveness shall not impede the competition and the outcome of such efficiency will have not any adverse impact on competition in the relevant market<sup>102</sup> or in case one of the undertakings having monetary crisis, the merger will result in the least anti competitive practice.<sup>103</sup> If commission finds that the

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the Applicant by the Commission." <  
[http://www.cc.gov.pk/images/Downloads/ffc\\_final\\_order\\_26\\_01\\_11.pdf](http://www.cc.gov.pk/images/Downloads/ffc_final_order_26_01_11.pdf)> accessed on 23 Oct 2014.

<sup>100</sup> Competition Act 2010, supra note 50, Section 11 (8). "On initiation of the second phase review the Commission shall, within ninety days of receipt of the requested information under subsection (6), review the merger to assess whether it substantially lessens competition by creating or strengthening a dominant position in the relevant market, and shall give its decision on the proposed transaction. In case concerned undertakings fail to provide the information requested, the Commission may reject the application."

<sup>101</sup> Ibid, Section 11 (9). "Failure to render a decision within ninety days shall be deemed to mean that the Commission has no objection to the intended merger."

<sup>102</sup> *In re: Acquisition of Pfizer Nutrition (a business unit of Pfizer Inc.) By Nestlé S.A.* The commission emphasized these issues and also discussed that "Regulation 6 of the Competition (Merger Control) Regulations, 2007 (the "CMCR") lays down the factors in which the Commission may consider when determining substantial lessening of competition in the relevant market. One such factor which the Commission may consider when determining substantial lessening of competition in the relevant market is "whether the merger situation will result in the removal of an effective competitor." "Apart from lessening of competition, elimination of a competitor also reduces the choices available to consumer. Availability of choice is an important determinant of a competitive market. Reduction in choices available to consumers was the concern of the Commission." <[http://www.cc.gov.pk/images/Downloads/nestle\\_order.pdf](http://www.cc.gov.pk/images/Downloads/nestle_order.pdf)>, accessed on 23 Oct 2014.

<sup>103</sup> Competition Act 2010, supra note 50, Section 11 (10). "If after the second phase review, the Commission determines that the intended merger substantially lessens competition by creating or strengthening a dominant position, it may nonetheless approve the transaction, if it is shown that--(a) it contributes substantially to the efficiency of the production or distribution of goods or to the provision of services; (b) such efficiency could not reasonably have been achieved by a less restrictive means of competition; (c) the benefits of such efficiency clearly outweigh the adverse effect of the absence or lessening of competition; or (d) it is the least anti-competitive option for the failing undertaking's assets, when one of the undertakings is faced with actual or imminent financial failure: Provided that the burden of proof shall lie with the undertaking seeking the approval."

transaction/merger is affecting the competition and/or does not fulfill the criteria<sup>104</sup>, the commission may prohibit such transaction; or may approve the merger subject to any condition, as in the matter of "Acquisition of 79% Shares of M/s. Agritech Limited by M/s. Fauji Fertilizer Company Ltd.", the Commission approved the merger with conditions;<sup>105</sup> or may approve subject to entering into legally enforceable agreement by the commission.<sup>106</sup> However, in cases where commission gives approval of merger with some conditions, the commission may, within one (1) year<sup>107</sup>, review the order of approval of such merger on its own or on the application of undertakings.<sup>108</sup>

<sup>104</sup> Ibid., the criteria sets in Section 11 (10) a. b. c. d. this criteria was also discussed by the Commission in the matter of "Acquisition of 79% Shares of M/s. Agritech Limited by M/s. Fauji Fertilizer Company Ltd.", see footnote 71; and In THE MATTER OF ACQUISITION OF WIND TELECOM S.p.A (FORMERLY WEATHER INVESTMENTS Sarl) BY VIMPELCOM LTD., <[http://www.cc.gov.pk/images/Downloads/vimpel\\_wind\\_telecom\\_merger.pdf](http://www.cc.gov.pk/images/Downloads/vimpel_wind_telecom_merger.pdf)> accessed on 23 Oct 14.

<sup>105</sup> FAUJI FERTILIZER COMPANY LTD., supra note 99, the Commission hereby issues its no objection to the bidding by FFC for the proposed merger subject to the following conditions: (1) FFC shall maintain "tara" and "sona" brands separately for two years and there shall be a price cap on the price increase of "tara" product by FFC for a period of one year (although with efficiencies claimed we expect that the price for ..tara shall go down). The maintenance of the two brands shall be subject to review after a period of one year or any time later but prior to two years; provided the market share of Urea acquired by FFC i.e., 6% drops from the existing market share through distribution or redistribution amongst existing and upcoming players in the fertilizer sector. (It may be noted that the 6% is taken from the Applicant's estimate of the share in the market, prior to the revised percentage i.e. 5.2%). (2) FFC shall maintain transparency for any change in price in all its fertilizer products and shall for the period of three years intimate to the Commission any price escalation along with reasons for such price increase (if any) within seven days of such increase. (3) Subject to review of this decision as stipulated below, the Commission if deemed necessary may require FFC to divest a portion of shareholding in Hazara."

<sup>106</sup> Competition Act. 2010, supra note 50, Section 11 (11). "In case the Commission determines that the transaction under review does not qualify the criteria specified in subsection (10), the Commission may--- (a) prohibit the consummation of the transaction; (b) approve such transaction subject to the conditions laid by the Commission in its order; (c) approve such transaction on the condition that the said (d) undertakings enter not legally enforceable agreements specified by the Commission in its order."

<sup>107</sup> FAUJI FERTILIZER COMPANY LTD., supra note 99, the Commission after approval of merger in this matter with imposing conditions (see footnote 99 and 105) further ordered that "In terms of sub-section 11(b) of Section 11 this approval is subject to review within one year under sub-section 13 of the said section. For the purpose of review, the following shall be considered as a yardstick which may include but shall not be limited to the monitoring of: a) unexplained escalation in price levels; b) tendency of price parallelism; c) changes in market share and levels of concentration; d) new investments made in Balancing Modernization Replacement of the target firm by the acquirer leading to enhancement of production capacity; and e) commitment to nondiscriminatory behavior."

<sup>108</sup> Competition Act. 2010, supra note 50, Section 11 (13). "Where the Commission has granted approval subject to conditions, 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

If commission identifies that information provided by concerned undertakings, at the time of approval, is in fact false; or any conditions, stipulated in the approval order, are not complied with or violated by the undertakings, the commission may cancel the merger or accordingly amends its own order after hearing the pleas of the undertakings.<sup>109</sup>

Section 12 of the Act established an authority i.e. Competition Commission of Pakistan to make the competition feasible and to maintain the theme of Competition law in the country.<sup>110</sup> Its head office is in Islamabad.<sup>111</sup> The Act provides that the Commission shall consist of minimum five but not more than seven members.<sup>112</sup> Federal Government of Pakistan is in its sole discretion in selection of members<sup>113</sup> as per the qualification prescribed in the Act.<sup>114</sup> The Chairman is the Chief Executive of

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that it is satisfied that the circumstances of the relevant market or the undertakings have so changed as to warrant review of the conditions imposed.”

<sup>109</sup> Ibid. Section 11 (14). “If the Commission determines that the approval was based on false or misleading information submitted by the undertaking, or the conditions prescribed in the relevant orders of the Commission have not been fully complied with, the Commission may after affording the undertakings concerned an opportunity of being heard,---(a) undo such merger or acquisition; or (b) prescribe modifications or additions in the original order.”

<sup>110</sup> Ibid. Section 12. “(1) There is hereby established a Commission to be called the Competition Commission of Pakistan. (2) The Commission shall be 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 movable 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 movable or immovable property or any interest vested in it, upon such terms as it deems fit. (3) The Commission shall be administratively and functionally independent, and the Federal Government shall use its best efforts to promote, enhance and maintain the independence of the Commission.”

<sup>111</sup> Ibid. Section 13. “The head office of the Commission shall be in Islamabad and the Commission may establish and close down offices at such other places in Pakistan as it considers necessary.”

<sup>112</sup> Ibid, Section 14 (1), “The Commission shall consist of not less than five and not more than seven members;--Provided that the Federal Government may increase or decrease the number of Members, from time to time, as it may consider appropriate.”

<sup>113</sup> Ibid. Section 14 subsection (2). “The Members shall be appointed by the Federal Government and from amongst the Members of the Commission, the Federal Government shall appoint the Chairman.” Subsection (3). “All Members of the Commission shall serve on a full time basis.” Subsection (4). “Not more than two Members of the Commission shall be employees of the Federal Government.”

<sup>114</sup>Ibid. Section 14 subsection (5). “No person shall be recommended for appointment as a Member unless that person is known for his integrity, expertise, eminence and experience for not less than ten years in any relevant field including industry, commerce, economics, finance, law, accountancy or public administration;--Provided that the Federal Government may prescribe qualifications and experience and mode of appointment of such Members in such manner as it may prescribe.

the Commission<sup>115</sup> and will be appointed by Federal Government.<sup>116</sup> For Commission's expenditures and remuneration, the Commission Fund shall be established as known as CCP Fund.<sup>117</sup> The Commission shall maintain its accounts, audits<sup>118</sup> and an annual report which will be submitted to Federal Government for its

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Subsection (6) No person shall be appointed or continued as a Member if he---(a) has been convicted of an offence involving moral turpitude; (b) has been or is adjudged insolvent; (c) is incapable of discharging his duties by reason of physical, psychological or mental unfitness and has been so declared by a registered medical practitioner appointed by the Federal Government; (d) absents himself from three consecutive meetings of the Commission, without obtaining leave of the Commission; (e) fails to disclose any conflict of interest at or within the time provided for such disclosure under this Act or contravenes any of the provisions of this Act pertaining to unauthorized disclosure of information; or (f) deemed incapable of carrying out his responsibilities for any other reason.

Subsection (7) No act or proceeding of the Commission shall be invalid by reason of absence of a Member or existence of any vacancy among its members or any defect in the constitution thereof.

(8) No Member or officer of the Commission shall assume his office until he has made such declaration affirming secrecy and fidelity."

<sup>115</sup>Ibid. Section 15 Subsection (1). "The Chairman shall be the Chief Executive of the Commission and shall, together with the other Members, be responsible for the administration of the affairs of the Commission.

Subsection (2). The Chairman may subject to such conditions as he may deem fit, from time to time delegate all or any of his powers and functions to any of the Members."

<sup>116</sup>Ibid. Section 14 (2). See foot note 141.

<sup>117</sup>Ibid, Section 20 Subsection (1). "There shall be established a fund to be known as the "CCP Fund" which shall vest in the Commission and shall be utilized by the Commission to meet charges in connection with the functioning of the Commission including payment of salaries and other remuneration to the Chairman, Members, Officers, Officials, experts advisers, and consultants of the Commission.

Subsection (2) The Fund shall consist of,--- (a) allocations or grants by the Federal Government; (b) charges and fees levied by the Commission; (c) contributions from local and foreign donors or agencies with the approval of the Federal Government; (d) returns on investments and income from assets of the Commission; and (e) all other sums which may in any manner become payable to or vested in the Commission; (f) a percentage of the fees and charges levied by other regulatory agencies in Pakistan as prescribed by the Federal Government in consultation with the Commission and the percentage so prescribed shall not be varied to the disadvantage of the Commission.

Subsection (3) The Commission shall make regulations for incurring expenditures as well as investments from the Fund.

Subsection (4) The Commission may open and maintain accounts at such scheduled banks as it may from time to time determine. The Commission may with the approval of the Federal Government, open and maintain foreign currency accounts."

<sup>118</sup>Ibid, Section 21 Subsection (1). "The Commission shall cause proper accounts to be kept and shall as soon as practicable after the end of each financial year cause to be prepared for that financial year a statement of accounts of the Commission which shall include a balance sheet and an account of income and expenditure.

Subsection (2), within sixty days after the end of each financial year, the annual financial statements of the Commission shall be audited by the Auditor-General of Pakistan or by a firm of chartered accountants nominated by the Auditor-General of Pakistan.

Subsection (3). The auditors shall make a report to the Commission upon the balance sheet and accounts and in such report they shall state whether in their opinion the balance sheet is a full and fair balance sheet containing all necessary particulars and properly drawn up so as to exhibit a true and correct view of the affairs of the Commission and, in case they have called for any explanation or information from the Commission, whether it has been given and whether it is

publication in the Official Gazette and ultimately for Commission's accountability before the both Houses of Parliament of Pakistan.<sup>119</sup>

This Act confers powers to Commission and also discusses its functions. These powers and functions include initiation of the proceedings and make orders in case of non compliance or violation is taken place by the undertakings; to take steps to promote competition in the market, to conduct proper enquiries and maintain check and balance on the affairs of undertaking; to provide guidance to the undertakings so that they may act according to the rules, orders and provisions of the Act; and all other necessary actions for enhancement of competition and for implementation of the Act.<sup>120</sup> This Act also makes the Commission responsible for promoting competition through awareness and training programs and developing competition culture, reviewing policy for the development of competition and making suitable amendments and other laws as per requirements to affect the competition in Pakistan.<sup>121</sup>

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satisfactory.”

<sup>119</sup> Ibid. Section 22 Subsection (1), “Within ninety days from the end of each financial year, the Commission shall cause a report to be prepared on the activities of the Commission (including investigations, advocacy activities, enquiries and merger reviews made by the Commission) during that financial year.

Subsection (2). The Commission shall, within one hundred and twenty days of the end of each financial year send a copy of the annual report of the Commission under subsection (1) together with a copy of the statement of accounts of the Commission certified by the auditors and a copy of the auditors' report to the Federal Government which shall cause them to be published in the official Gazette and laid before both Houses of the Majlis-e-Shoora (Parliament) within two months of their receipt.”

<sup>120</sup> Ibid, Section 28 Subsection (1), “The functions and powers of the Commission shall be--- (a) to initiate proceedings in accordance with the procedures of this Act and make orders in cases of contravention of the provisions of the said Act: (b) to conduct studies for promoting competition in all sectors of commercial economic activity: (c) to conduct enquiries into the affairs of any undertaking as may be necessary for the purposes of this Act: (d) to give advice to undertakings asking for the same as to whether any action proposed to be taken by such undertakings is consistent with the provisions of this Act. rules or orders made there under: (e) to engage in competition advocacy: and (f) to take all other actions as may be necessary for carrying out the purposes of this Act.

Subsection (2). The Commission may, subject to such conditions as it may think fit to impose. delegate all or any of its functions and powers to any of its Members or officers as it deems fit.”

<sup>121</sup> Ibid. Section 29 “The Commission shall promote competition through advocacy which, among others, shall include--- (a) creating awareness and imparting training about competition issues and

If the Commission finds that any undertaking is not fulfilling the requirements or not complying with the core provisions of the Act, the commission has power to pass orders and publish in the Official Gazette<sup>122</sup> and it may also impose penalties<sup>123</sup> against the concerned undertaking for non compliance or ignoring the provisions of the Act.<sup>124</sup> However, before making such orders or imposing penalties, the commission is required to give the undertaking a chance to appear before the Commission and opportunity to contest the allegations against it.<sup>125</sup> On the other hand, if the concerned undertaking does not avail such opportunity, the commission has power to decide the matter *ex parte*.<sup>126</sup>

The Commission may ask any undertaking to restore the competition, in case of abuse of dominant position<sup>127</sup>; it may declare the agreements void or order the

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taking such other actions as may be necessary for the promotion of a competition culture; (b) reviewing policy frameworks for fostering competition and making suitable recommendations for amendments to this Act and any other laws that affect competition in Pakistan to the Federal Government and Provincial Governments; (c) holding open hearings on any matter affecting the state of competition in Pakistan or affecting the country's commercial activities and expressing publicly an opinion with respect to the issues; and (d) posting on its website all decisions made, inquiries under review and completed, merger guidelines, educational material, and the like.”

<sup>122</sup> Ibid. Section 30 Subsection (3), “The Commission shall publish its orders in the official Gazette, for the information of the public.

Subsection (4), An order made under subsection (1) shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force or in any contract or memorandum or articles of association.

Subsection (5), Any order issued under this section shall include the reasons on which the order is based.”

<sup>123</sup> Ibid, See footnote 140 below

<sup>124</sup> Ibid, Section 30 Subsection (1), “Where the Commission is satisfied, that there has been or is likely to be, a contravention of any provision of Chapter II, it may make one or more of such orders specified in section 31 as it may deem appropriate. The Commission may also impose a penalty at rates prescribed in section 38, in all cases of contravention of the provisions of Chapter II.”

<sup>125</sup> Ibid, Section 30 (2), “Before making an order under subsection (1), the Commission shall--- (a) give notice of its intention to make such order stating the reasons therefore to such undertaking as may appear to it to be in contravention; and (b) give the undertaking an opportunity of being heard on such date as may be specified in the notice and of placing before the Commission facts and material in support of its contention.”

<sup>126</sup> Ibid, Section 30 (2): “Provided that in case the undertaking does not avail the opportunity of being heard, the Commission may decide the case *ex parte*.”

<sup>127</sup> Ibid, Section 31 (1), “The Commission may in the case of -- (a) an abuse of dominant position, require the undertaking concerned to take such actions specified in the order as may be necessary to restore competition and not to repeat the prohibitions specified in Chapter II or to engage in any other practice with similar effect.”

undertaking to amend agreements, if it finds the agreements are prohibited<sup>128</sup>; it may instruct the undertaking to take necessary steps in case of deceptive marketing practice<sup>129</sup>; and it may cancel the mergers or approve the mergers subject to conditions<sup>130</sup>.

During proceeding the Commission may pass an interim order with directions to the undertaking for action or omission for sake of competition and public interest, if the commission thinks that it will take time to issue final order.<sup>131</sup> Though the interim order may be cancelled and / or modified but it shall remain in effect till the final order issues unless cancelled or revoked.<sup>132</sup>

The Act confers the Commission with the same powers as civil court has the powers for trial in Pakistan has under the Code of Civil Procedure 1908.<sup>133</sup> Further, this Act provides that any proceeding before the Commission shall be considered as

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<sup>128</sup> Ibid, Section 31 (1), (b) "prohibited agreements. annul the agreement or require the undertaking concerned to amend the agreement or related practice and not to repeat the prohibitions specified in section 4 or to enter into any other agreement or engage in any other practice with a similar object or effect;" or

<sup>129</sup> Ibid. Section 31 (1), (c) "a deceptive marketing practice. require--- (i) the undertaking concerned to take such actions specified in the order as may be necessary to restore the previous market conditions and not to repeat the prohibitions specified in section 10; or (ii) confiscation, forfeiture or destruction of any goods having hazardous or harmful effect."

<sup>130</sup> Ibid, Section 31 (1), (d) "A merger, in addition to the provisions contained in section 11--- (i) authorize the merger, possibly setting forth the conditions to which the acquisition is subject, as prescribed in regulations; (ii) decide that it has doubts as to the compatibility of the merger with Chapter II, thereby opening a second phase review; or (iii) undo or prohibit the merger, but only as a conclusion of the second phase review."

<sup>131</sup> Ibid. Section 32 (1). "Where, during the course of any proceeding under section 30. the Commission is of opinion that the issuance of a final order in the proceedings is likely to take time and that, in the situation that exists or is likely to emerge, serious or irreparable damage may occur and an interim Order is necessary in the public interest, it may, after giving the undertaking concerned an opportunity of being heard, by order, direct such undertaking to do or refrain from doing or continuing to do any act or thing specified in the order."

<sup>132</sup> Ibid, Section 32 (2). "An order made under subsection (1) may, at any time, be reviewed, modified or cancelled by the Commission and, unless so cancelled, shall remain in force for such period as may be specified therein but not beyond the date of the final order made under section 31."

<sup>133</sup> Ibid. Section 33 (1). "The Commission shall, for the purpose of a proceeding or enquiry under this Act, 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, namely:---(a) summoning and enforcing the attendance of any witness and examining him on oath; (b) discovery and production of any document or other material object producible as evidence; (c) accept evidence on affidavits; (d) requisitioning of any public record from any Court or office; and (e) issuing of a commission for the examination of any witness, document or both."

judicial proceeding within the ambit of section 193 and 228 of the Pakistan Penal Code, and the Commission shall be considered as civil court for the purpose of section 195 of Chapter XXXV of the code of criminal procedure, 1898 (Act V of 1898).<sup>134</sup>

The Commission may call any undertaking to present in front of commission or any officer of the commission specified in this behalf for proceeding or inquiry, or commission can ask for documents or accounts under the control of undertaking for the examination of matter necessary for the purpose of implementation of the Act. The undertakings are responsible to provide all such information which are required for inquiry by the commission.<sup>135</sup>

The Commission through its authorized officer has power for full and free access to any premises for the execution of the Act. It may have right to seize any account or retain these as long as may be necessary for the purpose of this Act. For example, if hard disk of information stored in computer is not instantly provided, the computer may be retained as long as is necessary to copy the information required.<sup>136</sup>

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<sup>134</sup> Ibid, Section 33 (2), "Any proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Pakistan Penal Code (Act XLV of 1860), and the Commission shall be deemed to be a civil Court for the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 (Act V of 1898)."

<sup>135</sup> Ibid, Section 33 (3), "The Commission may, for the purpose of a proceeding or enquiry under this Act, require any undertaking:--- (a) to produce before, and to allow to be examined and kept by, an officer of the Commission specified in this behalf, any books, accounts, or other documents in the custody or under the control of the undertaking so required, being documents relating to any matter the examination of which may be necessary for the purposes of this Act; and (b) to furnish to an officer so specified such information in its possession, relating to any matter as may be, necessary for the purpose of this Act."

<sup>136</sup> Ibid, Section 34 Subsection (1), "Notwithstanding anything contained in any other law for the time being in force, the Commission for reasonable grounds to be recorded in writing shall have the power to authorize any officer to enter and search any premises for the purpose of enforcing any provision of this Act."

Subsection (2), For the purpose of subsection (1), "the Commission, (a) shall have full and free access to any premises, place, accounts, documents or computer, (b) may stamp, or make an extract or copy of any accounts, documents or computer-stored information to which access is obtained under clause (a), (c) may impound any accounts or documents and retain them for as long as may be necessary for the purposes of the Act, (d) may, where hard copy or computer disk of information stored on a computer is not made available, impound and retain the computer for as

If any undertaking refuses without valid cause to allow Commission's authorized officer to enter and search premises for inquiry of the matters, investigating officer of the commission can forcibly enter by the written order of the commission signed by two members. And if written order is not signed by two members of the commission, investigating officer may not allow entering such premises. If it is found that investigating officer who is authorized but he entered into premises by force with *mala fide* intention, he will be dismissed from the services and shall be liable on conviction to pay fine which can be extended to five hundred thousand or to imprison for one year or both.<sup>137</sup>

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long as is necessary to copy the information required, and (e) may make an inventory of any article found in any premises or place to which access is obtained under clause (a)."

Subsection (3), Any officer of the Commission who seeks to exercise the right to enter and search premises shall be required to provide evidence of his authority to act on behalf of the Commission.

Subsection (4). "The Commission may authorize any valuer to enter any premises or place to inspect such accounts and documents as may be necessary to enable the valuer to make a valuation of an asset for the purpose of this Act."

Subsection (5). "The occupier of any premises or place to which access is sought under subsection (1) shall provide all reasonable facilities and assistance to ensure the effective exercise of the right of access."

Subsection (6). "Any accounts, documents or computer impounded and retained under subsections (2) and (3) shall be signed for by the Commission or an authorized officer."

Subsection (7), "An undertaking whose accounts, documents or computer have been impounded and retained under subsection (2) may examine them and make an extract or copy from them during regular office hours under such supervision as the Commission may determine. Explanation: In this section, the expression "occupier", in relation to any premises or place, includes the owner, manager or any other person found present on the premises or place."

<sup>137</sup>Ibid, Section 35 Subsection (1), "In the event that an undertaking refuses without reasonable cause to allow the Commission to exercise the powers contained in section 34, an investigating officer of the Commission may by written order, signed by any two Members enter any place or building by force, if necessary.

Subsection (2), Notwithstanding anything contained in subsection (1), no investigating officer of the Commission shall enter any premises by the use of force without a written order of the Commission signed by two Members.

Subsection (3), If, on enquiry conducted in accordance with the rules it is found that the exercise by an investigating officer of his power under subsection (2) was vexatious, excessive or with *mala-fide* intent such officer shall be dismissed from service, and shall be guilty of an offence and shall be liable on conviction to a fine which may extend to five hundred thousand rupees or to imprisonment for a term not exceeding one year or both.

Subsection (4), Whenever a criminal court imposes a fine under subsection (3) it shall, when passing judgment, order that a sum equal to the whole or any part of the fine recovered, be paid to the person on whose complaint the investigating officer was convicted, and in case the fine is not recovered the sum shall be paid out of the Fund.

Subsection (5), Any sum paid under subsection (4) shall be without prejudice to the right of the aggrieved person to avail any other remedies available to him under the law but at the time of awarding compensation in any subsequent proceedings relating to the same matter the Court shall take into account any sum recovered from the convict and paid to the aggrieved person."

Whenever commission requires the information regarding accounts, business, activities, organization, connections with any other undertaking, management and trade practices of undertaking concerned, the commission may call to provide such information which is considered necessary for the purpose of this Act.<sup>138</sup>

On the reference of Federal Government, the Commission shall conduct inquiry of any matter relevant to purpose of this act. If any consumer complaints in writing against any undertaking for anti competitive practice based on the real fact and not on frivolous information, the Commission shall conduct an enquiry into the matter to which this complaint relates. The commission may hire professionals on contract basis for such purposes. If commission found that the conclusion of inquiry is of public interest then it will start proceeding under section 30 of this Act.<sup>139</sup>

If commission determines after hearing undertaking's contentions. that such undertaking has been involved in any practices which are contrary to the Act; or such undertaking is not complying the rules determined by the commission; or such undertaking is not providing relevant documents or information required by the commission; or such undertaking is providing inaccurate information to the commission and impeding the process of commission for the purpose of this Act in

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<sup>138</sup> Ibid. Section 36 "Notwithstanding anything contained in any other law for the time being in force, the Commission may, by general or special order, call upon an undertaking to furnish periodically or as and when required any information concerning the activities of the undertaking, including information relating to its organization, accounts, business, trade practices, management and connection with any other undertaking, which the Commission may consider necessary or useful for the purposes of this Act."

<sup>139</sup> Ibid. Section 37 Subsection (1), "The Commission may, on its own, and shall upon a reference made to it by the Federal Government, conduct enquiries into any matter relevant to the purposes of this Act.

Subsection (2). Where the Commission receives from an undertaking or a registered association of consumers a complaint in writing of such facts as appear to constitute a contravention of the provisions of Chapter II, it shall, unless it is of opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by *prima facie* evidence, conduct an enquiry into the matter to which the complaint relates. Subsection (3). The Commission may outsource studies by hiring consultants on contract.

Subsection (4). If upon the conclusion of an inquiry under subsection (1) or subsection (2), the Commission is of opinion that the findings are such that it is necessary in the public interest so to do it shall initiate proceedings under section 30."

any manner, the commission may penalize the undertaking by imposing penalty in sum which the commission shall mention in its order.<sup>140</sup> The Act also provides the rates of penalties, which may be imposed by the Commission.<sup>141</sup> If any undertaking continues to violate or disobeys the order of the commission, it shall pay by the way of penalty a further sum which may extend to one million rupees for every day after such violation.<sup>142</sup> Further, the Commission has also the authority to penalize the undertaking with imprisonment for a term extendable to one (1) year or with fine which may extend to twenty five (25) million rupees, in case undertaking fails to comply the order of the Commission.<sup>143</sup> The Act provides the leniency provisions for the undertakings that make full and true disclosures in relation with alleged violations

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<sup>140</sup> Ibid. Section 38 (1). "The Commission may by order direct any undertaking or any director, officer or employee of an undertaking, to pay by way of penalty such sum as may be specified in the order if, after giving the undertaking concerned an opportunity of being heard, it determines that such undertaking---- (a) has been found engaged in any activity prohibited under this Act; (b) has failed to comply with an order of the Commission made under this Act; (c) has failed to supply a copy of the agreement or any other documents and information as required under this Act or requisitioned by the Commission; (d) has furnished any information or made any statement to the Commission which such undertaking knows or has reason to believe to be false or found by the Commission to be inaccurate; or (e) knowingly abuses, interferes with, impedes, imperils, or obstructs the process of the Commission in any manner: Provided that fair comments made in good faith and in the public interest on the working of the Commission or on any order of the Commission issued after the completion of any proceedings, shall not be subject to the imposition of a penalty."

<sup>141</sup> Ibid. Section 38 (2). "The Commission may impose penalties at the following rates, namely:--- (a) for a contravention of any provision of Chapter II of this Act, an amount not exceeding fifty million rupees or an amount not exceeding fifteen per cent of the annual turnover of the undertaking, as may be decided in the circumstances of the case by the Commission; or (b) for non-compliance of any order, notice or requisition of the Commission an amount not exceeding one million rupees, as may be decided in the circumstances of the case by the Commission; and (c) for clause (e) in subsection (1), an amount not exceeding one million rupees as may be decided in the circumstances of the case by the Commission."

<sup>142</sup> Ibid. Section 38 subsection (3). "If the violation of the order of the Commission is a continuing one, the Commission may also direct the undertaking guilty of such violation, shall pay by way of penalty a further sum which may extend to one million rupees for every day after the first such violation.

Subsection (4). The Commission may, with the approval of the Federal Government by notification in the official Gazette, vary the rates and amount of the penalties as and when necessary in the public interest.

Subsection (5). Any penalty imposed under this Act shall be recoverable as provided in section 40."

<sup>143</sup> Ibid. Section 38 (6). "Notwithstanding anything contained in this Act or any other law for the time being in force, failure to comply with an order of the 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 twenty five million rupees and the Commission may, in addition to, or in lieu of, the penalties prescribed in this Act initiate proceedings in a Court of competent jurisdiction."

against competition.<sup>144</sup> In the matter of "Show Cause Notice Issued to Bahria University", the Commission took lenient view and did not impose penalty on the offenders, when the undertaking asked to buy laptops imported by the undertaking and made it mandatory for all newcomers admitted in the University.<sup>145</sup>

Besides the leniency factor, the Act also provides the procedure for recovery of amount, imposed to undertaking as penalty. In case of default of penalty amount by undertaking, the commission may attach its immovable property or sale of moveable property including its bank accounts.<sup>146</sup>

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<sup>144</sup> Ibid, Section 39 Subsection (1). "The 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 a full and true disclosure in respect of the alleged violation, impose on such undertaking a lesser penalty as it may deem fit, than that provided in section 38.

Subsection (2), Any exemption from a penalty or imposition of a lesser penalty shall be made only in respect of an undertaking that is a party to a prohibited agreement which first made the full and true disclosure under this section.

Subsection (3). The Commission may if it is satisfied that any undertaking which has been granted lenient treatment under subsection (1) failed to comply with the conditions on which a lesser penalty was imposed had given false evidence, revoke the leniency provision and impose on the undertaking the penalty provided under section 38."

<sup>145</sup> In re: Bahria University. In the Order, the Learned Single Member of the Commission took a lenient view and did not impose any penalty, owing to the fact that 'the University pleaded ignorance of the Ordinance and violation of any of its provisions (which of course is no excuse) and also submitted that as soon as it received the notice of the Commission, it stopped the mandatory sale of laptops to the incoming student, and further agreeing to give rebate to its students'. The Commission passed directions to Bahria University instead of penalties. <[http://www.cc.gov.pk/images/Downloads/bahria\\_order\\_final\\_21\\_07\\_10.pdf](http://www.cc.gov.pk/images/Downloads/bahria_order_final_21_07_10.pdf)>. accessed on 24 Oct 14.

<sup>146</sup> Competition Act, 2010, supra note 50, Section 40 subsection (1). "For the recovery of any amount from an undertaking, the Commission may serve upon the concerned person or the chief executive or director of the said undertaking, a copy of a notice in the prescribed form requiring such person to pay the said amount within the time specified in the notice.

Subsection (2), If the amount referred to in the notice under subsection (1) is not paid within the prescribed time, the Commission may proceed to recover the said amount from the person or undertaking in default in anyone or more of the following manners, namely:--- (a) attachment of immovable or sale of any movable property, including bank account of the person or undertaking; (b) appointment of a receiver for the management of the movable or immovable property of the person or undertaking; (c) recovery of the amount as arrears of land revenue through the District Revenue Officer; (d) require any of the following, by notice in writing, the person to deduct and pay the sum specified in the notice on or before such date as may be so specified, namely: (i) from whom any money is due or may become due to the undertaking; (ii) who holds, or controls the receipt or disposal of or may subsequently hold, or control the receipt or disposal of, any money belonging to the undertaking or on account of the undertaking; or (iii) who is responsible for payment of any sum to the undertaking.

Subsection (3), Any bank, receiver, District Revenue Officer or undertaking who has paid any sum in compliance with a notice under subsection (2) shall be deemed to have paid such sum to the Commission in respect of the undertaking, and the receipt of the Commission shall constitute a good and sufficient discharge of the liability of such bank, receiver, District Revenue Officer or

The Act also discusses the procedure, if any of the undertakings may be aggrieved by the orders of the Commission. In this respect, any order made by any member or authorized officer of the commission is challengeable and any undertaking or person can file appeal<sup>147</sup>, within thirty (30) days, against such order before Appellate Bench<sup>148</sup>. *In the matter of "Appeals filed by M/s. Takaful Pakistan Limited & M/s. Travel Agents Association of Pakistan"* against the impugned order of the Member of the Commission. In this case the Member of the Commission took notice of abusing dominant position in the relevant market by tying in insurance coverage for travel agents' default liability towards International Air Transport Association regarding insurance for passengers. The Commission also noticed that the undertakings had entered into to a prohibited agreement. It also found that

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undertaking to the extent of the sum referred to in such receipt.

Subsection (4). If any bank, receiver, District Revenue Officer or undertaking on whom a notice is served, fails to attach, receive, recover, deduct and pay, as the case may be, the amount specified in the said notice, such bank, receiver, District Revenue Officer or undertaking shall be treated as a defaulter and the amount specified in the said notice shall be recoverable from him or it, as the case may be, by the Commission in accordance with the provisions of this Act.

Subsection (5). The Commission may, by order, direct any bank, receiver, District Revenue Officer or undertaking which is a defaulter as referred to in subsection (4), to pay by way of penalty, such sum as specified in the order, after giving to the bank, receiver, District Revenue Officer or undertaking an opportunity of being heard, it determines that such bank, receiver, District Revenue Officer or undertaking has willfully failed to comply with the order of the Commission.

Subsection (6). For the purposes of the recovery of the amount under subsection (2) the Commission shall have the same powers as a Civil Court has under the Code of Civil Procedure 1908 (Act V of 1908).

Subsection (7). The Commission may make rules regulating the procedure for the recovery of amounts under this section and any other matters connected with or incidental to the operation of this section.

Subsection (8). All penalties and fines recovered under this Act shall be credited to the Public Account of the Federation."

<sup>147</sup> Ibid, Section 41 (1). "An appeal shall lie to an Appellate Bench of the Commission in respect of an order made by any Member or authorized officer of the Commission. The person aggrieved by such order may, within thirty days of the passing of the order submit an appeal, to the Appellate Bench of the Commission."

<sup>148</sup> Ibid, Section 41 Subsection (2). "The Commission shall constitute Appellate Benches comprising not less than two Members to hear appeals under subsection (1).

Subsection (3). 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 Commission.

Subsection (4). No Member shall be included in an Appellate Bench who has participated or been involved in the decision being appealed against.

Subsection (5). The form in which an appeal is to be filed and the fees to be paid therefore and other related matters shall be prescribed by rules."

undertakings were engaged in practice of deceptive marketing. However, the undertakings filed appeal against the order of the Member of Commission before the Appellate Bench. And Appellate Bench later set aside the order of the Commission and revoked the imposed penalty.<sup>149</sup>

Further, order of Appellate Bench can be challenged before the Competition Appellate Tribunal<sup>150</sup> within sixty (60) days.<sup>151</sup> Furthermore, the Competition Appellate Tribunal's order is appealable, within sixty (60) days, before the Honorable Supreme Court of Pakistan.<sup>152</sup>

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<sup>149</sup> *In the Matter of Appeals filed before the Appellate tribunal by M/s. Takaful Pakistan Limited & M/s. Travel Agents Association of Pakistan*, the Appellate Bench held that "To our minds it is clear from the above that the travel insurance policy is assigned by the travel agents to the passengers and hence they would be covered under the surplus fund as beneficiaries. Indeed, counsel for TAAP submitted before us repeatedly in oral arguments that the travel insurance is assigned by the agent to the passenger. Paradoxically, however, even though TPL and TAAP might lose their claim that the term 'Participant' is limited to travel agents, they cannot be held responsible for deceptive marketing if the insurance certificate gives the impression that passengers are covered by the fund and if this is supported by Takaful Rules, 2005. A final and binding construction of the Takaful Rules, 2005 though is not within our domain and we shall defer to the wisdom of the Securities and Exchange Commission of Pakistan in this regard. We hope and trust that the SECP will clarify this issue at the earliest for the benefit of stakeholders as well as in the interest of consumer welfare. To our mind on the basis of facts available on the record as such no such representation has been made either by TAAP or by TPL to the passengers which could be held as false or misleading in terms of section 10 of the Ordinance." [http://www.cc.gov.pk/images/Downloads/taap\\_tpl\\_order\\_app\\_bench.pdf](http://www.cc.gov.pk/images/Downloads/taap_tpl_order_app_bench.pdf) accessed on 25 Oct 2014.

<sup>150</sup> Competition Act, 2010, supra note 50. Section 43 Subsection (1). "As soon as may be within thirty days of the commencement of this Act, the Federal Government shall constitute the Competition Appellate Tribunal which shall consist of a Chairperson who shall be a person who has been a Judge of the Supreme Court or is a retired Chief Justice of a High Court and two technical members who shall be persons of ability, integrity and have special knowledge and professional experience of not less than ten years in international trade, economics, law, finance and accountancy.

Subsection (2). The Chairperson and members shall hold office for a period of three years and shall be eligible for reappointment for a similar term and shall cease to hold office on attaining the age of sixty eight years or the expiry of the term whichever is earlier.

Subsection (3). The Chairperson and the members shall be entitled to such salary and other terms and conditions of service as the Federal Government may by rules prescribe.

Subsection (4). The Competition Appellate Tribunal may, in consultation with the Federal Government, make rules governing procedure in proceedings before the Tribunal.

Subsection (5). The Competition Appellate Tribunal shall decide an appeal expeditiously within six months of its presentation to the Tribunal.

<sup>151</sup> Ibid. Section 42 "Any person aggrieved by an order of the Commission comprising two or more Members or of the Appellate Bench of the Commission may within sixty days of the communication of the order, prefer appeal to the Competition Appellate Tribunal."

<sup>152</sup> Ibid. Section 44 "Any person aggrieved by an order of the Competition Appellate Tribunal may prefer an appeal to Supreme Court within sixty days."

In line with modern competition regimes, this Act approached with strict laws to control anti competitive behavior in the society by not only providing high penalties but also punishments in shape of imprisonment. It has also lenient policy for the undertakings who surrender against it. Similarly, in our society for maintaining high standard of evidence for unearthing secret cartels, the Act provides powers to the Competition Commission of Pakistan to inspect and enquire undertakings for the enforcement and implementation of the Act.<sup>153</sup>

### **2.1.2 CONSUMER PROTECTIONS LAWS IN PAKISTAN**

Human beings are interdependent in order to fulfill their needs and for other necessities they deal with each other and in result, disputes and conflicts arise related to rights and obligations. Therefore, to resolve such issues, there is need of law which addresses these issues with transparency and binds other to follow it.<sup>154</sup> The roots of Consumer Protection Law lie in Holy Quran and Sunnah as well. According to Islamic legal principles, such principles neither allow violation of other rights nor do such principles let others to deprive one from its rights.<sup>155</sup> As consumer has a right of inspection, it is the right to cancel the sale in respect of such goods which were not inspected at the time of the sale by the buyer but later on when seen were found defective or not up to the standard of goods agreed to.<sup>156</sup>

UN General Assembly presented following Guidelines for achieving the objectives of consumer protection by assisting countries in achieving or maintaining

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<sup>153</sup> <[http://cc.gov.pk\\_index.php?option=com\\_content&view=article&id=59&Itemid=115](http://cc.gov.pk_index.php?option=com_content&view=article&id=59&Itemid=115)>

<sup>154</sup> Justice® Dr. Munir Ahmed Mughal, "Consumer Protection Law in Pakistan". Lecture delivered at Federal Judicial Academy Islamabad, published at website [www.academia.edu](http://www.academia.edu) and available at <[http://www.academia.edu/1261849\\_Consumer\\_Protection\\_Law\\_in\\_Pakistan](http://www.academia.edu/1261849_Consumer_Protection_Law_in_Pakistan)>

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

enough protection to the rights of consumer; by making the process of production and distribution easy and according to the needs of consumers; by encouraging high levels of ethical conduct for those engaged in the production and distribution of goods and services to consumers; by assisting countries in reduction of abusive business practices by all enterprises at the national and international levels which adversely affect consumers; by promoting international cooperation in the field of consumer protection; by encouraging the development of market conditions which provide consumers with greater choice at lower prices.<sup>157</sup> There are some important issues which must be considered in the consumer protection law, e.g. protection and promotion of consumer economic interests, establishment of the standards to measure the quality of goods and services, provide the distribution facilities for the goods and services of basic and essential need.

Pakistan like many other countries also has taken this issue seriously and made policies and laws for the protection of the rights of consumer. The Islamabad Consumer Protection Act, 1995 is the first Act which provides the legislation for the protection of consumer interest and addresses the consumer complaints. Consumer Protection Acts in all Provinces are further extension of Capital consumer protection Act, namely The NWFP Consumer Protection Act-1997, The Baluchistan Consumer Protection Act-2003, The Punjab Consumer Protection Act-2005, and "The Sindh Consumer Protection Ordinance-2007". These may be different in their contents but the main theme of these Acts is to protect consumer rights. To be benefitted from these laws consumer must be aware of it. The Government should organize such seminars and awareness programs in order to create awareness among general public

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<sup>157</sup> Ibid.

for protection of their rights. Publicity campaigns through media and NGOs can also play eminent role for this purpose.

a. **ISLAMABAD CONSUMER PROTECTION ACT, 1995**

Due to expansion of private sector, there may arise some issues of market imperfection because every firm tries to get dominant position in order to earn higher profit through becoming a price setter firm. However, the consumer suffers because he has to bear high prices with no choice of product and quality and therefore, there was a need of legal frame to regulate trade in this context to provide safeguard to consumer's interest.<sup>158</sup>

An Act to provide for promotion and protection of the interest of consumers was enacted on October 18<sup>th</sup>, 1995 as the Islamabad Consumers Protection Act, 1995<sup>159</sup>, which extended to the Islamabad Capital Territory.<sup>160</sup> The Act empowers rights to consumers for protection of their rights, for example, Complainant<sup>161</sup> as a consumer<sup>162</sup>; association of consumers; or the Federal Government, Chief Commissioner, Islamabad Capital Territory, Capital Development Authority, or any

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<sup>158</sup> Mr. Asad Jamal, "Consumer Protection In Pakistan: Some Concerns", available at <<http://www.supremecourt.gov.pk/jlc/Articles/18/3.pdf>>

<sup>159</sup> Islamabad Consumers Protection Act, 1995, (Published in the Gazette of Pakistan, October 18, 1995).

<sup>160</sup>Ibid, Section 1 Subsection (1). "This Act may be called the Islamabad Consumers Protection Act, 1995.

Subsection (2). It extends to the Islamabad Capital Territory.

Subsection (3). It shall come into force at once."

<sup>161</sup> Ibid, Section 2 (2). "complainant" means:- (i) a consumer; (ii) a consumer's association; and (iii) the Federal Government, Chief Commissioner, Islamabad Capital Territory, Capital Development Authority, or any person or agency authorized by the aforesaid on their behalf to file complaint before the Authority."

<sup>162</sup> Ibid, Section 3, "consumer" means any person who- (i) buys goods for a consideration which has been paid or partly paid and partly promised to be paid or under any system of deferred payment or hire purchase and includes any user of such goods but does not include a person who obtains such goods for re-sale or for any commercial purpose; or (ii) hires any goods or services for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any beneficiary of such services."

other person authorized by the aforementioned on their behalf; can file complaint<sup>163</sup> before the Authority<sup>164</sup> in respect of any goods sold or delivered or any service<sup>165</sup> provided or supplied or against any unfair trade practice<sup>166</sup>. The Court of Sessions, Islamabad. is the Authority to deal with the issues under this Act<sup>167</sup>, which may penalize<sup>168</sup> the persons responsible for any infringement in consumers' rights. The order of the Authority is appealable before High Court.<sup>169</sup> Further, The Consumers Protection Council<sup>170</sup>, Islamabad has also been established under this Act for the achievement of goals<sup>171</sup> in relation with the protection of rights of consumers. However, this Council cannot directly deal with infringers but may directly file

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<sup>163</sup> Ibid. Section 8 Subsection (1). "A complainant may in respect of any goods sold or delivered or any service provided or supplied or against any unfair trade practice file a complaint with the Authority. Subsection (2), The Council may, in the case of any unfair trade practice coming to its notice, directly make complaint to the Authority through an officer authorized by it." Also see Subsections (3) and (4).

<sup>164</sup> Ibid, Section 6 Subsection (1), The Authority shall receive complaints of the consumers and those made on behalf of the council for investigation and determination thereof."

<sup>165</sup> Ibid, Section 2 (5).

<sup>166</sup> Ibid, Section 2 (6).

<sup>167</sup> Ibid, Section 2 (1) "Authority" means the Court of Sessions, Islamabad.

<sup>168</sup> Ibid, Section 9 Subsection (1). "Where any right of consumer required to be protected under section 5 of the Act is in any way infringed, the person responsible for such infringement shall be punished with imprisonment which may extend to two years, or with fine which may extend to forty thousands rupees, or with both.

Subsection (2). Whoever makes advertisement through print or electronic media or by chalking on walls or in any other manner in contravention of section 7, he shall be punished with imprisonment which may extend to two years, or with fine which may extend to thirty thousand rupees, or with both.

Subsection (3). The Authority may, where it deems appropriate, order for payment of compensation to the consumer to the extent the consumer has suffered any damage or loss through any unfair trade practice.

Subsection (4) The Authority may, where it deems necessary for protection of the rights of other consumers, order for confiscation of any goods or material or direct for their destruction."

<sup>169</sup> Ibid, Section 10. "An appeal against the order of Authority shall lie to the High Court and the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), in respect of appeals to the High Court shall, *mutatis mutandis*, apply."

<sup>170</sup> Ibid, Section 2 (4), "Council" means the Consumers Protection Council, Islamabad, established under section 3: Further, Section 3 (1) provides that " As soon as may be, after commencement of this Act, the Federal Government may, by notification in the official Gazette, establish the Consumers Protection Council, Islamabad."

<sup>171</sup> Ibid, Section 5. Subsection (1), "The objects and functions of the Council shall be to determine, promote and protect rights of consumers, including- (a) the right of protection against marketing of goods which are hazardous to life and property; (b) the right of information about the quality, quantity, potency, purity, standard and price of goods and services; (c) the right of access to a variety of goods at competitive prices; (d) the right for redressal against unfair trade practices of unscrupulous exploitation of consumers; (e) the right of consumers' education; and (f) the right of easy availability of essential services."

complaint to the Authority through an officer authorized by it.<sup>172</sup> Further this Act also addresses prohibition of false advertisement, etc.<sup>173</sup>

Currently, Islamabad Capital Territory and the provinces of Pakistan have consumer protection laws as discussed above. After analysis of the Islamabad Consumer Protection Act, 1995, we find that the Act confers the powers to the Court of Sessions, Islamabad for safeguarding the consumers' rights. The Consumer Protection Act of 2003 of Balochistan requires a consumer court to be established; however, unfortunately the consumer court is presiding by a judge or judicial magistrate and no separate court has been established. The Consumer Protection Act of Khyber Pakhtunkhwa, formally known as NWFP, specifically allocated the separate court for consumer issues; however, these separate courts are yet to be established to entertain consumers' matters. In Sindh, District Court has the power to deal with the issues, though the Sindh Consumer Protection Ordinance 2007 provides establishment of Consumer Tribunals.<sup>174</sup>

Despite the laws of consumer protection promulgated in Federal and three Provinces, The Punjab Consumer Protection Act of 2005<sup>175</sup> also provides for the establishment of consumer courts having powers of District and Sessions Court. At present separately constituted consumer courts are properly functioning and playing their roles effectively in Punjab Province.

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<sup>172</sup> Ibid. Section 8 (2) provides "The Council may, in the case of any unfair trade practice coming to its notice, directly make complaint to the Authority through an officer authorized by it."

<sup>173</sup> Ibid. Section 7 Subsection (2). "Notwithstanding any punishment provided for making misrepresentation, false or misleading advertisement in any other law for the time being in force, the company, firm or a person making such advertisement shall be liable to pay such compensation as the Authority may direct for causing loss to the person affected by such advertisement."

<sup>174</sup> Mr. Asad Jamal, *supra* note 158. Further also see the link <<http://www.brecorder.com/general-news/172:pakistan-1214027:sindh-islamabad:-government-fails-to-implement-consumer-protection-law?date=2013-07-23>>

<sup>175</sup> The Punjab Consumer Protection Act, 2005. (Published in the Gazette of Punjab Extraordinary, January 25, 2005).

The Punjab Consumer Protection Act, 2005 was passed by the Punjab Assembly on 13 January 2005, accordingly assented by the Governor of Punjab on 19 January 2005, extended to the whole of the Province of the Punjab.<sup>176</sup>

Part 1 of the Act defines commencement of the Act and definitions of important terms related to consumer Act such as consumer<sup>177</sup>; damage<sup>178</sup>; laboratory<sup>179</sup>; manufacturer<sup>180</sup>; manufacturing a product<sup>181</sup>; product<sup>182</sup>; services<sup>183</sup>; reasonably anticipated alteration or modification<sup>184</sup>; and reasonably anticipated use<sup>185</sup>.

<sup>176</sup> Ibid. Section 1 subsection (1). "This Act may be called the Punjab Consumer Protection Act 2005. Subsection (2). It shall extend to the whole of the Province of the Punjab. Subsection (3). It shall come into force at once."

<sup>177</sup> Ibid. Section 2 (c) "consumer" means a person or entity who- (i)buys or obtains on lease any product for a consideration and includes any user of such product but does not include a person who obtains any product for resale or for any commercial purpose: or (ii) hires any services for a consideration and includes any beneficiary of such services: Explanation:- For the purpose of sub-clause (i), "commercial purpose" does not include use by a consumer of products bought and used by him only for the purpose of his livelihood as a self-employed person."

<sup>178</sup> Ibid Section 2 (d) "damage" means all damage caused by a product or service including damage to the product itself and economic loss arising from a deficiency in or loss of use of the product or service"

<sup>179</sup> Ibid. Section 2 (e) "laboratory" means a laboratory established or recognized by the Provincial Consumer Protection Council and includes any such laboratory or organization established by or under any law for the time being in force, which is maintained, financed, aided or recognized by the Government for carrying out analysis or test of any goods with a view to determining whether such goods suffer from any defect."

<sup>180</sup> Ibid. Section 2 (h) "manufacturer" includes a person or entity who- (i) is in the business of manufacturing a product for purposes of trade or commerce: (ii) labels a product as his own or who otherwise presents himself as the manufacturer of the product: (iii) as a seller exercises control over the design, construction or quality of the product that causes damage: (iv) assembles a product by incorporating into his product a component or part manufactured by another manufacturer: and (v) is a seller of a product of a foreign manufacturer and assumes or administers warranty obligations of the product, or is affiliated with the foreign manufacturer by way of partial or complete ownership or control: or modifies or prepares the product for sale or distribution."

<sup>181</sup> Ibid. Section 2 (i). "manufacturing a product" means producing, fabricating, constructing, designing, remanufacturing, reconditioning or refurbishing a product"

<sup>182</sup> Ibid. Section 2 (j). "product" has the same meaning as assigned to the word "goods" in the Sale of Goods Act, 1930, and includes products which have been subsequently incorporated into another product or an immovable but does not include animals or plants or natural fruits and other raw products, in their natural state, that are derived from animals or plants"

<sup>183</sup> Ibid. Section 2 (k) "services" includes the provision of any kind of facilities or advice or assistance such as provision of medical, legal or engineering services but does not include-(i) the rendering of any service under a contract of personal service: (ii) the rendering of non-professional services like astrology or palmistry; or (iii) a service, the essence of which is to deliver judgment by a court of law or arbitrator"

<sup>184</sup> Ibid. Section 2 (l) "reasonably anticipated alteration or modification" means a change in a product that a product manufacturer should reasonably expect to be made by an ordinary person in the same or similar circumstances and a change arising from ordinary wear or tear, but does not include- (i) changes to or in a product because the product does not receive reasonable care and maintenance: or

Part II of this Act is about the liability which arises in case of defective goods.<sup>186</sup> Products may be defective in composition<sup>187</sup>, in design<sup>188</sup> or may be defective because of improper warning<sup>189</sup> or because of non-conformity to express warranty<sup>190</sup>.

Part III discusses liability in case of defective or faulty services provided to consumers.<sup>191</sup> Part IV describes the obligation of manufacturers<sup>192</sup>, e.g. prices should be mentioned at the outlet, and receipt should be issued to buyer at the time of transaction. Part V is about the unfair trade practices<sup>193</sup> and also prohibits on bait

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(ii) alteration, modification or removal of an otherwise adequate warning; or (iii) the failure of the seller to provide an adequate warning to the consumer where the same had been provided by the manufacturer and he could do no more"

<sup>185</sup> Ibid. Section 2 (m) "reasonably anticipated use" means a use or handling of a product that the product manufacturer should reasonably expect of an ordinary person in the same or similar circumstances."

<sup>186</sup> Ibid. Section 4 Subsection (1). "The manufacturer of a product shall be liable to a consumer for damages proximately caused by a characteristic of the product that renders the product defective when such damage arose from a reasonably anticipated use of the product by a consumer.

Subsection (2) A product shall be defective only if- (a) it is defective in construction or composition as provided in section 5: (b) it is defective in design as provided in section 6; (c) it is defective because an adequate warning has not been given as provided in section 7; and (d) it is defective because it does not conform to an express warranty of the manufacturer as provided in section 8."

<sup>187</sup> Ibid. Section 5 " A product shall be defective in construction or composition if, at the time the product was manufactured, a material deviation was made from the manufacturers' own specifications, whether known to the consumer or not."

<sup>188</sup> Ibid. Section 6 Subsection (1). "A product shall be defective in design if, at the time the product left its manufacturer's control- (a) there existed an alternative design for the product that was capable of preventing the damage to a consumer; and (b) the likelihood and gravity of damage outweighed the burden on the manufacturer of adopting such alternative design and any adverse effect of such alternative design on the utility of the product."

<sup>189</sup> Ibid. Section 7 Subsection (1). "A product shall be defective if an adequate warning about the product that it possessed a characteristic that could cause damage, has not been provided at the time the product left its manufacturer's control or the manufacturer has failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product: Provided that a manufacturer shall not be required to provide an adequate warning about his product when- (a) the ordinary user or handler of the product could know, with the ordinary knowledge common to the community, that the product has dangerous characteristics which could cause damage: or (b) the user or handler of the product already knows or should be reasonably expected to know that the product has characteristics which were dangerous and could cause damage."

<sup>190</sup> Ibid. Section 8 "A product shall be defective when it does not conform to an express warranty made at any time by the manufacturer about the product if the express warranty has induced the claimant to use the product and the claimant's damage was proximately caused because the express warranty was untrue."

<sup>191</sup> Ibid. Section 13. Section 14. Section 15. Section 16 and Section 17.

<sup>192</sup> Ibid. Section 18, "Unless a price catalogue is available for issue to customer, the manufacturer or trader shall display prominently in his shop or display-centre a notice specifying the retail or wholesale price, as the case may be, of every goods available for sale in that shop or display-centre." Further see Sections 19 and 20.

<sup>193</sup> Ibid. Section 21. "No person shall make a false, deceptive or misleading representation that- (a) the products are of a particular kind, standard, quality, grade, quantity, composition, style or model: (b) the

advertisement<sup>194</sup>, misrepresentation and false advertisement. Part VI discusses the powers of Authority<sup>195</sup> and Powers of Government<sup>196</sup>. Part VII requires the Provincial Government to establish Consumer Protection Council.<sup>197</sup>

Part VIII requires the Provincial Government to establish Consumer Courts<sup>198</sup> in the Province and also discusses filing<sup>199</sup> of claims under the Act, claims settlement<sup>200</sup>, procedure on receipt of complaint<sup>201</sup> and Consumer Court's orders<sup>202</sup>

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products have particular history or particular previous use: (c) the services are of a particular kind, standard or quality: (d) the services are provided by a person having a requisite skill or qualification or experience: (e) the products were manufactured, produced, processed or reconditioned at a particular time; (f) the products or services have any sponsorship, approval, endorsement, performance, characteristics, accessories, uses or benefits: (g) the products are new or reconditioned or have been in use for a particular period of time only: (h) the seller or producer of products or provider of services has any sponsorship, approval, endorsement or affiliation: (i) the products or services are necessary for somebody's well being: (j) concerns the existence, exclusion or effect of any condition, guarantee, right or remedy; and (k) concerns the place of origin of products."

<sup>194</sup>Ibid. Section 22 Subsection (1), "No person shall, in trade, advertise or supply at a specified price products or services which that person (a) does not intend to offer for supply; or (b) does not have reasonable grounds for believing that they can be supplied at that price for a period that is, and in quantities that are, reasonable having regard to the nature of the market in which the person carries on business and the nature of the advertisement."

<sup>195</sup>Ibid. Section 23: Any person may file a complaint for violation of the provisions of sections 11, 16, 18 and 19 before the Authority under Subsection (1); the Authority may file a claim for declaring a product defective under Subsection (2); the Authority may file a claim before the Consumer Court for declaring any act on the part of any person as being in contravention to Part IV of this Act under Subsection (3); the Authority may hold an inquiry as to defects in products or services or practices which contravene any of the provisions of this Act under Subsection (4); further see Subsections (5), (6) and (7) of this Section.

<sup>196</sup>Ibid, Section 23-A Subsection (1). "The Government may, by general or special order and subject to such conditions as may be prescribed, exercise all or any of the powers conferred upon the Authority under this Act except the power of imposition of fine under section 23(1).

Subsection (2). The Government may, from time to time, issue directions to the Authority with regard to the performance of the functions of the Authority under this Act.

Subsection (3) The Government may, at any stage, modify or set aside any order or action of the Authority subject to such condition or conditions as it may deem fit."

<sup>197</sup>Ibid. Section 24 Subsection (1), "The Government shall set up a Consumer Protection Council in the Province."

<sup>198</sup>Ibid, Section 26 Subsection (1). "The Government shall, by notification, establish one or more separate Consumer Courts for an area, comprising one or more districts to exercise jurisdiction and powers under this Act.

Subsection (2). A Consumer Court shall consist of a District Judge or an Additional District Judge to be appointed by the Government in consultation with the Lahore High Court."

<sup>199</sup>Ibid, Section 25. "A claim for damages arising out of contravention of any provisions of this Act shall be filed before a Consumer Court set up under this Act."

<sup>200</sup>Ibid. Section 29. "Any party to the dispute may, at the pretrial stage, make a firm written offer of settlement stating the amount offered for settlement and if the offer is accepted by the opposing party, the Consumer Court shall pass an order in terms of the settlement: Provided that notwithstanding anything contained in any other law for the time being in force, the party refusing the offer of settlement shall pay actual costs of litigation, including lawyer's fees, in case the final order of the Consumer Court is passed against that party: Provided further that the court's approval regarding settlement shall be required in the following matters- (i) claims of a minor; (ii) claims of a legally incapacitated person; and (iii) claims involving collective rights."

and its penalties<sup>203</sup>. The final order<sup>204</sup> of the Consumer Court is appealable before the Lahore High Court within thirty (30) days.<sup>205</sup> Last Part of the Act provides miscellaneous provisions along with providing aid to the Consumer Court and immunity to Consumer Council and Provincial Government for the acts done in good faith.<sup>206</sup>

Since enactment of this Act, the separate consumer courts in Punjab gave milestone decisions to facilitate consumers in the supervision of Honorable Lahore High Court. Recently, in the matter of *Dr. Shamshad Hussain Sved Vs. District Consumer Court Lahore*, a complaint was filed before the Consumer Court seeking

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<sup>203</sup>Ibid. Section 30 Subsection (1). "The Consumer Court shall, on receipt of a claim if it relates to any products.– (a) forward a copy of the claim to the defendant mentioned in the claim directing him to file his written statement within a period of fifteen days or such extended period not exceeding fifteen days: (b) where the defendant, on receipt of claim referred to him under clause (a). denies or disputes the allegations contained in the claim, or omits or fails to present his case within the time specified, as the case may be, the Consumer Court shall proceed to settle the consumer dispute in the manner specified hereafter: (c) where the claim alleges that products are defective and do not conform to the accepted industry standards, the Consumer Court may decide the dispute on the basis of the evidence relating to the accepted industry standards and by inviting expert evidence in this regard: (d) where the dispute cannot be determined without proper analysis or test of products, the Consumer Court shall obtain sample of the products from the complainant, seal it and authenticate it in the manner prescribed and refer the sample to a laboratory along with a direction to make analysis or test, whichever may be necessary, with a view to finding out if such products suffer from any defect and to report its findings to the Consumer Court within a period of thirty days of the receipt of the reference or within such period as may be extended, not exceeding fifteen days by the Consumer Court; and (e) the Consumer Court may require the claimant to deposit to the credit of the Consumer Court such fees as may be specified, for payment to the laboratory for carrying out the necessary analysis or test and the fee so deposited by the claimant shall be payable by the defendant if the test or analysis support the version of the claimant." Further see Subsection (2), (3), (4) and (5) of this Section.

<sup>204</sup>Ibid. Section 31, "If, after the proceedings conducted under this Act, the Consumer Court is satisfied that the products complained against suffer from any of the defects specified in the claim or that any or all of the allegations contained in the claim about the services provided are true, it shall issue an order to the defendant directing him to take one or more actions" as per the nature and circumstances of each case.

<sup>205</sup>Ibid. Section 32, Subsection (1). "Where a manufacturer fails to perform or in any way infringes the liabilities provided in sections 4 to 8, 11, 13, 14, 16, 18 to 22, he shall be punished with imprisonment which may extend to two years or with fine which may extend to hundred thousand rupees or with both in addition to damages or compensation as may be determined by the court." Further see Subsection (2) where Consumer Court has power to make parties bound to comply its orders in case of omission or non compliance by punishing with further imprisonment and fine or both.

<sup>206</sup>Ibid. Section 34. "Every order of the Consumer Court, if no appeal has been preferred against such order under the provisions of this Act, shall become final."

<sup>205</sup>Ibid. Section 33. "Any person aggrieved by any final order of the Consumer Court may file an appeal in the Lahore High Court within 30 days of such order."

<sup>206</sup>Ibid. Section 36. "All agencies of the Government shall act in aid of the Consumer Court in the performance of its functions under this Act."

Section 37. No suit, prosecution or other legal proceedings shall lie against any functionary under this Act, acting under the direction of the Consumer Council or the Government for anything which is in good faith done or intended to be done under this Act."

directions against the respondents that the services rendered by them were faulty and defective as diagnostic center of the respondents issued a wrong medical report. The consumer court passed the orders in favor of complainant and held the respondents liable. The Honorable Lahore High Court upheld the decision and set the precedent that "Complainant had availed medical services after paying consideration and was therefore, a consumer under Punjab Consumer Protection Act, 2005 and the consumer court had jurisdiction to try complaint of the complainant."<sup>207</sup>

In another case, the consumer court while deciding the matter against a Motor Company held them responsible when a complaint was lodged by detecting manufacturing defect in gearbox of the purchased car by the complainant. Despite the fact, the manufacturer replaced the defected gearbox; the consumer court made the decision and directed the Company to replace the defective car. The Honorable High Court upheld the decision with some modifications in the order of consumer court and directed the consumer to return his purchased vehicle to manufacturer who would refund the full price thereof received from the consumer.<sup>208</sup>

Besides the Courts, another nongovernmental organization namely, Consumer Rights Commission of Pakistan established in 1998.<sup>209</sup> is the first organization working for the protection of consumer rights with one of the aims to create awareness and encourage consumers for protection of their rights.<sup>210</sup>

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<sup>207</sup> *Dr. Shamshad Hussain Sved Vs. District Consumer Court Lahore*, 2010 PLD 214.

<sup>208</sup> *Chairman Indus Motors Co. Versus Muhammad Arshad*, 2012 PLD 264.

<sup>209</sup> Mohammad Sarwar Khan, Abrar Hafeez, "Consumer Laws in Pakistan" Part I. Published by: Consumer Rights Commission of Pakistan. website: <http://crcp.sdupk.org>. 1999. at page 82

<sup>210</sup> Ibid at page 82 and 83. "Mission Statement To articulate and promote the interests and rights of consumer at all socio-economic levels, and facilitate the emergence of an organized consumer movement in Pakistan. Aims and Objectives: To encourage and support the formation of consumer groups and organizations at all socioeconomic levels of society; To create awareness among different categories of consumers, especially the marginalized groups about their roles, rights and responsibilities; To undertake advocacy and lobbying activities for the enactment and implementation of improved legislation on consumer protection; To intervene on behalf of consumers, while seeking active support and participation of existing consumer groups, where a regulatory or redress framework is available"; etc.

Competition Act and consumer protection Act both provide protection to consumer interests but they use different tools and instrument to address the issues related to exploitation of consumer rights and interests. Competition law tackle the issue in horizontal way, it mostly takes actions on the basis of firms who impede the perfect competition by creating monopolization or making cartel etc., on the other side consumer protection law addresses the issues related to consumers and firms in respect of defected and faulty goods and / or services.<sup>211</sup>

## 2.2

### **ANALYSIS OF LEGISLATIONS ON COMPETITION LAW IN DIFFERENT COUNTRIES**

As discussed above almost 120 systems are dealing with competition law today, that laws, historically, related to competition or antitrust existed in some forms and some of them were recently developed due to economical behavior of the market.<sup>212</sup> As economies have become globalized, there was a need for legal regime to restrict anti competitive practice and in this respect competition law of developed societies may be considered as threshold and most influential legal regimes.<sup>213</sup> Here, we need to discuss some different jurisdictions to evaluate that how international legislators established the competition law internationally.

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<sup>211</sup> Statement given after the analysis of Competition Act 2010 and Consumer Protection laws of Pakistan.

<sup>212</sup> Please see page 1 of Chapter 1 of the thesis “Introduction and History”.

<sup>213</sup> Tilottama Raychaudhuri, “Vertical Restraints in Competition Law: the Need to Strike the Right Balance Between Regulation and Competition”, 4 NUJS Law Review, 609, 2011. Available on [http://www.nujslawreview.org/pdf/articles/2011\\_4\\_tilottama-raychaudhuri.pdf](http://www.nujslawreview.org/pdf/articles/2011_4_tilottama-raychaudhuri.pdf), accessed on 26/03/14

## 2.2.1

### THE COMPETITION LAW OF THE USA:

The Granger movement (based on a depressed agricultural sector)<sup>214</sup> was started in 1867 and in 1873, got strength against monopoly sector, with a 'possible self interest'<sup>215</sup> of economical sector led to Sherman Act, which was absolutely supported by individual states<sup>216</sup> of USA and Congress as well as Senate.<sup>217</sup>

US antitrust law, initially known as Sherman Antitrust Act was passed in 1890 in order to protect competition of the market from monopoly and dominant position. Amendments and developments in the Act now converted into advanced antitrust law of today in USA. Many other countries formed their competition law according to the model Sherman Antitrust Law.<sup>218</sup> Initially, Sherman Antitrust Act focused on anticompetitive practices and made prohibited such agreement which contravened the provisions of law, command of trade and economic activities among different economies and foreign states; and estimated the outcomes of anti competitive

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<sup>214</sup> George J Stigler. "The Origin of the Sherman Act", *The Journal of Legal Studies*, Vol 14, No. 1, (Jan., 1985) PP 1-12, at page 1. Published by the University of Chicago Press. available at [www.jstor.org/stable/724314](http://www.jstor.org/stable/724314) "A depressed agricultural sector-still in 1890 a major part of the American economy-was casting about for sources of its economic troubles. One source was found in the deflation of the 1879- 93 period and in the gold standard which brought it about. But monopolies-especially railroads for the farmer and the flourishing industrial trusts for everyone-were equally popular targets of complaints. The Republicans passed the Sherman Act to head off the agrarian (Granger and Populist) movements. So, in brief outline, goes the most popular explanation for the emergence of our antitrust policy. This essay is devoted to a reexamination of the problem of why the United States introduced an affirmative competitive policy. We begin with the explanation that has just been sketched, but since that explanation seems gravely incomplete, we proceed to other hypotheses. The Granger movement, which began in 1867 and reached its maximum strength about 1873, gave rise at one time or another to political parties with antimonopoly programs (and in one case the name "Anti-Monopoly"). State laws seeking to control railroad rates were passed under the influence of this movement.' In the late 1880s, numerous western and southern states passed antimonopoly laws."

<sup>215</sup> Ibid.. at page 5

<sup>216</sup> Ibid at page 5 "The first is the attitudes of the individual states toward antitrust policy. Well before 1890 some states had passed antitrust laws, and in some cases also had constitutional prohibitions on monopolies. I list these states in the order of their passage of such laws in Table 1. Five states, all southern, passed laws before 1880. A full dozen (chiefly in the North) passed laws in 1889, and three more in both 1890 and 1891. Thereafter the intense movement subsided.

<sup>217</sup> Ibid at page 5 "The second evidence is the vote in Congress. The House vote was 242 for, none against, the passage of the Act; the Senate vote was 52 for and one against."

<sup>218</sup> Ibid at page 8 "Several other nations which shared our common law tradition against restraints on trade slowly followed our precedent. Britain itself waited until the 1930, to begin policies against restrictive practices. It is a cliché of British History that the policy of free trade protected the domestic economy against monopoly, until that time, but it is a cliché lacking specific evidence and possibly lacking general plausibility.

behavior on the market and prohibited the actions of undertaking which monopolize the trade among several states.<sup>219</sup>

Sherman Act prohibits the anti competitive practices such as monopolization, price fixing, market allocation, collusive bidding, exclusive dealing agreements and tying in arrangements. Further, the act provides exemption for nonprofit organizations, banks, sports league, patent owner labor unions and agricultural organizations. This Act does not prohibit the monopoly but it prohibits the abusive use of monopolistic firm.<sup>220</sup>

Sherman Act formed into Clayton Antitrust Act in 1914 with additional amendments of prohibition of price discrimination. The Clayton Act amended by Robinson Patman the Act of 1936.<sup>221</sup>

USA Antitrust law is based on two main views i.e. evolutionary and interventional. Evolutionary vision means market forces itself restrict the monopoly without the intervention of Government and the latter vision discussed intervention of Government to impede the monopoly which influence the market competition. However, Sherman Act embodied a legislative compromise between these two visions.<sup>222</sup> The Federal Government enforces the antitrust laws in USA through Federal Trade Commission and / or the U.S Department of Justice (Antitrust Division).<sup>223</sup>

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<sup>219</sup> <<http://www.ftc.gov/tips-advice/competition-guidance/antitrust-laws/antitrust-laws>> accessed on 25/04/14

<sup>220</sup> Thomas A. Piraino, JR., "Identifying Monopolist's illegal conduct under Sherman Act", New York University Law Review – 809. Volume 75. Number 4. October 2000. And Gary R. Roberts, "Sports leagues and the Sherman Act: The Use and abuse of Section 1 to regulate Restraints on intraleague Rivalry", 32 UCLA L. Rev 219 (1984-1985) available at <[www.heinonline.org](http://www.heinonline.org)> accessed on 30/04/14

<sup>221</sup> [www.ftc.gov](http://www.ftc.gov), supra note 219.

<sup>222</sup> Competition Commission of India, "Dissertation on "Anti Competitive Agreements – Underlying Concepts & Principles Under the Competition Act 2002", submitted by Pratima Singh Parihar, available on <<http://cci.gov.in/images/media/ResearchReports/Pratima31jan2012.pdf>> accessed on 30/04/14

<sup>223</sup> [www.ftc.gov](http://www.ftc.gov), supra note 219 "Both the FTC and the U.S. Department of Justice (DOJ) Antitrust Division enforce the federal antitrust laws. In some respects their authorities overlap, but in practice the

## 2.2.2

## THE COMPETITION ACT, 1998 OF THE UK:

The Competition Act 1998<sup>224</sup>, by ceasing the Restrictive Practices Court Act 1976, the Restrictive Trade Practices Act 1976, the Resale Prices Act 1976, the Restrictive Trade Practices Act 1977 and by amending and repealing other Acts<sup>225</sup>, was enacted to make provisions about competition; investigations under prescribed provisions of Community Law relating to Article 85 and 86; Monopolies; and for connected purposes.<sup>226</sup>

Chapter I of Part 1 of the Act deals with the agreements and related prohibitions<sup>227</sup> and exclusions of agreements<sup>228</sup> as well as provides exemptions<sup>229</sup>. Subsection 3 of Section 2 of the Chapter discusses the agreements between

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two agencies complement each other. Over the years, the agencies have developed expertise in particular industries or markets. For example, the FTC devotes most of its resources to certain segments of the economy, including those where consumer spending is high: health care, pharmaceuticals, professional services, food, energy, and certain high-tech industries like computer technology and Internet services. Before opening an investigation, the agencies consult with one another to avoid duplicating efforts. In this guide, "the agency" means either the FTC or DOJ, whichever is conducting the antitrust investigation."

<sup>224</sup> The Competition Act, 1998, U.K. accessible on <<http://www.legislation.gov.uk/ukpga/1998/41>>, accessed on 10/05/14

<sup>225</sup> Ibid. The Fair Trading Act 1973; The Energy Act 1976; The Patents Act 1977; The Estate Agents Act 1979; The Competition Act 1980; The Telecommunications Act 1984; The Airports Act 1986; The Gas Act 1986; The Financial Services Act 1986; The Consumer Protection Act 1987; The Channel Tunnel Act 1987; The Road Traffic (Consequential Provisions) Act 1988; The Water Act 1989; The Electricity Act 1989; The Companies Act 1989; The Broadcasting Act 1990; The Water Industry Act 1991; The Water Resources Act 1991; The Osteopaths Act 1993; The Railways Act 1993; The Chiropractors Act 1994; The Coal Industry Act 1994; The Deregulation and Contracting Out Act 1994; and The Broadcasting Act 1996;

<sup>226</sup> Ibid. "An Act to make provision about competition and the abuse of a dominant position in the market; to confer powers in relation to investigations conducted in connection with Article 85 or 86 of the treaty establishing the European Community; to amend the Fair Trading Act 1973 in relation to information which may be required in connection with investigations under that Act; to make provision with respect to the meaning of "supply of services" in the Fair Trading Act 1973; and for connected purposes." <<http://www.legislation.gov.uk/ukpga/1998/41/introduction>> accessed on 10/05/14

<sup>227</sup> Ibid, Section 2 Subsection (1). "Subject to section 3, agreements between undertakings, decisions by associations of undertakings or concerted practices which— (a)may affect trade within the United Kingdom, and (b)have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom, are prohibited unless they are exempt in accordance with the provisions of this Part."

<sup>228</sup> Section 3 Subsection (1). "The Chapter 1 prohibition does not apply in any of the cases in which it is excluded by or as a result of— (a)Schedule 1 (mergers and concentrations); (b)Schedule 2 (competition scrutiny under other enactments); (c)Schedule 3 (planning obligations and other general exclusions); or (d)Schedule 4 (professional rules)."

<sup>229</sup> Ibid, Section 4 Subsection (3): "The exemption— (a)may be granted subject to such conditions or obligations as the Director considers it appropriate to impose; and (b)has effect for such period as the Director considers appropriate."

undertakings which obstruct the competition in the market and may affect the trade within UK.<sup>230</sup> Agreements which control or limit production price, technical development, investment or any other trading conditions are prohibited.<sup>231</sup> Chapter II regulates the abuse of dominant position and related prohibitions<sup>232</sup> and its excluded cases.<sup>233</sup> Further Chapter III of the Act discusses the procedure and implementation of the Act through investigation<sup>234</sup>, enforcement<sup>235</sup> and its directions<sup>236</sup> in case of infringement in Chapter I and II, along with recovery of penalties by the Authority i.e. Director.<sup>237</sup> In case one infringes, Director may require the undertaking concerned to pay him a penalty in respect of such infringement. Under section 36, the maximum

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<sup>230</sup> Ibid, Section (3) Subsection (1) applies only if the agreement, decision or practice is, or is intended to be, implemented in the United Kingdom.

<sup>231</sup> Ibid, Section 2 (2). See footnote 226.

<sup>232</sup> Ibid, Section 18 Subsection (1): "Subject to section 19, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom."

Subsection (2): "Conduct may, in particular, constitute such an abuse if it consists in— (a)directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b)limiting production, markets or technical development to the prejudice of consumers; (c)applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (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." Also see Subsections (3) and (4).

<sup>233</sup> Ibid, Section 19 Subsection (1): "The Chapter II prohibition does not apply in any of the cases in which it is excluded by or as a result of—(a)Schedule 1 (mergers and concentrations); or (b)Schedule 3 (general exclusions)."

<sup>234</sup> Ibid, Section 25: "Director's power to investigate: The Director may conduct an investigation if there are reasonable grounds for suspecting— (a) that the Chapter I prohibition has been infringed; or (b)that the Chapter II prohibition has been infringed." Also see Section 26: "Powers when conducting investigations"; Section 27: "Power to enter premises without a warrant"; Section 28: "Power to enter premises under a warrant.;" Section 29: "Entry of premises under warrant: supplementary"; Section 30: "Privileged communications"; and Section 31: "Decisions following an investigation".

<sup>235</sup> Ibid, Section 34 Subsection (1): "If a person fails, without reasonable excuse, to comply with a direction under section 32 or 33, the Director may apply to the court for an order— (a)requiring the defaulter to make good his default within a time specified in the order; or (b)if the direction related to anything to be done in the management or administration of an undertaking, requiring the undertaking or any of its officers to do it."

<sup>236</sup> Ibid, Section 32 Subsection (1): "If the Director has made a decision that an agreement infringes the Chapter I prohibition, he may give to such person or persons as he considers appropriate such directions as he considers appropriate to bring the infringement to an end."

<sup>237</sup> Ibid, Section 36: Penalty for infringing Chapter I or Chapter II prohibition: Subsection (1): "On making a decision that an agreement has infringed the Chapter I prohibition, the Director may require an undertaking which is a party to the agreement to pay him a penalty in respect of the infringement."

penalty that may be imposed by the Director is 10% of turnover of the undertaking.<sup>238</sup>

If concerned undertaking failed to deposit penalty amount within specified period of time, the Authority will recover it as civil debt from undertaking.<sup>239</sup> Chapter IV of the Act constitutes Competition Commission<sup>240</sup> as Appellate forum.<sup>241</sup> Further, decisions of Competition Commission are challengeable before the Appellate Tribunal.<sup>242</sup> Furthermore, any aggrieved party from the decision of Appellate Tribunal may also file appeal on limited basis<sup>243</sup> before the appropriate court.<sup>244</sup>

Part II of the Act is the salient feature of the Act and deals with the investigation of European Commission and Director under a prescribed provision of Community Law relating to Articles 85 and 86.<sup>245</sup> Part III of the Act is related to

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<sup>238</sup>Ibid, Section 36 Subsection (8): "No penalty fixed by the Director under this section may exceed 10% of the turnover of the undertaking (determined in accordance with such provisions as may be specified in an order made by the Secretary of State)."

<sup>239</sup>Ibid. Section 37 Subsection (1): "If the specified date in a penalty notice has passed and—(a)the period during which an appeal against the imposition, or amount, of the penalty may be made has expired without an appeal having been made, or (b)such an appeal has been made and determined, the Director may recover from the undertaking, as a civil debt due to him, any amount payable under the penalty notice which remains outstanding."

<sup>240</sup>Ibid. Section 45 Subsection (1): "There is to be a body corporate known as the Competition Commission."

Subsection (2): "The Commission is to have such functions as are conferred on it by or as a result of this Act."

<sup>241</sup>Ibid. Section 46 Subsection (1): "Any party to an agreement in respect of which the Director has made a decision may appeal to the Competition Commission against, or with respect to, the decision." Further see Subsection (2).

<sup>242</sup>Ibid. Section 48 Subsection (1): "Any appeal made to the Competition Commission under section 46 or 47 is to be determined by an appeal tribunal."

<sup>243</sup>Ibid, Section 49 Subsection (1): "An appeal lies— (a)on a point of law arising from a decision of an appeal tribunal, or (b)from any decision of an appeal tribunal as to the amount of a penalty."

Subsection (2): "An appeal under this section may be made only— (a)to the appropriate court: (b)with leave: and (c)at the instance of a party or at the instance of a person who has a sufficient interest in the matter."

Subsection (3): "Rules under section 48 may make provision for regulating or prescribing any matters incidental to or consequential upon an appeal under this section."

<sup>244</sup>Ibid. Section 49 Subsection (4): "In subsection (2)— "the appropriate court" means— (a) in relation to proceedings before a tribunal in England and Wales, the Court of Appeal; (b) in relation to proceedings before a tribunal in Scotland, the Court of Session: (c) in relation to proceedings before a tribunal in Northern Ireland, the Court of Appeal in Northern Ireland."

<sup>245</sup>Ibid. Section 61 Subsection (1). "In this Part— "Article 85" and "Article 86" have the same meaning as in Part I: "authorised officer", in relation to the Director, means an officer to whom an authorisation has been given under subsection (2); "the Commission" means the European Commission; the Director" means the Director General of Fair Trading; "Commission investigation" means an investigation ordered by a decision of the Commission under a prescribed provision of Community law relating to Article 85 or 86; "Director's investigation" means an investigation conducted by the Director at the request of the Commission under a prescribed provision of

monopolies and related offences and implemented through amendments in Sections 44, 46 and 137 of the Fair Trading Act 1973.<sup>246</sup>

Recently, an Order namely "The Competition and Marketing Authority (Penalties) Order 2014" came into force on dated 1<sup>st</sup> of April 2014, specified the maximum amount that the Competition and Marketing Authority may impose as a penalty under Enterprise Act 2002 and Competition Act 1998.<sup>247</sup>

Further, the powers of Director to investigate and enforce the legislation have been transferred to the Office of Fair Trading under the Enterprise Act, 2002. Furthermore, from 1<sup>st</sup> of April 2014, the Competition Commission has been closed<sup>248</sup> and its functions and authorities including many of the functions of Office of Fair Trading have now been transferred to the Competition and Market Authority and this authority is now responsible for investigations where there may be breaches against anti competitive agreements, abuses of dominant positions and / or illegal mergers or cartels.<sup>249</sup> Here are some cases, in which we can easily observe that the Authorities in the United Kingdom are playing an effective role and controlling the anti competitive behaviors in different sectors.

The Office of Free Trading started investigation against anti competitive agreements in mobility aids sector (Mobility Scooter Sector) and found the concerned undertakings liable in violation of Chapter I of the Competition Act 1998, when

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Community law relating to Article 85 or 86: "Director's special investigation" means a Director's investigation conducted at the request of the Commission in connection with a Commission investigation."

<sup>246</sup> Ibid, Section 66 Monopoly investigations: general: and Section 67 Offences of the Competition Act, 1998.

<sup>247</sup> The Competition and Marketing Authority (Penalties) Order 2014. "Citation, commencement and interpretation 1. (1) This Order may be cited as the Competition and Markets Authority (Penalties) Order 2014 and is to come into force on 1st April 2014."

<sup>248</sup> As per the latest status on <<https://www.gov.uk/government/organisations/competition-commission>>, accessed on 11/05/14

<sup>249</sup> <<https://www.gov.uk/government/organisations/competition-and-markets-authority>> accessed on 11/05/14

undertakings made illegal arrangements in price fixing and prevented online retailers not to advertise the fewer prices than the recommended price by the undertakings.<sup>250</sup>

In another case, OFT started investigations against a Laboratory which was initially found abusing a dominant position in the veterinary diagnostic testing sector by providing different discounts on products and services if any consumer purchases or avails from the same laboratory. However, later on the Authority did not find the laboratory guilty.<sup>251</sup>

Further the relevant Authorities have investigated and made notable work to implement competition policies in many sectors affecting the society including but not limited to Access control and alarm systems; Airline passenger fuel surcharges; Bunker fuel cards; Business continuity services; Commercial vehicle manufacturers; Construction industry; e-books; Healthcare products; Heating oil contracts; Hotel online booking; Leisure goods; Loan products to professional service firms; Local bus market; Mercedes-Benz commercial vehicles; NHS equipment; Print advertising; Recruitment agencies; Retailers and suppliers in the UK grocery sector; Sports

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<sup>250</sup> *"Mobility Aids Sector,"*

<<http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-and-updates/press/2014/23-14>> and <<https://www.gov.uk/cma-cases/investigation-into-agreements-in-the-mobility-aids-sector>> accessed on 06/11/14

<sup>251</sup> "In November 2011, the OFT concluded that it had no grounds to take action against IDEXX Laboratories Limited (IDEXX) following an investigation into alleged abuse of a dominant position in the veterinary diagnostic testing sector. The OFT opened its investigation in November 2010 after it received a complaint alleging that IDEXX was abusing a dominant position in the market for the supply of in-clinic companion animal testing equipment in order to foreclose competition. The conduct assessed by the OFT included alleged practices of: Providing discounts on diagnostic testing equipment to vets who agreed to use IDEXX's external laboratory services; providing free or heavily discounted IDEXX analysers to vets who agreed to spend a minimum amount each month on materials to be used with those analysers; and offering discounted bundles of external laboratory tests which included a test that was only available from IDEXX. Following careful assessment of the evidence at its disposal, the OFT concluded that it had no grounds to take action against IDEXX. <<http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/oft/competition-act-and-cartels/c98-closure-veterinary-diagnostics>> accessed on 06/11/14.

goods; Street furniture (Outdoor advertising); Visa sponsorship arrangements for Olympics 2012; and Transport sector.<sup>252</sup>

### 2.2.3 E.U COMPETITION LAW:

The old Rome Treaty of 1957 is now known as Treaty on the Functioning of the European Union which was enacted on December 2009.<sup>253</sup> EU competition law is contained in Section 1<sup>254</sup> and Section 2<sup>255</sup> of the Chapter I, the 'Rules on competition' of the Title VII "Common Rules on Competition, Taxation and Approximation of Law", of the Treaty on the Functioning of the European Union (TFEU); which consists of Article 101 to 109.<sup>256</sup>

European antitrust policy is based on the two main principles which have been evolved in the Treaty on the Functioning of the European Union.

- According to article 101 of the Treaty such agreement between two or more than two firm which restrict competition are prohibited. This provision covers both horizontal agreement (between actual or potential competitors operating at the same level of the supply chain) and vertical agreements (between firm operating at different levels, i.e. agreement between manufacturer and distributor).<sup>257</sup>

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<sup>252</sup> <[http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/OFTwork/competition-act-and-cartels.ca98\\_closure](http://webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/OFTwork/competition-act-and-cartels.ca98_closure)> accessed on 06/11/14

<sup>253</sup> Richard Whish, *Supra* note 2, Chapter 2, at page 49 and 50. Also see Alison Jones, Brend Sufrin, "EU Competition Law: Text, Cases and Materials, 5<sup>th</sup> Edition, 2014, Oxford University Press.

<sup>254</sup> Section 1: Rules Applying to Undertakings

<sup>255</sup> Section 2: Aids Granted by States

<sup>256</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union - Consolidated version of the Treaty on the Functioning of the European Union - Protocols - Annexes - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, available at <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>> accessed on 23/06/14

<sup>257</sup> *Ibid*, Article 101 of the Treaty: 1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and

- According to Article 102 of Treaty prohibits firm to hold a dominant position and abusive use of that position by fixing prices higher level which exploits the consumer interests.<sup>258</sup>

European Commission is fully empowered by the treaty to search the business premises in order to get facts for resolving issues in case of contravene of the provisions or send written notice to undertaking to provide the required information and in this respect Article 103<sup>259</sup> of the Treaty indirectly<sup>260</sup> gives empowerment to

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concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of: - any agreement or category of agreements between undertakings, - any decision or category of decisions by associations of undertakings, - any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

<sup>258</sup> Ibid. Article 102 of the Treaty: Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting production, markets or technical development to the prejudice of consumers; (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (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 such contracts.

<sup>259</sup> Ibid., Article 103 of the Treaty: 1. The appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 shall be laid down by the Council, on a proposal from the Commission and after consulting the European Parliament. 2. The regulations or directives referred to in paragraph 1 shall be designed in particular: (a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 by making provision for fines and periodic penalty payments; (b) to lay down detailed rules for the application of Article 101(3), taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other; (c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102; (d) to define the respective functions of the Commission and of the Court of Justice of the European Union in applying the provisions laid down in this paragraph; (e) to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article.

<sup>260</sup> Ibid., Articles 101 and 102 of the Treaty (TFEU) prohibit various anticompetitive practices. Article 103 gives the European Council powers to put in place an enforcement system, including the imposition of fines. Council Regulation 1/2003, based on Article 103 TFEU, gives the Commission powers to enforce these rules and fine companies for infringements.

Commission for the imposition of fine, and fining policy is based on the principles that by violating the rules or provisions some companies affect more than others and it has bad impact on the high value of sales so in long run it will more harm the economy, as long run breaches are more harmful than short run breaches.<sup>261</sup>

The penalty can be increased in case of repetition of offence, or creating obstruction in the process of investigation and in case of ring leader which are called aggravating factors. And such fine or penalty may be decreased by mitigating factor involved e.g. limited role or conduct encouraged by legislation. **Or it may be 10% of turnover (per infringement).** If undertaking cooperate with the commission in order to provide facts and it also provide clear evidence, that fine would be harmful for the capability of undertaking then under exceptional circumstances commission may provide full reduction of fine.<sup>262</sup>

#### **2.2.4 THE COMPETITION LAW OF INDIA:**

Competition Law in India has its foundation in Articles 38<sup>263</sup> and 39<sup>264</sup> of the Constitution of India. Article 38 of the constitution refers that social, economic and

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<sup>261</sup> The European Commission, Fines for breaking EU Competition Law, [http://ec.europa.eu/competition/cartels/overview/factsheet\\_fines\\_en.pdf](http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf) at Page 1 and 2

<sup>262</sup> Ibid page # 2

<sup>263</sup> Constitution of India, Article 38: "State to secure a social order for the promotion of welfare of the people.

(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.

(2) The State shall, in particular, strive to minimize the inequalities in income, and Endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations."

<sup>264</sup> Ibid. Article 39: "Certain principles of policy to be followed by the State —The State shall, in particular, direct its policy towards securing — (a) that the citizens, men and women equally, have the right to an adequate means of livelihood; (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength; (f)

political welfare shall be protected by the state. Article 39 refers to reduce the inequalities of income, status, opportunities among the people or group of people.

India enacted its first anti-competitive legislation in 1969, known as the Monopolies and Restrictive Trade Practices Act (MRTP Act), and made it an integral part of the economic life of the country. The Government of India realized that there is strong relationship between trade and economic growth. Economic growth of a country depends on the expansion of trade. The Government of India, in the early 90s took step to incorporate the Indian economy with the global economy. In order to meet challenges of globalization, there is need of competition regime. After India became a member of WTO<sup>265</sup> agreement, it has brought adequate changes in its foreign trade policy which had been highly restrictive. It removed the trade barrier and opened its economy for international trade. After finding that MRTP Act is not appropriate for the development of competition culture in the market and restricting the anti competitive practices in the national and international trade, the Government of India decided to appoint a committee to propose a modern competition law.<sup>266</sup>

With the increasing amalgamation of the Indian economy and markets with the international economy the Government of India has also obtained such policies which promote the competition and impede the monopoly in the market.

The objective of the Competition Act, 2002<sup>267</sup>, has been clearly stated is to prevent market from anti competitive practices, to promote and sustain competition in the market, to protect the interest of consumers, remove the barriers from international

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that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.”

<sup>265</sup> India is a World Trade Organization member since 1 January 1995.

<sup>266</sup> Competition Commission of India, *supra* note 222.

<sup>267</sup> The Competition Act, 2002, No. 12 of 2003, received the assent of the President of India on the 13<sup>th</sup> January, 2003, as amended by The Competition (Amendment) Act, 2007, available on <[http://www.cci.gov.in/images/media/competition\\_act/act2002.pdf?MyAdmin=QuqXb-8V2yTtcq617iR6-k2VA8d](http://www.cci.gov.in/images/media/competition_act/act2002.pdf?MyAdmin=QuqXb-8V2yTtcq617iR6-k2VA8d)> accessed on 28/06/14

trade and allow it to enter into the economy of country so that there will be healthy competition among the national and international firms. Hence the basic objective is to provide a law relating to smooth competition among enterprises and no enterprise is allowed to take dominant position and get the advantages by harming other firms and consumers.

The Competition Act, 2002, extends to the whole of India except the State of Jammu and Kashmir.<sup>268</sup> Section 2 of the Chapter I defines legal terminologies related to Competition law such as 'acquisition' which may be acquiring of shares, assets or control over management;<sup>269</sup> 'agreement' which may be formal or in writing or intended to be enforceable by legal proceedings;<sup>270</sup> 'cartel' may be association of producers, sellers, traders, who may limit or control the market by entering into agreements;<sup>271</sup> and 'relevant market'<sup>272</sup> that may be the relevant product market<sup>273</sup> or the relevant geographic market<sup>274</sup> or both. Similarly, this section also provides

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<sup>268</sup>Ibid, Section 1 Subsection (1): "This Act may be called the Competition Act, 2002. Subsection (2): It extends to the whole of India except the State of Jammu and Kashmir. Subsection (3): It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint: Provided that different dates may be appointed for different provisions of this Act and any reference in any such provision to the commencement of this Act shall be construed as a reference to the coming into force of that provision."

<sup>269</sup>Ibid, Section 2 (a): " "acquisition" means, directly or indirectly, acquiring or agreeing to acquire— (i) shares, voting rights or assets of any enterprise; or (ii) control over management or control over assets of any enterprise"

<sup>270</sup>Ibid, Section 2 (b): "agreement" includes any arrangement or understanding or action in concert.— (i) whether or not, such arrangement, understanding or action is formal or in writing; or (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings."

<sup>271</sup>Ibid, Section 2 (c): "cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services"

<sup>272</sup>Ibid, Section 2 (r): "relevant market" means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets."

<sup>273</sup>Ibid, Section 2 (t): "relevant product market" means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use"

<sup>274</sup>Ibid, Section 2(s): "relevant geographic market" means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas"

definitions of 'consumer',<sup>275</sup> 'enterprise',<sup>276</sup> 'goods',<sup>277</sup> 'practice',<sup>278</sup> 'price',<sup>279</sup> 'service',<sup>280</sup> 'trade',<sup>281</sup> etc.,<sup>282</sup> which directly or indirectly relevant and affect competition practices.

Section 3 of the Chapter II is about prohibition of certain agreements<sup>283</sup> which adversely affects the competition of markets in India.<sup>284</sup> Where this Act, for the implementation of competition, declares such agreements to be void,<sup>285</sup> on the other hand it does not restrict the right of any person to impose reasonable terms and conditions for sake of securing copyrights, trademarks, patents, and designs etc.<sup>286</sup> Section 4 of the same chapter prohibits any enterprise or group for abusing its

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<sup>275</sup>Ibid, Section 2 (f)

<sup>276</sup>Ibid, Section 2 (h)

<sup>277</sup>Ibid, Section 2 (i)

<sup>278</sup>Ibid, Section 2 (m)

<sup>279</sup>Ibid, Section 2 (o)

<sup>280</sup>Ibid, Section 2 (u)

<sup>281</sup>Ibid, Section 2 (x)

<sup>282</sup>Ibid, This includes the definitions of Appellate Tribunal, Chairperson, Commission, Director General, Member, notification, person, prescribed, public financial institution, shares, statutory authority, turnover.

<sup>283</sup>Ibid, Section 3 Subsection (3): "Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—(a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition: Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services."

<sup>284</sup>Ibid, Section 3 Subsection (1): "No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India."

<sup>285</sup>Ibid, Section 3 Subsection (2): "Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void."

<sup>286</sup>Ibid, Section 3 Subsection (5): Nothing contained in this section shall restrict— (i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under: (a) the Copyright Act, 1957 (14 of 1957); (b) the Patents Act, 1970 (39 of 1970); (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999); (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999); (e) the Designs Act, 2000 (16 of 2000); (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000); (ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

dominant position<sup>287</sup> by fixing price at high level or the level below than cost just to eliminate the competitors out of market or to enter into or protect other relevant market.<sup>288</sup> Section 5 in this chapter regulates combinations such as acquisitions<sup>289</sup> and mergers<sup>290</sup> in India which causes adverse effect on the competition in the relevant market, duly prohibited by the Act.<sup>291</sup>

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<sup>287</sup> Ibid. Section 4 Subsection (1): "No enterprise shall abuse its dominant position."

<sup>288</sup> Ibid. Section 4 Subsection (2): "There shall be an abuse of dominant position under sub-section (1), if an enterprise.— (a) directly or indirectly, imposes unfair or discriminatory— (i) condition in purchase or sale of goods or services; or (ii) price in purchase or sale (including predatory price) of goods or service; or Explanation.—For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or services referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory conditions or prices which may be adopted to meet the competition:

Or (b) limits or restricts— (i) production of goods or provision of services or market therefore; or (ii) technical or scientific development relating to goods or services to the prejudice of consumers:

Or (c) indulges in practice or practices resulting in denial of market access:

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

or (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market."

<sup>289</sup> Ibid. Section 5. Combination.—The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if— (a) any acquisition where— (i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have.— (A) either, in India, the assets of the value of more than rupees one thousand crore or turnover more than rupees three thousand crore; or (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover of more than fifteen hundred million US dollars:

Or (ii) the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have.— (A) either in India, the assets of the value of more than rupees four thousand crore or turnover of more than rupees twelve thousand crore; or (B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover of more than six billion US dollars; or (b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if— (i) the enterprise over which control has been acquired along with the enterprise over which the acquirer already has direct or indirect control jointly have.— (A) either in India, the assets of the value of more than rupees one thousand crore or turnover of more than rupees three thousand crore; or (B) in India or outside India, in aggregate, the assets of the value of more than five hundred million US dollars or turnover more than fifteen hundred million US dollars:

Or (ii) the group, to which enterprise whose control has been acquired, or is being acquired would belong after the acquisition, jointly have or would jointly have.— (A) either in India, the assets of the value of more than rupees four thousand crore or turnover of more than rupees twelve thousand crore; or (B) in India or outside India, in aggregate, the assets of the value of more than two billion US dollars or turnover of more than six billion US dollars;

<sup>290</sup> Ibid. Section 5 (c) any merger or amalgamation in which— (b) "group" means two or more enterprises which, directly or indirectly, are in a position to— (i) exercise twenty-six per cent. or more of the voting rights in the other enterprise; or (ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise:

These three main elements i.e. anti competitive agreements; abuse of dominant position; and combination that may be mergers or acquisitions are controlled by the Competition Commission of India. The Commission may conduct inquiry under Section 19 of the Act,<sup>292</sup> if it finds any contravention against the provisions of section 3<sup>293</sup> and 4<sup>294</sup> and for the implementation of these sections; the commission may pass appropriate orders against the alleged person or enterprise to discontinue such agreement or abuse of dominant position and may also impose penalty against the violators in this respect.<sup>295</sup> In a recent case Raaj Kamal Film International (Informant) Versus M/s Tamil Nadu Theatre Owner Association (Opposite Party), the commission was of the opinion that there was violation of section 3 when the commission received compliant from the Informant against the opposite party that "the nature of an agreement among the members of association was intended to limit

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(c) the value of assets shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout-design or similar other commercial rights, if any, referred to in sub-section (5) of section 3.

<sup>291</sup>Ibid. Section 6 Subsection (1) "No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void."

<sup>292</sup>Ibid. Section 19 Subsection (1) The Commission may inquire into any alleged contravention of the provisions contained in sub-section (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—(a) receipt of a complaint, accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or (b) a reference made to it by the Central Government or a State Government or a statutory authority.

<sup>293</sup>Ibid, See footnote 283, 284, 285 and 286

<sup>294</sup>Ibid, See footnote 287 and 288

<sup>295</sup>Ibid. Section 27 "Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely:— (a) direct any enterprise or association of enterprises or person or association of persons, as the case may be, involved in such agreement, or abuse of dominant position, to discontinue and not to re-enter such agreement or discontinue such abuse of dominant position, as the case may be; (b) impose such penalty, as it may deem fit which shall be not more than ten per cent, of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse: Provided that in case any agreement referred to in section 3 has been entered into by any cartel, the Commission shall impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent, of the average of the turnover of the cartel for the last preceding three financial years, whichever is higher."

and control the market of exhibition of movies as well as innovative use of technical development in the exhibition of feature films.<sup>296</sup> The Commission, therefore, took notice and instructed Director General<sup>297</sup> to further investigate the matter and asked to submit the report before the Commission within sixty (60) days. In another case Indian Exhibition Industry Association (Informant) Versus Ministry of Commerce and Industry and India Trade Promotion Organization (ITPO), the commission on information of informant found that the opposite party (ITPO) was in violation of Section 4 and was abusing its dominant position over other organizers by restriction of time gap and preferential treatment given to itself for organizing trade fairs and exhibitions. The Commission further directed to Director General to investigate the matter.<sup>298</sup>

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<sup>296</sup> Raaj Kamal Film International Versus M/s Tamil Nadu Theatre Owner Association, The informant alleged that it had approached the theatre owners and distributors directly offering them terms of exhibition involving no minimum guarantee amount and only on revenue sharing basis as per the normal industry practice. However, the informant as an innovative and pioneering step and to take advantage of exhibition of film via Direct to Home Satellite Television Services (DTH) platform. wanted to premiere the movie through DTH service providers with one-time viewing to be made available to subscribing consumers between 9 PM on 10.01.2013 and 2 AM on 11.01.2013 i.e. a day prior to its theatrical release. on payment of movie subscription charges by viewers. For the purpose of premiering the movie through DTH platform the informant entered into a 'Content Provider Agreement' for one time telecast of the movie on identical terms with the six DTH providers operating in India under the brand names viz. Airtel, Sun Direct, Tata Sky, Dish TV, Videocon and Reliance Big TV. The case of the informant is that while it was organizing premier of the movie in a novel manner. the informant learnt of a decision taken by the opposite party association on 20.12.2012 whereby the association resolved 'not to lend co-operation for screening of any film that is released even before it comes to the theatre, through DTH or any other technology.' The informant's contention is that the aforesaid resolution dated 20.12.2012 passed by the opposite party was a direct and blatant contravention of the provisions of section 3(1) read with section 3(3)(b) of the Act. Available on <[http://www.cci.gov.in/May2011/OrderOfCommission\\_261012013.pdf](http://www.cci.gov.in/May2011/OrderOfCommission_261012013.pdf)> accessed on 28/06/14

<sup>297</sup> Competition Act, 2002, supra note 267. Section 41. Chapter V of the Act, Duties of Director General: "Director General to investigate contraventions."

<sup>298</sup> Indian Exhibition Industry Association (Informant) Versus Ministry of Commerce and Industry and India Trade Promotion Organization (ITPO), "On the basis of the information and material on record it appears that ITPO was abusing its dominant position *prima facie* in the following manners: •By imposing discriminatory conditions of time gap restrictions. it was abusing its dominant position in contravention of section 4(1) read with section 4(2)(a)(i) of the Act. •By the time gap restriction and preferential treatment given to itself for organizing trade fairs and exhibitions over other organizers. it was limiting the provision of services of holding trade show/ exhibition at Pragati Maidan in contravention of section 4(1) read with section 4(2) read with section 4(2)(c) of the Act. •By altering the guidelines coupled with phenomenal delay in confirmation of allotment dates to other organizers. it was denying access to use the venue in contravention of section 4(1) read with section 4(2)(c) of the Act. •By allotting the venue subject to acceptance of supplementary obligations such as conditions of compulsorily taking of foyer area. engaging of empanelled House Keeping agency. it was in

Similarly, for any contravention against combinations, the Commission may conduct inquiry under section 20<sup>299</sup> of the Act and may pass order that the combination shall not take effect or propose modifications to the combination to eradicate the anti competitive activities.<sup>300</sup> Further, to execute the orders, the commission has the authority to penalize such person in case of non compliance occurs.<sup>301</sup> The Act also provides the provisions regarding Appeals against the orders of the commission and in this respect established Competition Appellate Tribunal<sup>302</sup> under section 53<sup>303</sup>. Further, the orders and decisions of the Appellate Tribunal may

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contravention of section 4(1) read with section 4(2)(d) of the Act." Available on <<http://www.cci.gov.in/May2011/OrderOfCommission/261/Case%20No%2074%20of%202012.pdf>> accessed on 28/06/14.

Resultantly, the Commission is of the opinion that *prima facie* there is sufficient material to refer the case to the Director General (DG) to cause an investigation to be made into the matter under section 26(1) of the Act.

<sup>299</sup>Competition Act, 2002, *supra* note 267 Section 20 Subsection (2): "The Commission shall, on receipt of a notice under sub-section (2) of section 6 or upon receipt of a reference under sub-section (2) of section 21, inquire whether a combination referred to in that notice or reference has caused or is likely to cause an appreciable adverse effect on competition in India."

<sup>300</sup> *Ibid.* Section 31 Subsection (3): "Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition but such adverse effect can be eliminated by suitable modification to such combination, it may propose appropriate modification to the combination, to the parties to such combination."

<sup>301</sup>*Ibid.* Section 42 Subsection (1): "The Commission may cause an inquiry to be made into compliance of its orders or directions made in exercise of its powers under the Act.

Subsection (2): If any person, without reasonable clause, fails to comply with the orders or directions of the Commission issued under section 27, 28, 31, 32, 33, 42 A and 43 A of the Act, he shall be punishable with fine which may extend to rupees one lakh for each day during which such non-compliance occurs, subject to a maximum of rupees ten crore, as the commission may determine.

Subsection (3): If any person does not comply with the orders or directions issued, or fails to pay the fine imposed under sub section (2), he shall, without prejudice to any proceeding under section 39, be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to rupees twenty – five crore, or with both, as the Chief Metropolitan Magistrate, Delhi may deem fit: Provided that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence under this section save on a complaint filed by the Commission or any of its officers authorized by it."

<sup>302</sup> *Ibid.* Section 53A. Subsection (1): "The Central Government shall, by notification, establish an Appellate Tribunal to be known as Competition Appellate Tribunal – (a) to hear and dispose of appeals against any direction issued or decision made or order passed by the Commission under sub sections (2) and (6) of section 26, section 27, section 28, section 31, section 32, section 33, section 38, section 39, section 43, section 43A, section 44, section 45, or section 46 of the Act; (b) to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any finding of the Commission or under section 42A or under sub-section (2) of section 53Q of this Act, and pass order for the recovery of compensation under section 53N of this Act.

Subsection (2): The Headquarter of the Appellate Tribunal shall be at such place as the Central Government may, by notification, specify."

<sup>303</sup> *Ibid.* Inserted by Competition (Amendment) Act, 2007

be challenged directly before the Supreme Court of India within the prescribed time provided under section 53T.<sup>304</sup>

Under the scheme of the Act, the Competition Commission of India<sup>305</sup> has the authority and powers of investigative, regulatory, and negotiation and up to some extent advisory responsibilities.<sup>306</sup> If commission itself finds any contravention of the provisions under section 3 and section 4 or receives any complaint or information, it takes necessary steps accordingly after enquiry and investigation. Competition commission has right to make regulation, subject to approval of both Houses of Parliament of India, to carry out the purposes of this Act.<sup>307</sup>

Competition commission is responsible to establish such environment in which welfare of consumer would be taken care of, ensure healthy competition in economic activities and promote competition culture by creating awareness about the consumer benefits and wellbeing. The Act is extra-territorial and assumes jurisdiction over acts outside India that may affect a market within India.<sup>308</sup>

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<sup>304</sup> Ibid. Section 53T: "the Central Government or any State Government or the Commission or any statutory authority or any local authority or any enterprise or any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to them; Provided that the Supreme Court may, if it is satisfied that the applicant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed after the expiry of the said period of sixty days."

<sup>305</sup> Ibid. Section 7 Subsection (1): "With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a Commission to be called the "Competition Commission of India."

<sup>306</sup> Ibid. Section 18: "Duties of Commission.—Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in markets in India:

Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement, with the prior approval of the Central Government, with any agency of any foreign country."

<sup>307</sup> Ibid. Section 64 Subsection (1): "The Commission may, by notification, make regulations consistent with this Act and the rules made there-under to carry out the purposes of this Act."

<sup>308</sup> Ibid. Section 32: Acts taking place outside India but having an effect on competition in India- "The Commission shall, notwithstanding that.— (a) an agreement referred to in section 3 has been entered into outside India; or (b) any party to such agreement is outside India; or (c) any enterprise abusing the dominant position is outside India; or (d) a combination has taken place outside India; or (e) any party to combination is outside India; or (f) any other matter or practice or action arising out of such

As per the above discussion and evaluation of different Acts and Laws, including Pakistan, implemented to restrict the behavior of anti competition, we can observe that principle objective of supplier of goods and services who are in a position to manipulate the market is to maintain their profits at pre-determined levels and in this respect they seek to achieve it by any means such as entering into anti competitive agreements; abusing dominant position and mergers or combinations for price-fixing, limiting supply of goods or services, dividing the market, etc. are the usual modes of interfering with the process of competition and ultimately reducing or eliminating competition.<sup>309</sup> Therefore, countries approach in different techniques to control such behaviour in their society; however, the main subject of such techniques is almost same, where competition is adversely affected.<sup>310</sup> These Competition or Antitrust Acts have been framed according to modern competition law with the consideration of national and international trends of competition.<sup>311</sup> These aim at nurturing competition and promoting their markets against anti-competitive practices by undertakings.

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of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit in accordance with the provisions of this Act.”

<sup>309</sup> As we have seen in Chapter 2 “Evaluation of law on Competition.

<sup>310</sup> Please see part 2.2.1 “The Competition law of the U.S.A.”, 2.2.2 “The Competition Act, 1998 of the U.K.”, 2.2.3 “E.U. Competition Law”, 2.2.4 “The Competition Law of India”.

<sup>311</sup> Such as Competition Act of U.K and India.

## **CHAPTER 3: INADEQUACIES IN THE EXISTING COMPETITION LAW OF PAKISTAN**

Pakistan, since its birth in the year 1947, is facing multiple challenges and one of those was legislative challenge because democracy of the country was derailed due to martial laws<sup>312</sup> eventually the country could not build required advancement in the field of legislation to cater the social demands for legislations in the emerging fields of law unlike USA, UK and off course our contemporary India. The half lived and half trained parliament of Pakistan mostly had to rely on copy paste principle of legislation without going through the vires of different provisions of the legislations. The Competition Act, 2010 is also a legislation which certainly has some better features but it is replete with lot of shortcomings and procedural complications which arise due to its direct clash with the rights and liberties ensured by the state, in the Constitution as well as already existing laws of the country. The substantive as well as the procedural parts of the legislation do require further changes and adoption of better scheme of enforcement which could meet the requirements of the society in Pakistan for getting rid of menace of corrupt and unfair marketing and for ensuring better competitive market where rights of consumers are well guarded like other societies of Europe, USA & UK. We borrowed the legislation from U.K. by emulating main principles of its Competition Act, 1998 & Enterprise Act, 2002. The socio economic conditions, human resource and institutional strength of U.K and Pakistan is off course not similar therefore the U.K's available model of Competition law is not suitable as it has been adopted for its application in Pakistan because there

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<sup>312</sup> Paula R. Newberg, "Judging the State. Courts and Constitutional Politics in Pakistan". 1<sup>st</sup> Paper Back Edition 2002. Published by Cambridge University Press – 1995. Chapter 1, Page 9, "Since its independence, Pakistan has struggled with constitutions, governments and the structure of the State. It has swung between the poles of dictatorship and democracy, and between civilian and military rule. Although it was established with a parliamentary system of government, the military has seized power many times since 1947."

are multiple substantive and procedural flaws in the Competition Act, 2010 enacted by Pakistan and because of those flaws the consumers could not get desired protection of state from the exploitations of hefty and powerful undertakings.

The shortcomings, loopholes and flaws in the Competition Act, 2010 with their comparative analysis and most suitable solution in consonance with the law and natural justice shall be discussed in this chapter in detail. The substantive and procedural problems of the Competition law with suitable solution after comparison of each problem with the available laws of other countries are discussed here.

### **3.1 DELAYED JUSTICE:**

The foremost objective of consumer relating justice system ought to be to provide immediate and expense free relief because a common consumer making shopping of routine use commodities, making cell phone calls, paying utilities etc would definitely need maximum time saving for pursuing his complaint in case of violation of competition law. Therefore, such common consumer cannot afford delay in decision of his applications/complaints before any forum investigating and adjudication his complaint. The delay process in any judicial system does not only deprive the genuine aggrieved persons from enjoying their rights or getting their cases disposed of promptly but it also saps the moral vitality of the people. The Constitution of Islamic Republic of Pakistan, 1973 has provided certain guarantees for the enforcement of some basic rights known as fundamental rights and one of those guarantees is the provision of expeditious and inexpensive justice under Article 37 (d) as a principle of policy.<sup>313</sup> The constitutional guarantee for provision of speedy and inexpensive justice

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<sup>313</sup> Constitution of Pakistan, supra note 18. Article 37 (d): "The State shall ensure inexpensive and expeditious justice."

is borrowed from Universal Declaration of Human Rights<sup>314</sup> like many other rights guaranteed to the people of Pakistan.

The Competition Act, 2010 adopted U.K.'s model of competition law as far as it was possible but entire legislation of U.K. in the shape of Competition Act, 1998 & Enterprise Act, 2002 was not adopted as it was enacted and promulgated by the U.K.s Parliament. The pick and choose of certain principles of the competition law from a foreign system certainly did not suit our indigenous society and legal system where the people seldom care for the truth and due process of law.

The Competition Act, 2010 provided multi-stage complaint disposal system in case of violation of Chapter II<sup>315</sup> of the Act. The complainant may file grievance / complaint in the competition commission in accordance with the set procedure and there is no time limit provided in the law initially for the completion of inquiry and investigation. Further the participation and presence of the complainant is not mandatory in the said process therefore it results into unnecessary delay even in the very first stage of proceedings by the competition commission of Pakistan. The second stage of adjudication of complaint begins when a final order<sup>316</sup> is passed by

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<sup>314</sup> Universal Declaration of Human Rights a declaration adopted on 10<sup>th</sup> of December 1948.

<sup>315</sup> The Competition Act, 2010, *supra* note 50. Chapter II consists of Section 3: Abuse of Dominant Position; Section 4: Prohibited Agreements; Section 5: Individual exemptions; Section 6: Cancellation etc. of Individual exemptions; Section 7: Block Exemptions; Section 8: Block exemptions procedure; Section 9: The criteria for individual and block exemptions; Section 10: Deceptive marketing practices; and Section 11: Approval of mergers.

<sup>316</sup> *Ibid*, Section 30: Proceedings in cases of contravention: "Subsection (1). Where the Commission is satisfied that there has been or is likely to be, a contravention of any provision of Chapter II, it may make one or more of such orders specified in Section 31 as it may deem appropriate. The commission may also impose a penalty at rates prescribed in section 38, in all cases of contravention of the provisions of Chapter II.

Subsection (2). Before making an order under subsection (1), the Commission shall (a) give notice of its intention to make such order stating the reasons therefore to such undertaking as may appear to it to be in contravention; and (b) give the undertaking an opportunity of being heard on such date as may be specified in the notice and of placing before the Commission facts and material in support of its contention: Provided that in case the undertaking does not avail the opportunity of being heard, the Commission may decide the case ex-parte.

Subsection (3), The Commission shall publish its order in the official Gazette, for the information of the public.

the member commission but once again there is no time limit for the member for passing final order which may be appealed before the Appellate Bench of the commission within thirty days from the date of order passed by the member (s) commission but once again there is no time limit for the decision of even first appeal before the Appellate bench of the Commission under Section 41 of the Act.<sup>317</sup> This way the complaint may take at least a year or so for passing through first decision and its appeal before the Appellate Bench of the Commission even if it is on fast track. The decision of Appellate Bench is appealable within sixty days<sup>318</sup> of decision of the Appellate Bench before the Competition Appellate Tribunal under Section 42 of the Act and this time second appeal has to be decided within six (6) months<sup>319</sup> under Section 43 subsection (5) of the Act, but normally it is also delayed.<sup>320</sup> The decision of the Commission Appellate Tribunal is further appealable within sixty days before the Honorable Supreme Court of Pakistan<sup>321</sup> under Section 44 of the Act without fulfilling the pre requisites of Article 184 & 185 of the Constitution.<sup>322</sup> This multi-

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Subsection (4). An order made under subsection (1) shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force or in any contract or memorandum or articles of association.

Subsection (5). Any order issued under this section shall include the reasons on which the order is based."

<sup>317</sup> Ibid. See footnote 147 and 148 above.

<sup>318</sup> Ibid. See footnote 151 above.

<sup>319</sup> Ibid. Section 43 Subsection (5) The Competition Appellate Tribunal shall decide an appeal expeditiously within six months of its presentation to the Tribunal.

<sup>320</sup> CCP's Performance Termed Consistent By Global Competition Review Despite Dwindling Resources, "Competition Appellate Tribunal which would have ensured the timely disposal of cases has remained dysfunctional due to non- appointment of judges." Report Dated 04-June-2014. Islamabad,

available at

<[http://www.cc.gov.pk/index.php?option=com\\_content&view=article&id=351:04-june-2014&catid=2:uncategorised](http://www.cc.gov.pk/index.php?option=com_content&view=article&id=351:04-june-2014&catid=2:uncategorised)> accessed on 04 December 2014.

<sup>321</sup> The Competition Act. 2010. supra note 50. See foot note 152 above.

<sup>322</sup> Constitution of Pakistan. supra note 18. Article 184; "Original Jurisdiction of Supreme Court: (1) The Supreme Court shall, to the exclusion of every other court, have original jurisdiction in any dispute between any two or more Governments. Explanation.- In this clause, "Governments" means the Federal Government and the Provincial Governments.

(2) In the exercise of the jurisdiction conferred on it by clause (1). the Supreme Court shall pronounce declaratory judgments only.

(3) Without prejudice to the provisions of Article 199. the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights

stage lengthy and very costly process for pursuing initially the application/complaint before the Competition Commission, then Appellate Bench, then Competition Appellate Tribunal and then before Honorable Supreme Court of Pakistan which not only wastes the precious time of the Apex court but also results into inordinate delay and heavy expenses both for the consumer/complainant and the undertaking while negating the constitutional policy under Article 37 (d)<sup>323</sup> for providing speedy and inexpensive justice.

The comparative study of the Competition Act, 2002 of India shows that the Indian law on the subject is swift, better and consumer friendly because the decision of commission is assailed in appeal only before the Competition Appellate Tribunal under Section 53B of the Act, 2002<sup>324</sup> instead of Appellate Bench of the Commission

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conferred by Chapter I of Part II is involved have the power to make an order of the nature mentioned in the said Article."

Article 185 Appellate Jurisdiction of Supreme Court (1) Subject to this Article, the Supreme Court shall have jurisdiction to hear and determine appeals from judgments, decrees, final orders or sentences. (2) An appeal shall lie to the Supreme Court from any judgment, decree, final order or sentence (a) if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to transportation for life or imprisonment for life; or, on revision, has enhanced a sentence to a sentence as aforesaid; or (b) if the High Court has withdrawn for trial before itself any case from any court subordinate to it and has in such trial convicted the accused person and sentenced him as aforesaid; or (c) if the High Court has imposed any punishment on any person for contempt of the High Court; or (d) if the amount or value of the subject matter of the dispute in the court of first instance was, and also in dispute in appeal is, not less than fifty thousand rupees or such other sum as may be specified in that behalf by Act of Majlis-e-Shoora (Parliament) and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below; or (e) if the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below; or (f) if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution. (3) An appeal to the Supreme Court from a judgment, decree, order or sentence of a High Court in a case to which clause (2) does not apply shall lie only if the Supreme Court grants leave to appeal.

<sup>323</sup> Ibid. See footnote 313 above.

<sup>324</sup> The Competition Act, 2002, *supra* note 267. Section 53B: "Subsection (1). The Central Government or the State Government or a local authority or enterprise or any person, aggrieved by any direction, decision or order referred to in clause (a) of section 53A may prefer an appeal to the Appellate Tribunal.

Subsection (2). Every appeal under sub-section (1) shall be filed within a period of sixty days from the date on which a copy of the direction or decision or order made by the Commission is received by the Central Government or the State Government or a local authority or enterprise or any person referred to in that sub-section and it shall be in such form and be accompanied by such fee as may be prescribed: Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that there was sufficient cause for not filing it within that period.

as provided in case of Pakistan. The appeal has to be decided within six months from the date of its institution as provided in Section 53B (5) of the Act.<sup>325</sup> There is no Appellate Bench of the commission as it is provided in case of Pakistan. The second and final appeal can be filed before the Supreme Court of India under Section 53 T of the Act, 2002.<sup>326</sup> The India versus Pakistan competition law shows difference in time frame for the final adjudication of any complaint against the violation of competition law and Indian side has made better efforts for curtailing the time as Indian competition law provides less forum of appeal to decide the matter and expenses of the complainant as compared to Pakistan which has yielded better results to the country's economy as well as to the consumers.

In case of United Kingdom, the orders of the Office of Fair Trading and Competition and Markets Authority can be assailed under Section 48 of the Competition Act, 1998, before the Competition Appeal Tribunal.<sup>327</sup> Further, an appeal under Section 49 of the Competition Act 1998, may be filed against the order of the Competition Appeal Tribunal either on a point of law or in cases involving penalties, as to the amount of the penalty, before the Court of Appeal in England and Wales or in the case of proceedings in Scotland before the court of Sessions, or in the case of proceedings in Northern Ireland the Court of Appeal of Northern Ireland.<sup>328</sup> The comparative study shows that the complaint disposal procedure provided in the U.K is not only more detailed but simultaneously time saving. Further fewer forums of

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Subsection (3) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the direction, decision or order appealed against.

Subsection (4) The Appellate Tribunal shall send a copy of every order made by it to the Commission and the parties to the appeal." Further See footnote 302 and 303 above.

<sup>325</sup> Ibid. Section 53 B: Subsection (5). "The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavor shall be made by it to dispose of the appeal within six months from the date of receipt of the appeal."

<sup>326</sup> Ibid. Section 53 T. see footnote 304.

<sup>327</sup> The Competition Act, 1998, supra note 224. See footnote 242.

<sup>328</sup> Ibid. see footnote 243 and 244.

Appeals are provided in the U.K.'s law for expediting delivery of justice and to benefit the public.

The most swift and consumer friendly system has been given in the USA in the shape of century old time tested The Sherman Antitrust Act, 1890 and the Clayton Antitrust Act, 1914. The scheme of US law on the point is very simple; however, the principle adopted in the legislation saves complainant's money and time because the office of Attorney General has the responsibility for pursuing competition law violations at the state expense as per section 4 of the Act, 1890. The US law for more than a century has been adhering the principle of decentralization of legal forum for the adjudication of competition law violations. The district courts have been provided the powers for deciding the complaint instead of a central body/institution at the US capital Washington DC.<sup>329</sup>

### **3.2 EXPENSIVE JUSTICE:**

Pakistan is a state which is facing problems of terrorism, lack of population control, speedy urbanization and very high rate of poverty amongst other problems.<sup>330</sup> The contaminated food and substandard goods are sold at each and every shop even in the names of brands and that too with impunity because the enforcement mechanism for the protection of consumers is either lacking in technique or not working with

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<sup>329</sup> The Sherman Antitrust Act 1890. *supra* note 4, Section 4: "The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7 of this title: and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case: and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

<sup>330</sup> Hamza Hameed and M. Kamil Jamshed. "A study of the Criminal law and Prosecution system in Pakistan" Manzil Pakistan, October – 2013 available at <<http://www.manzilpakistan.org/wp-content/uploads/2014/01/Law-and-Justice-Study-on-Criminal-Prosecution.pdf>>. Further also see Justice Sayed Zahid Hussain. "Justice at the Grossroots level through Alternate Dispute Resolution (A.D.R) Modes" available at <<http://www.supremecourt.gov.pk/jkc/articles/77.pdf>>.

required integrity and efficiency.<sup>331</sup> The poor and helpless consumers if dare to lodge a complaint against any hefty undertaking which may be violating Chapter II of the Act, 2010, have to pay huge price in the shape of valuable time of life and thousands of rupees for pursuing the complaint against an undertaking, therefore, in this situation a common man of Pakistan would hardly even think to go to the Competition Commission of Pakistan at Islamabad for seeking justice against his grievance at the cost of hard earned thousands of rupees.<sup>332</sup>

The Competition Act, 2010 has provided for very expensive justice and it badly ignored Constitutional principle for providing inexpensive justice to the aggrieved complainant knowing the fact that the preamble<sup>333</sup> clause of the Act, 2010 has emphasized on the policy for protection of consumers from anti competitive behavior of the powerful undertakings. The Act, 2010 is a legislation which may suit to a country where everyone is rich and free from rates of beans and rice and is enjoying luxury but Pakistan has a society which is mostly hit by two extreme classes of the society. One class is tension free and owning huge enterprises whereas the poor class including daily wagers, farmers and salaried class is continuously facing the agony of daily basis inflation, exploitation by undertakings in one way or the other, poor law and order, lack of efficient price control policy, lack of medication and health policy or in other words that class is the direct victim of state and undertakings at the same time. The foremost objective of the legislation for the protection of consumers failed only because of very expensive complaint disposal mechanism provided in the Competition Act, 2010.

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<sup>331</sup> Ibid.

<sup>332</sup> See the foot note 334 below where a complainant has to pay heavy fees to avail any remedy before the Competition Commission.

<sup>333</sup> The Competition Act, 2010, supra note 50. Preamble "An Act 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."

The Competition Act, 2010 has provided very expensive system of complaint disposal mechanism either for the complainant or for the undertaking. For example if any undertaking or consumer or complainant wants to seek mere advice regarding any issue, provision of laws or any fact or information or regarding violation of Competition Act, 2010 such undertaking or consumer or complainant has to submit pay order / bank draft of Rs. 100,000/- in favor of Competition Commission and in case of complexity in matter, the Commission may charge further fee in thousands of rupees without providing any criteria for imposing additional charges.<sup>334</sup> This situation is not only disappointing for consumer/complainant and undertaking but also against the right of access to inexpensive justice provided in the Constitution. Further, any complainant or consumer or any aggrieved person has to pay fee of Rs. 5000/- to the Commission in case the complaint is from any individual and fee of Rs. 50,000/- in case the complainant is a firm or company according to the Competition Commission of Pakistan Statutory Notification S.R.O. 03 (I)/2014 of Revised fee Schedule.<sup>335</sup> The expensiveness of the complaint adjudication forums provided in the Act, 2010 can be ascertained from the fact that court fee has to be paid by the complainant or appellant in all statutory appeals at four different times in addition to fee of Rs.25000/- fixed for mere interim relief.<sup>336</sup> Moreover, if any person or undertaking wants to file the appeal against the impugned order of Commission, it has to deposit the 25% of penalty imposed as a deposit in the account of the Commission under Rule 7 (2) of the Competition Commission Appeal Rules, 2007.<sup>337</sup> It seems that

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<sup>334</sup> Competition Commission of Pakistan Statutory Notification, S.R.O. 03 (I)/2014 Islamabad, dated 02 January 2014, (Published in the Gazette of Pakistan Extraordinary, January 4, 2014). Revised Fee Schedule, available at <[http://www.cc.gov.pk/images/Downloads/notifications/revised\\_fee\\_schedule\\_2\\_jan\\_2014.pdf](http://www.cc.gov.pk/images/Downloads/notifications/revised_fee_schedule_2_jan_2014.pdf)> accessed on 04 December 2014.

<sup>335</sup> Ibid.

<sup>336</sup> Ibid.

<sup>337</sup> Competition Commission of Pakistan Statutory Notification, S.R.O. 399 (I)/2008 Islamabad, dated 24 April, 2008, (Published in the Gazette of Pakistan Extraordinary, April 24, 2008). The Competition

the competition commission works for fee and fine collection either from the complainant or the undertaking without delivering even a penny to the complainant even in case of success or rejection of complaint. That is why, the ordinary consumer living in the distant areas of Pakistan even in cases of acute anti competitive grievances feels comfortable to stay home instead of consuming thousands of rupees and precious time of his life in pursuing the proceedings before the competition commission of Pakistan. That is the reason that most of the cases dealt by the Commission are under the *Suo Moto* jurisdiction of the competition commission of Pakistan and the private complainant seems least interested.<sup>338</sup> The competition commission of Pakistan is no doubt established for the protection of the consumers alongside the regular provincial consumer courts but as of today the consumer courts of the country are much inexpensive, public friendly and convenient for adjudication of consumer's grievance against undertaking as only one appeal is provided against the order of the consumer court and it involves minimum capital input and time of the complainant.<sup>339</sup> The complainant feels more comfortable for pursuing his grievances

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Commission (Appeal) Rules, 2007, available at <[http://www.cc.gov.pk/images/Downloads/rules\\_cc\\_appeal\\_rules\\_2007.pdf](http://www.cc.gov.pk/images/Downloads/rules_cc_appeal_rules_2007.pdf)> accessed on 10 Nov 2014. Rule 7 (2) provides: "Where an appeal is filed under these rules and the impugned order related to any penalty imposed under the Ordinance or rules and regulations made thereunder, the person desirous of filing such an appeal, shall at the time of filing the appeal, deposit in the account of the Commission twenty five percent of the penalty imposed." It is pertinent to mention here that these Rules have been adopted by the Competition Commission of Pakistan under Section 62 of the Competition Act 2010 which provides, Validation of actions, etc.: "Anything done, actions taken, orders passed, instruments made, notifications issued, agreements made, proceedings initiated, processes or communication issued, power conferred, assumed or exercised, by the Commission or its officers on or after the 2<sup>nd</sup> October 2007 and before the commencement of this Act, shall be deemed to have been validly done, made, issued, taken, initiated, conferred, assumed, and exercised and provisions of this Act shall have, and shall be deemed always to have had, effect accordingly."

<sup>338</sup> "Indus Motor Company Ltd.", "LDI Operators", "Urea Manufacturers", "Engineering University", "Institute of Chartered Accountant of Pakistan", "I Link Guarantee Ltd and its Member Banks", "Paint Manufacturers", "Fauji Fertilizer Company Ltd.", "Pakistan Steel Mill", "Karachi Stock Exchange Guarantee Ltd.", "Pakistan Mobile communication Ltd. & Others", "Bahria University", and "Pakistan Banks Association Ltd." are Few examples of the cases of show cause and sou moto available on <[http://www.cc.gov.pk/index.php?option=com\\_content&view=article&id=168&Itemid=106](http://www.cc.gov.pk/index.php?option=com_content&view=article&id=168&Itemid=106)> accessed on 05/11/14

<sup>339</sup> See footnote 169 and 205 above.

at the district headquarter concerned and with the minimum expenses he seeks redress of his grievance with costs of litigation.

On the other hand, in India, the Commission is charging Rs. 5000/- from individual and Rs. 20,000/- in case of firm or company having turnover in the preceding year up to rupees One Crore, as fixed in the provisions of Regulation 49 of the Competition Commission of India (General) Regulations, 2009.<sup>340</sup> No other extra charges, the Commission in India is charging such as for interim relief to aggrieved parties. Further unlike Pakistan, the Indian competition law has provided for the reimbursement of cost of proceedings to the complainant in the shape of award of damages, costs and compensation. The USA law also ensured very inexpensive justice system in the similar matter and ensured pursuance of complaints at state expense through the Attorney General who has control over the District Attorney office concerned.<sup>341</sup>

### **3.3 DOUBLE JEOPARDY:**

The Competition Act, 2010 is a legislation of the Parliament which deals with the consumer's grievance against the undertaking. The provincial & ICT Islamabad consumer laws also hold field along with the Act, 2010 as the provincial laws have

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<sup>340</sup> The Competition Commission of India Notification No. R-40007/6/ Reg – General/ Noti/ 04 – CCI. (Published In the Gazette of India, Extraordinary. Part III. Section 4. dated 22 May 2009. The Competition Commission of India (General) Regulations, 2009 (No. 2 of 2009). Regulation 49: Fee under clause (a) of sub-section (1) of section 19 of the Act. - (1) Each information received under clause (a) of sub-section (1) of section 19 of the Act from any person shall be accompanied by proof of having paid the fee as under. - (a) rupees 5000/- (five thousand) in case of individual or Hindu undivided family (HUF), or Non Government Organisation (NGO), or Consumer Association, or a Co-operative Society, or Trust, or (b) rupees 20,000/- (twenty thousand) in case of firm or company having turnover in the preceding year upto rupees one crore, or (c) rupees 50,000/- (fifty thousand) in the cases not covered under clause (a) or (b). (2) The fee may be increased or decreased on the basis of annual notification of Cost Inflation Index by the Central Board of Direct Taxes. Department of Revenue, Ministry of Finance by an order of the Commission. (3) The fee can be paid either by tendering demand draft or pay order or banker's cheque, payable in favour of Competition Commission of India (Competition Fund), New Delhi or through Electronic Clearance Service (ECS) by direct remittance to the Competition Commission of India (Competition Fund), Account No. 1988002100187687 with "Punjab National Bank, Bhikaji Cama Place, New Delhi-110066".

<sup>341</sup> The Sherman Antitrust Act 1890. supra note 4, see footnote 329 above.

not been repealed in the Act, 2010. It is pertinent to mention here that "Both consumer and competition policies serve to improve consumer welfare, and they naturally complement each other. Competition theory that excludes consumer policy is not only shortsighted but, given the growing importance of consumer issues, can ultimately be self-defeating. Consumer policy that ignores its impact on competition can result in cures worse than the disease. An agency's contribution to the economy can be measured by its progress in increasing consumer welfare overall. Thus, well-conceived competition and consumer policies should take complementary paths to the same goal."<sup>342</sup>

Both the laws in Pakistan provide consumers' protection. Though, the Competition Act, 2010 has provided that a complaint against undertaking may be filed by the consumer or complainant for any of the violations of the Chapter II before the Competition Commission of Pakistan, but it has not provided that a consumer who would complain before Commission shall be debarred from complaining the consumer courts working under the Provincial Consumer Protection laws in Pakistan and in case both forums are complained and if both forums penalize the manufacturer or undertaking for imprisonment or fine for the same offence upon different complaints then it will be violation of Article 13<sup>343</sup> of the Constitution of Pakistan which provides that no person shall be prosecuted and punished for the same offence more than once.<sup>344</sup> In the same way, Section 26 of the General Clauses Act, 1897 also provides that where an act or omission constitutes an offence under two or more

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<sup>342</sup> Joseph Wilson, *supra* note 09, at Page 111 and 112. Further, the author cited Timoth J. Muris, *Principles for a successful competition Agency*, 72 U. CHI. L. REV. 165, 174 (2005).

<sup>343</sup> Constitution of Pakistan, *supra* note 18, Article 13: "No person (a) shall be prosecuted or punished for the same offence more than once; or (b) shall, when accused of an offence, be compelled to be a witness against himself."

<sup>344</sup> The same concept was emphasized and reiterated by the apex courts of Pakistan in 2009 PLD 866 "*Ghulam Abbas Niazi Versus Federation of Pakistan*"; PLD 2014 Sindh 218 "*Imran Ahmed Versus Federation of Pakistan & others*"; and 2014 SCMR 1376 SC "*Mohammad Nadeem Ahmed Versus Securities & Exchange Commission of Pakistan*" when the respondents violated the Article 13 of the Constitution against the Petitioners.

enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished or prosecuted twice for the same offence.<sup>345</sup> Section 403<sup>346</sup> Code of Criminal Procedure, 1898 and section 10<sup>347</sup> of the Code of Civil Procedure, 1908 bear the same prohibition.

The Act, 2010 is silent to deal with the situation when more than one consumer/ complainant file complaint against one undertaking before different forums, for example, three aggrieved complainants against one undertaking / respondent. One of the complainants files complaint before the consumer court in Punjab, the other one files the complaint before Islamabad consumer court and the third one files the complaint before Competition Commission in Islamabad, there is no mechanism provided in the Act that what would be the position or procedure in

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<sup>345</sup> The General Clauses Act, 1897, Act No. X of 1897, 11<sup>th</sup> March, 1897. Section 26 of the Act: "Provisions as to offences punishable under two or more enactments – Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."

<sup>346</sup> The Code of Criminal Procedure, 1898, As amended by Act II of 1997. Section 403: Persons once convicted or acquitted not to be tried for the same offence: Subsection (1). a person who has been tried by a Court of Competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not to be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 36, or for which he might have been convicted under section 237.

Subsection (2). A person acquitted or convicted for any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under sections 235, subsection (1).

Subsection (3). A person convicted of any offence constituted by any act causing consequences which together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last-mentioned offence, if the consequence had not happened, or were not happened, or were not known to the Court to have happened, at the time when he was convicted.

Subsection (4). A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for any other offence constituted by the same acts which he may have committed if the court by which he was first tried was not competent to try the offence with which he is subsequently charged.

Subsection (5). Nothing in this section shall affect the provision of section 26 of the General Clauses Act, 1897, or section 188 of this Code.

<sup>347</sup> Code of Civil Procedure, 1908, Act No. V of 1908, 21<sup>st</sup> March, 1908. Section 10: Stay of Suit: No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit is pending in the same or any other Court in Pakistan having jurisdiction to grant the relief claimed, or in any Court beyond the limits of Pakistan established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

such case. Though the Appellate Bench has power under Rule 13 of the Competition Commission (Appeal) Rules, 2007, to consolidate the matters/appeals pending before Appellate Bench, but the competition commission has not been empowered to consolidate more than one complaints pending before it as well as it has no power to call for the identical complaints pending before the consumer courts under the provincial laws.<sup>348</sup> The non empowerment of the commission to deal with this situation will ultimately result into double jeopardy which is prohibited under the law.

At least, for avoiding the double jeopardy, the Competition Commission of Pakistan may be empowered to decide whether an identical complaint filed by different parties at the different forums has to be heard under the Competition Act, 2010 or by the district level consumer courts concerned keeping in view the nature and intensity of the complaint. The active coordination as prescribed under the two sets of similar laws has to be ensured for the benefit of consumer. The commission may also be empowered to withdraw consumer's complaint from the consumer courts concerned for its disposal.

On the other hand, in U.S.A, Competition Agencies i.e. FTC and Department of Justice consult each other so to avoid not only duplicating efforts before starting any investigation but also to avoid penalizing the undertaking or offenders twice.<sup>349</sup> In India, though no particular provisions related to clubbing or consolidating the matters against one undertaking has been available, but Section 53 N of the Competition Act, provides that where any loss or damage is caused to numerous persons having the

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<sup>348</sup> Competition Commission of Pakistan Statutory Notification, S.R.O. 399 (I)/2008, supra note 337, Rule 13 (1) provides that "where two or more appeal proceedings are pending in relation to the same decision of the Commission, or involve the same or similar issues, the Appellate Bench may at any time, on the request of a party or of its own initiative, order that the proceedings or any particular issue or matter raised in the proceedings be consolidated or heard together.

Rule 13 (2) provides "Before making an order under sub-rule (1), the Appellate Bench shall invite all the parties to the relevant proceedings to make their submissions thereon.

<sup>349</sup> In USA before opening an investigation, the agencies consult with one another to evade duplicating efforts. In this guide, the agency means either FTC or DOJ, whichever is conducting the antitrust investigation. See footnote 223 above.

same interest, one or more of such persons may make an application for and on behalf of or for the benefit of the persons so interested. For such purpose the provisions of Rule 8 of Order 1 of the First Schedule to the Indian Code of Civil Procedure, 1908 shall apply that every reference therein to a suit or decree shall be construed as a reference to the application before the Appellate Tribunal and the order of the Appellate Tribunal thereon and for implementation of such provisions the Appellate Tribunal shall not examine afresh the findings of the Commission but shall determine the eligibility and quantum of compensation accrue to such aggrieved persons.<sup>350</sup>

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<sup>350</sup> The Competition Act, 2002, *supra* note 267, Section 53 N: Subsection 1, "(1)Without prejudice to any other provisions contained in this Act, the Central Government or a State Government or a local authority or any enterprise or any person may make an application to the Appellate Tribunal to adjudicate on claim for compensation that may arise from the findings of the Commission or the orders of the Appellate Tribunal in an appeal against any findings of the Commission or under section 42A or under sub-section(2) of section 53Q of the Act, and to pass an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by the Central Government or a State Government or a local authority or any enterprise or any person as a result of any contravention of the provisions of Chapter II, having been committed by enterprise.

Subsection (2). Every application made under sub-section (1) shall be accompanied by the findings of the Commission, if any, and also be accompanied with such fees as may be prescribed.

Subsection (3). The Appellate Tribunal may, after an inquiry made into the allegations mentioned in the application made under sub-section (1), pass an order directing the enterprise to make payment to the applicant, of the amount determined by it as realisable from the enterprise as compensation for the loss or damage caused to the applicant as a result of any contravention of the provisions of Chapter II having been committed by such enterprise:

Provided that the Appellate Tribunal may obtain the recommendations of the Commission before passing an order of compensation.

Subsection (4). Where any loss or damage referred to in sub-section (1) is caused to numerous persons having the same interest, one or more of such persons may, with the permission of the Appellate Tribunal, make an application under that sub-section for and on behalf of, or for the benefit of, the persons so interested, and thereupon, the provisions of rule 8 of Order 1 of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908), shall apply subject to the modification that every reference therein to a suit or decree shall be construed as a reference to the application before the Appellate Tribunal and the order of the Appellate Tribunal thereon.

Explanation — For the removal of doubts, it is hereby declared that— (a) an application may be made for compensation before the Appellate Tribunal only after either the Commission or the Appellate Tribunal on appeal under clause (a) of sub-section (1) of section 53A of the Act, has determined in a proceeding before it that violation of the provisions of the Act has taken place, or if provisions of section 42A or sub-section (2) of section 53Q of the Act are attracted. (b) enquiry to be conducted under sub-section(3) shall be for the purpose of determining the eligibility and quantum of compensation due to a person applying for the same, and not for examining afresh the findings of the Commission or the Appellate Tribunal on whether any violation of the Act has taken place

### **3.4 AWARD FOR DAMAGES, LOSS & COMPENSATION TO THE COMPLAINANT:**

The Competition Act, 2010 has empowered Competition Commission under section 38 (1) & (2) for imposing penalties of amount not exceeding fifty million rupees or an amount not exceeding fifteen per cent of the annual turnover of the undertaking if the undertaking committed violations of any provision of Chapter II which include prohibition of abuse of dominant position, certain agreements, deceptive marketing practices and approval of mergers;<sup>351</sup> but Section 40 subsection (8) of the Act binds the Competition Commission to credit the recovered amount as penalties & fines to the Public Account of the Federation.<sup>352</sup> Due to such provision the consumer/complainant who pursued the complaint after payment of heavy fee to the Commission and lawyers would get nothing as costs of litigation, damages for the losses or compensation. However, the provincial consumer laws of the country provided for the compensation and reimbursement of loss due to defective service.<sup>353</sup> The consumer would definitely prefer in the given circumstances to have resort to the consumer court instead of competition commission which has power only to receive fee from the consumer or fine from the undertaking but has no power to make the delinquent pay the aggrieved party in the shape of damages, loss or compensation.

In U.S.A, Section 4 of the Clayton Antitrust Act, 1914 particularly provides that any person, who shall be injured in his business or property by reason of anything forbidden in the antitrust laws, shall recover not only the damages but also the cost of the suit/case including a reasonable attorney's fee. Further, in case of delay tactics used by the offenders/infringers, the court may increase the award of damages or

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<sup>351</sup> See footnote 140 and 141 above.

<sup>352</sup> See footnote 146 above

<sup>353</sup> See footnote 207 and 208 above

compensation.<sup>354</sup> This is how the U.S society is efficiently working for the welfare of consumers resultantly the citizens of USA enjoy pure milk, uncontaminated food and quality products and services by the undertakings because of proportionate and balanced law which definitely comes to rescue and reimburse the aggrieved consumer and also helps to save the undertaking from frivolous and vexatious complaints.

Comparatively in India, unlike Pakistan, Section 42A<sup>355</sup> and 53N<sup>356</sup> of the Competition Act, 2002, provides that any person may make an application to the Appellate Tribunal and such Tribunal may pass orders to adjudicate on claim of such person for compensation that may arise from the findings of the Commission for any

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<sup>354</sup> The Clayton Antitrust Act 1914, Section 4 provides, "Suits by persons injured (a) Amount of recovery; prejudgment interest: Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only - (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith; (2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and (3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof. (b) Amount of damages payable to foreign states and instrumentalities of foreign states (1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) of this section an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee. (2) Paragraph (1) shall not apply to a foreign state if- (A) such foreign state would be denied, under section 1605(a)(2) of title 28, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section; (B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action; (C) such foreign state engages primarily in commercial activities; and (D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state."

<sup>355</sup> The Competition Act, 2002, *supra* note 267, Section 42 A, "Without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person as a result of the said enterprise violating directions issued by the Commission or contravening, without any reasonable ground, any decision or order of the Commission issued under sections 27, 28, 31, 32 and 33 or any condition or restriction subject to which any approval, sanction, direction or exemption in relation to any matter has been accorded, given, made or granted under this Act or delaying in carrying out such orders or directions of the Commission."

<sup>356</sup> *Ibid.* Section 53 N, see foot note 350 above.

loss or damage caused to him. Moreover, any person may make an application to the Appellate Tribunal for recovery of compensation from any undertaking/enterprise for any loss or damage in case of delay is carried out by such undertaking/enterprise.

Even though there is much similarity in the Competition Act, 1998 of U.K and the Competition Act, 2010 of Pakistan, but unlike Pakistan, the U.K society and legislators ensured the consumers to be awarded with compensation and damages and set the rules and criteria for claiming of damages of individual consumers/complainants. For such purpose, once the Office of Fair Trading or Competition and Markets Authority in the U.K, made the decision against the undertaking/accused/offender that it has committed infringement against the right of consumer/complainant under the Act of 1998, the complainant may claim damages before the Competition Appeal Tribunal against such undertaking under Sections 47A<sup>357</sup> and 47B<sup>358</sup> of the Competition Act, 1998 duly inserted by the Enterprise Act,

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<sup>357</sup> The Enterprise Act 2002. Section 18 provides. "Monetary claims (1) After section 47 of the 1998 Act there is inserted— "47A Monetary claims before Tribunal (1) This section applies to— (a) any claim for damages, or (b) any other claim for a sum of money, which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom.

(2) In this section "relevant prohibition" means any of the following— (a) the Chapter I prohibition; (b) the Chapter II prohibition; (c) the prohibition in Article 81(1) of the Treaty; (d) the prohibition in Article 82 of the Treaty; (e) the prohibition in Article 65(1) of the Treaty establishing the European Coal and Steel Community; (f) the prohibition in Article 66(7) of that Treaty.

(3) For the purpose of identifying claims which may be made in civil proceedings, any limitation rules that would apply in such proceedings are to be disregarded.

(4) A claim to which this section applies may (subject to the provisions of this Act and Tribunal rules) be made in proceedings brought before the Tribunal.

(5) But no claim may be made in such proceedings— (a) until a decision mentioned in subsection (6) has established that the relevant prohibition in question has been infringed; and

(b) otherwise than with the permission of the Tribunal, during any period specified in subsection (7) or (8) which relates to that decision.

(6) The decisions which may be relied on for the purposes of proceedings under this section are—(a) a decision of the OFT that the Chapter I prohibition or the Chapter II prohibition has been infringed; (b) a decision of the OFT that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed; (c) a decision of the Tribunal (on an appeal from a decision of the OFT) that the Chapter I prohibition, the Chapter II prohibition or the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed; (d) a decision of the European Commission that the prohibition in Article 81(1) or Article 82 of the Treaty has been infringed; or (e) a decision of the European Commission that the prohibition in Article 65(1) of the Treaty establishing the European Coal and Steel Community has been infringed, or a finding made by the European Commission under Article 66(7) of that Treaty.

(7) The periods during which proceedings in respect of a claim made in reliance on a decision mentioned in subsection (6) (a), (b) or (c) may not be brought without permission are—(a) in the case

2002, whereas legislators in Pakistan have unnoticed to legislate on the issue rather they have still ignored to address the issue regarding damages or loss incurred by the consumers/complainants.

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of a decision of the OFT, the period during which an appeal may be made to the Tribunal under section 46, section 47 or the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001(S.I. 2001.2916); (b) in the case of a decision of the OFT which is the subject of an appeal mentioned in paragraph (a), the period following the decision of the Tribunal on the appeal during which a further appeal may be made under section 49 or under those Regulations; (c) in the case of a decision of the Tribunal mentioned in subsection (6)(c), the period during which a further appeal may be made under section 49 or under those Regulations:

(d) in the case of any decision which is the subject of a further appeal, the period during which an appeal may be made to the House of Lords from a decision on the further appeal; and, where any appeal mentioned in paragraph (a), (b), (c) or (d) is made, the period specified in that paragraph includes the period before the appeal is determined.

(8) The periods during which proceedings in respect of a claim made in reliance on a decision or finding of the European Commission may not be brought without permission are—(a) the period during which proceedings against the decision or finding may be instituted in the European Court; and (b) if any such proceedings are instituted, the period before those proceedings are determined.

(9) In determining a claim to which this section applies the Tribunal is bound by any decision mentioned in subsection (6) which establishes that the prohibition in question has been infringed.

(10) The right to make a claim to which this section applies in proceedings before the Tribunal does not affect the right to bring any other proceedings in respect of the claim."

(2) Section 47A applies to claims arising before the commencement of this section as it applies to claims arising after that time."

<sup>36\*</sup> Ibid. Section 19 provides "Claims on behalf of consumers After section 47A of the 1998 Act (which is inserted by section 18), there is inserted— "47B Claims brought on behalf of consumers: (1) A specified body may (subject to the provisions of this Act and Tribunal rules) bring proceedings before the Tribunal which comprise consumer claims made or continued on behalf of at least two individuals. (2) In this section "consumer claim" means a claim to which section 47A applies which an individual has in respect of an infringement affecting (directly or indirectly) goods or services to which subsection (7) applies.

(3) A consumer claim may be included in proceedings under this section if it is — (a) a claim made in the proceedings on behalf of the individual concerned by the specified body; or (b) a claim made by the individual concerned under section 47A which is continued in the proceedings on his behalf by the specified body; and such a claim may only be made or continued in the proceedings with the consent of the individual concerned.

(4) The consumer claims included in proceedings under this section must all relate to the same infringement.

(5) The provisions of section 47A(5) to (10) apply to a consumer claim included in proceedings under this section as they apply to a claim made in proceedings under that section.

(6) Any damages or other sum (not being costs or expenses) awarded in respect of a consumer claim included in proceedings under this section must be awarded to the individual concerned; but the Tribunal may, with the consent of the specified body and the individual, order that the sum awarded must be paid to the specified body (acting on behalf of the individual).

(7) This subsection applies to goods or services which— (a) the individual received, or sought to receive, otherwise than in the course of a business carried on by him (notwithstanding that he received or sought to receive them with a view to carrying on a business); and (b) were, or would have been, supplied to the individual (in the case of goods whether by way of sale or otherwise) in the course of a business carried on by the person who supplied or would have supplied them.

(8) A business includes— (a) a professional practice; (b) any other undertaking carried on for gain or reward; (c) any undertaking in the course of which goods or services are supplied otherwise than free of charge.

(9) "Specified" means specified in an order made by the Secretary of State, in accordance with criteria to be published by the Secretary of State for the purposes of this section.

(10) An application by a body to be specified in an order under this section is to be made in a form approved by the Secretary of State for the purpose."

Contravention of the antitrust or competition law such as price cartels or abuses of a dominant position in the market, are not only harmful for the economy and consumers at large, they also cause harm to customers and competitors in shape of high prices or less profit. That is why the Court of Justice of the European Union ensured that any EU citizen has a right to compensation for such harm. Though the right to compensation is an EU right but most consumers rarely obtain compensation in practice due to its cost and difficulty in bringing antitrust damages actions. Therefore, the EU Commission proposed a Directive on antitrust damages actions to remove the obstacles to make it cost effective and to guarantee a minimum protection at least for citizens and businesses everywhere in the EU. For the benefits of individual consumers and small and medium sized enterprises, after a legislative procedure such Directive was signed into law on 26 November 2014.<sup>359</sup> Further, EU Commission is also working on collective redress mechanisms so that to facilitate the enforcement of the rights for all EU citizens.<sup>360</sup>

In this regard, the Competition Act, 2010, must have the same provisions as enacted in the U.S.A, the U.K and India or at least the Competition Commission of Pakistan should have the powers similar to Civil Court or Criminal Court in Pakistan under section 35 and 35-A of Code of Civil Procedure, 1908 or section 544 and 250 of Criminal Procedure Code, 1898, respectively. Under Section 35 of the Civil Procedure Code, the court may award the actual cost in order to protect or reimburse the expenses to successful litigant.<sup>361</sup> Further, the Section 35-A of the Code provides

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<sup>359</sup> The European Commission, *supra* note 261, Action for damages, <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>, accessed on 10 Dec 2014.

<sup>360</sup> *Ibid.*

<sup>361</sup> Code of Civil Procedure, 1908, *supra* note 347, Section 35: "Costs (1) 35.(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

compensation in shape of cost and damages against the false or vexatious claims.<sup>362</sup>

Similarly, Section 544 of the Criminal Procedure Code allows criminal court to award expenses to complainants and witnesses<sup>363</sup> and Section 250 of the code provides compensatory cost awarded by Magistrate to the accused in case of false and baseless accusation made by complainants.<sup>364</sup>

### **3.5 LACK OF CONFIDENTIALITY:**

The Competition Act, 2010 made it obligatory for the Commission and its Members and employees to maintain confidentiality under section 51<sup>365</sup> but again this clause did not include the interest of the undertaking resultantly the goodwill and reputation of

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Subsection (2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

Subsection (3) The Court may give interest on costs at any rate not exceeding six per cent. per annum, and such interest shall be added to the costs and shall be recoverable as such."

<sup>362</sup> Ibid. Section 35-A, subsection (1) "If in any suit or other proceeding 2[including an execution proceeding], not being an appeal, any party objects to the claim or defence on the ground that the claim or defence or any part of it is, as against the objector, false or vexatious to the knowledge of the party by whom it has been put forward, and if thereafter, as against the objector, such claim or defence is disallowed, abandoned or withdrawn in whole or in part. the. Court, if the objection has been taken at the earliest opportunity and if it is satisfied of the justice thereof, may, after recording its reasons for holding such claim or defence to be false or vexatious, make an order for the payment to the objector by the party by whom such claim or defence has been put forward, of costs by way of compensation."

<sup>363</sup> The Code of Criminal Procedure, 1898, supra note 346. Section 544: "Expenses of complainants and witness: Subject to any rules made by the Provincial Government any criminal! Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial, or other proceeding before such Court under this Code."

<sup>364</sup> Ibid. Section 250. "False frivolous or vexatious accusations – Subsection (1) If in any case instituted upon complaint or upon information given to a police officer or to a Magistrate, one or more persons is or are accused before a Magistrate of any offence triable by a Magistrate, and the Magistrate, by whom the case is heard, acquits all or any of the accused, and is of opinion that the accusation against them or any of them was false and either frivolous or vexatious, the Magistrate may by his order of acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or if such person is not present direct the issue of a summons to appear and show cause as aforesaid."

<sup>365</sup> Competition Act, 2010, supra note 50. Section 51 Subsection (1): "Subject to this section, any person who is or was at any time, (a) acting as a Member of the Commission; or (b) engaged as an officer or employee of the Commission; or (c) authorized to perform or exercise any function or power of the Commission or any function power on behalf of the commission or to render services to the Commission adviser: shall not, except to the extent necessary to perform his official duties, or in the performance or exercise of such function or power, either directly or indirectly, make a record of, or disclose to any person any information that is or was acquired by him because of having been so appointed, engaged or authorized or make use of any such information, for any purpose other than the performance of his official duties or the performance or exercise of that function or power."

entities and companies or even individuals remained ignored and unprotected in the Act and the undertaking becomes a victim when even frivolous complaints and proceedings and mere show cause notice by the Commission is circulated through publications in the newspapers; posting of all decisions and inquiries of the commission on its website under Section 29 (d) of the Act<sup>366</sup>; and publishing of orders by the commission in the official Gazette for the information of the public under Section 30 subsection (3) of the Act<sup>367</sup> without waiting for final order of the prescribed appellate forums and it surely results in loss to the good will and reputation of the undertaking and this act of the commission tantamount to persecution before prosecution and the Competition law of Pakistan has not provided a compensation or damages for the undertaking which faced false and vexatious complaint of the consumer or complainant. The pursuance of action by the undertaking against the malicious action will need extra money and time in pursuing remedy in civil action for damages. The commission also enjoys indemnity under Section 48 of the Act from liabilities even in case of serious loss or damage to the reputation of the aggrieved undertaking.<sup>368</sup>

Reputational damage is a serious concern for any undertaking, company, firm or even individual in case of any adverse orders passed by any judicial forum or in case of vexatious or frivolous proceedings against it. The same concept was emphasized in OECD Roundtable held on June 2011, "A company's reputation is seriously damaged by the adverse publicity attracted by a decision that it has violated the law and this

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<sup>366</sup> Ibid., see foot note 121 above.

<sup>367</sup> Ibid. Section 30 subsection (3). "The Commission shall publish its orders in the official Gazette, for the information of the public.

<sup>368</sup> Ibid. Section 48 of the Competition Act 2010, "Subject to subsection (3) of section 35 no suit, prosecution or other legal proceeding shall lie against the Commission or any Member, officer or servant of the Commission for anything in good faith done or intended to be done under this Act or any regulations or order made there under."

damage can extend across the group, impacting business divisions not directly involved in the infringement and even hitting the company's share price."<sup>369</sup>

Reputational damage of the companies or individuals are not limited to publication in the newspapers. but the publicity of investigations and decisions and strict checks by the Competition Commission against the mergers for compliance of competition law may also result in loss of reputation of companies not only among its clients and consumers but also among its own share holders and competitors particularly in a society like Pakistan where business rivals may safely misuse the authority of the commission for pursuing their motives to undermine the good will of the market leaders.

We may compare our competition law with the EU where the European Commission, throughout the proceeding and hearing of the case, is duty bound to ensure the confidentiality of the case. Even in the publication of its decisions, it shall regard the legitimate interests of undertakings in the protection of their business secrets.<sup>370</sup>

In India, the regulation 35 of the Competition Commission of India (General) Regulations, 2009, provides that any person may submit a request to the Commission

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<sup>369</sup> Torben TOFT, Principal Administrator Directorate General For Competition, EU Commission, "A speech compiled on 2<sup>nd</sup> AML Competition Week, 2011 in China, Competition Law & Policy & the Business Community, Monday, 28<sup>th</sup> November 2011, "Consequences of non-Compliance: The EU Experience. He further added "I remember a case where an airline was involved in a cartel and many corporate customers went to the competition to buy transport as the airline had in particular surcharged on business tickets." He also gave the facts in result of reputational damage "The Swiss giant chemical and pharmaceutical maker Roche Holding is reported to have stated publicly that the image-bruising vitamin price-fixing case from the 1990's was taking a growing toll on its finances. Moreover, when Roche sold its vitamin and fine chemicals division to DSM, the DSM webpage stated: "The total consideration of the transaction is EUR 2.25 billion. The present and future liabilities from the vitamin price fixing case will remain with Roche." In the press it was said that Roche had dropped the price by €200m because of the legal issues due to its involvement in the Vitamins cartel and also retained liability for court costs and compensation arising from these legal issues. Roche had allegedly set aside more than \$ 4 bn. to cover the costs of lawsuits in the matter." Accessible at <[http://ec.europa.eu/competition/speeches/text\\_sp2011\\_14\\_en.pdf](http://ec.europa.eu/competition/speeches/text_sp2011_14_en.pdf)> accessed on 05/11/14.

<sup>370</sup> EU Competition Law, Rules Applicable to Antitrust Enforcement, Volume I: General Rules, situation as at 1<sup>st</sup> July 2013. [http://ec.europa.eu/competition/antitrust/legislation/handbook\\_vol\\_1\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/handbook_vol_1_en.pdf) accessed on 10 Dec 14.

that a document or written submissions be treated as confidential.<sup>371</sup> In this regard, the public version of such documents or written submissions shall be an exact copy of the confidential version with the omissions of confidential information being indicated in a conspicuous manner.

The Competition Commission of Pakistan may control the confidentiality issues for the protection of reputation of the companies or individuals in such manner as practicing in EU and India. The Commission may also restrict the complainants or consumers that they will not publish or discuss any material at any forum that may be newspapers, electronic media, posts, blogs etc. until the final verdict of the final appellate authority is issued and till then the Commission if found any undertaking guilty, may pass a confidential version of order in which the name of undertaking (companies and / or individuals) may be kept secret.

### **3.6 LENIENCY:**

The Competition Act, 2010 section 39 provided that the commission may adopt lenient view by way of lesser penalty if full and true disclosure in respect of the alleged violation of chapter II is made by any undertaking.<sup>372</sup> This clause almost defeated the concept of due process of law, equality before law and equal protection of law. As it has been discussed above that the complaint disposal mechanism provided in the Act, 2010 is very expensive for a common consumer and in case any complainant in the pursuit of principles pursues any complaint with whole heart and

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<sup>371</sup> The Competition Commission of India (General) Regulations, 2009 (No. 2 of 2009), supra note 340. Regulation 35: "(1) The Commission shall maintain confidentiality of the identity of an informant on a request made to it in writing. (2) Any party may submit a request in writing to the Commission or the Director General, as the case may be, that a document or documents, or a part or parts thereof, be treated confidential."

<sup>372</sup> The Competition Act 2010, supra note 50. Section 39. See footnote 144 above. Further in the following cases The Competition Commission took lenient view: *In the Matter of Leniency Application filed by M/s. Siemens (Pakistan) Engineering Company Ltd.*; *In re- Institute of Chartered Accountants of Pakistan*; *In the Matter of Appeals filed before the Appellate Tribunal by M/s. Takaful Pakistan Ltd. & M/s. Travel Agents Association of Pakistan*.

succeeds to establish guilt of undertaking but the commission's power to make lenient view at the time of decision ultimately deny him justice which ought to have been provided otherwise if leniency clause were not there.

The leniency provisions favoring the undertakings merely because of cooperation and good conduct before the commission in the enquiry and proceedings means forgiving the killer, robber, thief on the basis of mere confession or remorse for even most heinous crime. The antitrust complaints are treated like felony in USA but that much serious crime against consumers in Pakistan has been taken very light because the undertaking may at the end of proceedings seek leniency by showing mere good conduct in the proceedings before the commission. The concept of rule of law; reward and punishment seems altogether missing in the Act, 2010 where undefined discretion of the commission for relieving the guilty undertaking under the leniency clause will ultimately prove as blow which will destroy the objective of legislation. The consumer/complainant knows that the commission has all rights to treat the guilty undertaking as an innocent child and it will ultimately forgive it like a loving mom then why he should file a complaint after bearing huge loss to his finance and comfort.

On the contrary, in U.S.A, more than 100 years ago, the antitrust was equated with felony and the heaviest fines were prescribed for violations by the undertakings in contracts or combinations or monopolization or conspiracy which restrained trade or commerce among the several States of U.S.A. They were declared illegal and void under Section 1 of the Sherman Antitrust Act, 1890. The seriousness of the U.S society against anti competition behavior can be easily observed that in 1890, they set the punishment of such offences under Section 1 and 2 of the Sherman Act, with a fine not exceeding \$10,000,000 for a corporation and \$350,000 for individual or

imprisonment not exceeding three years or both.<sup>373</sup> The U.S society, by setting such a harsh penalty and punishment without any leniency provisions, considered the offences which reduce or impede competition as a guilty of felony and as a social immorality whereas in Pakistan, the commission, under Section 38<sup>374</sup> of the Competition Act, 2010, can impose a penalty of maximum fifty million rupees in contravention of chapter II without any imprisonment. Though the Act provides the maximum imprisonment of 1 year under Section 38 Subsection (6)<sup>375</sup> of the Act, in case the undertaking does not obey the orders of the Competition Commission, but the method for criminally prosecuting the culprit for imprisonment has not been defined in the Act. The Indian side has authorized magistrate of Delhi for punishing in similar situation but Pakistan has yet to decide as to who shall award the culprit punishment for imprisonment due to non compliance with the order of the competition commission.

The provisions relating to leniency clearly negate the constitution which is always supreme law of the land. The constitution spoke for due process of law, equality before law and equal protection of citizens or persons before the law.<sup>376</sup> The objective of the law for creating deterrence in the minds of culprits who defraud and loot the innocent consumers seems to have failed by way of mere incorporation of

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<sup>373</sup> The Sherman Antitrust Act. 1890, *supra* note 4. Section 1 provides: "Trusts, etc., in restraint of trade illegal: penalty: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. Section 2: Monopolizing trade a felony: penalty: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

<sup>374</sup> The Competition Act 2010, *supra* note 50, Section 38. See footnote 140, 141, 142 and 143 above.

<sup>375</sup> *Ibid.* See footnote 143.

<sup>376</sup> The Constitution of Pakistan, *supra* note 18. See also 3.8 heading of chapter 3 below.

leniency clause in the Act, 2010. The power of the commission provided in section 39 of the Act, 2010 is totally unwanted and unconstitutional which may be safely misused for giving undue benefit to the undertaking. The hefty undertaking even after looting and plundering of consumers or by making violations of chapter II of the Act will end up as beneficiary and this fact will be not less than exploitation of ordinary individuals and citizens at the hands of commission and the undertakings. As it has been discussed in detail that the complainant gets nothing in the form of costs of proceedings, damages, losses or compensation even after payment of heavy charges on the commission proceedings whereas commission earns financial benefits in the shape of court fee and fines but at the end only an undertaking becomes co-beneficiary at the cost of innocent consumer by availing commission's mercy in the shape of leniency.

### **3.7 EXECUTION OF ORDERS AND CONTEMPT PROVISIONS:**

In Pakistan, the Competition Commission has the power to take steps regarding the recovery of fines and execution of its orders. The recovery of penalties is the responsibility of Commission under Section 40 and the Commission shall have the same powers like a Civil Court enjoys under the Code of Civil Procedure, 1908.<sup>377</sup> The Commission may recover penalty from offender by attachment of immovable property or sale of movable property, including bank account of the person or undertaking under Section 40 (2) (a); by appointment of receiver under Section 40 (2) (b); and / or by recovering of the amount as arrears of land revenue through the District Revenue Officer under clause (c) of such section. The amount of penalty shall be recoverable from such bank, receiver, District Revenue Officer or undertaking, if

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<sup>377</sup> Ibid. Section 40. See footnote 146.

any bank, receiver, District Revenue Officer or undertaking fails to attach, receive, recover, deduct and pay, as the case may be.<sup>378</sup>

However, in India, for execution of orders, the Competition Commission has a versatile method and under Section 39<sup>379</sup> of the Competition Act, 2002, substituted by Competition (Amendment) Act, 2007, proper regulations namely "The Competition Commission of India (Manner of Recovery of Monetary Penalty) Regulations, 2011 (No. 1 of 2011)<sup>380</sup> has been made. Under such Regulations an officer to recover the penalty from the enterprise in default has been authorized and deputed by the Commission namely, "Recovery Officer". For such purpose, under regulation 6, the Commission shall issue recovery certificate<sup>381</sup> to be executed by the Recovery Officer under regulation 7 of the Regulations<sup>382</sup>, if any enterprise is in default. Further, such Recovery Officer may also proceed to recover the amount of penalty by attachment

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<sup>378</sup> Ibid. see footnote 146.

<sup>379</sup> The Competition Act, 2002, *supra* note 267. Section 39 "Subsection (1): If a person fails to pay any monetary penalty imposed on him under this Act, the Commission shall proceed to recover such penalty, in such manner as may be specified by the regulations."

<sup>380</sup> The Competition Commission of India Notification No. R-40007/Reg – Recovery/ Noti/ 04 – CCI, (Published In the Gazette of India, Extraordinary, Part III, Section 4, dated 8<sup>th</sup> February 2011, The Competition Commission of India (Manner of Recovery of Monetary Penalty) Regulations, 2011 (No.1 of 2009).

<sup>381</sup> Ibid. Regulation 6: "(1) Where an enterprise is an enterprise in default or deemed to be an enterprise in default as per sub-regulation (2) and/ or (3) of regulation 4, the Commission shall issue recovery certificate through the Secretary to be executed by the recovery officer, as set out in Form III appended to these regulations mentioning the amount of penalty and interest thereon along with modes of recovery therein, giving fifteen days time to deposit the penalty.

(2) The Commission may, at any time rectify any clerical or arithmetical mistake made in the recovery certificate issued or extend the time for making any payment in pursuance of such recovery certificate."

<sup>382</sup> Ibid. Regulation 7. "(1) The Commission may from time to time authorise any of its officers to function as recovery officer for the purposes of these regulations, to recover the penalties in the manner specified under these regulations.

(2) The recovery officer shall ensure that the demand notice is duly served on the enterprise concerned. In the case of non-service of the demand notice, the recovery officer shall immediately inform the Secretary.

(3) When the payment of penalty is made by the enterprise concerned, recovery officer shall bring it to the notice of the Secretary. In the case of default by the enterprise concerned he shall intimate to the Secretary and ensure thereafter issuance of recovery certificate to such an enterprise in default.

(4) The recovery officer shall execute the recovery certificate to realise the amount of penalty imposed upon the enterprise in default in the manner specified in these regulations.

(5) The recovery officer shall after issuance of recovery certificate proceed in accordance with the modes specified under these regulations for recovery of the penalty imposed."

and sale of immovable and movable property under regulation 10.<sup>383</sup> Moreover, if the Commission is of the opinion that it would be expedient to recover the penalty imposed under the Competition Act of 2002, the Commission shall make reference under section (2) of section 39 of the Competition Act 2002 to the concerned Income-tax authority as per the regulation 11 of such Regulations.<sup>384</sup> In India, not only the execution of orders of Commission has been given and regularized but the execution of orders of Appellate Tribunal has also properly defined under Section 53P of Indian Competition Act<sup>385</sup>, in which the Appellate Tribunal shall send its order to the court of local limits of offenders/infringers in case of inability to execute its order. Further, if any person contravenes any order of the Appellate Tribunal, the Chief Metropolitan Magistrate, Delhi has been assigned to punish such person with fine one crore maximum or imprisonment up to three years or both under Section 53Q of the Competition Act, 2002.<sup>386</sup> Furthermore, under Section 53U, the Appellate Tribunal

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<sup>383</sup> Ibid. Regulation 10, "After issuance of recovery certificate the recovery officer may also proceed to recover the amount of penalty through the modes mentioned below, in accordance with the rules laid down in the Second Schedule of Income-tax Act, 1961(43 of 1961). namely:- (a) by attachment and sale of movable property of the enterprise; and (b) by attachment and sale of immovable property of the enterprise."

<sup>384</sup> Ibid. Regulation 11, "Where the Commission is of the opinion, for reasons to be recorded in writing, that it would be expedient to recover the penalty imposed under the Act in accordance with the provisions of the Income-tax Act, 1961 (43 of 1961), it shall make reference under sub-section (2) of section 39 of the Act to the concerned Income-tax authority as set out in the Form V appended to these regulations for recovery of the penalty as 'tax due' under the Income-tax Act, 1961 (43 of 1961)."

<sup>385</sup> The Competition Act, 2002, supra note 267 Section 53P, "(1) Every order made by the Appellate Tribunal shall be enforced by it in the same manner as if it were a decree made by a court in a suit pending therein, and it shall be lawful for the Appellate Tribunal to send, in case of its inability to execute such order, to the court within the local limits of whose jurisdiction- a) in the case of an order against a company, the registered office of the company is situated; or b) in the case of an order against any other person, place where the person concerned voluntarily resides or carries on business or personally works for gain, is situated. (2) Notwithstanding anything contained in sub-section (1), the Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court."

<sup>386</sup> Ibid. Section 53Q, "(1) Without prejudice to the provisions of this Act, if any person contravenes, without any reasonable ground, any order of the Appellate Tribunal, he shall be liable for a penalty of not exceeding rupees one crore or imprisonment for a term up to three years or with both as the Chief Metropolitan Magistrate, Delhi may deem fit: Provided that the Chief Metropolitan Magistrate, Delhi shall not take cognizance of any offence punishable under this sub-section, save on a complaint made by an officer authorized by the Appellate Tribunal. (2) Without prejudice to the provisions of this Act, any person may make an application to the Appellate Tribunal for an order for the recovery of compensation from any enterprise for any loss or damage shown to have been suffered, by such person

shall have and exercise, the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has and may exercise.<sup>387</sup>

While in Pakistan Section 38 (2) (b)<sup>388</sup> deals with the situation of non compliance of Competition Commission's orders and if such violation is a continuing one, the Commission itself may make liable undertaking with the penalty of a sum which may extend to one million rupees for every day. In case of failure to comply with the order of the Commission, under section 38 (6) of the Act 2010, shall constitute a criminal offence punishable with imprisonment for a term which may extend to one year or with a maximum fine of twenty five million rupees and the Commission may initiate proceedings in a Court of competent jurisdiction.<sup>389</sup>

For the execution of orders and in case of contempt and contravention of orders of Commission and Appellate Tribunal, the Indian Competition Act has such a helpful, practical, versatile and handy provisions enacted along with distribution of acts and works through separate deputed officers not to burden the Commission itself.

In Pakistan, the law dealing with the contempt is also vague and contradictory. The commission is equal to civil court for the purpose of execution. The contempt of civil, revenue or criminal court is punishable under section 480 & 482 of the Code of Criminal Procedure, 1898<sup>390</sup> if contempt of judge is made in his presence and hearing.

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as a result of the said enterprise contravening, without any reasonable ground, any order of the Appellate Tribunal or delaying in carrying out such orders of the Appellate Tribunal.”

<sup>387</sup> Ibid. Section 53U, “The Appellate Tribunal shall have, and exercise, the same jurisdiction, powers and authority in respect of contempt of itself as a High Court has and may exercise and, for this purpose, the provisions of the Contempt of Courts Act, 1971 (70 of 1971) shall have effect subject to modifications that. -- (a) the reference therein to a High Court shall be construed as including a reference to the Appellate Tribunal; (b) the references to the Advocate-General in section 15 of the said Act shall be construed as a reference to such Law Officer as the Central Government may, by notification, specify in this behalf.”

<sup>388</sup> The Competition Act, 2010, supra note 50 Section 38 (2) (b). See footnote 141 above.

<sup>389</sup> Ibid. Section 38 (6). See footnote 143 above.

<sup>390</sup> The Code of Criminal Procedure, 1898, supra note 346. Section 480 provides, “Procedure in certain cases of contempt. (1) When any such offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Pakistan Penal Code is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody and at any time before the rising of the Court on the same day may, if it thinks fit, take cognizance of the

The punishments provided for the contempt are subject to fair trial after affording the accused of contempt an opportunity of hearing whereas the contempt provision under section 38<sup>391</sup> of the Competition Act is vague as compared to the laws of India & UK.

### **3.8 PRIVACY OF HOME, DUE PROCESS AND FAIR PROSECUTION:**

The Constitution of Pakistan adopted some of the very important fundamental human rights from the Universal Declaration of Human Rights<sup>392</sup> and those fundamental rights were the right to enjoy fair prosecution by the state institutions only through a due process of law. The signatory states including the Pakistan were put under obligation for providing the citizens an exploitation free system of governance, protection against unnecessary arrest and detention, privacy of home, right to life and liberty, equality before law and equal protection of law, dignity was made inviolable and above all fair prosecution in case of civil or criminal proceedings. Many other signatories like Pakistan adopted the UN Declaration of Human Rights and incorporated all those rights defined by the U.N.O. The European Convention on Human Rights and its five protocols<sup>393</sup>, The African Charter on Human and Peoples'

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offence and sentence the offender to fine, not exceeding two hundred rupees, and, in default of payment, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

Section 482 provides, "Procedure where Court considers that case should not be dealt with under section 480. (1) If the Court in any case considers that a person accused of any of the offences referred to in section 480 and committed in its view or presence should be imprisoned otherwise than in default of payment of fine, or that a fine exceeding two hundred rupees should be imposed upon him, or such Court is for any other reason of opinion that the case should not be disposed of under section 480, such Court after recording the facts constituting the offence and the statement of the accused as hereinbefore provided, may forward the case to a Magistrate having jurisdiction to try the same and may require security to be given for the appearance of such accused person before such Magistrate or if sufficient security is not given, shall forward such person in custody to such Magistrate. (2) The Magistrate, to whom any case is forwarded under this section, shall proceed to hear the complaint against the accused person in manner hereinbefore provided."

<sup>391</sup> The Competition Act, 2010, *supra* note 50 Section 38. See footnote 140, 141, 142 and 143 above.

<sup>392</sup> Universal Declaration of Human Rights, *supra* note 314.

<sup>393</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 04.XI.1950, available at <[http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)> accessed on 12 Dec 14.

Rights<sup>394</sup>, American Convention on Human Rights<sup>395</sup> etc. were signed and adopted for provision of those rights including access to justice, indiscrimination, fair prosecution, equality before law and to be dealt with due process of law.

The Competition Commission of Pakistan has a wide range of powers and authorities under the Competition Act such as in relation to proceedings or enquiry under Section 33 of the Act to summon and enforce the attendance; to produce before and to allow to be examined and kept any books, accounts or other documents in the custody;<sup>396</sup> power to call for information relating to undertaking under Section 36 of the Act;<sup>397</sup> and at the same the powers to pass orders and make decisions under Section 31 of the Act against such undertaking or any person against whom investigation were made.<sup>398</sup>

The fundamental rights enshrined in the Constitution of Pakistan and UN Declaration of Human Rights also mentioned in the Holy Quran for example Surah AN-NUR commanded right of privacy of home as an inviolable and absolute right.<sup>399</sup> Similarly Article 14 of the Constitution of Pakistan, 1973 guaranteed that the dignity of every person in the country and privacy of home shall be uninfringeable.<sup>400</sup> This right was acknowledged and emphasized in Universal Declaration of Human Rights under Article 12 which reads that "no one shall be subjected to arbitrary interference

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<sup>394</sup> African Commission on Human and Peoples' Rights, which was set up in 1987 and is now headquartered in Banjul, Gambia. A protocol to the Charter was subsequently adopted in 1998 whereby an African Court on Human and Peoples' Rights was to be created. The protocol came into effect on 25 January 2005, available at <<http://www.achpr.org/instruments/achpr>> accessed on 12 Dec 14.

<sup>395</sup> American Convention on Human Rights "PACT OF SAN JOSE, COSTA RICA", available at <[http://www.oas.org/dil/treaties/B-32\\_American\\_Convention\\_on\\_Human\\_Rights.htm](http://www.oas.org/dil/treaties/B-32_American_Convention_on_Human_Rights.htm)> accessed on 12 December 2014.

<sup>396</sup> The Competition Act, 2010, supra note 50, Section 33. See footnote 133, 134 and 135 above.

<sup>397</sup> Ibid., Section 36. See footnote 138 above.

<sup>398</sup> Ibid., Section 31. See footnote 127, 128, 129 and 130 above

<sup>399</sup> The Holy Quran, Surah AN-NUR, Verse 27, "O ye who believe: Enter not houses other than your own, until ye have asked permission and saluted those in them: That is best for you, in order that ye may heed (what is seemly)" and Verse 28, "if ye find none in the house, enter not until permission is given to you: if ye are asked to go back, go back: That makes for greater purity."

<sup>400</sup> The Constitution of Pakistan, supra note 18, Article 14. Inviolability of dignity of man, etc.: (1) The dignity of man and, subject to law, the privacy of home, shall be inviolable. (2) No person shall be subjected to torture for the purpose of extracting evidence."

with his privacy, family, home or correspondence nor to attacks upon his honor and reputation, everyone has the right to the protection of the law against such interference or attacks”.

Section 34 of the Competition Act, 2010, provides that for reasonable grounds to be recorded in writing the Competition Commission of Pakistan has the power to authorize any of its officers to enter and search any premises.<sup>401</sup> For such purpose, the Commission shall have full and free access to any premises place, accounts, documents and / or computers. However, such authorization and powers given to officers may be converted into abuse of powers, which may violate the privacy of individual and its house. Further, 35 of the Act, provides that for any kind of forcible entry, such officer may simply by written order of Commission signed by two Members enter any place or building by force.<sup>402</sup> Non presence of any court official such as bailiff or any other officer of the court or any other authority with such officer of Commission may obviously turn down the protection given under the Constitution of Pakistan. Further, no proper criteria have been set that when the Commission's officer has power to enter premises without a warrant and with a warrant. Even not a single notice to occupier is given in any case.

Whilst, in U.K. under Section 27 of the Competition Act 1998, any investigating officer who is authorized in writing by the Director may enter any premises for sake of investigation without warrant but by serving at least two days notice to the occupier with indicating the subject matter, purpose of investigation and nature of offences committed by occupier.<sup>403</sup> If there are reasonable grounds for

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<sup>401</sup> The Competition Act, 2010, supra note 50, Section 34. See footnote 136 above.

<sup>402</sup> Ibid, Section 35. See footnote 137 above.

<sup>403</sup> The Competition Act, 1998, supra note 224, Section 27 provides, “Subsection (1) Any officer of the Director who is authorised in writing by the Director to do so (“an investigating officer”) may enter any premises in connection with an investigation under section 25. Subsection (2) No investigating officer is to enter any premises in the exercise of his powers under this section unless he has given to the

suspecting that any information or documents which are required to be produced, would not be produced but would be concealed, removed, tampered or destroyed, the Director has an obligation to make application before the court under Section 28 of the Act, 1998, which may issue warrant in this respect.<sup>404</sup> Simply speaking, for forcible entry or conducting any raid, the Director of Commission in U.K has to convince the Court but not to Commission, contrary to practicing in Pakistan where already authorized officer by the Competition Commission has to get order of the Commission for any kind of forcible entry which makes no sense. Similarly in India, the Commission issue notice to parties under Section 29 (1) of the Competition Act 2002, if the Commission wants to start an investigation particularly in combination and mergers.<sup>405</sup>

The competition commission needs to do more for protection of fundamental rights of the individuals and undertakings while conducting the proceedings. The existing law which has not provided enough safeguards against the prospective violations of vested rights of the individuals provided in the constitution have to be treated sacrosanct

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occupier of the premises a written notice which—(a) gives at least two working days' notice of the intended entry; (b) indicates the subject matter and purpose of the investigation; and (c) indicates the nature of the offences created by sections 42 to 44.”

<sup>404</sup>Ibid. Section 28. “Subsection (1) On an application made by the Director to the court in accordance with rules of court, a judge may issue a warrant if he is satisfied that— (a) there are reasonable grounds for suspecting that there are on any premises documents— (i) the production of which has been required under section 26 or 27; and (ii) which have not been produced as required; (b) there are reasonable grounds for suspecting that— (i) there are on any premises documents which the Director has power under section 26 to require to be produced; and (ii) if the documents were required to be produced, they would not be produced but would be concealed, removed, tampered with or destroyed.”

<sup>405</sup> The Competition Act 2002, supra note 267. Section 29. Procedure for investigation of combination. Subsection (1) Where the Commission is of the *prima facie* opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India, it shall issue a notice to show cause to the parties to combination calling upon them to respond within thirty days of the receipt of the notice, as to why investigation in respect of such combination should not be conducted.

1(A) After receipt of the response of the parties to the combination under subsection (1), the Commission may call for a report from the Director General and such report shall be submitted by the Director General within such time as the Commission may direct.”

because all laws in violations of fundamental rights are void as enjoined in the article 8 of the Constitution.<sup>406</sup>

### **3.9 COMPOSITION OF COMMISSION:**

The mode of appointment of the members and chairman commission as provided in Section 14 (2) of the Competition Act, 2010 that the Federal Government shall appoint the Members of the Commission and from amongst the Members, the Federal Government shall appoint the Chairman,<sup>407</sup> but such appointment of Members and Chairman may be easily influenced by the Government and political parties. The possibility of nepotism and favoritism at the cost of merit remains there because chances of pick and choose by the incumbent executive cannot be ruled out. The qualifications prescribed may also be easily compromised or by-passed by the executive. However, the Federal Government may set the criterion under section 14(4) of the Act for the appointment of members,<sup>408</sup> but it does not provide the procedure of recommendation for their appointment. Moreover, the Commission's members and the chairman are appointed for three years as defined in Section 17 of the Act.<sup>409</sup>

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<sup>406</sup> The Constitution of Pakistan, supra note 18. Article 8: "Laws inconsistent with or in derogation of Fundamental Rights to be void,"(1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by the Chapter, shall, to the extent of such inconsistency, be void. (2) the State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this Clause shall, to the extent of such contravention, be void."

<sup>407</sup> The Competition Act, 2010. supra note 50. Section 14 (2). See foot note 113 above.

<sup>408</sup> Ibid. Section 14 (4) see footnote 113 above.

<sup>409</sup> Ibid. Section 17 "Terms of office." Provides. "The Chairman and Members of the Commission shall be appointed for a term of three years on such salary, terms and conditions of service as the Federal Government may by rules prescribe: Provided that the Chairman and Members shall be eligible for re-appointment for such term or terms but shall cease to hold office on attaining the age of sixty-five years or the expiry of the term whichever is earlier."

In USA, the members of the commission are appointed through consultation and consent of the Senate.<sup>410</sup> Similarly, in India, from 2007, a selection committee has been established under Section 9<sup>411</sup> and Section 53E<sup>412</sup> of the Competition Act, 2002, for recommendation and selection of Commission's Members and Chairperson and Appellate Tribunal respectively.

For composition and selection of members and the chairman Competition Commission, Appellate Bench and Competition Appellate Tribunal established under the Competition Act, 2010 more transparency and minimum executive interference has to be ensured if we want to choose right people for the right job on merit basis only. The qualifications also need to be defined mere provision of epithets of

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<sup>410</sup> Joseph Wilson, *supra* note 19, at page 118. He stated "The Act envisages appointment of technocrats, as opposed to political appointees. Section 14(5) talks about "recommended for appointment" but stops short of giving guidance as to who has the responsibility to recommend. However, the proviso to Section 14(5) states "that the Federal Government may prescribe qualifications and experience and mode of appointment of such Members in such manner as it may prescribe." In the United States, Commissioners of the Federal Trade Commission are appointed "with the advice and consent of the Senate." In India, section 9 of the original Competition Act 2002 provided that "members shall be selected in the manner as may be prescribed." In 2007, section 9 was amended to read: "[t]he Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee." The Selection Committee is composed of (i) the Chief Justice of India or his nominee; (ii) Secretary, Ministry of Corporate Affairs; (iii) Secretary, Ministry of Law and Justice; and two experts of repute of international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs, or competition law and policy. In Pakistan, no such mode or manner has been prescribed by the Federal Government so far."

<sup>411</sup> The Competition Act 2002, *supra* note 267, Section 9, Selection Committee for Chairperson and Members of Commission: "Subsection (1) The Chairperson and other Members of the Commission shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of – a) the Chief Justice of India or his nominee -- Chairperson; b) the Secretary in the Ministry of Corporate Affairs -- Member; c) the Secretary in the Ministry of Law and Justice -- Member; d) two experts of repute who have special knowledge – Members of, and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy. Subsection (2) The term of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed."

<sup>412</sup> Ibid, Section 53E, Selection Committee: "Subsection (1) The Chairperson and members of the Appellate Tribunal shall be appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of – (a) the Chief Justice of India or his nominee (Chairperson); (b) the Secretary in the Ministry of Corporate Affairs (Member); (c) the Secretary in the Ministry of Law and Justice (Member). Subsection (2) The terms of the Selection Committee and the manner of selection of panel of names shall be such as may be prescribed."

members for selection is not the right way to do because who will decide that the proposed candidate for selection really has that good epithets as provided in the Act.

### **3.10 CENTRALISED SYSTEM OF JUSTICE:**

The Competition Act, 2010 has provided that the Islamabad shall remain the head office of the Commission.<sup>413</sup> The commission since its establishment in the year 2007 could not establish any bench at any other city of the country despite a provision in the Act, 2010. The grievance of consumer or violation of chapter II of the Act can be complained only at Islamabad therefore the system of CCP is centralized. The travelling from far off areas of the country is very much expensive and also time consuming if any aggrieved complainant opts to file a complaint against any undertaking for the violation of chapter II of the Act.

It is responsibility of the State to provide inexpensive, expeditious and easily accessible justice to the aggrieved person. The disposal of complaint under the Act, 2010 is very expensive, inaccessible, fruitless and time consuming with the end result of amnesty to the undertaking under the garb of leniency for the undertaking because of good conduct and cooperation of undertaking in the proceedings before the commission. The complainant even though he may come from very distant and far off area of the country gets nothing and as of today the commission could not provide expected relief to the consumers and still the powerful undertakings violate chapter II of the Act.

In U.S.A, the legislators knew that for the welfare of consumers they have to provide proper forum which should not be centralized so that any consumer may avail the remedies and be benefitted from the competition law at anytime and anywhere.

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<sup>413</sup> The Competition Act 2010, *supra* note 50, Section 13. See footnote 111 above.

That is why they did not restrict the jurisdiction to a special forum like foundation of Competition Commission as done in Pakistan but they awarded, under Section 4 of the Sherman Antitrust Act, 1890, jurisdiction to district courts of the United States and bestowed authority to several United States Attorneys, under the direction of Attorney General, to institute proceedings in equity to prevent and restrain such violations.<sup>414</sup>

Later on, the Clayton Antitrust Act, 1914, not only endorsed the jurisdiction of district courts but also enhanced the limits for well being of the consumers. Section 4 of the Clayton Act, provides that any aggrieved person against the actions of anti competitive behavior may sue in any district court in the U.S district in which defendant (alleged accused) resides or has an agent, irrespective of the controversial amount involved in the case.<sup>415</sup> This shows that the U.S society has awarded its district courts unlimited powers without the limitation of pecuniary jurisdiction.

The State's objective must be to ensure the good life and for such objective it should be the responsibility of the State and its authorities to provide the justice to all without any difficulty. Decentralization of institution established under the Competition Act, 2010, may be the only way to ensure the right of every citizen. There should be at least transnational institutions so to make the Act effective in all Provinces and regions. Or otherwise the methodology adopted by the U.S.A society to make the courts powerful in Competition Crimes, should be the benchmark for Competition system in Pakistan, so that the common consumer may avail the benefits of Competition law any time and everywhere without any trouble.

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<sup>414</sup> The Sherman Antitrust Act 1890. Supra note 4. Section 4. See footnote 329 above.

<sup>415</sup> The Clayton Antitrust Act, 1914, supra note 354 Section 4. See footnote 354 above.

### **3.11 CONSTITUTIONALITY:**

The Constitution has not expressly provided in the Fourth Schedule that whether the legislation for protection of consumers against anti competitive behaviour of the undertakings shall be a federal subject.<sup>416</sup> The silence for not adding the subject in the Federal Legislative List implies that the legislation is a provincial subject. The provincial consumer laws<sup>417</sup> are already there. The constitutional backing for the Competition Act, 2010 is therefore altogether missing even until after 18<sup>th</sup> Constitution Amendment in which entire constitution was overhauled.<sup>418</sup> The legislation against anti competition is very important for implementing the rights of the individuals ensured in the Constitution. The Competition Act, 2010, being a federal law, has not been listed in such schedule through any amendment as of today therefore the Act, 2010 does not get the mandate of the Constitution.

The scheme of the Constitution of Pakistan, 1973 shows that promotion of social and economic well-being of the people and the provisions related to the protection against all kind exploitations of the individuals was priority for the Constitution makers. Therefore, under Article 3 and 38 (a), the Constitution imposed duty upon the State to "ensure the elimination of all forms of exploitation and the gradual fulfilment of the fundamental principle, from each according to his ability to each according to his work"<sup>419</sup> and to "secure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment

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<sup>416</sup> The Constitution of Pakistan, supra note 18. Please see fourth (4<sup>th</sup>) Schedule of the Constitution made under Article 70 of the Constitution.

<sup>417</sup> The N.W.F.P Consumer Protection Act, 1997: The Baluchistan Consumer Protection Act, 2003: The Punjab Consumer Protection Act, 2005: The Sindh Consumer Protection Ordinance 2007: The Islamabad Consumer Protection Act, 1995.

<sup>418</sup> The Constitution of Pakistan, supra note 18. See 18<sup>th</sup> amendment.

<sup>419</sup> Ibid., Article 3.

of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants".<sup>420</sup>

The financial benefits or exploitations do affect the individuals and the society as a whole therefore finances are directly related to the life of individual. Article 9 of the Constitution has relevancy to be considered here which says that "no person shall be deprived of life or liberty save in accordance with the law."<sup>421</sup> Similarly, under Article 18, the Constitution provides that "subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business."<sup>422</sup> Further, Article 18 (b) provides that "Provided that nothing in this Article shall prevent -- the regulation of trade, commerce or industry in the interest of free competition therein".<sup>423</sup>

On the other hand the competition laws in India, USA and U.K are Federal laws and the Pakistan also need to provided constitutional backing to the law because principles of policy and the fundamental rights provided in the Constitution make demand from the state for protection of some potent and fair law for the protection and implementation of those rights which deal with the economic exploitations. India also has similar policy and rights in its Constitution under Article 38 and 39 for protection of the social and economic welfare of its individuals but their law has constitutional mandate<sup>424</sup> because the Indian legislators inserted competition law in the Constitution of India under list III, Item No. 21 of Concurrent list of 7<sup>th</sup>

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<sup>420</sup> Ibid., Article 38.

<sup>421</sup> Constitution of Pakistan, supra note 18, Article 9.

<sup>422</sup> Constitution of Pakistan, supra note 18, Article 18.

<sup>423</sup> Ibid..

<sup>424</sup> The Constitution of India, supra note 263. See Part 2.2.4 of Chapter 2.

schedule<sup>425</sup> and made competition law as a federal law. In United Kingdom as there is no written constitution. the Competition Act, 1998 was enacted by the Queen` advice and consent of the Lords Spiritual and Temporal and Commons and duly assembled the Act.<sup>426</sup> Similarly in U.S.A. the Sherman Antitrust Act was listed in USA Constitution by Fifty-First Congress session as a federal law under Chapter 647 of title 15 of the United States Code.<sup>427</sup>

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<sup>425</sup> Ibid., List III (Concurrent List) under 7<sup>th</sup> Schedule made under Article 249 of the Indian Constitution.

<sup>426</sup> The Competition Act, 1998, supra note 224. See Preamble of the Act of 1998.

<sup>427</sup> The Constitution of U.S.A. See Fifty-First Congress Session 1. Chapter 647 under title 15 of the United States Code.

We may assert that modernization in economical behaviour<sup>428</sup> of market holders in different states forced Pakistan, like other countries<sup>429</sup>, to develop its law for having requisite check and control over the undertakings against their anti competitive behaviours.<sup>430</sup> The Competition Act, 2010 is the third generation<sup>431</sup> of the legislation against monopolies and anti competition. The current legislation is first copy of the U.K Competition Act, 1998 but as it is adoption of U.K law without looking into the prospects of similar legislation in Pakistan resulted into complications relating to the application of the law.<sup>432</sup>

The inadequacies pointed out in the chapter 3<sup>433</sup> of this research made it clear that the system of complaint disposal by the competition commission is not meant for the common consumers because no incentive has been given to the complainant<sup>434</sup> even if he opts to file complaint before the competition commission against any undertaking for the violation of chapter II of the Act.<sup>435</sup> The complainant has not been offered reimbursement of litigation cost even if he is successful; further he gets no damages or compensation for his sufferings whereas the commission is the only financial beneficiary of every complaint because the fee and fine both goes to the commission.<sup>436</sup> The undertaking also becomes beneficiary in the end if it pleases the

<sup>428</sup> See Chapter 1 at Page 1 and also see footnote 2 & 3.

<sup>429</sup> Ibid, see footnote 3.

<sup>430</sup> Ibid.

<sup>431</sup> First is "The Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (Pakistan); Second is "The Competition Ordinance, 2007"; and Third is "the Competition Act, 2010".

<sup>432</sup> For a complete analysis and similarity of both Acts please see Chapter 2 part 2.1.1 at page 13 and Part 2.2.2 at page 50 above.

<sup>433</sup> See Chapter 3 at pages from 67 to 104.

<sup>434</sup> See footnotes 146 and 352 above.

<sup>435</sup> See footnotes 140, 141 and 351 above.

<sup>436</sup> See Part 3.4 of Chapter 3 at Page 82. See also footnote 352.

commission with its good conduct and cooperation and it may win amnesty under the leniency power of the commission.<sup>437</sup>

The Provincial consumer courts working under the provincial laws are much swift, economical, time saving and fruitful for the common consumer because the consumer gets immediate relief at the immediate district headquarter and he may get costs of litigation, compensation and damages.<sup>438</sup> There are number of statutory appeals under the Competition Act. 2010 whereas in case of provincial laws there are minimum complications.<sup>439</sup> Similarly the antitrust laws of USA, EU, India and UK are better on the substantive and procedural side than Pakistan.<sup>440</sup>

Another important impediment in the way of implementation of existing law of Pakistan is non availability of properly trained and expert judges in the Competition Appellate Tribunal as well as in the Honourable Supreme Court for dealing with the technical side of the substantive law and this weak part of the system was highlighted by the Volunteer Peer Review of Competition Law and Policy by United Nations Conference on Trade and Development, as it noted that "not a single case has been decided by the courts on merit, so far."<sup>441</sup> And therefore, as per the report produced by International Competition Network in 2003, comes true that courts are "a major stumbling block in the path of effective competition enforcement".<sup>442</sup>

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<sup>437</sup> See Part 3.6 of Chapter 3 at Page 90.

<sup>438</sup> See above Chapter 2, Part 2.1.2 "Consumer Protection Laws in Pakistan". Sub-Part (a) and Sub-Part (b) at Pages from 36 to 46.

<sup>439</sup> See Part 3.1 "Delayed Justice" of Chapter 3 at Pages from 68 to 73.

<sup>440</sup> For a comparative analysis of Competition laws in Pakistan with these countries, please see Chapter 3 at pages from 67 to 104.

<sup>441</sup> United Nations Conference on Trade and Development, Volunteer Peer Review of Competition Law and Policy, 2013. Further See also Joseph Wilson, *supra* note 19 at Page 124.

<sup>442</sup> Joseph Wilson, *supra* note 19, at page 124. Further see, Int'l Competition Network, Capacity Building and Technical Assistance: Building Credible Competition Authorities in Developing and Transition Economies 35 (2003). available at <[www.intemationalcompetitionnetwork.org](http://www.intemationalcompetitionnetwork.org)> Int'l

Such situation is alarming and therefore, properly trained staff is required to deal with the issues related with the Competition laws as well as a Selection Committee needs to be constituted which can select Members of the Commission and other forums through consultation on merit basis without any political influence so that such institutions can work independently.<sup>443</sup>

The multiple violations of fundamental rights in the existing competition law of Pakistan have been pointed out in this research; which include expensive<sup>444</sup> and delayed justice.<sup>445</sup> unfair prosecution,<sup>446</sup> leniency for the undertaking,<sup>447</sup> violation of privacy right and unfair damage to the reputation of the undertaking before culmination of the proceedings,<sup>448</sup> no reward for the complainant even if he is successful in complaint as no damages or compensation has been awarded to the complainant and ultimate financial beneficiary is the commission,<sup>449</sup> lack of fool proof system of appointment of commission and its appellate tribunals<sup>450</sup>; centralized system stationed only at Islamabad<sup>451</sup> and unconstitutionality of the Act;<sup>452</sup> may the Competition Act be void as violation of Article 8 of the Constitution of Pakistan which clearly states that all laws in violation of fundamental rights shall be void.<sup>453</sup>

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Competition Network further noted that " "Judges do not understand competition law and are content to avoid the necessity to learn through diverting competition issues into a maze of esoteric administrative and procedural side-streets out of which the substantive matters at issue rarely emerge."

<sup>443</sup> See part 3.9 "Composition of Commission" of Chapter 3 at Pages from 101 to 103.

<sup>444</sup> See Part 3.2 of Chapter 3 at pages 73 to 77.

<sup>445</sup> See Part 3.1 of Chapter 3 at pages 68 to 73.

<sup>446</sup> See Part 3.3 of Chapter 3 at pages 77 to 81.

<sup>447</sup> See Part 3.6 of Chapter 3 at pages 90 to 93.

<sup>448</sup> See Chapter 3, part 3.5 at pages 87 to 90 and Part 3.8 at Pages 97 to 101.

<sup>449</sup> See Chapter 3, part 3.4 at pages 82 to 87 and part 3.6 at pages 90 to 93

<sup>450</sup> See part 3.9 of Chapter 3 at pages 101 to 103.

<sup>451</sup> See part 3.10 of Chapter 3 at pages 103 to 104.

<sup>452</sup> See part 3.11 of Chapter 3 at pages 105 to 106.

<sup>453</sup> The Constitution of Pakistan – 1973, *supra* note 18, "Article 8: Laws inconsistent with or in derogation of Fundamental Rights to be void.- (1) Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void. (2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention.

The State owned undertakings seem more powerful than the commission because as of today the commission could not effectively rescue the consumers from the anti competitive behaviors of state owned corporations like DISCOs<sup>454</sup>, SNGPL<sup>455</sup>, SSGPL<sup>456</sup> and SECP<sup>457</sup> etc. because state owned companies still enjoy monopoly and they make abuse of their dominant position as a routine.<sup>458</sup>

The Competition Law of Pakistan has no doubt started evolving due to hard work being done by the commission.<sup>459</sup> In the recent past the commission ordered Indus Motor Company<sup>460</sup> for removing unreasonable clause from the contract and this decision of the commission received appreciation but even then lot more is required to be done for providing free competition in all spheres of commercial and economic

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be void. (3) The provisions of this Article shall not apply to— (a) Any law relating to members of the Armed Forces, or of the Police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them; or (b) any of the- (i) laws specified in the First Schedule as in force immediately before the commencing day or as amended by any of the laws specified in that Schedule; (ii) other laws specified in, Part I of the First Schedule; and no such law nor any provision thereof shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter. (4) Notwithstanding anything contained in paragraph (b) of clause (3), within a period of two years from the commencing day, the appropriate Legislature shall bring the laws specified in Part II of the First Schedule into conformity with the rights conferred by this Chapter: Provided that the appropriate Legislature may by resolution extend the said period of two years by a period not exceeding six months. (5) The rights conferred by this Chapter shall not be suspended except as expressly provided by the Constitution.”

<sup>454</sup> Pakistan Power Distribution Companies.

<sup>455</sup> Sui Northern Gas Pipelines Limited.

<sup>456</sup> Sui Southern Gas Pipelines Limited.

<sup>457</sup> Securities and Exchange Commission of Pakistan.

<sup>458</sup> Since constitution of Competition Commission of Pakistan, the Commission has not taken any action or suo moto notice against these organizations.

<sup>459</sup> Syed Umair Javed, “Globalization of Competition Law – Challenges for Pakistan’s Competition Regime, 2012” at page 14. In the past four years, CCP has identified collusion in many sectors of the economy namely banking, accountancy, securities, cement, dredging, poultry, jute bags, sugar, shipping, oil and gas, edible oil, electric power equipment, and even the print media. At the same time, CCP has not been shy of taking on more complex abuse of dominance cases. He further added at page 13 “CCP has won consistent recognition by international peers and juries alike. This year it became the first South Asian competition agency to be included in the Global Competition Reviews’ Annual Enforcement Ratings, receiving two and half stars, out of five, as a new entrant. Speaking at an international conference in Pakistan recently, the associate director of international affairs at the US Federal Trade Commission remarked that CCP had managed to do in four years what FTC did in fifty.” Available on <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2035813](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2035813)> accessed on 18/07/14. Further see Daily Times, “Regulators across the globe laud CCP Achievements”, *Daily Times (Islamabad* 2<sup>nd</sup> December 2011) <[http://dailytimes.com.pk/default.asp?page=2011%5C12%5C02%5Cstory\\_2-12-2011\\_pg5\\_9](http://dailytimes.com.pk/default.asp?page=2011%5C12%5C02%5Cstory_2-12-2011_pg5_9)>

<sup>460</sup> *In re: M/s. Indus Motor Company Limited*, supra note 39. See footnote 67.

activity for enhancing the economic efficiency and eventually for the protection of consumers from the anti competitive behaviors. In the light of the above it can be safely stated that the proportionate treatment between the consumer and the undertaking has yet to be made and for helping the commission the parliament has to make the Competition Act, 2010 more simple and public friendly after removing the defects pointed out in present research so that law should take its course and our coming generation enjoy the rule of law.

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