

**A Framework for a New
Competition Policy and Law**

PAKISTAN

August 2007



Finance and Private Sector Development Unit
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Development

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ABBREVIATION AND ACRONYMS

CCP	Competition Commission of Pakistan
CMI	Census of Manufacturing Industries
DFID	Department of International Development, United Kingdom
DG	Directors General
FDI	Foreign Direct Investment
GDP	Gross Domestic Products
ICN	International Competition Network
MCA	Monopoly Control Authority
MOF	Ministry of Finance
MRTPO	Monopolies and Restrictive Trade Practices Ordinance
NEPRA	National Electric Power Regulatory Authority
OGRA	Oil & Gas Regulatory Authority
PAS	Performance Appraisal System
PEMRA	Pakistan Electronic Media Regulatory Authority
PMS	Performance Management System
PTA	Pakistan Telecommunication Authority
PTCL	Pakistan Telecommunications Corporation Limited
RPM	Resale Price Maintenance
SECP	Securities and Exchange Commission of Pakistan
SME	Small and Mediums Enterprises
TNA	Training Needs Assessment
WAPDA	Water and Power Development Authority

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US\$ 1 = 60.7 Rupees

ACKNOWLEDGEMENT

The Government of Pakistan, in December 2005, requested a technical assistance program to help develop a new competition law and policy framework, including a Government policy statement, a new competition law and design for a new competition agency to implement the law. The technical assistance was carried out in close consultation with the Ministry of Finance (MOF) and the Monopoly Control Authority (MCA) of Pakistan under the guidance of a Steering Committee chaired by the Secretary, MOF. The technical assistance team was led by the World Bank and jointly funded by the World Bank and the Department of International Development, United Kingdom (DFID).

The purpose of the report was to develop and present for the Government and other stakeholders, policy and institutional underpinnings to the new competition law framework. The report was discussed in its early forms at various stakeholder consultation workshops held in Islamabad in May 2006 and in numerous internal workshops with the MOF and MCA.

The report was prepared by a team led by Eric D. Manes (The World Bank) and consisting of Dr. Faisal Bari (Lahore University of Management Sciences), Dr. A. R. Kemal (Pakistan Institute for Development Economics and Dr. Joseph Wilson, (Lahore University of Management Sciences) for Chapters 1 – 4 and Appendix 1 of the report, and Tony Lane (Maxwell Stamp Associates), Shahid Ahmad Khan (Anjum Asim Shahid Rahman Chartered Accountant) and Zohir Ashir (Anjum Asim Shahid Rahman Chartered Accountants) for Chapters 5 - 7 and Appendices 2-8. The team gratefully acknowledges invaluable inputs provided by various experts along the way, including by the formal reviewers, Dr. Asad Sayeed (The Collective for Social Sciences, Karachi) and Paulo Correa (The World Bank), as well input provided by Anjum Ahmad, Guiliana Cane, Mark Dutz, R. Shyam Khemani and Peter Kyle from The World Bank and John Preston, Karen Ellis, Haroon Sharif and Tim Hatton from DFID. The report was produced with the assistance of Syed Hye (The World Bank).

EXECUTIVE SUMMARY

COMPETITION POLICY AND LAW IN PAKISTAN

i. The Government of Pakistan seeks to promote sustainable economic development and improve the well-being of all citizens by protecting and promoting competition in the economy. Private and public barriers to competition need to be prevented from hindering the development path in order to guarantee maximization of consumer and producer welfare in a dynamic framework. Competition policy and its regulatory framework will support an environment in which entry and growth is fostered, anti-competitive behavior by all firms is prevented, and abuse of market power by dominant firms is restrained.

ii. **The government has supported *implicit* competition policy for almost two decades**, by opening markets for imports and foreign investment, lowering administrative control on the economy, and reducing government ownership. Gathering steam in the late 1980s and continuing through the 1990s, the first wave of market oriented reforms committed Pakistan to a path toward private sector led growth. The increased role of market signals in resource allocation, coupled with favorable external conditions, has produced immediate dividends in the form of increased business activity and higher rates of growth.¹ To meet the challenge of maintaining a buoyant economy in an increasingly globalized world, there is increased recognition that sustained productivity increases and enhanced competitiveness must come from improved business processes, higher technology content of investment and strengthened human resources.

iii. **There is consensus among policy makers, academics and the business community that sustained growth will come from improvement in Pakistan's international competitiveness in an increasingly globalized world market.** At the same time, small and mediums enterprises (SMEs) dominate economic livelihood and represent the seeds for a growing, innovative corporate sector but are particularly disadvantaged by obstacles to their own growth and development. With both ends of the economic spectrum in mind, the government is committed to improve three "second generation" areas which have impact on firm-level productivity: (i) economic governance, (ii) efficiency of factor markets, and (iii) provision of infrastructure services. The goal is a thriving market which rewards innovation and risk-taking while penalizes activities which distort proper functioning of markets.

iv. **Various studies indicate that economies which have competitive domestic markets perform better.** Such economies have higher levels and rates of growth of per capita GDP, are better able to withstand economic shocks, have higher rates of entry of new firms and an ability to attract more foreign direct investment (FDI). Along with the consensus that private sector initiatives rather than direct government provision has to be the main driver of the growth process, it is equally accepted that competition and rivalry, between and within businesses, is one of the least cost and most efficient ways of arranging and ensuring efficiency and innovation in business activity.

v. **The current economic landscape requires active policy and institutional reform to deepen competitive forces.** Adjusting from a legacy of heavy protection to an environment of increased competition both nationally and internationally, the economy is now relying on a dynamic and flexible private sector for growth, employment and poverty reduction. Barriers to entry and exit have softened, and the cost of doing business has been reduced but all are still significant, particularly for small and medium firms. Indicators extracted from Doing Business 2007 demonstrate that Pakistan ranks toward the top of South Asian countries in key areas, but somewhat around the middle of all countries when compared globally.

¹ Growth rate rose from less than 4 percent in 1990-2001 to 2003-04 to 8.6 percent in 2004-05, falling slightly to 6.6 percent in 2005-06. Growth is projected to remain around 7 percent range for 2006-07. The government's goal is to deepen the reform effort into its second generation, in order to sustain the 6-8 percent per annum growth rate of GDP required to reduce poverty in the country.

vi. **At the same time, the transformation of state to private ownership in industry, utilities, and financial institutions** initiated in the 1990s and accelerating in the early part of the current decade are taking various paths; but all with a view of improved performance within the context of open, competitive markets. Industry is practically exclusively in private hands, as is more than three quarters of banking system. Strides are being made to foster competition and private ownership in utilities, with the telecommunications sector leading the way. These broad sweeping reforms coincided with a period of strong private sector led growth. At the same time, as the private sector becomes increasingly exposed to the pressures of the global market, the productivity increases necessary to maintain competitiveness will come from improved business processes, advances in technology, higher content of investment and strengthened human resources.

vii. **The legacy of protection has also left in its wake concentrated production and limited domestic competition.** While dominant positions by a few firms characterize key areas of the economy, in recent years, there have been a rising number of allegations of anti-competitive behavior on the part of private firms, particularly in primary sectors, such as cement, sugar, vegetable ghee and fertilizers as well as in some manufacturing industries such as automobiles and auto parts. At the same time, the Global Competitiveness Indicators published by the World Economic Forum show that Pakistan's rank in terms of "intensity of local competition" have fallen from 39th (out of 102 countries) in 2003 to 73rd (out of 125 countries) in 2006.

viii. **Competing in home markets is often viewed as a prerequisite for integrating effectively in international markets.**² Therefore, factors limiting domestic competition have become increasingly recognized as a hindrance to global competitiveness. As a result, the case for an optimal competition policy has become stronger. In recent years, monopolies and oligopolies have been privatized, increasing the dominant players in markets that were previously the preserve of government. Agreements amongst firms which may have been necessary before may no longer be appropriate as market structures mature. Moreover, as foreign competition increases, in the form of FDI and imported goods and services, the pressure for firms to merge in order to gain efficiency is increasing.

ix. **In recognition of the need for higher rates of productivity, policy makers are actively expanding reforms to new, more complex areas.** Such "second generation" reforms include as a centerpiece the introduction of rules for market governance and the establishment of autonomous bodies to enforce these rules.³ These new areas of market governance focus on strengthened transparency and prudential behavior on the part of firms operating in the corporate sector. In areas where market power is naturally vested with private firms, such as in some aspects of network utilities, rules governing the use of that market power are established and through licensing and enforced by the sector's regulators.

x. **As a key initiative in this regard, the Government is pursuing a new explicit competition policy framework.** The objective of competition policy is to foster entrepreneurship through a strong competition culture and equal opportunities for all viable entities to participate in the economy, and thereby creating fertile ground for innovation, skills development and product diversification. In doing so, the power of consumers increases as does confidence among domestic and foreign investors. Firms are not only pressured to lower prices, increase the quality, and expand availability of good and services but are also encouraged to engage in good corporate governance and higher standards of business behavior.

xi. **A range of efforts is needed to remove unnecessary barriers to entry, entrepreneurship and exit.** These barriers are created either by badly designed policies, poorly implemented regulations or anti-

² Michael Porter, "The Competitive Advantage of Nations"

³ In the late 1990s and early 2000s a number utility regulators were established for telecommunications (1996), power (1997), and oil and gas (2002). The Securities and Exchange Commission of Pakistan was established in 1997 and the autonomy of The State Bank of Pakistan was strengthened through amendments to the SPB through the 1990s, culminating in constitutional protection in 2003.

competitive business practices by private firms. Fostering effective competition at home through an effective competition policy is supportive of a business environment which improves efficiencies, leads to allocation of resources in the best manner and in which unfettered competition reduces the abuse of market power. At the same time, implementation of an explicit competition policy will need to avoid (i) procedures that may pose unnecessary transaction or compliance costs on firms, (ii) becoming an obstacle to beneficial mergers and acquisitions, and (iii) unnecessary restrictions on innovative arrangements among firms.

xii. **An effective competition policy framework involves a multi-faceted set of initiatives, all of which are new to Pakistan.** The components of the new competition framework include (i) a modern enabling law, (ii) specific rules and regulations to operationalize the law, (iii) guidance for corporate behavior, (iv) education and empowerment of consumers (including producers who are the largest group of consumers), (v) public policy advocacy, and (vi) a professional, autonomous institution to enforce the law.

xiii. **The centerpiece for the introduction of competition policy in Pakistan is the enabling law and establishment of a new autonomous agency.** There are currently more than 100 countries that have enacted competition law-policies with more than 70 of these - mainly developing or transition market economies - enacted new or significantly strengthened existing competition law-in the 1990s.⁴ The “Monopolies and Restrictive Trade Practices Ordinance, 1970 (MRTPO)” is antiquated as it was developed under different economic conditions and for different reasons than typically underpinning for a modern competition law. Definitions, particularly the coverage for types of anti-competitive behavior and abuse of power, need to be updated, as do the provision of penalties for non-compliance. The law needs to be extended to all enterprises - public and private, local and multinational – and exemptions need to be minimized. Most significantly, there is a need to move to a ‘rule of economic reason’ basis of analysis and decision making, rather than the use of static measures of market share to determine monopoly power.

xiv. **The new competition agency will be empowered with the human, technical, informational capacity to carry out its functions.** The institutional set up needs a modern, robust structure which can carry out highly technical analysis which will be upheld in the face of judicial and corporate challenges. To break from the past ineffective institution, an entirely new corporate culture needs to be developed, starting with quality appointments, strong internal and external governance and, qualified technical capacity. More importantly the reconstitution of the “Monopoly Control Authority” (MCA) and supporting institutional structure is badly needed to take into account the dynamic factors of the new economy and the requisite human, technical, informational and capacity backing to carry out its functions.

xv. **The law will be implemented based on ‘rules of analysis and reason’ by an institution that is autonomous but accountable,** and whose dealings are transparent, fair, and in accordance with law. The key principles to be followed in the application of the new competition policy framework include:

- *Non-discrimination* – the law’s non-discriminatory approach provides predictability and consistency through its application to all sectors of the economy. Such a non-discriminatory approach is supportive of transparency, accountability and public confidence in business dealings.
- *Protection of competition not competitors* - the assessment of competition will be tolerant of single firm growth on the basis that competition law should not punish those who have gained dominance through efficient use of resources and innovation without resorting to exclusionary and anticompetitive tactics.

⁴ Countries recently introducing competition law, include India, Indonesia, Korea, Singapore and Thailand. Japan has had a Fair Trade practices Act since 1948. China has recently introduced new legislation to address competition matters which is under discussion. In Africa, countries such as Kenya, South Africa, and Tanzania have enacted competition laws five or more years ago. Among Islamic countries, Algeria, Jordan, Morocco and Tunisia have such laws and Egypt (which recently passed its competition law) is staffing its competition commission while Kuwait is currently in the process of drafting its first comprehensive competition law. Even industrialized economies such as Australia, Canada, the European Union and U.K. have amended and updated their competition laws.

- *Facilitating rather than regulating business* - competition law needs to be viewed as supportive to private business not a hindering regulatory framework. The principle in applying and implementing competition policy is to promote consumer welfare without hampering the day-to-day activities of the business. The vast majority of day-to-day transactions that take place in markets across Pakistan will not be affected by the new law.
- *Coordinated approach* - the responsibility for implementing the new law depends as much on ordinary citizens and business entities that bring forward complaints. Coordination will also be required with other public agencies charged with implementing government policies as well as the relevant ministries analyzing and making public policies which impact on the competitive landscape.
- *Pursuit of integrity in the law's application* - including (i) a collegial body of commissioners (members) with integrity, stature and ability - each with substantial experience and collectively with a range of relevant expertise, (ii) transparency and speed in the investigation of serious infractions without an undue burden on individuals and businesses, (iii) public proceedings with safeguards for the proprietary information, (iv) published decisions subject to review on appeal and (v) annual reporting and (vi) third party audits.

xvi. **Law enforcement provisions in competition law are bifurcated into *ex post* review of prohibited practices and *ex ante* assessment of reviewable transactions.** Prohibited practices consist of vertical and horizontal agreements, abuse of dominance and unfair trading practices. While most mature markets try to minimize exceptions to prohibited practices based on efficiency grounds, but evolving markets with a legacy of distortions require some transparent and clearly defensible exemptions, but based only on efficiency grounds. Reviewable transactions include review of mergers and acquisitions. Efficiency gains as the result of merger activity will also be given a high weight in the decision making process.

xvii. **Competition advocacy is about the promotion of competition through means other than law-enforcement** and plays an important role, particularly in developing and transitional economies emerging from a legacy of state intervention. It complements its role to prevent private restraints through analytical and promotional efforts aimed at reducing public sources of restrictions on competition. Its main objective is to mobilize other entities within government, business and the public to form a constituency in favor of the protection of competition – in particular by providing information to the public. The competition agency will be the public voice on competition issues, creating expectations of a competitive environment, and articulating the competition perspective. Since public as well as private restraints can provide monopoly rents to enterprises, an effective competition policy function must be able to analyze and articulate the need for concerted action on both fronts. The main advocacy activities include:

- *Influencing government policy-making and implementation* by providing analytical advice on ways to enhance competition to government agencies, regulators, undertakings and representative bodies (*e.g.*, strategy setting, commenting on specific existing and proposed legislation, regulatory practices, or the policies of public bodies),⁵
- *Raising public awareness* of the benefits of competition and the role of competition policy to deliver better economic outcomes, by championing competition more broadly in society to develop the country's "competition culture", and

⁵ The areas can include trade and investment policies (for instance tariffs, anti-dumping duties, FDI restrictions, IPR rules), sector regulations (for instance telecoms, transport, oil & gas), privatization review, and the operation of other central, provincial and local government entities; The appropriate short-term priority in Pakistan likely will be on regulatory reforms stressing de-regulation to facilitate enterprise entry, expansion and exit.

- *Market analysis of key sectors* where competition does not appear to work (because of public or private restrictions), either in response to a request from government or of the agency's own volition to support advocacy as well as guide the agency's efforts.
- *An Annual Report* which includes a review entitled "*The State of Competition in Pakistan*", including market analyses, a review of government activities to lower barriers to competition, summary of the agency's public awareness activities and special topics for the year.

xviii. **The organizational structure, scope, and powers of the competition agency are essential determinants for the successful implementation of competition policy and law.** The government realizes that an independent and efficacious agency with strict accountability safeguards is the key success factor for the effective implementation of competition law and policy. These requirements are particularly relevant for an agency at the beginning of its life where the legitimacy, reputation and relevance are established. Principles to be followed in the competition agency's operations center on: operational and financial autonomy, due process and accountability. Specifically, implementation of these principals includes:

- a collegial body of leaders with integrity, stature and ability - each with substantial experience and collectively with a range of relevant expertise,
- a well funded organization with security of tenure among the principals and a high level of technical skills in the staff,
- transparency and speed in the investigation of serious infractions without undue burden on individuals and business firms,
- attention to rules of natural justice which will insulate the agencies law enforcement activities from reproach from the courts,
- autonomy to the competition agency in its day to day work, while ensuring that powers vested in it are applied within legal limits and carried out in a transparent way,
- public proceedings with safeguards for the proprietary information,
- well reasoned and published decisions subject to review on appeal, and
- mandatory annual reporting including third party audits.

xix. **As competition law is a law of general application, inter-agency coordination - formalized or otherwise - is needed to ensure effective application of the regulatory framework for the corporate sector.** Though competition law and sector regulation differ fundamentally in their jurisdiction, perspective, tools and skills required, the effective application of competition law requires consideration of technical, political and development aspects covered by other types of regulators. Hard and fast rules specifying respective responsibilities are difficult to frame in a rapidly changing regulatory landscape with coordination generally the result of open interaction and mutual recognition of respective roles. Strong coordination amongst regulatory agencies also brings mutually reinforcing - rather than contradictory - oversight. For example, ex-ante market structure, pricing (in the absence of competitive forces) and technological requirements, including open access, generally falls within the purview of sector specific regulators while anti-competitive behavior and pre-merger control involving private firms operating in contestable markets typically fall within the jurisdiction of competition agencies.

xx. **The functions, powers and duties of the Competition Commission are wide and strong** to pursue (i) enquiries into business for the purposes of enforcing the law, (ii) proceedings against contraventions of the law, (iii) advising businesses on compliance, and (v) competition advocacy, including studies, hearings and opinions, to create a culture of consumer driven competition in Government and the

public at large. Like competition authorities everywhere, however, the competition agency will endeavor to make its procedures as transparent and predictable as possible. It will do this through rules, notified by the Government, to amplify the law; internal regulations and procedures set by the Commission to govern its work; and public guidelines issued by the Commission to inform the consumer and business community of its intentions and approaches in carrying out the law as well as its views on areas of public interest. The key rules and regulations cover the Commission's basic governance structure, national and international jurisdiction, enforcement policy, funding and methods of economic analysis.

xxi. **The Commission itself will start operations with a modest sized staff initially** and grow over its initial three years, with emphasis on attracting high quality professionals, establishing clear lines of accountability and empowerment, and developing its technology for speedy decision-making. At the initial phase, the agency will consist of around 34 staff members at the Commissioner and Professionals rank, including the Chairman & the Chief Executive Officer. Support or clerical staff represent another 36 members for a total staffing strength of 70. The Commission will be primarily staffed at three professional levels with background covering Industrial Economists, Lawyers and Forensic Accountants.

xxii. **As the professional staff requires competencies found in relatively short supply in Pakistan, the Commission will maintain a strong capacity building program** continuing throughout the first three years of its life followed by comprehensive and intensive training for its staff on a continuous basis. In this way, the Commission will seek top people based on it being recognized as an attractive and rewarding place to work. The preparation of an initial training strategy covering technical and general management dimensions is a critical priority for the Commission's first set of activities. The major training programs will be devoted to economics, law and finance skills and knowledge, supplemented by general management development and team-building programs. While some of these programs will take place overseas, involving the "best and the brightest," the Commission's aim is to build demand for upgrading the local expertise to provide the broad based, continuous capacity building it requires.

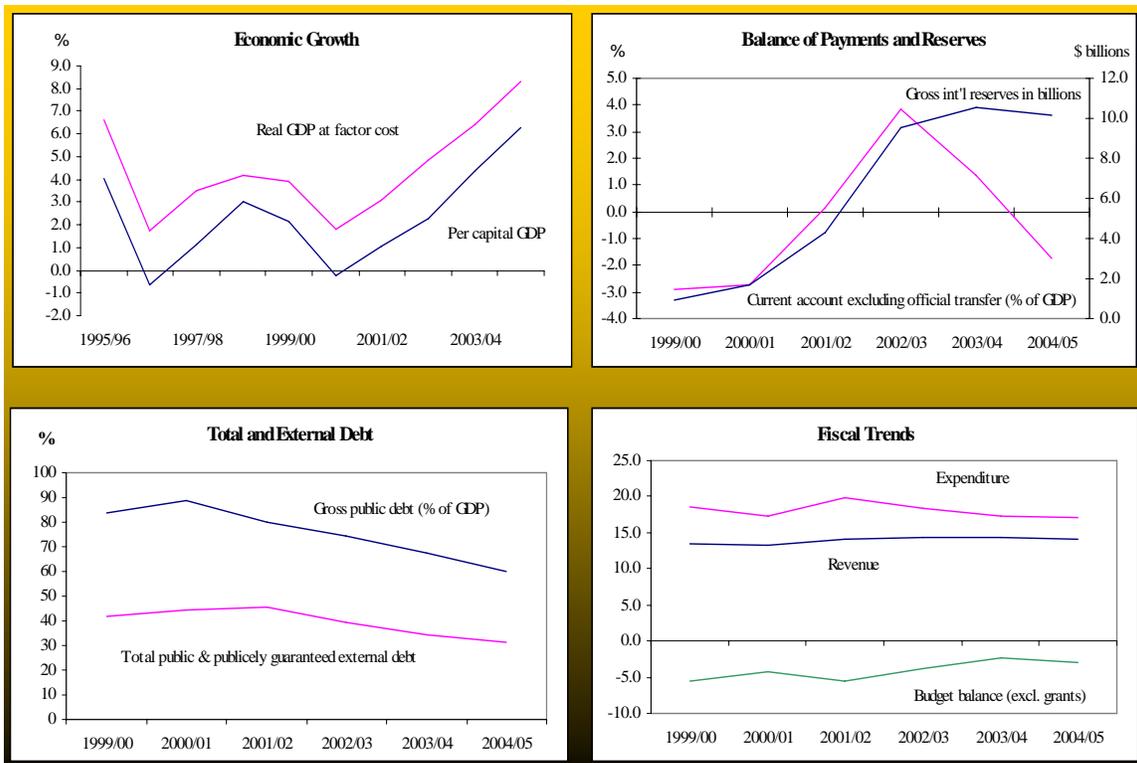
xxiii. **The Commission will be set –up as a statutory corporation** with total expense of setting-up consisting of (i) fixed, non recurring costs mainly expended in creating the institution, (ii) operational or recurring costs mainly expended in operating the asset, and (iii) capacity building. Based on a wide set of assumptions regarding staffing, unit costs and work load, over the first three years the Commission's costs are projected to average Rs. 51 million for fixed/start up costs, Rs 123 million for training and capacity building and Rs. 350 million for recurring costs.

xxiv. **A three proposed action plan envisions focus on (i) specifying internal regulations and procedures, (ii) establishing the physical presence, (iii) building the commission itself, the management team and the staff, and (iv) engages in capacity building.** Actions to be taken prior to enactment of the law include the drafting of rules and regulations required to make the new law operational, (ii) development of guidance literature and information bulletins for the business community, (iii) advertisements for senior staff appointments, (iv) carrying out competition assessments of key sectors, and (v) developing a strategy for competition advocacy. As the Commission will develop according to the requirements of its mission, rather than a predetermined plan, the driving factors for its growth include: (i) demand-led work as the volume of mergers and acquisitions grow in Pakistan, (ii) investigative work regarding the proactive discovery of cartels as the Commission's detection skills improve, (iii) the speed with which the commission's teams can develop their case-handling capacity, (iv) the breadth and depth of the Commission's advocacy work, and (v) the Commission's success in fostering compliance, which would tend to reduce the Commission's work.

CHAPTER 1: POLICY UNDERPINNINGS

I. Economic Background

1.1 Gathering steam in the late 1980s, and continuing through the 1990s, the first wave of market oriented reforms committed Pakistan to a path toward reaching its medium term vision of a country, ‘developed, industrialized, just and prosperous’ through private sector led growth. The increased role of market signals in resource allocation, coupled with favorable external conditions, has produced immediate dividends in the form of increased business activity and higher rates of growth. The GDP growth rate rose from less than 4 percent in 1990-2001 to 8.4 percent in the fiscal year 2004-05, falling slightly to 6.6 percent in 2005-06 and is projected to remain around 7 percent range for 2006-07.



Source: World Bank, *Pakistan, Growth and Export Competitiveness*, 2006

1.2 The government’s goal is to deepen the reform effort into its second generation, in order to sustain the 6-8 percent per annum growth rate of GDP required to reduce poverty in the country. To meet the challenge of a buoyant economy in a globalized world, a strong competition culture among rival firms is needed to spur innovation, demand higher skills development and product diversification.

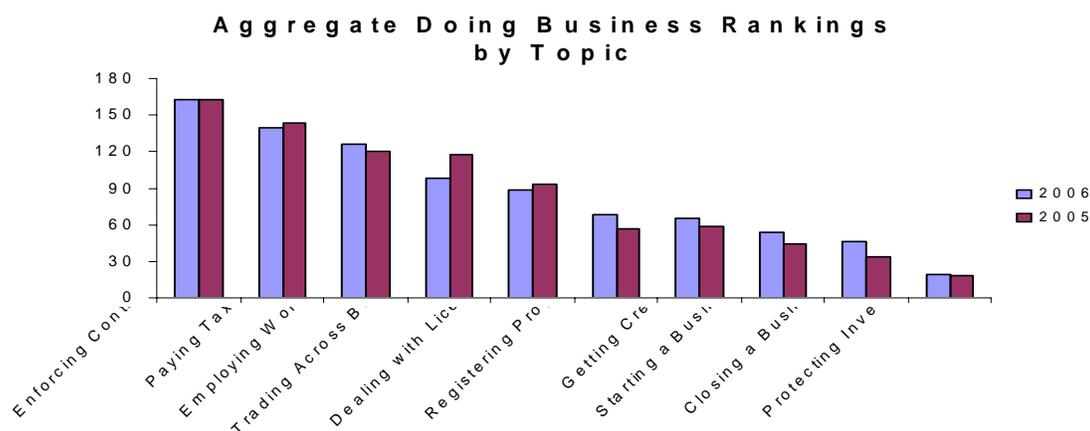
A. Deepening the Economic Reform Agenda

1.3 **First Generation Macro Reforms** By the end of the 1980s, sustained high levels of fiscal deficit and high debt levels were becoming difficult to service thereby limiting the government’s

capacity to provide for necessary investments in infrastructure, essential services, health and education. The persistent trade gap and pressure on the rupee led to exchange controls and significant devaluations throughout the 1980s. Macroeconomic instability was looming.

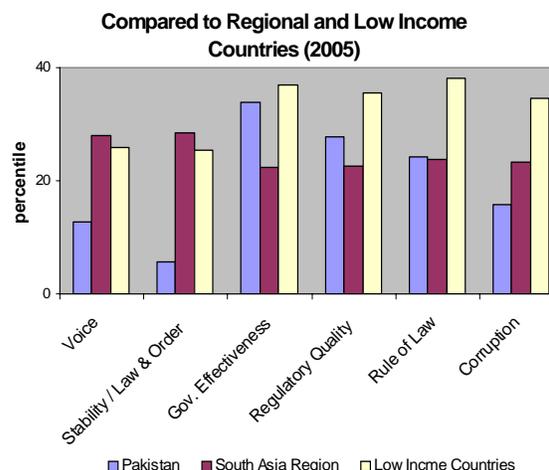
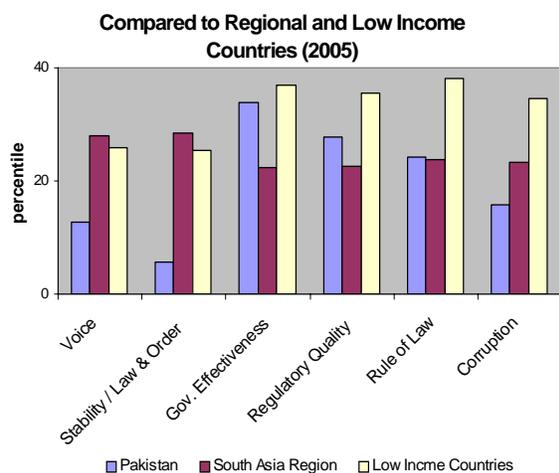
1.4 Underlying the macroeconomic challenges, was the fundamental issue of a public sector driven economy that lacked market incentives needed for sustainable growth. Economic activity was closely managed by the state, particularly in the important sectors of the economy, such as utility provision, credit allocation, interest/exchange rate setting, agricultural commodity trade, and manufacturing in certain sectors. State involvement crowded out private activity and distorted market incentives, causing growth to be dependent on limited and inefficient public investment.

1.5 Reforms were introduced in almost all areas of the economy, with a common strategy - government control, direct or indirect, had to be reduced or eliminated from areas that could be better organized by the private sector. Specifically, reforms took the shape of better tax and expenditure policy, significant reduction of non-tariff barriers and international trade taxes, liberalization of foreign exchange regime, elimination of administrative control over domestic and foreign investors, and significant privatization in the areas of finance, insurance, and large scale manufacturing. Sectors dominated by public monopolies were corporatized, privatized and governed through the introduction of sector specific regulators. Financial sector regulation was strengthened through the introduction of separate regulators for banks (State Bank of Pakistan) and capital markets (Securities and Exchange Commission).



Source: The World Bank, *Doing Business Database*, 2007

1.6 **The Second Generation Micro Reforms.** There is consensus among policy makers, academics and the business community that sustained growth will come from improvement in Pakistan’s international competitiveness in an increasingly globalized world market. At the same time, small and mediums enterprises (SMEs) dominate economic livelihood and represent the seeds for growing, innovative firms but are particularly disadvantaged by obstacles to their own growth and development. With both ends of the economic spectrum in mind, the government committed itself to improving three “second generation” areas which have impact on firm-level productivity: (i) economic governance, (ii) efficiency of factor markets, and (iii) provision of infrastructure services. The goal is a thriving market which rewards innovation and risk-taking while penalizes activities which distort proper functioning of markets.



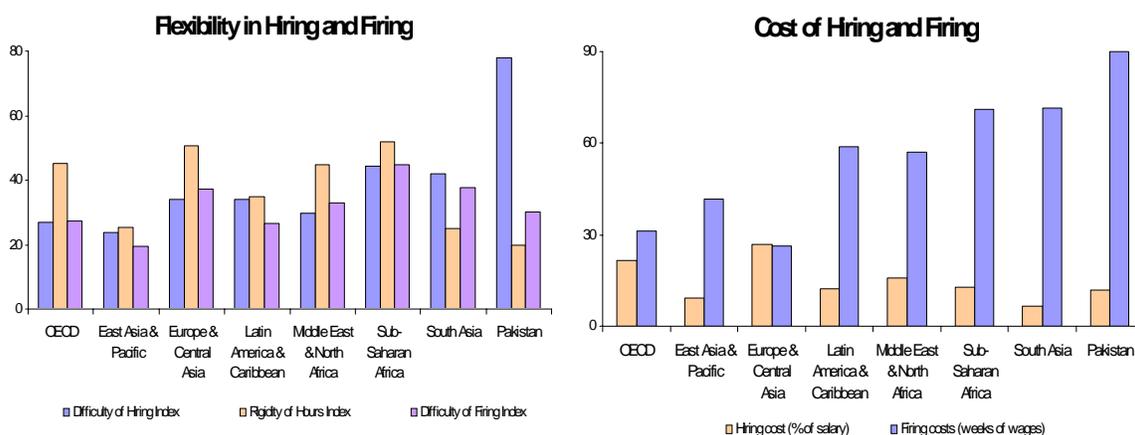
Source: The World Bank, Governance Indicators Database

1.7 *Economic Governance.* As the economy increasingly opens up to international trade and investment, attention has turned to regulatory and institutional reform to create a more certain and predictable environment for commercial transactions. Progress is being made in some key areas considered by many as deficiencies in the investment climate. However, the institutional development needed to instill and enforce market discipline and certainty in investment returns is a long and arduous process requiring sustained attention to challenging areas such as effectiveness of government institutions, quality of regulation, political uncertainty, and the rule of law. Consistency of policies and policy continuity are also key objectives.

1.8 Governance indicators in these areas show a mixed picture. While all indicators are lower than average against all low income countries, some of the indicators show Pakistan outperforms the South Asian average in *Government Effectiveness*, and *Regulatory Quality*, and is about average for *Rule of Law*. At the same time, over the past 10 years, Pakistan has improved in regulatory quality, particularly in the last 5 years, and made slight improvements in the corruption indicator as compared with 1996. Concerted attention is being paid to the implementation of governance improvements covering tax, customs, financial institutions, labor, public procurement and utility regulation and will be deepened in the coming years.

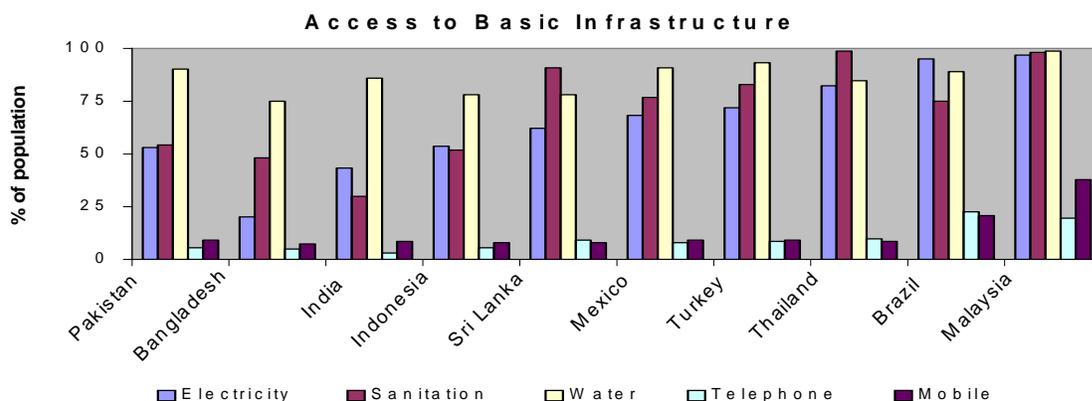
1.9 Worrysome however, is the fact that the other governance indicators have deteriorated over the past 10 years, particularly those reflecting the *Rule of Law* and *Government Effectiveness* – key areas to support the implementation of second generation reforms. To address this, attention is expanding to (i) modernizing business laws and processes to improve entry, corporate governance and exit, (ii) improvement in the access to, and efficiency of, the justice system, particularly in commercial areas, and (iii) strengthened and transparent enforcement mechanisms. Capacity building efforts to reengineer processes in public sector entities, particularly those which have business and citizen interface is an ongoing activity.

1.10 *Efficiency of Factor Markets.* Efforts to improve the functioning of factor markets are central to the fluidity in resource allocation needed to drive economic restructuring. In particular, the recent efforts to strengthen the banking system and improve prudential oversight will bring important improvements in the economy's access to finance. Further efforts are being undertaken to expand outreach, deepened participation and improve term transformation while more a competitive sector is being sought through continued privatization, rationalized regulatory constraints facing insurance and pension funds and improved governance in the corporate sector.



Source: The World Bank, *Doing Business Database*, 2007

1.11 As Pakistan legal framework embodies one of the most inflexible labor markets in the world, particularly covering hiring practices and firing costs, national labor legislation is being codified, rationalized and liberalized to replace antiquated legislation governing labor compensation, industrial relations, working conditions, health and safety requirements and human resource development. Provincial implementation will need to follow in turn to realize the far reaching benefits. Activities to develop land markets are being initiated, first through improving land records and divesting of publicly held lands and then through the delicate process of establishing robust property rights.



Source: The World Bank, *Pakistan: Growth and Export Competitiveness*, 2006

1.12 *Physical Infrastructure and Transport Logistics.* Constraints to providing improved infrastructure are challenging but Government efforts to address these constraints have been intensive. In power, telecommunications and oil & gas sectors, formerly government monopolies in non-contestable markets are being restructured and opened to private sector operations in various ways and according to differing timelines based on specific policy objectives. The Government has raised its investments in infrastructure to help mitigate the significant bidding constraints on business. At the same time regulators are building their own capacity and to carry out the new and complex task of guiding the sector restructuring and governing the private participation until markets truly develop. Transport, trade logistics and municipal services are being strengthened according to a strategic approach to each respective sector, based on strong private participation and improvement in government interface and coordination among the federal, provincial and local levels.

B. The Nature of Competition

1.13 Based on more than a decade of reforms, fiscal deficits have been reduced, expenditure re-prioritized, tax structure altered and tariffs lowered. Exchange and interest rate determination have the opportunity to be more responsive to market forces through T-bill auctions, open market operations and inter-bank transactions. Most of the financial sector is now owned and operated by the private sector. Similarly, for manufacturing and service provision, previously closed markets are now becoming more open across a range of activities. A budding stock market and a strengthening regulator have is forming the basis for improved corporate governance within companies.

1.14 While these broad sweeping reforms have initiated a period of strong private sector led growth, competitiveness in the face of increased exposure to the pressures of the global market demands that firms must become more productive through improved business processes, advances in technology, higher content of investment and strengthened human resources. To foster such a business environment, the government has pursued an *implicit* competition policy through the liberalization of imports and foreign investment and is now seeking to deepen the efforts through a new framework for an *explicit* competition policy.

	2003/2004			2005/2006			2006/2007*		
	(based on 102 countries)			(based on 117 countries)			(based on 125 countries)		
Countries	Intensity of Local Competition	Extent of Market Dominance	Effectiveness of Antitrust Policy	Intensity of Local Competition	Extent of Market Dominance	Effectiveness of Antitrust Policy	Intensity of Local Competition	Effectiveness of Antitrust Policy	
	Score Rank	Score Rank	Score Rank	Score Rank	Score Rank	Score Rank	Score Rank	Score Rank	
Pakistan	5.0 39	3.5 20	3.4 65	5.1 45	4.3 31	4.3 40	4.6 73	3.4 79	
Bangladesh	4.8 52	2.7 72	3.0 84	4.6 72	2.6 109	3.0 96	4.7 66	2.7 117	
Brazil	5.2 31	3.2 31	4.7 26	4.8 56	4.2 41	4.4 38	5.2 40	4.2 46	
China	5.3 24	3.4 22	3.8 52	5.3 31	4.1 44	3.8 55	5.3 34	3.5 74	
India	5.6 10	3.6 16	4.3 37	5.8 11	5.2 17	4.6 33	6.0 4	5.1 27	
Indonesia	4.0 87	3.6 14	3.6 62	4.8 55	3.6 66	61.0 4	5.7 15	5.2 23	
Mexico	4.9 47	2.4 89	4.2 38	4.8 62	3.2 81	3.8 56	4.9 57	3.9 57	
Sri Lanka	4.7 58	2.8 66	3.4 66	5.2 34	3.2 85	3.3 83	4.7 69	3.8 60	
Thailand	5.3 25	3.5 21	4.1 42	5.2 36	4.3 30	4.2 42	5.2 42	4.2 47	
Turkey	4.7 56	2.8 63	3.7 56	5.2 33	4.0 50	4.4 37	5.4 27	4.7 34	

Source: World Economic Forum, Global Competitiveness Reports.

* Data on the Extent of Market Dominance was not available for 2006/2007.

1.15 Little is know about the degree of competition in the economy as the actual empirical description is difficult to measure. Perception indicators shown above, reveal that the intensity of local competition has fallen in recent years and now ranks in the lower half of countries surveyed. At the same time, due to the dominance of small and medium firms in the economy, the perception of Pakistan's market dominance actually leads to a relatively high ranking world-wide. To understand better the nature of competition in Pakistan, analysis is necessary not only of the state of market competition but as well, the legal and regulatory framework governing entry, operation and exit.

1.16 **Concentrated Markets and Oligopolistic Competition.** Some manufacturing industries, such as textiles, steel furnaces, grain milling, cotton ginning are dominated by micro and small enterprises and are operate in a segmented market structures. Limited information is available on concentrations, but broad indications from the census of manufacturing indicate little change in a

highly concentrated industrial structure over time⁶ and a relatively constant number of large enterprises. Though there are few data sources covering this area, existing evidence would suggest that firms are generally small and high in numbers, it is concentrated in some areas and segmented in others leading to an insufficient degree of intra-firm rivalry in some of the key sectors.

1.17 **Alleged Cases of Explicit or Implicit Collusion.** In some sectors of primary goods industries such as sugar cement and ghee, government has investigated cartel formation, but has not been able to bust them because of lack of requisite skills and resources to carry out professional investigations. Questions have arisen in the past regarding the role of various associations in the coordination of market power. However, little market research of sources to reveal non-market causes for price movements – particularly for the primary goods in the domestic market. Alleged cartels involving cement, automobiles manufacturers and sugar producers have been investigated⁷ while collusion in the fertilizer sector has been suspected but not yet investigated to the same extent as other sectors.

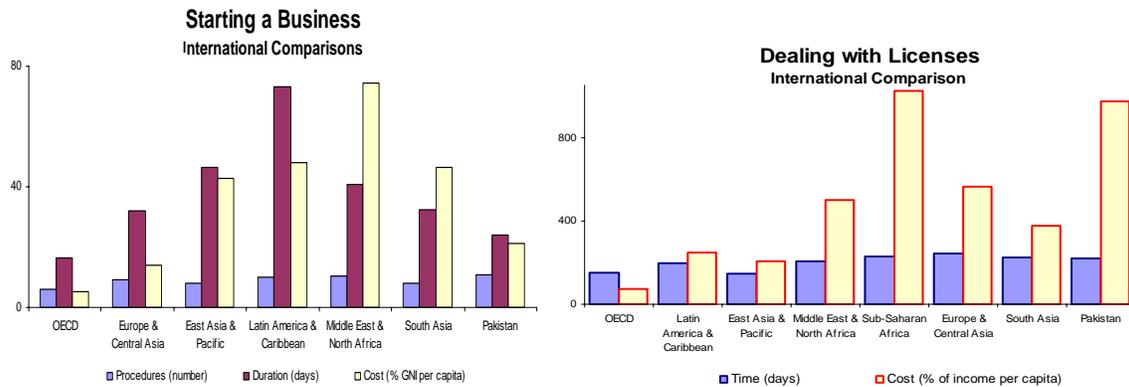


Source: The World Bank, *Doing Business Database*, 2007

1.18 **A Legacy of Heavy Protection.** Effective protection in 1990-91 was estimated at 77 percent rising from 66 percent in the 1980s. Since then there has been considerable rationalization of non-tariff barriers and trade taxes, thus increasing import competition in the economy. Overall tariff rates have recently come down significantly – to a weighted average of around 10 percent in 2004-05, but the tendency to lower tariffs for raw materials and intermediate inputs for particular sectors in order to help competitiveness may have the effect of raising effective protection rates. At the same time, in some declining pockets of industry, explicit protection remains strong. The legacy of the protection domestic firms enjoyed in recent decades makes it difficult to unravel protection even as the policy to protect domestic industry is coming to an end.

⁶ Data for the Census of Manufacturing, 1995, suggests that the largest four firms in three quarters of the industries accounted for at least 80 percent of the industrial output in the particular industrial sector. Moreover, except for 17 percent of the industries the largest four firms controlled at least 60 percent of the

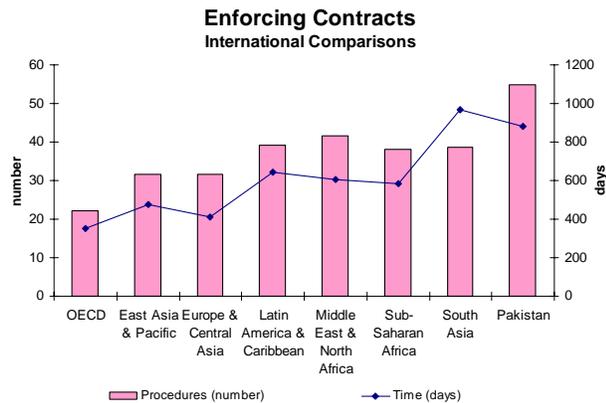
⁷ Starting in 1998, a well known and publicized cartel involving cement manufacturers was initiated based on a sudden rise in prices, seemingly without justification, such as input prices or capacity utilization issues. The decision of the MCA was not upheld by the higher judiciary



Source: The World Bank, Doing Business Database, 2007

1.19 **Barriers to Entry, Operations and Exit.** Considerable progress has been made in lowering the cost and time for new business to get incorporated. As a result, on paper, hindrance to entry and exist seems less binding that in other countries. However in practice, start up costs and time requirements along with the high compliance cost with operating a business, still represents a barrier to entry for small firms. While a range of efforts have sought to lower compliance costs associated with government interface, numerous analyses of the economy have pointed to deficiencies which prevent arms-length relationships particularly by smaller firms, including inefficient judicial processes.

1.20 Businesses unable to engage in long-term, frequent and complex contracting have limits buying and selling outside a known circle and are forced into backward or forward integration, limiting outsourcing as a way to encourage entry of new smaller and innovative firms. Finally, a key characteristic of a competitive economy is the ability of firms to exit from the market, swiftly, cleanly and in an organized fashion. Without it, resources will continue to be tied up in losing activities and investors will be reluctant to invest, both leading to drags on growth.



Source: The World Bank, Doing Business Database, 2007

1.21 **Public Utilities Evolving from State Monopolies.** The government has also opened up the sectors which have been in exclusive domain of the public sector in the past. The telecommunications services are opened to competition, and the state-owned fixed line company, Pakistan Telecommunications Corporation Limited (PTCL) is privatized. The WAPDA's is restructured through horizontal and vertical unbundling. Vertical unbundling entail separation of generation, transmission and distribution services, while horizontal unbundling occur through the creation of eight distribution companies. At the same time, the government has set up various regulatory authorities including NEPRA for power, OGRA for oil & gas, PEMRA for electronic print media, PTA for the telecommunication, and SECP for the corporate sector and State Bank for the banking sector. As a part of the reform process, competition is being introduced into these sectors. In electricity a competitive process for the provision of new independent power producers is being followed, while plans for a more competitive generation market are developed. In the gas sector limited open access is already being provided and plans for greater competition are being developed.

CHAPTER 2: PRINCIPLES OF COMPETITION POLICY

2.1 Various studies indicate that economies which have competitive domestic markets have higher levels and rates of growth of per capita GDP, are better able to withstand economic shocks, have higher rates of entry of new firms and an ability to attract more FDI. Along with the consensus that private sector initiatives rather than direct government provision has to be the main driver of the growth process, it is equally accepted that competition and rivalry, between and within businesses, is one of the least cost and most efficient ways of arranging and ensuring efficiency and innovation in business activity.

2.2 Fostering effective competition at home through, an effective competition policy is supportive of a business environment which improves efficiencies, leads to allocation of resources in the best manner and in which abuse of market power is prevented through competition. There are currently more than 100 countries that have enacted competition law-policies with more than 70, mainly developing or transition market economies enacted new or significantly strengthened existing competition law-in the 1990s alone, in light of changing domestic or international economic circumstances.⁸

A. Vision, Objectives and Scope

2.3 **Vision.** The Government of Pakistan seeks to promote sustainable economic development and improve the well-being of all citizens by protecting and promoting competition in the economy. Private and public barriers to competition need to be prevented from hindering the development path, to guarantee maximization of consumer and producer welfare in a dynamic framework. Competition policy and its regulatory framework will support an environment in which entry, and growth is fostered, anti-competitive behavior by all firms is prevented, and abuse of market power by dominant firms is restrained.

2.4 **Objectives.** As competing at home markets is a prerequisite for integrating effectively in international markets,⁹ and as factors limiting competition at home have become increasingly important, the case for an optimal competition policy has become stronger in recent years. Monopolies and oligopolies have been privatized and in cases dominate markets that were previously the preserve of government, agreements amongst firms which may have been necessary before, may no longer be appropriate and as foreign competition increases, in the form of FDI and competitive imports, the pressure for firms to merge in order to gain efficiency will increase.

2.5 An effective competition law-policy aims at providing equal opportunities for all capable entities to participate in the economy, thereby creating opportunities for entrepreneurship and giving rise to innovation. In doing so, the power of consumers increases and confidence among domestic

⁸ Amongst them in Asia includes India, Indonesia, Korea, Singapore and Thailand. Japan has had a Fair Trade practices Act since 1948. China has recently introduced new legislation to address competition matters which is under discussion. In Africa, countries such as Kenya, South Africa, and Tanzania have enacted competition laws five or more years ago. Among Islamic countries, Algeria, Jordan, Morocco and Tunisia have such laws and currently Egypt (which passed its competition law last year) is in the process of establishing and staffing its implementing agency, viz., the Competition Commission, while Kuwait is currently in the process of drafting its first comprehensive competition law. Even industrialized economies such as Australia, Canada, the European Union and U.K. have amended and updated their competition laws.

⁹ Michael Porter, "The Competitive Advantage of Nations"

and foreign investors increases. Firms are not only pressured to lower prices, increase the quality, choice and availability of goods and services but also are encouraged to engage in good corporate governance and higher standards of business behavior.

2.6 Therefore the main goals of competition policy are:

- To increase efficiency, adaptability, and competitiveness of Pakistan's economy;
- Improve the welfare of consumers by increasing the availability, choice, and quality of goods and services at lower prices;
- Ensure that all businesses, including small and medium-sized firms, have an equal chance to participate in the economy;
- Create an economic environment where businesses and entrepreneurs have incentives to invest, innovate, expand production of goods and services;
- Generate opportunities for spread of ownership and broad participation in the economy;
- Provide for more accountability, transparency and participation in public policies that may impact on consumer welfare.

2.7 **Scope.** The centerpiece for the introduction of competition policy is the repeal of the present "Monopolies and Restrictive Trade Practices Ordinance (1970)" and the reconstitution of the "Monopoly Control Authority" (MCA) and supporting institutional structure. At 36 years old, Definitions used in the law need to be updated, the scope and coverage of the law needs to be extended to all enterprises - public and private, local and multinational - exemptions need to be minimized, and most of all there is a need to move to a 'rule of economic reason' basis rather than static measures of market share and monopoly power. The coverage for types of anti-competitive behavior and abuse of power needs updating. Rules for information revelation requirements need changes. Penalties for non-compliance need to be updated and made binding.

2.8 At the same time the MCA is not empowered with the human, technical, informational and legal backing to carry out its functions. Its institutional set up needs a modern, robust structure which can uphold judicial and corporate challenges. To break from the past ineffective institution, an entirely new corporate culture needs to be developed, starting with the quality of appointments, internal and external governance and, technical capacity. A new agency, based on best practice models and attracting the top business, legal and economic talent in Pakistan, is being established to carry out the multi-functional task of analyzing markets, advocating competition and enforcing law.

B. Key Principles in the Law's Application

2.9 To further Government objectives to strengthen competitiveness of the economy, unnecessary barriers to entry and exit - created either by badly designed regulations and policies or by anticompetitive business practices by private firms - need to be removed. At the same time, risks associated with the process need attention including avoidance of additional transaction or compliance costs for firms, becoming an obstacle of beneficial mergers and acquisitions, and unnecessary restrictions on innovative horizontal and vertical arrangements among firms. The law will be simple to understand and easy to administer by an institution that is autonomous but accountable, and whose dealings are transparent, fair, and predictable.

2.10 **Non Discrimination.** Competition law is a policy of general application. It applies equally to all sectors and to all economic agents in an economy engaged in the commercial production and supply of goods and services in order that that similar lines of activity are subject to the same set of

legal principles and standards. Potential exemptions will be analyzed with due care and be based only on efficiency grounds, as distortions in one market can affect others through price, profit and resource linkages. The law's non-discriminatory approach implies predictability in interpretation and is supportive of transparency, accountability and confidence in its application. However, despite the law's general application, in practice conditions prevailing in regulated and/or evolving markets (particularly, media, utilities, financial institutions, energy, etc) need to be monitored and protocols established with the other key stakeholders to ensure complementary rather than overlapping application of the regulatory framework in these sectors.

2.11 Protection of Competition not Competitors. The objective of competition law is to promote consumer welfare through improved production and sales efficiencies resulting from market competition. Efficiency refers both to productive efficiency (i.e., lowest costs of a firm to achieve its outputs and sales) as well as dynamic efficiency (i.e., innovative means employed by the firm to provide new and differentiated products and services which satisfy consumers' desires). Thus, while in principal efficiency is the goal, in practice important trade-offs will need to be made.

2.12 The assessment of competition will be tolerant of single firm growth on the basis that competition law should not punish those who have gained dominance through efficient use of resources and innovation without resorting to exclusionary and anticompetitive tactics. Similarly, in a transitional economic landscape, traditional business practices needs time to adjust to new market conditions. On the other hand, the granting of exemptions and/or policies insulating any given sector (or firms) from competition, are likely to have other direct and indirect adverse effects on the economic system as a whole. Whether the costs of such exemptions and exceptions or policies are outweighed by the benefits will be carefully assessed with full transparency.

2.13 Facilitating Business not Regulating Trade. The main beneficiaries of competition are the business firms themselves as the largest group of 'consumers' in the economy through domestic purchases and sales of goods and services. Therefore, competition law needs to be viewed as supportive to private business not an additional hindrance. The principal in applying and implementing competition policy is to promote consumer welfare without hampering the day-to-day activities of the business. The vast majority of day-to day transactions that take place in markets across Pakistan will not be affected by the new Law. For example, past practices of requiring businesses to compulsorily register with the MCA will be eliminated as posing unnecessary regulatory compliance cost on the businesses. Instead, only large transactions of large firms, meeting specified thresholds shall be required to notify the competition agency.

2.14 The role of competition law enforcement is to deem business practices, policies or arrangements as explicitly permitted unless otherwise prohibited. In practice, enforcement should only prevent business transactions that substantially lessens or prevents competition, or gives rise to abuse of market power based on analysis which substantiates the practice and undergoes 'rules of analysis and reason.' The law will allow flexible application towards legitimate business arrangements and cooperation such as trade associations, standard setting for goods and services, collective bargaining by labor, and other such situations that can be legitimately show to improve efficiency in the conduct of business.

2.15 Coordinated and Consultative Approach. To investigate and prevent anti-competitive situations from arising or persisting, the Government will rely not only on heavily on complaints that are brought to the attention of the new competition agency. Thus the responsibility for implementing the new law depends as much on ordinary citizens and business entities that bring forward complaints as much as it relies on the new agency to be responsive.

2.16 There will be clear jurisdictional lines but strong coordination between the competition agency and the sector specific regulators to support their already mandated role to promote and ensuring fair competition in specific industries. Coordination will also be required with other public agencies charged with implementing government policies as well as the relevant ministries analyzing and making public policies which impact on the competitive landscape.

2.17 The task will require a high level of economic and legal sophistication from various authorities (competition agency, the regulators and the business community). With scarce talent in this area, cooperation among various private and public research institutes, commissions and professional bodies will be needed.

2.18 **Integrity in the Application of Competition Law.** The government realizes that an independent and efficacious agency, with strict accountability safeguards is the key success factor for the effective implementation of competition law and policy. Three principals will be followed in providing for a competition agency to replace the MCA: operational and financial autonomy, due process and accountability. described in more detail in Chapter VII, including:

- A collegial body of leaders with integrity, stature and ability - each with substantial experience and collectively with a range of relevant expertise.
- Transparency and speed in the investigation of serious infractions without undue burden on individuals and business firms.
- Public proceedings with safeguards for the proprietary information.
- Published decisions subject to review on appeal.
- Annual reporting based on financial and performance audits.

CHAPTER 3: OPERATION OF COMPETITION LAW

A. Law Enforcement

3.1 The law enforcement provisions in competition law are typically bifurcated in prohibited practices and reviewable transactions. The law becomes operative through *ex post* review of case of prohibited practices and *ex ante* assessment of reviewable transactions. A non-exhaustive list of prohibited transactions is provided in Appendix 1. Reviewable transactions consist mainly of mergers and acquisitions and in some special cases, joint ventures.

3.2 **Vertical and Horizontal Agreements.** The competition law in Pakistan will prohibit agreements or conspiracy to enter into agreements, and concerted practices that have the objective or effect of preventing, restricting or distorting competition within Pakistan, and in particular those which (i) directly or indirectly fix purchase or selling prices or any other trading conditions (ii) limit or control production, markets, technical development, or investment; (iii) allocate markets or sources of supply (iv) apply dissimilar and disadvantaged conditions to equivalent transactions across trading parties (v) make conclusion of contracts subject to acceptance by the other parties of supplementary obligations which have no commercial connection with the subject of such contracts or (vi) rig, suppress, rotate or complement bids. Various types of horizontal and vertical restraints are listed in the boxes 1 and 2 in Annex A.

3.3 **Abuse of Dominant Position.** A company or set of associated companies is said to hold a dominant position if it is able to act independently from the competitors and customers. If this independence is used to reduce competition, then it amounts to abuse of dominance. This may occur if it uses practices that have the effect of restricting the degree of competition which it faces, or of exploiting its market position unjustifiably. Examples of this abuse are predatory pricing, prevention of the entry from the market; refusal to deal; exclusive dealing; refusal of access to essential facilities; tying or tied selling. An explanation of these practices is provided in Box 3 of Annex A.

3.4 The law shall put restrictions not on the holding of the dominant position but on the abuse of it. The market in itself is not distorted by the fact that an undertaking is large; as efficiency demands that a company reaches large scale operational levels or is present in several markets. A company may grow precisely because of its "virtuous" market behavior, offering products which better meet consumer demand than other companies' products, even in terms of price. In other situations, firms with relatively small market shares can be considered dominant due to their unique ability.

3.5 **Unfair Trading Practices.** In addition to the agreements and abuse of dominance, false or misleading advertising which harms another competitor is considered an offence under most competition laws around the world. The law shall proscribe deceptive marketing practices, such as, unsupported test claims and testimonials, misleading ordinary price claims, sending deceptive prize notices, misleading advertising and malicious comparative advertising.

3.6 **Merger and Acquisitions.** In order to foster, encourage, and promote competition, businesses will be face minimum regulatory compliance cost. Firms engaging in reviewable transactions which meet notification thresholds and have the potential of affecting market structure or preventing, lessening or distorting competition within relevant market shall be reviewed by the competition agency. The objective of the clearance process is to identify and block only the mergers that substantially lessen competition in particular through the creation of a dominant position.

3.7 The provision should specify a clearance procedure, timeframe and criteria for approving or refusing a merger. Mergers, acquisitions, joint-ventures and strategic alliances by firms which meet certain size thresholds - calculated relatively easily, such as the turnover of the undertakings concerned or other size of operation or transaction - are required to be notified to the competition agency.

3.8 After notification, a two step analysis will be initiated. The first stage, taking 30 days, will assess whether the merger will substantially lessen competition through the creation of a dominant position. With prima facie evidence from the first stage, the second stage analysis, taking 90 days, will be based on detailed information provided by the undertakings. While reviewing the transactions the competition agency will take into consideration the following factors:

- Assessment of the relevant product and geographic markets;
- Competitiveness of local firms in the global market
- Identification of competitor firms;
- Market shares; and market concentrations of the relevant firms;
- Assessment of potential adverse effects of the transaction
- Assessment of market entry, that is, would it be, timely, likely, and sufficient enough either to deter or counteract the anticompetitive effects of the transaction;
- Assessment of efficiency gain, which the parties offset the effects of any prevention or lessening of competition and which cannot otherwise gain but for transaction under review;
- Assessment of likelihood, in the absence of transaction, of either party to the transaction to fail, causing its assets to exit the market. (Failing firm defense).

3.9 The outcome of the analysis should be that the merger is either blocked or cleared with or without conditions. A post merger review should be provided to allow the merged firm the possibility of reviewing or eliminating conditions attached to the original order.

3.10 **Efficiency Exception.** While some mature competition regimes provide efficiencies exception for prohibited practices, others do not offer exceptions to prohibited practices and treat them as *per se* offences. However, in developing markets, where policy distortions, underdeveloped institutions and less than fully functioning markets exists, exemptions based on efficiency grounds may be considered. The onus of proving efficiencies will be on the undertaking requesting the exemption and the competition agency may grant such exemption after thorough analysis and hearing the parties likely to suffer anti-competitive injury from such exemption.

3.11 **Adequacy of Sanctions.** The Law will provide for a credible threat in terms of sanctions and will include the possibility of behavioral and structural remedies necessary to restore competition where violated. In order to deter violations of competition law, the loss from penalties must outweigh the expected gains from the anticompetitive, illegal acts. Penalties will encourage violators to cease illegal activities and prevent refusal or delay of the correction orders issued by the agency. Where the Agency finds that there is an infringement of the competition rules, it may by decision require the undertakings concerned to bring such infringement to an end. For this purpose, it may impose behavioural or structural remedies, proportional to the infringement committed.

B. Competition Advocacy and Market Analysis

3.12 **Nature of Competition Advocacy – Beyond Law Enforcement.** Advocacy is about the promotion of competition through means other than law-enforcement. It operates through analytical efforts to reduce public restrictions by focusing on broader questions that relate to the role of competition in the overall economy. Its main objective is to mobilize other entities within government, business and the public to form a constituency in favor of the protection and promotion of competition. The main advocacy activities include:

- *Influencing government policy-making and implementation* by providing analytical advice on ways to enhance competition to government agencies, regulators, undertakings and representative bodies (e.g., strategy setting, commenting on specific existing and proposed legislation, regulatory practices, or the policies of public bodies),¹⁰
- *Raising public awareness* of the benefits of competition and the role of competition policy to deliver better economic outcomes, by championing competition more broadly in society to develop a “competition culture” in society, and
- *Market analysis of key sectors* where competition does not appear to work (because of public or private restrictions), either in response to a request from government or of the agency’s own volition to support advocacy as well as guide the agency’s efforts.

3.13 **Why Advocacy.** Advocacy has an important role to play in contributing to the creation and strengthening of competitive markets. The competition agency will be the public voice on competition issues, creating expectations of a competitive environment, and articulating the competition perspective. Moreover, as both public and private restraints can provide monopoly rents to enterprises, an effective competition policy function must be able to analyze and take concerted action on both fronts. The need for the two-front approach to competition policy is particularly strong in economies emerging from a legacy of state intervention.

3.14 A competition agency cannot function without support from stakeholders within the business and citizen communities. It has to create credibility for itself and its work and it has to create an environment where it can depend on support for its work from citizens and other stakeholders. For this purpose periodic but repeated seminars with all stakeholders will be necessary. In these cases, advocacy is viewed as more than just a complement to enforcement, but can play an essential role in the establishment of a competition culture.

3.15 **Inputs into Policy Formation.** The competition agency will be called upon to provide technical inputs on government policies, laws and decisions which have an impact on competition.¹¹

¹⁰ The areas can include trade and investment policies (for instance tariffs, anti-dumping duties, FDI restrictions, IPR rules), sector regulations (for instance telecoms, transport, oil & gas), privatization review, and the operation of other central, provincial and local government entities; The appropriate short-term priority in Pakistan likely will be on regulatory reforms stressing de-regulation to facilitate enterprise entry, expansion and exit.

¹¹ Countries have adopted approaches to advocating on government policy-making in various ways, ranging from implied or informal understandings based on a general advocacy statement in the law to more explicit statutory underpinnings. Countries such as Canada, Italy, the Republic of Korea and Russia give the competition agency an explicit legal mandate to submit its views on particular matters to the appropriate ministry or regulatory agency. This legal mandate, in turn, can range from making public opinions and recommendations to having veto power regarding legislation which removes competition to providing a no-objection screening to existing regulations. Many authorities include mandatory consultation on new legislation, regulatory measures or other government actions that affect competition, while others such as India provide for voluntary, non-binding consultation. Statutory powers in law or regulation are made for the competition agency

To be effective the agency will have a view on activities both at the federal and sub-national levels. The advice has to be pre-emptive and preventive to ensure that potential impacts on competition can be identified in advance before the impact is costly and irreversible. Advice of this nature generally takes the form of a review of draft laws, regulations, government programs, policies, decisions, actions as well as comment on implementation record of government, regulators and other public authorities which impact the nature of competition, industrial structure and free market access. Where appropriate, the advice given by the agency will be publicized.

3.16 In terms of specific legal mechanisms to ensure that the statutory role of advocacy is performed efficaciously, a process for making comments should be formalized through regulation and/or protocol. The power to hold public hearings, as well as other publication requirement of advocacy opinions will open the process to third-party advocates of competition and force a healthy public debate. The agencies will facilitate comments in the form of seminar discussions, published papers and an annual “State of Competition Report.” The agency will have access to required information and experts, and limit policy-related advocacy to the most obvious and urgent areas of competition restrictions based on a form of “proportionality test.”

3.17 **Promoting a “Culture of Competition.”** Particularly, in the early years of a new competition policy, there will be a critical role to create and strengthen the champions and natural allies. Education and constituency-building efforts should, among others, be directed at pro-competition interest groups, especially exporters, grass-roots entrepreneurs (new entrants and rural/smaller firms without market power) as well as consumers, who all stand to benefit most from competition policy.

3.18 Public awareness-raising activities typically include training of judges and lawyers, government officials and businesses (rule makers and regulators), outreach to universities, think tanks, consumer groups and broader civil society through sponsorship and participation in conferences and seminars, publications of guidelines, information notes and studies, and a user-friendly, up-to-date website. Firms need to know, in advance, what actions might come under practices that are forbidden and therefore can be questioned by the competition agency. So publication and dissemination of decision on cases and experiences will help ensure that competition related activities do not harm the certainty, predictability and transparency of the incentives regime. By posting on websites previous decisions and/or analyses can help firms to lower the probability of willfully engaging in prohibited activities, and thus save time and resources. The agency will publish merger enforcement and other guidelines for helping companies gauge the probability of their intended transactions getting clearance from the competition agency.

3.19 **Capacity and Data for Rigorous Market Analysis.** A key part of the advocacy function is the carrying out of various forms of analyses which not only support the advocacy functions relating to policy review, knowledge creation, information dissemination, and public awareness building but will also help in the investigations of violations of competition law. However to carry out useful market analysis, two requirements are necessary: the capacity for rigorous analysis and the data required to carry it out.

3.20 The competition agency, in carrying out its advocacy function will need to dedicate substantial human and material resources to research, advisory services, documentation, and

to be represented on the privatization commission or are ensured the opportunity for a fixed time-period to review privatizations from a competition angle. In some jurisdictions, the agency can challenge public restrictions directly in the courts or in other appropriate public fora. In the EU, Brazil and Mexico federal authorities can challenge regional or local government restrictions in the courts, while some transition economies in Europe can challenge national legislation.

dissemination. There will be a need for coordinating with government agencies, sector regulators and consumer groups, for creating and maintaining databases, informational pamphlets and other material, and for sharing results of investigations and in generating support for their work through all stakeholders. The competition agency will carry out this work through a combination of in-house capacity and out-sourcing, both to domestic as well as international institutions with research capacities. Capacity will thus be built in the agency and among domestic suppliers of research (universities, think tanks, consultant firms).

3.21 The agency will not only need to develop, maintain and keep updated a fairly comprehensive database covering the input and output structure of sectors and firms, international and domestic prices but will also need to cover industrial structure. To do so, the agency will need to obtain information from a variety of sources. The key sources are:

- *Federal and Provincial Statistics.* The Census of Manufacturing Industries (CMI) tabulated by the Federal Bureau of Statistics and the provincial departments of industry, provides the data on the input structure of firms, but suffers from under-reporting, and obsolesce. Access also faces confidentiality considerations for firm level data.
- *Other Agencies' Databases.* Protocols among agencies will be agreed to access limited, non-confidential data maintained in databases at the Central Board of Revenue, the Securities and Exchange Commission, the State Bank of Pakistan and utility regulators.
- *Private Sector Databases.* Sector and company data is collected by business groups, such as the textile association, the sugar mills association, the Engineering and Development Board and others. Market consultancy is also developing rapidly, and could become a potential source of data.
- *Own Market and Industrial Surveys.* The data published from these various sources still would not be adequate as international price data of heterogeneous products are difficult to obtain. Specialized surveys will therefore need to be commissioned on a regular basis.

3.22 **State of Competition Report.** A key annual output is envisioned, entitled, “*The State of Competition in Pakistan*” which would provide a formalized view on major sectors of the economy, from the perspective of competition – particularly, retail and wholesale trade, manufacturing, real estate and service provision. At the request of sector regulators, the report can provide analysis of network utility sectors. Within these categories the report will focus on areas and issues where there are competition concerns, through documentation of the product supply chains. Concentration ratios and indices for will be developed and tracked as a regular feature of the report. In addition, the report will take up specific issues of particular interest during the year, such as mergers.

3.23 In addition to the information on the productive sectors of the economy and the monitoring of competition indices, the competition report will be one the principal tools of advocacy by the competition agency. As such, it will comment on existing, proposed and needed Government policy and practices – at Federal and Provincial levels - The Competition Report will be published each year and placed before Parliament at the end of March, prior to the budget cycle in order that recommended policy changes can be considered in time for the budget. The report will be the sole responsibility of the competition agency.

CHAPTER 4: INSTITUTIONAL FRAMEWORK – THE COMPETITION AGENCY

The organizational structure, scope, and powers of the competition agency are essential determinants for the successful implementation of competition policy and law. The competition agency shoulders the burden of implementation, while at the same time maintains a level of stature and integrity which it could only achieve if it is independent and accountable.

A. Type of Agency

4.1 The draft law envisions a quasi-autonomous, quasi-judicial institution, with strong technical and legal powers of investigations, capable of applying severe penalties on private business in the case of violations of the law and at the same time accountable to Government's competition policy, the law and the public. Based on its own technical skills, stature and integrity as well as its ability to leverage research, the agency would also play a strong advocacy role in the promotion of competition with government, business and the public.

4.2 To reach this vision, the objectives embodied in the law are two fold: (i) autonomy to the competition agency in its day to day work, while ensuring that powers vested in it are applied within legal limits and carried out in a transparent way, and (ii) the appointed leadership assigned to carry out the functions of the agency have the requisite professional qualifications, stature, and integrity to implement the law in an appropriate and robust manner. These requirements are particularly relevant for an agency at the beginning of its life where the legitimacy, reputation and relevance are established.

4.3 Decisions are taken by a commission of the agency which is a collegial body. Cases are investigated, prepared and initially decided by the commission with the possibility of an internal appeal by an appellate bench of the commission. The judicial branch provides an opportunity for review on points of law. The internal design is such that checks and balances are maintained by safeguards provided for in the law generally fall into three areas: (i) autonomy, (ii) due process, and (iii) accountability.

B. Autonomy

4.4 Independence is one of the most important characteristic of an efficacious competition agency, which has the trust and confidence of the businesses and investor community. This independence will be legally protected and embodied in the law. Independence does not connote complete freedom but rather independence from external influences - particularly those coming from political quarters and the business community - in carrying out day-to- day business activities and especially decision-making. At the same time, the competition agency is held accountable for its administration to various stakeholders, including the public, the government and the judiciary.

4.5 The leadership of the competition agency as well as qualifications of its staff is critical ingredients for effective performance. Thus, the members and the staff will be persons of ability with substantial expertise in the areas relevant to the agency's mission. To carry out its functions and strengthen knowledge transfer, the agency will complement its own staff with top experts engaged at competitive rates.

4.6 **Professional Background, Tenure and Remuneration of the Commissioners.** The hiring process for the Commissioners will be open to the best pool of potential candidates who meet the required standards. A fundamental principle underlying the appointment of the Chairman and

Commissioners is that the agency be headed by persons of outstanding stature, integrity, competence, and professionalism. The Chairman requires the added quality of being a highly respected spokesperson, well received by a wide range of stakeholders and a good manager of people and resources. These principals would be provided for in the law in the form of legal safeguards including,

- A mixed balance of officials with various backgrounds appropriate to the institutional set up of the agency. Given both its investigative, analytical and enforcement roles, the Commissioners will be experts in law, business, administration and economic analysis, with a minimum number of years of experience - explicitly or implicit (e.g. by title, university professors, judges, etc.).
- A minimum number of commissioners – at least five and up to seven - to enable a wide mixture of the skills with staggered appointments of five to six years.¹²
- Remuneration packages comparable to similar positions in the private sector, the judiciary or the central bank would be needed to attract the top candidates and reinforce the a-political nature of the position of the commissioners and staff.
- Assurance as to their term in office with a procedure for dismissal that: (i) sets out clear criteria, such as gross misconduct, (ii) provides for independent third party adjudication or appeal; (iii) is transparent in terms of specifying precisely how a reason for removal is to be determined and by whom.¹³

4.7 **Funding.** To be effective the agency needs sufficient funding to undertake a wide range of functions. The process and freedom to use the funds as needed should however be subject to a clear and transparent budgeting process. Heavy reliance on budget allocation by the federal budget and fees/penalties levied by the agency risks both politicizing the agency, in the first case and, causing an undue incentive to penalize, in the second. To minimize these risks, independent funding sources will be sought, including:

- A multi year budget, updated annually, to plan its work without the uncertainty about future funding, lock- in provisions, which provides that the previous year's budget is automatically approved in the absence of a new budget, a general consolidated fund (one line budget) and treatment as an “inescapable expenditure,” in the disbursement of public funds against approved budgets.
- De-linking penalties imposed by the agency with the funding of the operations of the competition agency to avoid any conflict of interest (perceived or real), such having fees, or portion thereof, go through the consolidated fund.
- Automatic collection of a percentage of taxes and fees directly deposited to the consolidation fund or account of the agency at least for core expenditures with the possibility of obtaining loans as a safeguard for financial independence

¹² This type of agency, however, should not be established on the basis of having members with specific responsibilities – such as Member (Finance) etc as is seen in some of the regulatory bodies in Pakistan. This is inappropriate for a body with such a wide and flexible remit.

¹³The procedure specified by Art. 209 of the Constitution (i.e. Supreme Judicial Council) provides for a clear and transparency procedure.

C. Due process

4.8 For an agency to embody confidence and legitimacy, appropriate case preparation, processing and decision making is essential to project fairness and adherence to the laws of natural justice. In this way, appeal mechanisms would be limited to points of law and be rarely used, thereby limiting the tax on scarce court capacity. Specific safeguards in law, regulation and procedures will ensure effective and appropriate use of legal power by the agency.

4.9 **Complaint Procedure.** Internal procedural rules governing decision-making, consistent with legal due process, will be transparent and fair and cover initiation of the proceedings, case handling and hearing of the parties. Complaints can be initiated by any person with a legitimate interest, based on complete information. Complaints will be filed, documented and responded to in writing within a reasonable period of time. If the Commission responds by not opening an investigation, it will be required to state the factual and legal reasoning behind the decision. The parties will be given the opportunity to be heard, before the Commission takes a decision and have access to the file of the case to the parties, provided that proprietary information is protected, thus guaranteeing the right of defense.

4.10 **Organizational Safeguards.** To maintain separation between investigation and enforcement, various approaches will be considered including (i) different nomination procedures for various commissioners based on different background requirements (ii) clear rules on the access to information; inter-wing consultations, and lines of responsibilities and (iii) strict rules on the how the investigation wing opens, (either on its own or based on a complaint, closes and presents a case with a heavy burden of proof placed on the investigation to validate proper investigation and preparation procedures. A third wing will focus on competition advocacy and have little consultation with the other two.

4.11 **Access, speed and transparency.** For all inquiries, the agency will provide opportunity to all affected and interested parties and persons to be heard within a general time requirement for making a final decision (composed by investigation, analysis, hearings and decision making process). Given the great range of documents which can be inspected, requiring due process before forcibly entering private premises along with provisions to ensure the confidentiality of the data received would protect legitimate business secrets and instill confidence in the agency.

D. Accountability

4.12 **Publication.** Dissemination of information to business and the public would encourage compliance and build confidence in the market and the agency. In particular, all decisions and final orders incorporate the reasoning for the order, including the factual and legal basis; will be notified to the parties, publicly available and maintained in a public database. Such an enforcement database will promote better understanding and analysis, inside and outside the agency, of trends in enforcement activity and include the number of cases initiated under various provisions of the Act; the procedural and decisional history of the case; and aggregate statistics for each type of case each year. The agency will also make its rules, regulations, advocacy activities and recommended best practices updated on its website and assure wide distribution of an Annual Report, including to the public as a dual instrument of accountability and advocacy.

4.13 **Judicial Appeals.** The review of the decisions is ensured by the appeal on a point of law to the judicial branch, according to the Constitution. Factual determination by the agency will be considered final, based on good institutional governance, legal due process and reasonable separation of investigation and decision making.

4.14 **Financial and Performance Auditing.** Based on prescribed guidelines on record maintenance, accounts of the agency will be audited by the Auditor General of Pakistan including the possibility of value-for-money audits to complement standard audit procedures. In addition, to self-assess performance, the agency shall include in its annual report a review of its enforcement record, including the year's number and nature cases opened and closed, appeals preferred, penalties imposed, mergers cleared or blocked, etc, focusing not only on achievements but on selected elements of the enforcement process. In addition to the accountability goals achieved through wide circulation, the Agency should consider this annual review of its internal functioning as a vital tool to improve its efficiency and maintain its accountability and therefore should allocate funds in its budget for such studies every year

4.15 Its annual report will also include, an annual advocacy report, entitled, "The State of Competition" in Pakistan, including the key market analyses, a review of government activities to lower barriers to competition and reduce the cost of entry for small business, as well as the a summary of the agency's public awareness activities.

CHAPTER 5: BEYOND LAW – REGULATIONS, GUIDELINES & PRACTICE

A. Introduction

5.1 **Moving toward International Best Practice.** Pakistan’s new competition law puts the country squarely in line with international best practice by (i) adopting system which prohibits anti-competitive agreements and abuse of dominant position while requiring compulsory pre-clearance of large mergers and (ii) establishing the Competition Commission of Pakistan as an administrative enforcement body, operationally independent of Government, with quasi-judicial functions, subject to appeal to the Courts. International companies operating in Pakistan will be comforted by the familiarity with both the local competition law and its institutional framework.

5.2 **Functions and Powers of the Commission.** The functions of the Competition Commission are wide and strong to pursue (i) enquiries into businesses for the purposes of enforcing the law, (ii) proceedings against contraventions of the law; (iii) advising businesses on compliance; and (v) competition advocacy, including studies, hearings and opinions, to create a culture of consumer driven competition in Government and the public at large. To carry out these functions, the Commission will have the following powers:

- to make investigations, upon receiving evidence from a complainant of standing, or through evidence discovered on its own;
- to compel evidence and if necessary to enter premises
- to issue Orders to terminate anti-competitive conduct - including interim orders while proceedings are pending
- to require periodic information to be furnished, (eg for monitoring compliance) and,
- to impose penalties including fines up to a maximum of 15% of annual turnover.
- to hold hearings on any matter relating the state of competition.

5.3 Like competition authorities everywhere, however, the Competition Commission of Pakistan will endeavour to make its procedures as transparent and predictable as possible. It will do this through rules, notified by the Government to amplify the law, internal regulations set by the Commission to govern its work, internal procedures to operationalize the Commission’s internal policies and public guidelines to inform the consumer and business community of its intentions, approaches or views areas of public interest. In what follows, the term “regulation” is used generically to refer to rules, regulations and procedures, while “guidance” refers to publications issued by the Commission to inform the general public. A summary list of these regulations is provided in Appendix 2.

B. General Issues

5.4 **Basic Governance.** The Commission will function as a collegiate body with all substantive decisions as well as questions of general direction and practice to be decided collectively. The Commission will maintain general oversight, approve the launching of an investigation, oversee its progress, and take the final decision following the investigation. However, the Commission will have the powers to delegate powers, particularly in the area of case work to its senior staff. Therefore, a

general regulation will be required to specify the delegation of powers by the Commission to senior staff, identifying the specific areas where powers can be delegated.

5.5 **Appeals.** A finding of the Commission may be appealed to an internal Appellate Bench comprising two or more Commissioners who did not participate in the decision appealed against, providing the opportunity for recourse to the commission by parties dissatisfied with the initial decision. These appeals may be on points of law or fact.¹⁴ Judicial review of the Commission decisions will be provided through the possibility of appeal to the Supreme Court. The mechanics of the internal appeal process will be specified in an internal regulation to guide the process and provided to the public, guidelines in obtaining access to the internal appeals.

5.6 **Jurisdictional Boundaries.** Prohibitions apply to competition “in the relevant product and geographical market” and to all matters that reduce competition within Pakistan, even if the activities are take place outside of the country. For operational clarity, the principal will be specified in more detail by describing how the law applies to foreign enterprises doing business in Pakistan as well as to conduct taking place abroad but having effect in Pakistan. In particular, in order to make the law operationally relevant, the regulation will specify that one or more of the parties must be doing business in Pakistan.¹⁵ Specifically,

- For *prohibited agreements*, apart from foreign agreements with remote or indirect effects in Pakistan, the prohibition would apply to agreements if a party gave effect to it, or intended such, while doing business in Pakistan, regardless of where the agreement was entered into, where the parties were domiciled or where they had their principal place(s) of business.
- The prohibition of *abuse of dominant position* applies to an enterprise if it is in a dominant position in Pakistan, and carrying on business in the domestic market, irrespective of nationality or principal place of business of the dominant enterprise.
- The law applies to *mergers and acquisitions* if one of the merging parties is incorporated or doing business in Pakistan and would extend to mergers between foreign companies, provided one of them was carrying on business in Pakistan.

5.7 **International Co-operation.** Business is often international, so is anti-competitive conduct, and so too should be the outlook of national competition authorities. Competition laws should be administered so as to facilitate international co-operation between them. In particular, the Commission should seek and provide such co-operation, on many fronts, including sharing of studies, joint training and capacity building and indeed to joint conduct in the case of cross-border transactions / behaviour on the part of multi-national firms. In the case of cases requiring simultaneous and coordinated activities of two or more competition authorities, such as a merger between companies, each with operations in different countries, a regulation will be specified to guide the Commission and its foreign counterpart regarding the mechanics of this coordination. In particular the regulations will lay down the Commission’s co-operation and information policy exchange vis a vis other national & international competition authorities.

¹⁴ In the case of *appeals on points of fact*, consideration would be made on whether, in the light of the evidence taken, the decision had been reasonable. In the case of *appeals on points of law*, consideration would be made on whether the decision-making process itself (i) embodied clear reasons for its decisions (ii) were firmly based on the evidence (iii) that both the evidence and its decision-making process followed the principals of due process and natural justice as laid out in the law.

¹⁵ There is a recent and close precedent under the UK Competition Act, 1998 which prohibits all anti-competitive agreements decisions, or concerted practices etc and “applies only if the agreement, decision, or practice is, or is intended to be, implemented in the UK.” (Section 2.3).

5.8 **Civil Liability for Anti-Competitive Conduct.** The Courts may entertain actions brought by a plaintiff claiming to have suffered damages through an unlawful act under the Competition Law. Such actions would provide a useful additional weapon against anti-competitive conduct by conveying injured parties a strong interest in detecting violations and add additional “eyes and ears” to the Commission’s enforcement effort.¹⁶ Based on the Pakistan Tort Code and practice, co-operation between the Commission and private litigants could be encouraged to add to the range of penalties supporting the Competition Law. A regulation will specify the Commission’s practice in co-operating with private litigants injured by anti-competitive behaviour. Such published guidance would not only assist private litigates in helping them with the conduct of cases, they would in themselves be a signal to potential wrongdoing and even a deterrent for anti-competitive behaviour.

5.9 **Funding.** The law provides for several possibilities for funding. Regulation will specify that a funding plan which seeks to avoid heavy reliance on budget allocation by the federal budget and fees/penalties levied by the agency. Sources of independent funding may include: (i) a multi year budget, with lock- in provisions to automatically approve last years funding in the absence of a new budget, (ii) de-linking penalties imposed by the agency with the funding of the operations by passing through a consolidated fund, (iii) automatic collection of a percentage of taxes and fees directly deposited to the consolidation fund or (iv) income derived from an endowment fund.

5.10 **Summary - Regulations Needed.** Regulations will be specified to govern and operationalize the Commissions activities in the following five areas.

- Basic Governance / Delegation of Powers
- Mechanics of the Internal Appeal Mechanism
- Jurisdictional Boundaries
- International Cooperation
- Cooperation with Private Litigants
- Funding sources

C. Enforcement Policy

5.11 One of the first challenges facing the Commission is to codify its enforcement policy and practice across the range of activities under its responsibility. In the case of merger control, these procedures are relatively standardized and take place in “real tem” as the proposed transaction is notified to the Commission and placed on hold until the Commission provides its determination. For these reasons, the enforcement policy for merger control is specified in the law. In other cases, specification of the enforcement policy will be provided in subsidiary regulations. Such ttransparency will be an ally for the Commission, by (i) enabling it to demonstrate fairness and objectivity of processes, (ii) serving to educate the business community, (iii) enhancing the its credibility & respect and (iv) supporting a higher appeal.

5.12 The Commission’s enforcement procedures for all its actions cover three stages: (i) *detection*, which may lead to prima facie evidence of a prohibited agreement or monopoly abuse, (ii) *investigation*, where formal powers are brought to document the wrong doing and (iv) *determination*, when a remedy

¹⁶ For example, in the United States, private actions for damages on account of anti-trust violations are regarded as an even more formidable weapon than prosecution by the Department of Justice as US law goes a long way to reward private civil damages suits by those injured by an anti-trust violation, including contingency fees for lawyers, class actions suits and triple damages. As a result, it is common for litigants to await establishment of the damage through decisions by the Department of Justice before mounting the civil case.

may be imposed in the form of Orders and/or penalties. A graphical description of the enforcement policy work flow is provided in Appendix 3.

5.13 The enforcement policy for each type of action will be specified in a separate regulation. For each, the regulation should specify:

- The *three-stage processes* applying to all the Commission's enforcement work, covering detection, investigation and determination.
- The point of public announcement of various enforcement actions, particularly the stage of reasoned formal findings, regarding whether or not a wrong-doing has been found.
- Operationalizing the right of the investigated to be heard and protected, along with the related arrangements for public hearings.
- Responsibility and delegation arrangements for approving the launch, overseeing the conduct and ensuring due process compliance of the investigation, covering the relationship during the investigation between the staff and the Commission.
- The policy concerning penalties in the case of wrong-doing, including the principal of relating fines to the duration and severity of the offence, to the previous record of the offender, the degree of intention involved and any mitigating factors, such as the existence of corporate compliance program.
- Specification of Orders to ensure cessation and prevention of the offence and the requirement of periodic information returns to ensure compliance with orders.

(1) PROHIBITED AGREEMENTS

5.14 The law prohibits all agreements, vertical agreements or horizontal, that have the object or effect of preventing, restricting or reducing competition, including (i) fixing prices or other trading conditions, (ii) sharing or dividing markets, (iii) fixing quantities to be supplied, (iv) limiting investment or technical development; or (v) involving collusive tendering or bid rigging.

5.15 **Coverage Issues** The prohibition structure is broadly framed but with provision for exemptions, to allow the flexibility for the Commission to regulate its work program based on market realities. At the same time, the administration of the structure will ensure that resources are economized and not diverted into processing applications for exemptions.¹⁷ Therefore, regulations will be construed by ensuring that only significant anti-competitive agreements will be pursued and by treating applications for exemption according to rigorous criteria. Specifically, the regulation for prohibited agreements imply that the prohibitions will apply:

- Primarily to horizontal agreements (i.e. cartels) as *per se* violations,¹⁸

¹⁷ It became increasingly clear that the Competition Directorate of the EU Commission had insufficient staff to deal with the enormous volume of agreements notified to it for exemption, resulting in severe delays, considerable business time absorbed and distraction from the pursuit of cartels and abusive behavior. As a result, changes were made in EU competition law and administration whereby under regulation 1216/99, all vertical agreements can now benefit from retrospective exemption while a wide range of horizontal agreements do not have to be notified.

¹⁸ In all the main Competition Policy jurisdictions, horizontal agreements are attacked by a *per se* prohibition - i.e. they are prohibited in themselves. For vertical agreements however, there has been a trend to take them out of *per se* prohibition and instead to attack simply the examples that are found to be anti-competitive.

- To significant agreements, having the object or effect of monopolizing the market¹⁹ and
- To all price-fixing agreements, such as Resale Price Maintenance.²⁰

5.16 Moreover, the regulation should provide that agreements may not be considered anti-competitive if they are exclusively concerned with (i) standards and technical harmonization, joint R&D or bilateral assignments or licenses of Intellectual Property Rights,²¹ (ii) maintaining professional standards among the members of a profession,²² and (iii) labor agreements.

5.17 **The Enforcement Process.** The prohibited agreement regulation will specify the three phased enforcement policy and be complemented by an educational program to sharpen the eyes of those who might bring them to the Commission’s attention.

5.18 *Detection* is the hard part as anti-competitive agreements are always heavily guarded as secrets due to penalties under the law. The Commission detection function, will seek out prohibited agreements by stimulating and analyzing (i) complaints from customers who note, for example, that prices charged by all suppliers are the same, change at the same time, or follow a leader, (ii) complaints from procurement officers, for example of bid-rigging or collusive tendering, (iii) complaints from competitors squeezed out by the operation of a cartel, and (iv) “whistle-blowing” by disaffected member or members seeking leniency or amnesty.

5.19 The Commission will enhance its detection capacity by developing the following programs:

- A *transitional amnesty* announced at the outset of the Commission’s operations, or later on when it has already shown its teeth, will provide the Commission with notice of offending agreements in force at the outset of its duties, at a time when its investigatory capabilities were in their infancy. It will allow existing commercial arrangements to be unwound in an orderly way, and have the strategic advantage of giving notice that un-notified cartel agreements would be considered as been deliberately concealed.
- A *leniency program* will provide for permanent amnesty for first mover “whistle-blowers” reporting an anti-competitive agreement to the Commission to encourage companies to bring information to the Commission.²³ Both programs will be valuable to the Commission in its early days, when it is still building up its skill and experience in detection and investigation.

¹⁹It is to be noted that the UK Competition Act of 1998 prohibits horizontal agreements only when they bring about an appreciable restriction of competition and have made clear that they do not consider an agreement to have an appreciable effect on competition if the undertakings’ combined share of the relevant market does not exceed 25%.

²⁰ Resale Price Maintenance (RPM), which has both horizontal and vertical elements, is banned in most competition jurisdictions. Under the RPM, the manufacturer sets the price at which all retailers must sell his product, and refuses to supply any retailer who does not agree to maintain the fixed retail price. The aim is to prevent price competition between retailers, usually at the bidding of powerful retailers, who tell manufacturers they must impose RPM

²¹ As long as they relate exclusively to the bilateral licensing of a piece of Intellectual Property between (say) a single licensor and a single licensee The acid test by the Anti-Trust Division of the US Department of Justice is whether a patent licensing agreement, or other equivalent IP agreement, would suppress competition that would have taken place if no license had been granted as applied to patent-licensing agreements. Examples of anti-competitive agreements concerning Intellectual Property Rights include a patent ring whereby members undertake essentially that they will license their technology to one another; and that they will not license it to anyone else or a bilateral patent licensing agreement that contains anti-competitive extraneous terms, such as a term that precludes the licensee from competing with the licensor within a given territory, whether or not the licensed technology is used.

²²Unless the rules of the association go beyond standards of professional competence and are anti-competitive; for example they set scales of minimum charges, or set a cap on the number of people allowed to enter the profession

²³ The US amnesty program led to a marked increase in the number of cartels unveiled by the authorities and a similar program has been introduced by the EU and the UK. Indeed, the US Department of Justice considers the corporate leniency program as the single greatest tool of Anti Trust enforcers, stating that “The program has been responsible for cracking more international cartels than all our search warrants, secret audio & video tapes and FBI interrogations combined.”

- *Consumer guidance* for purchasers and other informants will assist in the detection function, by sharpening market participants' eyes to identify signs that they may be the victims of anti-competitive agreements and to encourage them to bring evidence. The Commission will arrange periodic workshops or seminars to keep informants informed, educated and vigilant.

5.20 Having concluded that there is prima facie evidence of a cartel, the detection function will recommend a full investigation to the Commission. The *investigation function* will (i) seek information in writing from suspected cartel members (ii) encourage principals to provide information under the amnesty or Leniency programs (iii) resort as necessary to the Commission's formal powers to summon and examine witnesses under oath, and to call for and examine documents; and (iv) if necessary enter premises, demand information and records and seize documents.

5.21 Following investigation, the *determination function* will be initiated whereby the commission will carry out formal hearings and will provide for appropriate remedies & penalties, including Orders to abandon the cartel, and arrangements for monitoring them.

5.22 **Summary – Required Regulations** In addition to specifying the three stage enforcement policy described above, prohibited agreement regulations will include coverage issues, clarifying that (i) horizontal agreements are per se violations, (ii) only significant agreements will be pursued and that (iii) Resale-Price Maintenance is deemed to be prohibited as a horizontal restriction. The regulation will also describe the specific terms for amnesty and leniency programs.

(2) ABUSE OF DOMINANT POSITION

5.23 Dominant positions can abuse their position through a number of methods including (i) limiting production to raise prices, (ii) refusing to deal, or dealing only on discriminatory terms, (iii) tied sales, (iii) predatory pricing and (iv) boycotting. These abuses fall into two types, often found together in practice: (i) exclusionary - entrenching their positions through creating barriers to entry, which exclude, eliminate or damage competitors and (ii) exploitative abuses, primarily, by raising prices above what would be a reasonably competitive level.

5.24 **The Enforcement Process.** The Commission will detect, investigate, and as necessary take action against both forms of monopoly abuse. It will determine first, whether the company concerned is in a dominant position, or a position to exercise monopoly power and second whether its conduct is such as to abuse that power. Both stages rely heavily on economic analysis, because it is the economic effects that are at issue and will involve inputs from the Commission's economic research team as well as the specialists in the control of monopoly power.

5.25 At the *detection stage*, the Commission's investigation team and economists analyze statistical indicators and evaluate complaints and apply the economic criteria to prove a dominant position exists and whether there are preliminary indications of possible abuse.

- *Identifying Dominant Positions.* A dominant position exists if an undertaking has the ability to behave independently of its competitors and customers, over a sustained period of time.. Whether a company has the ability to behave independently of its competitors is a matter of economic analysis. A market share in excess of 40 percent presumes dominance, but can be rebutted by the undertaking. Conversely, dominance may exist with less than 40 percent, but the burden of proof in this case rests with the Commission.

- *Identifying Abuse.* After being satisfied that a company possesses a dominant position, it will consider whether market power is being abused. While exploitative abuses bring persistently excessive profits, so does efficiency. Therefore, it is often necessary to also show evidence of exclusionary conduct - the entrenching of a monopoly position by excluding, eliminating or damaging competitors.²⁴

5.26 If the Commission is advised through preliminary indicators that a dominant position is being abused, an *investigation stage* is launched to assess whether there is sufficient proof to carry out formal hearings. During this *determination stage*, formal hearings will hear the evidence and provide the opportunity for the undertaking to provide countervailing evidence, including the possibility that there is no dominant position. Orders, including remedies and appropriate penalties would then be applied. Unlike the case of prohibited agreements which are pre-meditated and deliberate, abuse of dominance should take into consideration the possibility that (i) the undertaking did not know that it was in a dominant position and (ii) that market circumstances had changed or may change in the future which would nullify the undertaking dominant position, such as changes in trade policy, new entrants or merger activity.

5.27 **Summary - Regulations Needed.** In addition to specifying the three stage process, the abuse of dominance regulations will clarify that the Commission will be guided by economic criteria when assessing whether a company has a dominant position and when identifying conduct amounting to abuse.

(3) MERGER CONTROL

5.28 The Commission seeks to promote a dynamic economy and expects the corporate structure to be changing constantly. It is therefore important for the Commission to stress, publicly, that the object of merger control is not to prevent mergers as such, but to prevent the creation of dominant positions able to act independently from market forces.²⁵

5.29 **The Enforcement Process.** For merger control the process for enforcement is provided within the law, and follows a three stage process analogous to that pursued for prohibited agreements and abuse of dominance.

5.30 At the *pre-notification stage*, proposed mergers are notified to the Commission for prima facie analysis. Balancing administrative burden on the commission and industry with appropriate levels of pre-merger scrutiny, the Commission will decide, in regulation, the size threshold, above which, merger pre-notification is mandatory.²⁶ Joint ventures, which have the effect of combining existing enterprises, fall within the law's jurisdiction for merger control and will have to be pre-notified to the Commission in the same way as proposed mergers. Within 30 days, the Commission will undertake preliminary analysis of their foreseeable impact on competition and decide whether to pursue the matter further.

²⁴ Some leading examples are (i) *exclusionary vertical restrictions*, such as exclusive distribution, where a dominant player may refuse to supply distributor any unless the distributor agrees not to stock any competing products, (ii) *loyalty discounts* may be offered by a dominant company to customers in exchange for their undertaking not to purchase from competitors, and (iii) *predatory pricing* – pricing at a loss-making level, with the intention of eliminating a competitor who cannot carry losses.

²⁵ In a typical year, the UK competition authority considers 200-300 mergers by virtue of the turnover threshold. Of these about a 10-12 may be identified as requiring detailed phase 2 scrutiny. Of these, about 4-5 might be prohibited outright, and a further 2-3 allowed only subject to some parts of the combined businesses being divested. In addition, there will also be cases where mergers are abandoned in the face of scrutiny.

²⁶The initial notification threshold will be specified as 500 million rupees combined turnover for the merging companies..

5.31 If the prima facie analysis indicates the possibility of the creation of a dominant position, the merger control function will launch a second-phase *investigation stage* using the adopted economic criteria. The Commission will conduct formal hearings where witnesses are examined under oath and documents are called for and examined. If offsetting advantages are claimed by the merging parties, those claims would be scrutinized based on the evidence. During the investigation, the Commission will stimulate and assess the views of stakeholders, including customers and competitors of the merging companies, and public bodies who purchase from them. The investigation phase will be completed within 90 days.

5.32 The Commission will report the result at the *determination phase* in terms of an expectation that the proposed merger is expected to lessen competition substantially and, if so, determine whether the burden of proof for an efficiency exemption has been discharged. Together with the General Counsel, the merger control function would draw up Orders for the Commission to issue, giving effect to the decisions. Such Orders may authorize a merger subject to conditions, (i) designed to reduce its adverse effects on competition or (ii) strengthen the conditions which may justify efficiency exemptions. An important distinction must be made between “structural” conditions which address directly the structural issues (i.e. divestments) and “behavioral” conditions requiring indefinite monitoring (e.g. that the merged company must keep its prices low or its product lines separate).²⁷

5.33 **Summary - Regulations Needed.** The regulations and consumer guidance needed in the area of merger control are as follows:

- *Pre-notification conditions* specifying the turnover threshold, as well as the fees and prescribed information which should accompany a pre-notification application, along with specification that joint ventures will be treated, not as a prohibited agreement, but rather as merger if they have the effect of combining two or more existing enterprises.
- *Assessment specification* noting that the impact of a merger on market power will be guided by the criteria for economic assessment.
- *Efficiency exemption requirements*, specifying that a merger which creates a dominant position may be allowed if the merging parties convincingly prove that the proposed efficiencies could not have been achieved through alternative means and that a cost-benefits analysis was carried out showing the efficiencies outweigh the adverse effects of reduced competition.
- *Failing firm exemption requirements*, specifying the conditions under which a merger is allowable when one of the undertakings is faced with imminent financial failure.

(4) DECEPTIVE MARKETING PRACTICES

5.34 Deceptive marketing practices are covered include false or misleading information; and intellectual property fraud. Regulation will specify types of marketing practices consider misleading and actions which may be taken in response.

5.35 **The Enforcement Process.** At the *detection stage*, the Commission will receive complaints of deceptive marketing practices from consumers’ organizations, competitors and public bodies. A

²⁷Divestments are much used by the EC Mergers Task Force. Mergers dealt with under the EC Merger Regulation are usually settled by means of requiring divestments sufficient to eliminate any anti-competitive effect. Of all the European mergers that go to a phase II investigation, about 20 percent are cleared unconditionally, about 60 percent are cleared subject to conditions and about 20 percent are prohibited outright

deceptive marketing practice (i) can include spoken as well as written claims, including on the telephone, (ii) must have an economic effect, (iii) would be likely to change the economic decision-making of the audience, and (iv) does not include complaints on grounds of taste or decency.

Following receipt of a complaint, the Commission will launch the *investigation* stage. Based on the matter's urgency, the Commission may issue an Interim Order preventing further publication or advertisement while the investigation proceeds. Factual claims will be vetted for accuracy and significance will be judged in the light of (i) nature and size of the intended audience, including the likelihood that the audience possess specialized knowledge, (ii) the assessment of whether consumers have been or are likely to be actually deceived, and (iii) the probability that competitors have been or are likely to suffer actual loss, as well as the extent or likely extent of such loss. Tests will be applied to determine whether it considers a marketing practice to be deceptive, including (i) whether the marketing practice involves making a false statement of fact, (ii) whether it conceals or omits important facts to render misleading what is claimed, and (iii) whether it promises something that is not performed or whether it creates a false impression.

5.36 Special considerations arise in the case of comparative advertisements – those that identify competitors or their products. Comparative advertisements will be deemed deceptive marketing practices if they (i) fail to compare goods or services on a like-for-like basis, (ii) fail to make objective comparisons, (iii) create confusion in the market regarding the identity of the advertiser and the competitor(s), or (iv) exploit the competitors' trademark, trade name or mark of origin.

5.37 At the *determination stage*, if no adequate evidence to substantiate such claims is provided, the Commission may conclude that the marketing practice is deceptive and an Order issued to prevent further publication. The Order should cover any other deceptive marketing practices likely to convey a similar impression and any other product which may be subject to the same claims. In the event of serial offences, the Commission will consider additional remedies including fines.

5.38 **Summary - Regulations Needed** Regulation will specify what deceptive practices cover, whether the practice is significant and if so, whether it is considered deceptive.

D. Criteria for Economic Assessment

5.39 In much of its enforcement work, the Commission will be called upon to apply economic assessment criteria. The Commission will need, as one of its early policy decisions, to approve its economic criteria and to publish them, so that businesses and their advisers will know the standards to which they will be held.

5.40 Economic analysis is used more in merger control and analysis of dominance and abuse than in prohibited agreements or deceptive practices where the main investigative task is establishing the facts. However, to gauge significance, an economic analysis of the relevant market is necessary. In addition, the Commission will be required to assess the analysis supplies by parties submitting applications of exemptions. In determining whether a dominant position exists and is abusive, the main task is demonstrating effect while in the case of mergers the task is more difficult in predicting effects, particular when merger applications carry with them requests for efficiency exemptions.

5.41 In all cases, analysis will first involve, defining the product and geographic market and assessing the market-share. However such calculation is only the beginning of the analysis process. The market power of a dominant position will be apparent if, in addition to a high market share, (i) entry barriers obstruct potential newcomers from entering the market (ii) import penetration is low

(iii) buyer power is weak and (iv) pricing structures (including for example cross-subsidies) seem exempt from market pressures.²⁸

(1) KEY PRINCIPLES

5.42 **Identifying the Relevant Market.** To identify the relevant product, economic analyzes involves examining close substitutes for the product concerned, while the relevant geographical market takes into account whether the market is less or more than the whole of Pakistan. In the first case, substitutability itself depends upon such things as the characteristics of the products themselves, brand loyalty, and the ease with which a switch could be made.

5.43 Strong market positions for a product may exist in one part of the country but not the whole due to, for example, high transport costs. Conversely, if the product is traded internationally with low domestic trade barriers, high national market shares may not translate to market power. It can depend on product characteristics, such as perishability, transport costs, regulatory arrangements and accessibility to complementary or required inputs. Services, as distinct from goods, are not 'transportable,' so that the relevant market is local, not international, and perhaps not even national

5.44 **Identifying Barriers to Entry.** Potential newcomers may well be dissuaded from entering a market by the start-up costs entailed. Where there are no such barriers, even a company with a high market share may have little real market power. The market power of a merged company will depend on barriers to entry as well as on its market share. Such barriers can be created by the Government (e.g. trade barriers) or by exclusionary practices by dominant firms (e.g. exclusive distribution arrangements or predatory pricing). Where entry is easy for potential competitors, a high market share will not give lasting dominance.²⁹

5.45 **Identifying Countervailing Powers.** Powerful customers can sometimes help to wring competitive terms from companies that would otherwise have market power. Large customers may also underwrite the entry of a new supplier, or replace an existing supplier with their own in-house operation. Sometimes the mere threat can be a potent discipline. Sometimes the market power of a merged company can be countervailed by the buying power of its customers. For example large retail chains can have sufficient countervailing power to prevent a merged company from exploiting its position by exploiting its wide commercial "reach" to arrange new sources of supply.

5.46 The buying side of the market is an important criterion. Where the merging companies will have to deal with a dominant purchaser, their own market power may be constrained by that of their customer. More generally, wherever a purchaser who accounts for a significant proportion of a

²⁸ The UK authorities rely on analysis of "market dynamics" – i.e. an analysis about how competition can be expected to develop after the merger. In certain cases the UK merger control authorities have been prepared allow a merger producing a very high share of the UK market, provided that (i) the product is tradable and the market is fully open to imports from Europe, (ii) there are strong and credible suppliers of the product in other countries, and (iii) the UK customers have enough buying-power to impose their will on the UK market by using the threat of taking their business abroad. German practice is less indulgent towards dynamic arguments due to the uncertainty of the future and relies instead on an analysis of the state of competition as matters stand at the time of the merger.

²⁹ Some forms of entry barrier arise where a new entrant would have to spend heavily in order to establish itself. For example any necessary outlay on research, or advertising, distribution. Other barriers include patents and other intellectual property rights, which may be controlled by the established firms. Legal and regulatory requirements, such as the need to obtain a license, may also create entry barriers - and in such cases Government itself has an important responsibility to consider the effects of its actions on competition. The acid test of an entry barrier is whether a new entrant has to meet a cost that the incumbent firms did not have to meet. In assessing entry barriers, a relevant criterion is the experience of any firms that have entered the relevant market in recent years.

supplier's business can readily switch to another source (possibly foreign) and can thereby effectively deploy buyer power, the market power created by a merger will be constrained to some degree. The assessment will therefore include the size and significance of the merging companies' customers.

5.47 **Market Dynamics.** Also relevant to the analysis are forces which may alter competition through time. For example, a market that is growing fast is generally more likely to accommodate new entry and to see changes in the established ranking of suppliers than one where demand is static.

5.48 **Identifying Dominance.** Evidence of a dominant position may be provided by persistently excessive levels of profit, conspicuous inefficiency and pricing structures involving internal cross-subsidy which would be unsustainable in competitive conditions. For example a horizontal merger will lead to a larger combined market share of the merging companies. In general, the higher the merging companies' market share and the fewer their remaining competitors, the more likely it is that competition would suffer. But other relevant questions are: how big a jump in market share will the merger produce and how many competitors would remain, and what are their own market shares.

5.49 A crucial consideration is always the likely strength of competition between the firms remaining in a market after the merger takes place a merger may result in a large share of the supply of some good or service coming under common control, and yet still not lessen competition. This can happen when there are close substitutes for the product, for instance, or when the product is widely traded internationally, or when there is strong buying power in the hands of the customers.

(2) IDENTIFYING ABUSES OF DOMINANCE

5.50 **Practices Preventing the Entry of Competitors.** The commonest practices used by monopolies to prevent entry are by imposing vertical restrictions on their customers or suppliers distribution chain making it difficult for competitors to get access to distribution, or therefore to enter the market. Vertically integrated dominant firms can deter competition by refusal to supply competitors such restrictions may be entirely acceptable business practice in a competitive market, but are nevertheless unacceptable when used by a dominant firm to prevent new entry and to entrench its dominant position.

5.51 Such refusal can be especially important when it involves refusing access to networks or similar essential facilities. In many markets, access to existing networks or physical facilities is an essential condition for a small company to compete with a big one; in transport industries (bus stations, harbors, airport slots) and in the telecoms industry. In other sectors where access to intangible networks is essential, such as check clearing systems in retail banking. In each case, if a company in a dominant position prevents competition, either by denying new entrants access to an essential network, or by granting access only on discriminatory terms, that will be exclusionary conduct. Some typical examples are

- *Exclusive purchasing.* All distributors are required to agree to deal exclusively with a single supplier. If a monopoly supplier succeeds in this, it can become impossible for any competitor to find outlets.
- *Exclusive supply.* If the dominant firm is at the retail level, all its suppliers can be required to agree not to supply other distributors. In this way entry by new retailers can be prevented, and the retail monopoly entrenched.
- *Restrictive terms.* A dominant supplier will offer "loyalty" rebates and discounts, which retailers earn by promising not to stock the products of any other supplier. Thus the dominant supplier remains dominant.

- *Tie-ins.* A tie-in exists when a supplier of one product or service (e.g. some mechanical appliance) insists that customers buy all their requirements of another product or service (e.g. component parts) from the same source. If the supplier has a dominant position in the appliance, the tie-in may restrict competition for the components.
- *Restrictions on the supply of parts required by competitors.* Similar restrictions exist where a vertically integrated company refuses to supply items needed by a competitor who is not vertically integrated, or agrees to supply them only at prohibitive prices.
- *Long-term supply contracts.* Long-term contracts can have a similar effect, even if they do not contain an exclusivity term, if long-term contracts are the only terms available, and customers are faced with onerous termination provisions.

5.52 **Practices Eliminating Competition - Predatory Pricing.** Predatory pricing involves a company deliberately accepting losses in the short term, with the intention of eliminating competitors, so that the predator may earn larger profits in the long term. Five criteria must be satisfied in identifying predatory behavior without which all being satisfied, a complaint of predatory behavior is unlikely to be justified:

- the alleged predator must possess dominant power;
- the conduct of the alleged predator must be targeted selectively at a particular victim;
- the alleged predation must involve the predator in losses;
- there must be barriers to entry. Without these, other entrants would come forward, and the alleged predator could never make sufficient monopoly profits to recover its losses; and
- there must be evidence of predatory intent, taking into account any relevant evidence the alleged predator's previous behavior.

5.53 **Criteria for Identifying Exploitative Abuses.** The exploitation of dominance to force up prices is clearly one form of possible abuse. However an important criterion of abuse of dominant position is that the conduct must be such that it would not have been engaged in by a competitive firm. As an empirical matter, the clearest criterion of exploitation is often likely to be persistently excessive profits. Temporarily high profits are not necessarily a criterion of exploitation because they can be found in competitive markets too. A more reliable criterion is whether an apparently excess return is sustained over several years. Indirectly, the ability of a firm to exploit a dominant position will depend upon barriers to entry or exclusionary practices. Unless it can keep out competitors, it will be difficult to retain a dominant position, and difficult to exploit it. In practice therefore the Commission will probably not very often focus on exploitative abuse alone. More often it will focus on anticompetitive behavior, or exclusionary abuse, since the successful imposition of a barrier to entry is likely to pave the way towards excessive profits. In other words the main focus will in most cases still be on exclusionary conduct.

(3) APPLYING TO ANTI-COMPETITIVE MERGERS

5.54 The economic question regarding a merger pre-notified is whether it will substantially lessen competition by creating or strengthening a dominant position in the relevant market? Identifying the markets in which the parties to the merger are engaged with particular attention to horizontal mergers Vertical mergers are those that link businesses involved in successive stages of the supply chain. They too can have detrimental effects on competition.

5.55 As a general proposition, a vertical merger may lessen competition if the merged enterprise has any degree of monopoly power at any stage in the production or distribution of the product. But detrimental effects on competition are unlikely in cases where a significant number of competitors will still remain in both the 'upstream' and the 'downstream' markets linked by the merger.

5.56 Analyzing the structure and post-merger state of competition in those markets, with particular attention to extent and impact of public and private barriers to entry described above as well as the size and growth rates of the markets involved. Assessing factors such as the buying power of customers and

(4) EXEMPTIONS

5.57 Exemption can be granted to any agreement or merger for which dominance is anticipated, if it can be proved, (i) to contribute to efficiency of production (ii) that the same benefit could not be obtained without restricting competition; and (iii) that the benefit clearly outweighs the adverse effects of lessening competition. The onus of proof for each one of these rigorous tests is on the parties to the agreement. Therefore the door to an exemption is open but narrow as the exemption of anti-competitive behavior cartel should be a rare act. Competition Policy jurisdictions there has been a clear movement away from the belief that anti-competitive mergers can bring benefits

E. Advocacy

5.58 Competition Advocacy is the pursuit of Competition Policy by means other than law enforcement. Advocacy functions are of central importance to the Commission's work. They will both support and be supported by its enforcement responsibilities. It should administer the Act so as to maximize this mutual support. The Commission's advocacy responsibilities include:

- Conducting studies for promoting competition
- Creating awareness about competition issues and creating a competition culture
- Recommending pro-competitive changes to law and policy
- Conducting competition-related enquiries, including in response to complaints and references from the Government
- Making an annual report on all its activities for the Government to lay before Parliament

(1) PUBLICITY & RELATIONS WITH STAKEHOLDERS

5.59 **Publications Strategy.** The Commission's publications will be a central foundation of its reputation. Commission's publications will focus on (i) a comprehensive guide for business – as potential offenders and victim - on their rights and duties under the law, including advice on corporate compliance program and (ii) a consumers' guide to the law the rights it confers, and how to pursue them. The Commission will supplement these progressively, and will produce teaching packs for use in schools, including training materials for teachers.

5.60 **Consultative Panels of Stakeholders.** The Commission will establish consultative panels, and make active use of these in managing its relations with its various stakeholder interest. The purpose of consultative panels will be to help the Commission to mobilize support, and to provide potentially hostile interests with an outlet for any complaints they may have. Three panels are envisioned: (i) a *consumers' panel* to enliven consumer consciousness of competition as a promoter of consumer welfare; (ii) a *business panel*; which it will use to ensure that its procedures impose minimum

burdens and (ii) an *economists' panel*, which it will use to stimulate academic interest in Competition Policy.

5.61 **Encouragement of Corporate Compliance Programs.** In its relations with the business world, the Commission's should encourage the widespread use of competition law compliance programs to multiply the resources seeking to prevent anti-competitive behavior. In consultation with the business consultative panel, the Chambers and Associations about the terms of such guidance,³⁰ the Commission should publish guidelines (and avoid approving individual programs) for companies intending to establish compliance programs.

(2) MONITORING COMPETITION & PUBLIC POLICY

5.62 The Commission will review the wider state of competition in Pakistan's economy and will communicate in various ways with Government, Parliament, academics, think tanks and commentators to assess the state of competition and identify possible anti-competitive effects of public policy. This "wider angle" review of the general development of competition in the economy will be the Commission's principal means of promoting a pro-competitive culture. Success will depend both on *credible analysis* and *imaginative publicity*.

5.63 This side of its work will be the Commission's main pathway to professional links and alliances with academic researchers in this field. More broadly, this responsibility provides the Commission with a valuable opportunity to occupy a wider stage, to address a wider audience and thus to gain wider publicity and support for its mission. The "wider angle" review should be handled as high profile productions, and used by the Commission to stimulate public debate, and as a general opportunity to focus public interest on the impact of competition.

5.64 **Monitoring the Competitive Impact of Public Policy.** The Commission's "wider angle" review covering public policy will require it to recommend pro-competitive changes to law, policies and procedures at Federal and local levels, affecting competition in Pakistan. To perform this function it is essential that the Commission win a reputation for credibility by showing that its assessments of policy options are well grounded in market research and economic analysis.

5.65 The Commission cannot review all aspects of public policy at once and so will engage in a *rolling review* through specialized studies of one area at a time report formally to the Government in each area. The rolling review will cover, in the course of time, the competitive impact of every area of public policy. The Commission will use public hearings to pursue and publicize its rolling review, ensure that the results of the rolling review are incorporated in the Commission's annual report to Parliament and encourage academic contribution to the review, including published academic studies.

5.66 **Public Hearings.** The power for the Commission to hold open public hearings on any matter affecting the state of competition in Pakistan is expressly provided under the law. Such a power can be highly effective in that it will enable the Commission to involve many conflicting sides to of issues with a view to finding common ground. At the same time public hearings will focus publicity on the Commission's public policy analysis and to generate wide spread support for policy changes to strengthen competition in the economy.

³⁰ It may be asked why a company would need a compliance program. It will often lie within the authority of middle managers to make local market-sharing cartel agreements, or to adopt exclusionary practices. Top management needs to ensure that their staff complies with competition law, since the company's assets are at risk if they do not. A case in point is the UK ready-mixed concrete industry. As the product is extremely perishable each plant serves a small local market. Bid-rigging agreements were within the power of local plant managers. As top management was responsible they began to introduce compliance programs extending down the management chain.

(3) ASSESSING THE STATE OF COMPETITION

5.67 **Annual Report.** In its annual report to Parliament, the Commission will provide (i) its review of the operation of the law and any recommendations for legislative amendments in the light of experience; (ii) its review of the State of Competition in Pakistan’s economy more widely and (iii) specific suggestions on pro-competitive changes to law and policy.

- *Reviewing the Operation of the Act.* The purpose is to provide stakeholders with an assessment of the adequacy of the Act’s powers, both of investigation and of enforcement. Activities likely to be given prominence in the Commission’s annual report concern (i) the number of cartels, anti-competitive mergers and abuses of dominant positions have been brought to light (ii) how they have been dealt with under the law (iii) whether offences continue after being dealt with and (iv) whether the law requires amendment or strengthening.
- *Reviewing the State of Competition in Pakistan.* The Commission will also review the general development of competition in Pakistan’s economy, adopting a “wider angle” beyond individual instances of anti-competitive conduct. The assessment will include (i) the overall development of competition in Pakistan, (ii) changes in concentration ratios in concentrated industries, (iii) the impact of competition from abroad, (iv) the impact of such changes on the country’s economic performance, and (v) the role of public policy in strengthening competitive forces in the domestic market.

5.68 In analyzing the competitive impact of public policy, the Commission might put special emphasis on advising the Government on (i) *trade and tariff barriers*, particularly wherever a dominant position is sheltered, (ii) *divestments and privatizations* to help the Government structure sales such that competition is maximized, (iii) *licensing and other entry requirements*, questioning the rationale for their existence and the process for granting them, and (iv) *public procurement* policies including the competitive tendering procedures and transparency requirements.

CHAPTER 6: ORGANIZATIONAL DESIGN

A. Management Structure & Departmental Profiles

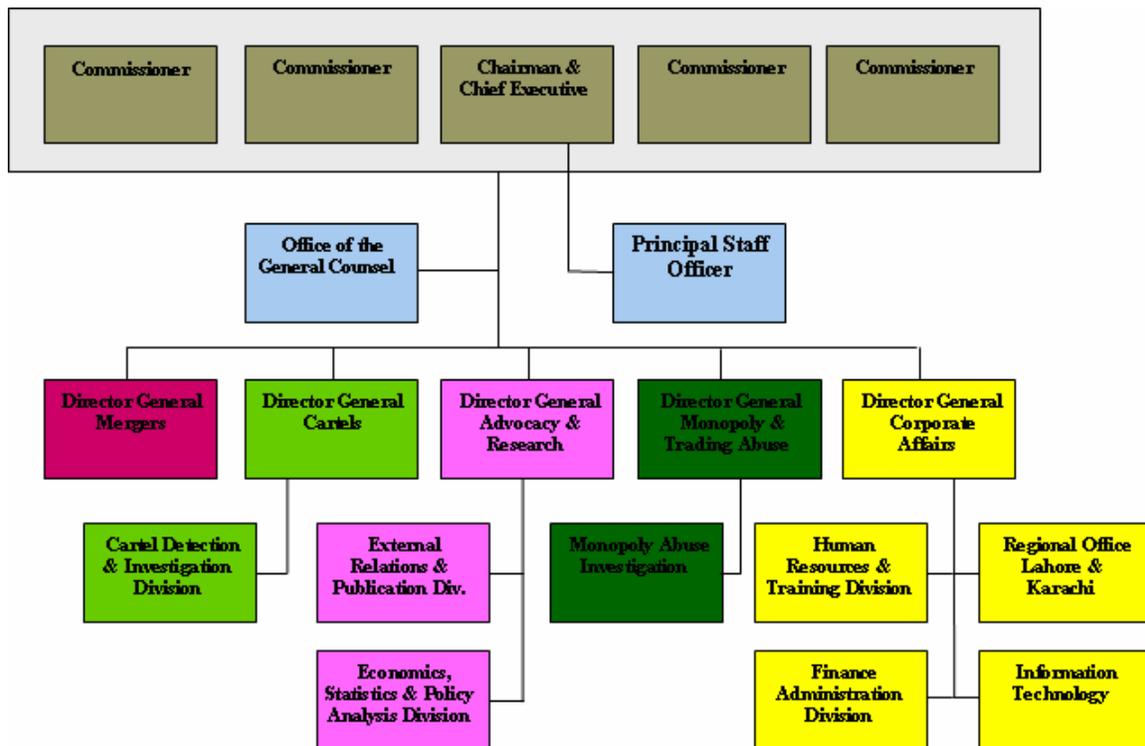
6.1 Management structures, for the start up and operational phase (after 3-5 years of operations) of the Commission is presented. The Commission will start with a modest sized staff complement initially, with emphasis on attracting high quality professionals, establishing clear lines of accountability and empowerment, and developing its technology for speedy decision-making.

(1) INITIAL HIGH LEVEL MANAGEMENT STRUCTURE

6.2 The Members of the Commission operate as a collegial body. Each has a role in “residual” oversight of one Department, carrying no executive powers, apart from the Commission’s Chairman who is delegated responsibility as Chief Executive Officer (Head of the organization) with all Directors General (DGs) reporting in to him. Beneath the Commission, the highest-level management units are five departments: (i) Cartels Department, (ii) Monopoly Abuse Department, (iii) Advocacy and Research Department, (iv) Corporate Affairs Department, and (v) Merger Control Department. Each Department is led by a Director General. In addition, 1 DG is reserved for the position of General Counsel and 1 Director level position for Principal Staff Officer. In some cases department are divided into divisions, led by Directors.

**Pakistan Competition Commission – Initial Management Structure
With Staff number – Commissioner & Professionals only**

Commissioner	5	Director General	6
Director	10	Manager	5
Assistant Manager	5	Officer	6
Total	37		

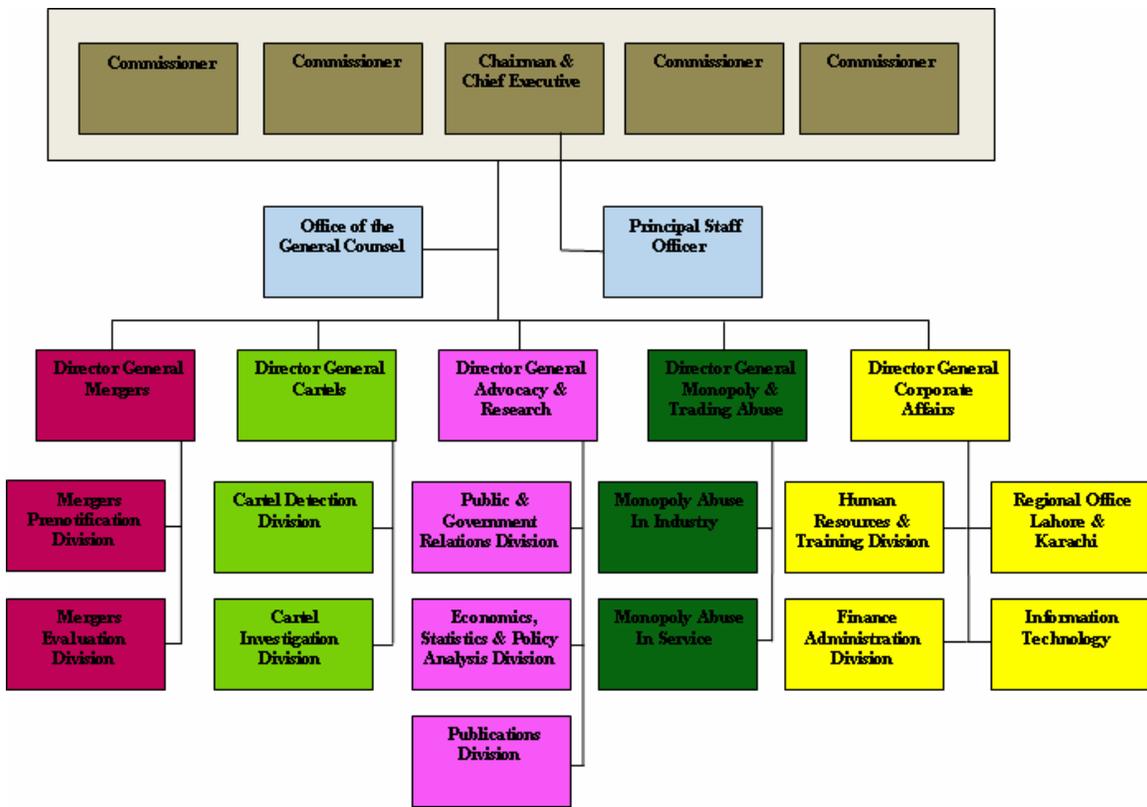


(2) FULLY OPERATIONAL MANAGEMENT STRUCTURE

6.3 An organization staffed on these lines is likely to expand over time. The eventual management structure envisages staff strength of 63 (Commissioners and Professional staff). Given the dynamic nature of organizational planning, this estimate may vary and would require revisiting each year.

**Pakistan Competition Commission – Eventual Management Structure
With Staff number – Commissioner & Professionals only**

Commissioner	5	Director General	6
Director	15	Manager	21
Assistant Manager	10	Officer	6
Total	63		



(3) DEPARTMENT PROFILES

6.4 A general description for each department and some key divisions is provided below. Detailed terms of reference for each department and some key divisions is provided in Appendix 4.

6.5 *The Monopoly Abuse Department* will enforce prohibitions of abuse of dominant and prohibition of deceptive marketing practices by identifying firms in a dominant position and of these, those that arouse suspicion of abuse. While initial cases will focus on dominant positions in industry, eventually, a separate division devoted to services will be formed, in line with the growing sophistication in the Commission’s analytical capacity.

6.6 At initiation, mergers will be a Division of the Monopolies Department. *The Merger Control Department* will be responsible for administering the mergers provisions. Despite mergers and acquisitions being relatively uncommon business practice, eventually, a market for ownership will emerge and it may be important for the merger parties to deal at a very senior level within the Commission.

6.7 *The Prohibited Agreements Department* will be responsible for detecting apparent cartels, and for investigating those brought to notice. Its work will eventually be divided into detection and investigation, due to the different skill sets required for each. Initially a single department will cover both.

6.8 *The Advocacy & Research Department* will be responsible for all the Commission's programmes of analysis, information, publicity, public education and awareness and relations with stakeholders. Its Head will also act as the Chief Economist to the Commission. It will also be the custodian of the Commission's public face, and to a large extent its reputation. Its work will be pro-active and market-oriented. On the basis of studies of the Commission's various markets, it will initiate publications, seminars, conferences and joint events with stakeholders. In its day-to-day work on publications and publicity, it will operate mainly through outsourcing to the private sector, and will be responsible for selecting contractors by competitive tender, and for monitoring their performance.

6.9 The department is divided into two divisions, *External Relations & Publications* and *The Economics, Statistics and Policy Analysis*. The latter, will be a small team which will advise the Commission on the development of Competition Policy generally. Its tasks will not involve the use of executive powers, but it will require a combination of high skills of economic analysis, public presentation and political handling. The Chairman will need to involve himself closely in the advice put to the Commission on this subject.

6.10 *The Corporate Affairs Department* will provide support and administrative functions to the Commission and its staff while the *General Counsel's Office* will provide legal advice to the Commission and its Departments on all aspects of the Commission's work.

B. Staffing & Compensation Structure

(1) STAFFING PLAN FOR INITIAL & EVENTUAL MANAGEMENT STRUCTURE

6.11 The staffing level and competencies perceived for CCP will be very different from those commonly associated with other government agencies and departments. The size of the team has been kept small, particularly at the initial levels while accountability and delivery capabilities of the staff are developed. Job descriptions for the major positions for each of the five departments, at positions of five Director-Generals and ten Directors which provide (i) responsibilities, (ii) job specifications, (iii) reporting relationships, and (iv) performance indicators have been specified in a companion volume.

6.12 At the initial phase, the agency will consist of 37 staff members (not including the support staff) at the Commissioner and Professionals rank, including the Chairman & Chief Executive Officer. Liaison offices in Karachi and Lahore where a small staff comprising mainly support level personnel may be deputed Support or clerical staff represent another 50 members for a total staffing strength of 87. At full staffing by year 3, the staff will consist of a total of 63 professional staff and another 77 support staff for full staffing of 140 personnel. The Commission will expand along the lines which are detailed in staffing plan provided in Appendix 5.

6.13 Included in the above is the unit called Chairman's Secretariat which will house the staff of the General Counsel and the Principal Staff Officer. One of the staff members in the General Counsel quota will be designated as a Registrar at a Director's level and this position with the responsibility for preparing the case documents for each hearing of the Commission.

(2) CORE BACKGROUND OF PROFESSIONAL STAFF

6.14 The Commission will be primarily staffed, at the professional level with background in Industrial Economists, Lawyers and Forensic Accountants, all three professions which require high degree of competencies and found in relatively short supply in Pakistan. It is noteworthy that Economists will be hired in two distinct capacities.

6.15 In the *Economics, Statistics & Policy Analysis Division of the Advocacy Department*, economists will be employed in economic analysis - in other words they will be employed as specialists to engage in their specialty. They will be leading members and rising stars of Pakistan's economics profession, tasked to monitor the general development of competition in Pakistan's economy, and to assess the competitive impact of new and existing public policies. To do so, they will be required to develop new techniques of economic measurement and appraisal.

6.16 Economists will play a different role when employed as competition policy enforcement caseworkers in the Commission's *Monopolies, Mergers and Cartels Departments*. These economists will be part of a mixed team which exhibit a combination of backgrounds covering industrial / micro economics, commercial law and accountancy.

6.17 All team members will be required to develop broad, cross-disciplinary capacities and to some degree to deploy all three kinds of professional knowledge. The requirement of the job is essentially multi-disciplinary. It will therefore be important to recruit the sort of professional who thinks across professional lines and absorbs learning from colleagues.

6.18 In addition, those hired for the *Corporate Affairs Department* may hold degrees or certifications in IT, Human Resource Management and Finance. Another branch of professional skill will be needed by those employed in the publicity and publications work of the *Advocacy Department*.

(3) PROPOSED COMPENSATION AND BENEFITS STRUCTURE

6.19 The following principals apply to the Compensation and Benefits structure if the Commission is to carry out its strongly technical and high profile mission:

- The compensation strategy should be market competitive, to attract to attract and retain the “best and the brightest” from the private sector and from the considerable pool of Pakistani professionals settled overseas.
- The compensation review forming the basis of the salary and benefits structure are based on analysis of pay scales in the private sector and offered by the government under various schemes (such as, MP 1 and MP 2 scales). The pay scales for the new agency have to be significantly over and above the existing pay scales offered by the government and at the higher end of the percentile even when compared with the private sector.

C. Training & Staff Development

6.20 The preparation of an initial training strategy covering technical and general management dimensions is a critical priority for the Commission first set of activities. The broad lines of the capacity building program follows, with details of the principal components and estimated costs, provided in Appendix 6.

(1) VISION FOR TRAINING & CAPACITY BUILDING PROGRAM

6.21 The Commission will maintain a strong capacity building program continuing throughout the first three years of its life followed by comprehensive and intensive training for its staff on a continuous basis. In this way, the Commission will become attract top people as it becomes recognized as an attractive and rewarding place to work.

6.22 The major training programs will be devoted to economics, law and finance skills and knowledge, supplemented by general management development and team-building programs. Some of these programs will be overseas but the Commission's aim will be to build up local expertise in providing the continuing training it requires.

(2) THE CAPACITY BUILDING PROGRAM

6.23 As a start up the following general specifications is specified: (i) a "Twinning Program" and its use in case studies, (ii) inter-disciplinary programs for broadening specialists, (iii) in-house and external local programs on competition enforcement, and (iv) international offerings on competition enforcement. Precise calibration of the Technical Training program will derive from the initial Training Needs Assessment (TNA) carried out at the outset of operations while a draft performance management system (PMS) is designed to provide feedback to the training strategy.

6.24 **Training Needs Assessments.** An essential part of the Training Strategy will be a Training Needs Assessment plan drawn up for each individual. This will be developed through evaluation of the required level of competency for each position, together with annual evaluation of the performance of its holder. The TNA plan will include identification of both technical as well as soft skills training including those covering people skills, strategic planning and human resource management

6.25 **The Twinning Program.** A critical aspect of capacity building will be the introduction of "Twinning Mentors", who will bring with them first-hand experience of competition policy enforcement in other jurisdictions. They will play a significant part in providing in-house training related to current casework, which will be a major component of the Commission's staff development.

6.26 **Inter-disciplinary Training.** Cross-disciplinary skills will be needed by the competition policy enforcement caseworkers in the Commission's Monopolies, Mergers and Cartels Departments. Particular attention is due to their training needs, since the will be recruited with a combination of backgrounds - industrial economics, commercial law and accountancy - and will be required to develop and apply broad, cross-disciplinary capacities across all three kinds of professional knowledge.

6.27 This requirement has to be built into their training. In-house inter-disciplinary courses will be needed, for example to teach "economics for lawyers", with a view to broadening the skills of the competition policy caseworkers. These courses will be designed and delivered in-house. It will be for the Director of HR and Training to design them. The agendas for these cross-disciplinary professional broadening programs will be along the following lines.

- Economics for Non-Economist Competition Policy Caseworkers
- Accounting for Non-Accountant Competition Policy Caseworkers
- Law for Non-Lawyer Competition Policy Caseworkers

6.28 **Training Agenda for Competition Enforcement Work.** The above cross-disciplinary professional broadening programs will be carried out in parallel with intensive training focused more specifically on competition enforcement. The following broad agenda of competition enforcement training

indicates the ground to be covered. This will be accomplished by a combination of external and internal training courses.

- Market Definition, Market Structure and Market Power
- Horizontal Agreements & Barriers to Entry
- Price Discrimination & Predatory Pricing
- Exclusivity & Vertical Restraints
- Dealing with Cartels in Pakistan and other Jurisdictions
- Merger Control in Pakistan and Other Jurisdictions
- Abuse of Dominant Position in Pakistan and other Jurisdictions

6.29 **External Training.** A series of external training and capacity building programs are anticipated. Under the present circumstances knowledge base and skills about most of the key specialties to be covered under the Competition Commission's mandate are sparsely available in Pakistan. With this background it is expected that much of the capacity building programs will be supported by overseas training.

(3) ON THE JOB TRAINING - IMPORTANCE OF CASE-STUDIES & THE CASEWORK HANDBOOK

6.30 The intention of hiring international mentors with first-hand experience of competition enforcement in other jurisdictions is mentioned above. These mentors will have a key role in the Commission's training and staff development. Notably in conducting case-studies, based on real cases the Commission receives, and focusing on special points of difficulty. The aim will be to link the content of training courses to the cases that come forward in real life.

6.31 Case studies will typically take place in daily casework conferences lasting about an hour. Each would focus on a recent difficult case involving prohibited agreements issues, abuse of dominant position, or anti-competitive mergers. The approach will be as follows:

- A caseworker would present a case he or she had handled,
- Its area(s) of difficulty would be identified,
- The mentor would invite views,
- Then give his own views on how it could have been handled,
- Drawing analogies with recent similar cases, and/or
- Analogies with international experience.

6.32 The Commission should maintain a Case Handbook as a permanent guide for its enforcement staff. The handbook should evolve in the light of experience, and daily casework conferences should be used to update it as a record of the enforcement team's accumulating store of case-handling knowledge. A synopsis illustrating the ground to be covered, and from which an initial Case Handbook could be developed, is provided in Appendix 7.

(4) PERFORMANCE MANAGEMENT SYSTEM

6.33 Training and performance management interact. Training is effective when it produces better performance. Unsatisfactory staff performance can be remedied by effective training. Keeping in stride with the intention of the Commission evolving into a high performance professional organization, the

performance appraisal system we recommend has been designed to reflect capability and productivity of individuals; hence it will be a Competency Based Performance Appraisal System (PAS). The system is described in Appendix 8.

6.34 This PAS has been selected and prepared, after reviewing and consulting with some of the similar organizations operating in Pakistan. While most of the public sector organizations are found wanting in terms of performance management system, there are a few, like State Bank of Pakistan, Pakistan International Airlines, and major semi-government banks, that have developed and have successfully implemented a system. Therefore, the draft PAS proposed for the Commission conforms with the Commission’s goals and the demands of the local environment.

6.35 A set of Competencies that reflect the working of the Commission have been specified. Initially the competencies have been broadly defined to give general information of what each competency entails. Subsequently, once the HR unit is established, each competency will be categorized into levels and defined accordingly. As the required competencies identified at this initial phase may change over time as the Commission engages in its operation, a two year review must be conducted to gauge the relevance of each competency to the Commission’s output and productivity.

D. Establishment and Running Costs

6.36 The CCP will be set-up as a statutory corporation³¹ with total expense of setting-up of CCP made up of (i) fixed, non recurring costs mainly expended in creating the institution and (ii) operational or recurring costs mainly expended in operating the asset. Over the first three years these costs are projected as follows:³²

	Total Costs (Rs millions)		
	FY 1	FY 2	FY 3
Start-up / Set-up Costs	99.0	35.9	19.4
Recurrent Costs	277.2	362.2	416.6
Training and Capacity Building	134.8	130.9	104.1
Total	511.0	528.9	540.1

(1) CAPITAL & OTHER START-UP REQUIREMENTS OF THE CCP

The start-up costs are made-up of one-time and/or non recurring capital costs, including vehicles, equipment & library, office constructing & furbishment, training & capacity building and working capital, summarized as follows:

³¹ The following statutory provisions apply: (i) the Commission’s funds shall be accounted through a CCP Fund which will account for all the CCP’s expenditures and receipts, including penalties levied under the act., (ii) income of the Commission shall be exempt from Income Tax, (iii) the creation of the CCP shall lead to dissolution of Monopoly Control Authority with the balance of assets and liabilities transferred to the CCP, and (iv) financial Statements shall be produced annually and subject to audit by Auditor General of Pakistan.

³² The following assumptions are used in development of the financial framework: (i) The conversion rate of US\$ to Pak. Rupee is fixed at Rs 60, (ii) The rate of inflation is 8%, (iii) MCA assets will liquidate outstanding liabilities with the balance used in setting-up CCP except for 7 vehicles and some computers which are expected to be used by the staff, (iv) Head office in Islamabad (20,000 sq.ft.) and branches in Karachi and Lahore (2,000 sq.ft each), and (v) MCA Employees not hired by CCP will be carried until suitably relocated and cost of such carry has been included in the star up cost.

**Start Up Costs
(Rs. Millions)**

	FY 1	FY 2	FY 3
Office Equipment and Intellectual Database.	7.4	2.7	2.8
Furniture & Fixture	17.0	-	-
Renovation	24.0	-	-
Library & Books	10.0	10.0	10.0
Additional Carry Cost of MCA Employees	12.2	5.8	-
Vehicles	28.4	17.4	6.6
Total	99.0	35.9	19.4

- **Office Equipment & Intellectual Database.** This category includes computers and the full range of equipment associated with the working of the office including printers, servers, multimedia, licenses, scanners, telephones, photocopiers, power stabilizers, UPSs and electric generators. Also provision is made for Library development and Intellectual material.³³
- **Office Development & Furnishing.** Office premises will be in a central location, developed and furnished to an efficient and modern design and sufficient for the total projected maximum staff strength of approximately 132 at head office and 4 each in each regional office. The cost of development has been projected at Rs. 1,000 per square foot for office space, totaling Rs. 24 million and Rs. 708 per square foot for furbishment including air-conditioning, carpeting, furniture, etc. totaling Rs. 17 million. The entire cost shall be incurred in the first year only.
- **Additional carry cost of MCA employees made redundant.** Employees of MCA not re-employed in the CCP shall, until suitable relocation shall be on the payroll of the Commission, estimated at just under two thirds of the existing employees.³⁴
- **Vehicles.** Vehicles are proposed to be provided to all staff cadres up to assistant manager. Taking into account the 7 vehicles already with MCA, 26 will additionally be purchased in year 1 with additions as staff increases. Based on the prevailing cost of vehicles, the total cost is estimated at Rs. 28.4 million in year 1 with additional expenditure of Rs. 17.4 million and 6.6 million in years 2 and 3 respectively.

Staffing Strength

Grade	Comp. Positions	FY 1	FY 2	FY 3
1	Chairman	1	1	1
1	Members	4	4	4
1	Director General	6	6	6
2	Director	10	13	15
3	Manager	5	17	21
4	Assistant Manager	5	9	10
5	Officers	6	6	6
6	Personal Assistants	5	5	5
7	Support Staff	45	66	72
Total Staffing Strength		87	127	140

³³ The projected cost is estimated out using quantities based on manpower and usage and prevailing prices with no increases given the reducing price trends. Estimates for intellectual material are derived from the MCA.

³⁴ Of the 92 persons presently employed by MCA, 37 are expected to be absorbed with the balance 55 being rendered surplus. Of these, 67% are expected to be relocated into suitable employment in year 1 and the remainder in year 2.

(2) RECURRENT OPERATING COSTS

6.37 The total operating cost of the Commission by line item is detailed below for a three year period. Three categories account for around 90 percent of the principal line item costs to run the CCP: personnel, rental and legal/professional costs.

Operational Costs			
Rs million			
	FY1	FY2	FY3
Personnel Cost	139.4	210.6	251.6
Repair & Maintenance	4.0	6.7	8.2
Traveling & Conveyance	5.0	5.4	5.8
Utilities	10.9	13.3	14.9
Stationary, Advertisement, etc.	3.9	2.6	2.9
Rental Cost	36.0	38.9	42.0
Legal & Professional	70.0	75.6	81.6
Insurance	3.0	3.6	3.7
Others / Contingencies	5.0	5.4	5.8
Total Operating Expenses	277.2	362.2	416.6

- **Personnel Cost** – The personal costs are based on staffing strength in first year at 87 with almost 50% (45) made up of support staff comprising of clerical, drivers and peons. Of this 79 personnel are at head office and 4 each (1 director and 3 support staff) at the 2 regional offices. Based on projected requirements the Commission is expected to expand to 140 staff by FY 3 as shown above. Personnel costs include all costs of the management and staff both with respect to remuneration as well as other costs borne by the institution such as medical insurance, retirement benefits, and costs relating to severance of the existing MCA staff.³⁵
- **Rental Cost and Utilities.** At an average Rs 125 per sq ft the details of 36 million rental cost for the head office in Islamabad (20,000 sq. ft) and branch offices in Karachi and Lahore (2,000 sq. ft) are shown in Annex along with Rs. 10 million in utilities covering the cost of telephone, gas, water and electricity computed by reference to either number of employees or covered area of the office. All these costs have been projected to increase at 8% per annum.
- **Legal & Professional.** Based on assumptions of initiation or participation in 15 legal cases, (5 major and 10 minor) per year, the estimated costs of legal and professional charges are Rs 70³⁶ increasing at 8% per annum.
- **Other Costs.** The other costs consist of items totaling less than 10 percent of the Commission's running costs including the following³⁷
 - Repair & Maintenance of vehicles and other assets at Rs 4 million
 - Travel costs for work execution and training at Rs 5 million.

³⁵ Salaries have been computed based on the pay scales detailed in Annex X. The cost is projected to increase at 8% per annum from year 2. Medical Insurance has been computed at 10% of the annual gross salary. Retirement benefits are 8.33% of gross monthly salary or 1 month gross salary for each year of service

³⁶ The assumptions are 5 major cases costing Rs. 10 million each and 10 minor cases at Rs. 2 million each.

³⁷ Costs are shown for first year and are assumed to rise by 8 percent p.a.

- Insurance calculated at 4% for the asset cover based on asset cost and other risks.
- Printing, stationary and advertisement estimated at Rs. 4 million.
- Contingencies for general expenses, estimated at Rs. 5 million.

(3) TRAINING AND CAPACITY BUILDING

Capacity building will be a major part of the Commission’s agenda initially as the agency matures with experience. For the first three years, the strategy will center around the following six programs:

- Performance and training needs assessments – in house
- General management training – in house and external
- Inter-disciplinary professional broadening programs – in house
- The “Twinning Program” and its use in case studies – in house
- Local technical programs – in-house and external
- International technical programs – external

6.38 The costs training and capacity building will be around Rs. 135 million in year 1 reducing to Rs. 131 million and the Rs. 104 million in years 2 and 3 respectively, and consist of the following activities:

- **Twinning** with up to five (5) international experts for a period of three (3) years, each costing US\$ 300,000 per annum (US\$200,000 fees and US\$100,000 for boarding, lodging and travel). One consultant will be “twinned” with each of the functional Director Generals and one with the Chairman.
- **In-house Training.** A large part of the cost of the program will consist of the in-house effort, with 10-15 percent of the Commission’s internal staff time devoted to planning and implementing the internal training and capacity building program. These initiatives focus on general management training, inter-disciplinary broadening programs and technical programs centered on competition policy.
- **External training.** The bulk of the capacity building programs will be supported by external training, either overseas and increasingly at Universities and institutes in Pakistan..
- **For the other programs** the cost estimate has been made on the basis of US\$10,000 per day of each international course and US\$3,000 to US\$5,000 per day for courses conducted internally or locally, covering all aspects of the program. Costs average both International and Local programs.

6.39 **Advocacy.** The cost of the Commission’s competition advocacy program merits special mention because, although a recurrent cost, will be designed and carried out with external assistance, representing a significant capacity building effort. These activities will occupy about a quarter of the Commission’s staff, and will account for annual expenditures estimated costs are 69 million, to 77 million to 84 million from 2007 – 2009. The competition advocacy program will have the following elements:

- Publications & Publicity Strategy
- Relations with stakeholders
- Reviewing the Operation of the Act
- Reviewing the State of Competition in Pakistan
- Specific Sector Studies
- Monitoring the Competitive Impact of Public Policy

CHAPTER 7: THREE YEAR ACTION PLAN

A. In Advance of Enactment

7.1 Actions to be taken prior to enactment of the law include the drafting of (i) regulations required to make the Act operational, (ii) guidance literature and (iii) advertisements for senior staff appointments. In addition, portfolios of publications and other guides can be prepared for (i) consumers & consumers' organizations (ii) businesses as potential offenders under the Act (including in particular, on developing and operating corporate compliance programs), (iii) businesses as potential victims of offences under the Act and (iv) handbook for the Commission's own enforcement staff.

B. Actions in Year 1 after Enactment

(1) YEAR 1 QUARTER 1

- **Government Appoints Members of the Commission**
- **Press launch of Competition Commission of Pakistan**
- **Commission Announces 6- month Amnesty for Declared Cartels**
- **Commission Approves:**
 - High-level management structure & overall staff complement
 - Budget for year 1
 - Job Descriptions & Advertisements for Directors General
 - Appointment of Director General of Corporate Affairs
 - Appointment of General Counsel
 - Appointment of Director, Human Resource & Training
 - Appointment of Director of Economics, Statistics & Policy Analysis
 - Regulations for Commission
 - Compensation and Benefits structure to facilitate new hiring

(2) YEAR 1 QUARTER 2

- **Director General of Corporate Affairs:**
 - Identifies new Accommodation
 - Initiates recruitment process for other Directors General
 - Initiates recruitment process for Directors
 - Develops operational Training Strategy
 - Discusses training strategy with donor organizations
 - Develops Commission Personnel policies
 - Develops Financial Policies & Procedures
- **Commission Approves:**
 - Appointments of other Directors General
 - Commission Training strategy
 - Commission Personnel policies

(3) YEAR 1 QUARTER 3

- **Director General of Corporate Affairs**
 - Develops IT strategy and initiates procurement

- Initiates recruitment for remaining staff below Director level
- Drafts Handbook for Enforcement Staff
- Development of Employee Orientation Handbook
- **Director General for Merger Control**
 - Issues Merger Pre-Notification Form
 - Issues business guide to merger procedure
- **Directors General Collectively**
 - Begin preparing development plan for Commission's years 2-3
 - Draft model corporate compliance program
- **Director General Advocacy Prepares for Commission's approval:**
 - advocacy strategy
 - first annual state of the nation competition report
 - publicity strategy
 - definitive guide to the Act for business
 - definitive guide to the Act for consumers
- **Commission**
 - Approves appointments of Directors
 - Launch campaign to promote corporate compliance programs
 - Approve publicity strategy and initial Commission publications
 - Announce first investigation of abuse of dominant position?
- **First training courses held**
 - First Twinning Mentors arrive in post

(4) YEAR 1 QUARTER 4

- **Commission**
 - Hold first Seminar for stakeholders on competition and public policy
 - Launch rolling review of policies with anti-competitive impacts
 - Approve development plan for Commission's years 2-3
 - Announce first investigation of a suspected cartel?
- **Director General of Corporate Affairs**
 - Completes IT procurement
 - Continues recruitment of remaining staff below Director level
 - Promulgates Handbook for Enforcement Staff
 - Introduces Staff Performance Management System
- **Further Training Courses Held**
 - Further Twinning Mentors arrive in post
- **Commission Activates Provisions on Deceptive Marketing Practices:**
 - Arrangements for local sources of complaints & data

- Regulations defining Commission’s enforcement practice

C. Actions in YEARS 2 – 3 After Enactment

7.2 A potential pattern of shows a scenario in which the Commission’s professional staff numbers grow from about 37 at vesting to about 63 by year 3.

7.3 The Commission will develop according to the requirements of its mission, and not according to a predetermined plan. The circumstances in which it can be expected to grow including driving factors include:

- Some of its work is demand-led, and this work load may grow as more mergers are pre-notified. Here the Commission simply has to adapt to developments as they occur,
- Some of its work is will grow as more cases are proactively discovered, e.g. as the Commission’s cartel detection skills are improved, which will lead to more formal cartel investigations being launched,
- There is also the speed with which the Commission’s teams can develop their case-handling capacity. The more sure-footed the Commission becomes, the easier it will be to contemplate expansion,
- The success of the Commission’s advocacy work will encourage complainants to bring cases forward. Part of the Commission’s role is to develop a competition culture. A competition culture will be vigilant for cartels, and educated in identifying the signs of them,
- The success of the Commission’s compliance work in deterring anti-competitive conduct in the bud. A competition culture in the business world will also be compliance-conscious. This could tend to reduce the Commission’s work.

(1) ACTIONS IN YEAR 2

- **Commission**
 - holds major media event at first anniversary
 - publishes guidelines to private civil damages suits
 - launches campaign to promote corporate competition law compliance programs
 - announces result of first investigation of abuse of dominant position
 - announces result of first investigation of a cartel
- **Director General for Corporate Affairs develops specialized advanced training courses in**
 - evaluating mergers
 - detecting cartels
 - assessing monopoly abuse
 - dealing with claims for exemption
- **Commission announces first results of rolling review of policies affecting competition**
- **Further Training Courses held**

(2) ACTIONS IN YEAR 3

- **Commissioners to consider, in the light of experience**
 - separate Mergers Department remains justified
 - expanding Mergers Department with Divisions pre-notification and Investigation Division
 - expanding Cartels Department with separate Divisions for Detection & Investigation
 - expanding Monopoly Abuse Department with separate Divisions for Industry & Services

- **Commission launches first review of the Act's effectiveness**
- **Director General for Corporate Affairs**
 - reviews performance management system
- **Directors General**
 - Attendance at international Competition Policy conferences
- **Further Training Courses held.**

Time-Bound Action Plan

Action	Pre-Enactment	Year 1				Y 2	Y 3
		Q 1	Q 2	Q 3	Q 4		
Government presents new law to Parliament Government allocates year 1 Budget for Competition Commission of Pakistan Government requests donor funding for development phase							
Drafting of : <ul style="list-style-type: none"> · regulations required to make the Act operational · guidance literature (see below) · advertisements for senior staff appointments. 							
Preparation of portfolios of publications and other guides for: <ul style="list-style-type: none"> · consumers & consumers' organizations · businesses as potential offenders under the Act · businesses as potential victims of offences under the Act · handbook for the Commission's own enforcement staff. 							
Government Appoints Members of the Commission Press launch of Competition Commission of Pakistan Commission announces 6-month amnesty for declared anti-competitive agreements							
Approval by Commissioners of: <ul style="list-style-type: none"> · High-level management structure & overall staff complement · Job Descriptions & Advertisements for Directors General · Appointment of Director General of Corporate Affairs · Appointment of General Counsel · Allocation of Budget for year 1 · Regulations to issue under section 44 of the Act · Appointment of Director, Human Resource & Training · Compensation and Benefits structure to facilitate new hiring. 							
Director of Corporate Affairs: <ul style="list-style-type: none"> · Identifies new Accommodation · Initiates recruitment process for other Directors General · Initiates recruitment process for Directors · Develops operational Training Strategy · Discusses training strategy with donor organizations · Develops Commission Personnel policies 							

Time-Bound Action Plan

Action	Pre-Enactment	Year 1				Y 2	Y 3
		Q 1	Q 2	Q 3	Q 4		
Approval by Commission of: <ul style="list-style-type: none"> · Appointments of other Directors General · Commission Training strategy · Commission Personnel policies 							
Commission launches rolling review of policies with anti-competitive impacts							
Director General of Corporate Affair: <ul style="list-style-type: none"> · Develops Commission IT strategy and initiates procurement · Initiates recruitment process for remaining staff below Director level · Completes Handbook for Enforcement Staff · Development of Employee Orientation Handbook. 							
Director General for Merger Control <ul style="list-style-type: none"> · Issues Merger Pre-Notification Form · Issues guide to merger procedure for business, emphasizing threshold 							
Directors General Collectively <ul style="list-style-type: none"> · Begin preparing development plan for Commission's years 2-3 · Draft model corporate compliance program 							
Director General Finalizes for Commission's approval: <ul style="list-style-type: none"> · comprehensive advocacy strategy · publicity strategy · definitive guide to the Act for business · definitive guide to the Act for consumers 							
Commissioners : <ul style="list-style-type: none"> · Approve appointments of Directors · Approve Handbook for Enforcement Staff · Launch campaign to promote corporate compliance programs · Publicity strategy and initial Commission publications · Announce first investigation of a cartel or monopoly abuse? 							
First training courses held: <ul style="list-style-type: none"> · 15 – day course on Competition Policy for Managers & Assts · 5 – day course Management course for Directors & Senior Managers 							

Time-Bound Action Plan

Action	Pre-Enactment	Year 1				Y 2	Y 3
		Q 1	Q 2	Q 3	Q 4		
<ul style="list-style-type: none"> · 4- day course on Ethical Leadership for Directors General · 2- day course on Customer Services for Managers and below 							
<ul style="list-style-type: none"> · First Twinning Mentors arrive in post 							
Commissioners: <ul style="list-style-type: none"> · Hold first Seminar for stakeholders on competition and public policy · Report on rolling review of policies with anti-competitive impacts · Approve development plan for Commission's years 2-3 							
Director General of Corporate Affair : <ul style="list-style-type: none"> · Completes IT procurement · Promulgates Handbook for Enforcement Staff · Introduces Staff Performance Management System 							
Further training courses held <ul style="list-style-type: none"> · Further Twinning Mentors arrive in post · 5 – day course Senior Management course for Directors & Managers · 5- day course on Applied Econometrics for Managers & Assts · 5- day Seminar on competition policy & Law for Directors and Managers · 3-day course on People Management for Managers 							
Commissioners consider activating the Act's provisions on Deceptive Marketing Practices: <ul style="list-style-type: none"> · arrangements for local sources of complaints & data; · regulations defining Commission's enforcement practice 							
Commission launches first Annual State of Competition review							
Commission: <ul style="list-style-type: none"> · holds major media event at first anniversary · publishes guidelines to private civil damages suits · launches campaign to promote corporate competition law compliance programs · announces first enforcement decisions? 							
Director General for Advocacy <ul style="list-style-type: none"> · Develops strategy for international links with other competition authorities 							

Time-Bound Action Plan

Action	Pre-Enactment	Year 1				Y 2	Y 3
		Q 1	Q 2	Q 3	Q 4		
Director General for Corporate Affairs develops specialized advanced training courses in: <ul style="list-style-type: none"> · evaluating mergers · detecting cartels 							
<ul style="list-style-type: none"> · assessing monopoly abuse · dealing with claims for exemption 							
Commission announces first results of rolling review of policies with anti-competitive impacts							
Further Training Courses held in: <ul style="list-style-type: none"> · Refresher-Competition Policy Course for Managers and Assistant Managers level from Enforcement Divisions · 2- day course on Customer Services for Managers, Assistant Managers and Below · 3-day course in Empowerment & Delegation Skills for Directors, Managers and Assistant Managers 							
Commission launches second State of Competition review							
Commissioners to consider, in the light of experience: <ul style="list-style-type: none"> · whether a separate Mergers Department remains justified · whether to expand Mergers Department with separate Divisions for pre-notification and Investigation · whether to expand Cartels Department with separate Divisions for Detection & Investigation · whether to expand Monopoly Abuse Department with separate Divisions for Industry & Services 							
Commission launches first review of the Act's effectiveness							
Director General for Corporate Affairs <ul style="list-style-type: none"> · reviews performance management system 							
Directors General Attendance at international Competition Policy conferences.							
Further Training Courses held in: <ul style="list-style-type: none"> · 3-day Cartel Workshop for Directors and Managers · 2-day Workshop for Trade Practice Investigation for Directors and Below · 2-day course in Inspirational Leadership for Directors and Managers with professional backgrounds 							

Time-Bound Action Plan

Action	Pre-Enactment	Year 1				Y 2	Y 3
		Q 1	Q 2	Q 3	Q 4		
· 3-day workshop on Training as People Managers for Managers with professional backgrounds.							
Commission launches third State of Competition Review							

APPENDIX 1

TYPES OF PROHIBITED BEHAVIOR

I. Vertical Restraints

- ***Exclusive dealing*** – a supplier of a product sells only on the condition that the buyer will not purchase competing products.
- ***Refusal to deal*** – a supplier refuses to sell to parties wishing to buy; similar to exclusive dealing, distinguished only by potential different treatment under the law.
- ***Resale price maintenance*** – a supplier supplies distributors only on the condition that the distributor sells at a price dictated by the supplier.
- ***Territorial restraint*** – a supplier sells to distributors only on the condition that the distributor not market the product outside a specified territory; supportive of price discrimination. A notable form of this restraint is prevention of parallel importation, for which a supplier prevents national distributors from shipping into another nation.
- ***Price discrimination*** – a supplier charges different parties different price under similar circumstances.
- ***Premium offers*** – a supplier offers discounts for a product with conditions that are irrelevant or unnecessary to the exchange of the product; typically these conditions involve the purchase of other products of the supplier.
- ***Tying*** – a supplier enters into contracts for a product with conditions that are irrelevant or unnecessary to the exchange of the product; typically these conditions involve the purchase of other products of the supplier.
- ***Full line forcing*** – a form of tying, a supplier requires distributors to carry all of the supplier's products.
- ***Abuse of negotiating position*** – a supplier imposes unfair or abusive conditions in contracts to the detriment of buyers.

II. Horizontal Restraints

- ***Price Fixing***: competing suppliers, rather than setting prices independently, enter into a cooperative agreement regarding prices
- ***Conscious parallelism***: competing suppliers, without an explicit agreement, generally set the same prices, allegedly for the purpose of weakening competition amongst themselves.
- ***Restraint of outputs***: competing suppliers enter into a cooperative agreement regarding output and product quality.

- **Market division:** a form of restraint of output, competing suppliers allocate customers amongst themselves, so that each customer is served by a single supplier and cannot benefit from competition by other suppliers.
- **Exclusionary practices:** competing suppliers employ practices that inhibit or preclude the ability of other actual or potential supplier to compete in the market for a product.
- **Exchange of information:** competing suppliers exchange commercially sensitive information regarding price, output, quality, or any other aspect of selling and marketing a product.
- **Predation:** one or more suppliers set prices intended to undermine the profitability and thereby induce the exit of one or more other competing suppliers.
- **Restraints on entry:** one or more suppliers take actions motivated to make entry by potential competitors more difficult.
- **Bid Rigging** is the way that conspiring competitors effectively raise prices where purchasers, often governments, acquire goods or services by soliciting competing bids. Bid-rigging conspiracies usually fall into one or more of the following categories:
 - **Bid Suppression:** Where, one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.
 - **Complementary Bidding:** also known as “cover” or “courtesy” bidding occurs when some competitors agree to submit bids that either is too high to be accepted or contain special terms that will not be acceptable to the buyer.
 - **Bid Rotation:** Is a scheme where all conspirators submit bids but take turns being the low bidder. The terms of the rotation may vary; for example, competitors may take turns on contracts according to the size of the contract, allocating equal amounts to each conspirator or allocating volumes that correspond to the size of each conspirator company.
 - **Subcontracting:** Subcontracting arrangements are often part of a bid-rigging scheme. Competitors who agree not to bid or to submit a losing bid frequently receive subcontracts or supply contracts in exchange from the successful low bidder. In some schemes, a low bidder will agree to withdraw its bid in favor of the next low bidder in exchange for a lucrative subcontract that divides the illegally obtained higher price between them.

APPENDIX 2

LIST OF REGULATIONS REQUIRED

I. General Regulations

1. Regulations on the *Commission's Enforcement Policy*
 - The **three - stage processes** applying to all the Commission's enforcement work.
 - The **rights of the investigated** to be heard and the related arrangements for public hearings.
 - Identification of **responsibility for various types of cases**, including the relationship during the investigation between the staff and the supervising Commissioner.
 - The Commission's policy on publicity of **formal findings**.
 - The Commission's approach to **penalties** covering Orders to ensure the offence is discontinued; periodic information returns for monitoring and fines related to the severity of the offence, to the previous record of the offender, and to the degree of intention involved.
2. Regulations on **jurisdictional boundaries**
3. Regulations on the mechanics of the **internal appeals**
4. Regulations on **information exchange** with international competition authorities
5. Regulations on the Commission's practice in **co-operating with private litigants** injured by infractions
6. Regulations on the **sources of funding** for the Commission's operations

II. Additional Regulations Needed for Prohibited Agreements

7. Regulations are needed to provide for **coverage issues**, clarifying that (i) horizontal agreements are per se violations, (ii) only significant agreements will be pursued and that (iii) Resale-Price Maintenance is deemed to be prohibited as a horizontal restriction

III. Additional Regulations Needed for Abuse of Dominant Position

8. Regulations are needed laying down that the Commission will be guided by the **criteria for economic assessment**, when assessing whether a company has a dominant position and when identifying conduct amounting to abuse.

IV. Regulations Needed on Anti-competitive Mergers

9. The regulations are needed to cover:
 - **Pre-notification conditions** specifying the turnover threshold, as well as the fees and prescribed information which should accompany a pre-notification application, along with specification

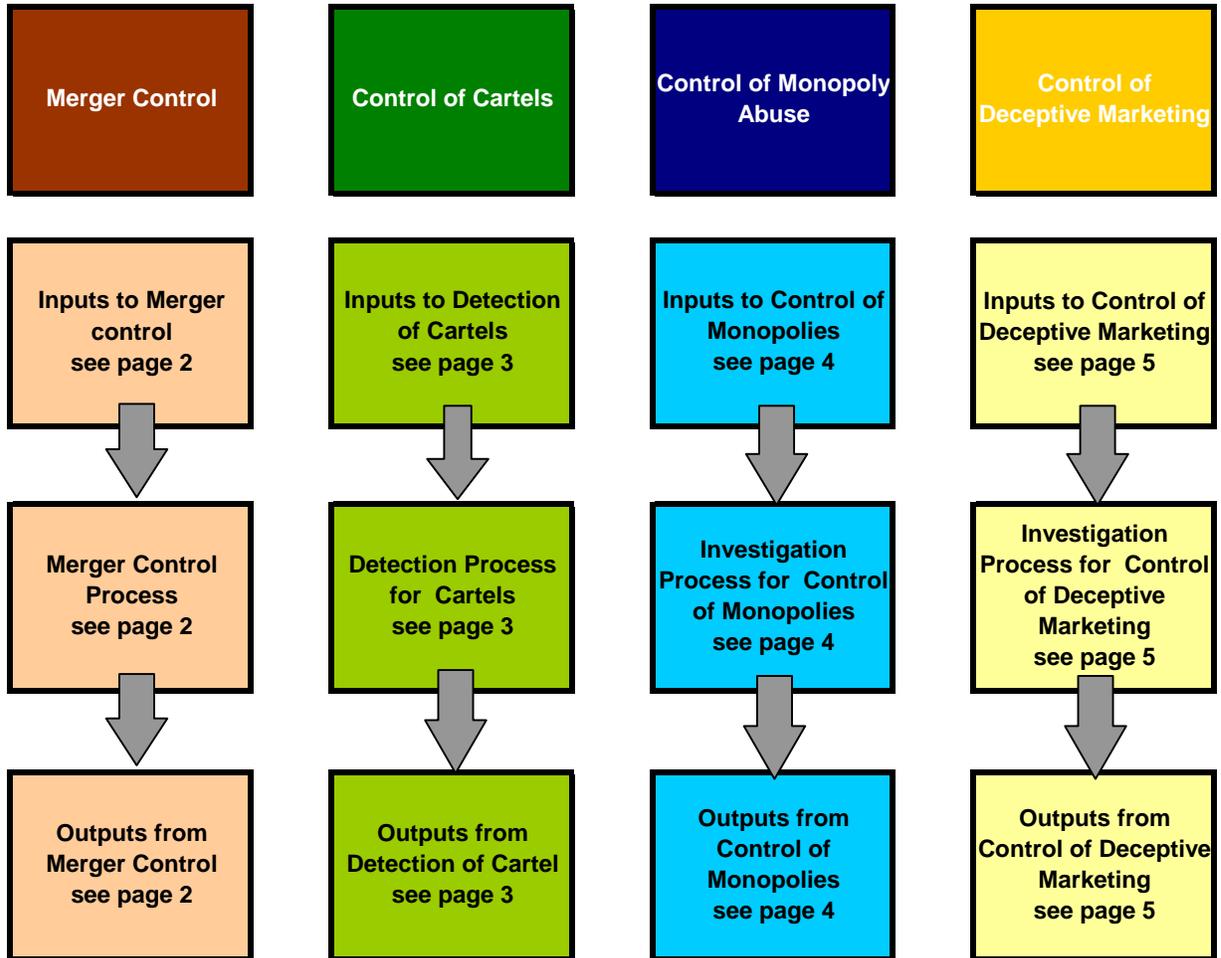
that joint ventures will be treated, not as a prohibited agreement, but rather as merger if they have the effect of combining two or more existing enterprises.

- ***Assessment specification*** noting that the impact of a merger on market power will be guided by the criteria for economic assessment,
- ***Efficiency exemption requirements***, specifying that a merger which creates a dominant position may be allowed if the merging parties convincingly prove that the proposed efficiencies could not have been achieved through alternative means and that a cost-benefits analysis was carried out showing the efficiencies outweigh the adverse effects of reduced competition.
- ***Failing firm exemption requirements***, specifying the conditions under which a merger is allowable when of the undertakings is faced with imminent financial failure.

V. Regulations for Economic Analysis

9. Regulations are needed specifying the ***type of economic and market analysis*** which will be carried out in the case to (i) define relevant market, (ii) dominant positions (iii) abuse there-of and (iv) predictive impact of mergers and acquisitions.

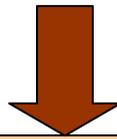
APPENDIX 3 ENFORCEMENT PROCESS FLOW



I. Merger Control

Merger Control Inputs

- prenotification of proposed merger on Commission's standard questionnaire
- discussions with the proposers & their professional advisers
- determine jurisdiction - size of merger - territorial
- advice from General Counsel's office
- objections & comments from stakeholders
- sector data from Commission economists
- use assessment criteria published by Commission



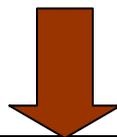
Merger Control Process

First-phase analysis of impact on competition within 30 days

Test against Commission's published criteria

Commission clears merger OR sees sufficient doubts to justify a full investigation: -

- panel of Commissioners appointed - public hearing (s)
- further interrogation of proposers, objectors, economic data & Commission criteria
- Commission clears merger within 90 days OR declares it anti-competitive OR attaches conditions
- parties may seek to prove offsetting public interest advantages
- Commission rejects these unless proved beyond reasonable doubt.



Merger Control Outputs

- Clearance within 90 days OR
- Clearance through expiry of 90 days OR
- Merger declared anti-competitive
- Order prohibiting merger OR
- Order attaching conditions - usually divestment
- Merger Department monitors conditions until they are fulfilled OR
- Clearance if offsetting public interest advantages proved

II. Control of Cartels

Anti-Competitive Agreements - Inputs

- requests for exemptions on efficiency grounds
- complaints from customers, competitors, purchasing managers & others,
- leniency applications from “whistle blowers”
- “whistle blowing” from ex-employees
- responses from member companies of suspected cartels,
- analytical diagnostics provided by Commission economists
- legal advice on use of powers



Anti-Competitive Agreements - Process

- identify prima facie case
- recommend formal investigation to Commissioners
- assist the panel in conducting the review and in holding public hearings,
- as necessary, panel will summon witnesses & enter premises
- recommend appropriate remedies, penalties & monitoring arrangements to the panel.



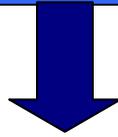
Anti-Competitive Agreements - Outputs

- decision - anti-competitive agreement found/ not found
- order issued to discontinue it
- penalties imposed on member firms, depending on
- continuing monitoring information required to prevent revival

III. Control of Monopoly Abuse

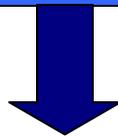
Control Monopoly Abuse - Inputs

- complaints
- concentration ratios & other sector data from Commission economists
- any academic input
- Commission's published criteria of dominance
- objections & comments from stakeholders
- Commission's published criteria of abuse



Control Monopoly Abuse - Process

- identify dominant position against Commission's published criteria
- consult stakeholders & complainants
- form provisional view on abuse
- recommend formal investigation be announced and launched
- analyse and evaluate abuse using published criteria
- hold public hearings



Control of Monopoly Abuse - Outputs

- final decisions:
 - is there a dominant position?
 - is there abuse?
- appropriate orders to discontinue abuse
- appropriate penalties to deter others
- continuing monitoring information required

IV. Control of Deceptive Marketing

Control Deceptive Marketing - Inputs

- complaints from consumers' organisations,
- complaints from competitors
- complaints from other public bodies.
- Commission's published tests of significance
- Commission's published tests of deceptiveness
- Commission's published tests of fair comparison



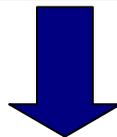
Control of Deceptive Marketing - Process

- First stage review, is the marketing practice significant?
- Second stage review, is the practice deceptive?

- Commission applies its published tests of significance
- Commission applies its published tests of deceptiveness
- Commission applies its published tests of fair comparison

If Commission concludes that the practice is significant : -

- formal investigation is announced,
- nominated Commissioner appointed to oversee the investigation;
- if no adequate evidence Commission may conclude that the marketing practice is deceptive.



Control of Deceptive Marketing - Outputs

- Interim Order preventing publication in urgent cases;
- Order to discontinue advertisement
- Order preventing further publication.
- Order prohibiting any other practices likely to convey a similar impression
- In the event of serial offences, additional remedies including fines.

APPENDIX 4

DEPARTMENTAL TERMS OF REFERENCE

The *Merger Control* Department / Function will: –

- receive applications under for authorization of mergers. The Commission will publish a standard questionnaire for this purpose. The applicants will probably be professionally represented at that stage, and it will be in the interest of the Commission to encourage their being so;
- consult affected stakeholders;
- determine jurisdiction: whether the pre-notified merger comes above the published turnover threshold.
- Analyze its foreseeable impact on competition, in a first phase review lasting not more than 30 days, testing it against the criteria that will have been approved by the Commission.
- recommend to the Commission whether there are sufficient doubts to justify a second phase review;
- if so, assist the Commissioner appointed to oversee the case, in conducting the review and in holding public hearings;
- seek inputs from the Advocacy & Research Department on the state of competition in the relevant market;
- recommend to the Commissioner whether to declare the merger likely to “substantially lessen competition by creating or strengthening a dominant position in the relevant market.” Note: This stage will be reached and publicly announced **before** consideration is given to any claim for exemption;
- advise the Commissioner if conditions (probably divestments) are suggested, that would make the merger acceptable;
- if exemption is claimed for an anti-competitive merger on efficiency grounds [section 7.6], the Division would scrutinize those claims, and examine the evidence for them. It would assist the Commissioner in further hearings and further consultation with stakeholders;
- advise the panel on its final decision,
- together with the General Counsel, draw up orders giving effect to their decisions.

The *Monopolies Department* will

- analyze and evaluate complaints of abuse
- apply the criteria for identifying abuse
- consult stakeholders
- recommend to the Commission when a formal investigation should be launched and announced
- assist the panel of Commissioners appointed to oversee the case, in conducting the review and in holding public hearings;
- recommend to the panel a final decision on whether both a dominant position and abuse of that position have been established. (Reminder: both have to be established);
- recommend appropriate orders penalties and required monitoring information to the panel in order to give confidence that the abuse is discontinued and not resumed.
- Whether if so it is abusing that position, either by excluding competitors from the market or by exploiting its pricing power.
- receive complaints of dominance and its abuse from those affected
- analyze indications of dominance and its abuse received from the Commission’s own economists
- assist the Commission in carrying out examinations, including formal hearings
- use the Commission’s published criteria to assess whether the company concerned is in a dominant position

- where it is proved that a company is in a dominant position, it will consider whether it has abused it, either through exclusionary conduct (keeping competitors out of the market) or through exploitative conduct (mainly excessive pricing)
- the Department will advise the Commission on appropriate remedies or penalties
- remedies will include Orders to abandon abusive conduct, arrangements for monitoring them and possibly penalties.

Where the complaint is of a deceptive marketing practice, the department will: -

- determine at a first stage review, whether the marketing practice is significant, in the light of pre-determined tests recommended in chapter 8 above; and if so
- a formal investigation will be announced, and in urgent cases an Interim Order will be issued preventing publication while the investigation proceeds;
- the Commission will require the person responsible for the marketing practice to provide evidence to show that any factual claims it makes are accurate;
- if no adequate evidence to substantiate such claims is provided, the Commission may conclude that the marketing practice is deceptive; and
- in that event issue an order preventing further use of that or any other deceptive marketing practices likely to convey a similar impression.

The ***Prohibited Agreements Department*** will consist of two functions which eventually will be organizationally divided into divisions headed by a Director:

The ***Detections Division*** will

- receive evidence of prohibited agreements by stimulating and analyzing:-
- complaints from customers of firms suspected to be operating within a cartel (including business purchasers and retailing customers);
- complaints of big rigging from procurement officers in public bodies;
- complaints from competitors squeezed out by the operation of a cartel;
- “whistle-blowing” by a disaffected and ex-employees of a cartel, particularly those seeking leniency
- publish guidance for purchasers and other informants, designed to sharpen their eyes for signs that they may be the victims of a secret cartel, and to encourage them to bring evidence to the Commission
- arrange periodic workshops or seminars to keep informants vigilant.
- Based on prima facie evidence of a cartel, recommend the a formally investigation,

The ***Investigation Division*** will

- seek information in writing from suspected cartel members,
- remind those approached for information about the Commission’s Leniency Policy for the first party to disclose a cartel (see below);
- resort to the Commission’s formal powers to summon and examine witnesses under oath, and to call for and examine documents,
- if necessary enter premises, demand information and records and seize documents,
- assist the Commission in carrying out including formal hearings,
- advise the Commission on remedies & penalties including fines up to 15% of the company’s turnover, Orders to abandon the cartel, and monitoring arrangements

The ***External Relations & Publications Division*** will: –

- Manage the publications program and relations with professional publisher(s);
- Handle relations with the media;
- Conduct public relations, public awareness and education campaigns on the benefits of competition to

- consumers, and on the state of competition in Pakistan,
- Initiate publications, seminars, conferences and joint events with stakeholders;
 - Maintain relations with government and non-government organizations, other government agencies, regulators & consumer groups
 - Manage relations with foreign competition authorities; the International Competition Network, aid donors
 - Manage the Commission's campaign to encourage Corporate Compliance.

The ***Economics and Policy Analysis Division*** will maintain periodic reviews of

- the operation of the Act, and the success of the Commission in detecting and controlling infractions;
- the general state of competition in Pakistan's economy, changes in the competitive landscape & its impact on the country's economic performance;
- possible changes to the Act in the light of administrative experience ;
- wider possible pro-competitive changes to law and policy.
- Maintain research, analysis & statistics in support of all the Commission's functions.
- monitor legislative & policy changes and advise the Commission on their impact on the development of competition in Pakistan
- manage the Commission's public position on public policy issues.

The ***Corporate Affairs Department*** will be responsible for: -

- administering the human resources policy, including recruitment and training
- developing and implementing the Commission's training strategy
- financial management and reporting
- the Commission's registry & records
- the Commission's IT strategy, including management of outsourced services

The ***General Counsel's Office*** will:-

- provide legal advice to the Commission and its Departments on all aspects of the work
- ensure good governance, due process and good practice generally
- act as the registrar of the commission in case of internal appeals
- represent the commission in case of external appeals
- advise and oversee any intended use of the Commission's formal powers
- work with the enforcement departments on Orders and other legal instruments
- provide an internal audit function
- Advise the Commission on the use of outside legal advice when necessary.

APPENDIX 5

I. Initial Operations (FY 1)

#	Position	Com- mission	Mergers	Cartels	Advocacy & Research	Monopoly Abuse & Trading Practices	Corporate Affairs	Total
1	Chairman/ Chief Executive	1	-	-	-	-	-	1
2	Commissioner	-	1	1		1	1	4
3	Director General	1	1	1	1	1	1	6
4	Director	2	1	1	2	1	3	10
5	Manager	-	1	1	1	1	1	5
6	Assistant Manager	1	1	-	1	1	1	5
7	Officer	1	1	1	1	1	1	6
Total		6	6	5	6	6	8	37

STAFFING PLAN

II. Fully Operational (FY 3)

#	Position	Com- mission	Mergers	Cartels	Advocacy & Research	Monopoly Abuse & Trading Practices	Corporate Affairs	Total
1	Chairman/ Chief Executive	1	-	-	-	-	-	1
2	Commissioner	-	1	1	-	1	1	4
3	Director General	1	1	1	1	1	1	6
4	Director	2	2	2	3	2	4	15
5	Manager	-	2	5	5	4	5	21
6	Assistant Manager	1	2	1	2	2	2	10
7	Officer	1	1	1	1	1	1	6
Total		6	9	11	12	11	14	63

APPENDIX 6 TRAINING PROGRAM

I. Basic Training in Economics and Law

- 1. Economics for Non-Economist Competition Policy Caseworkers**
 - How markets work, supply and demand; demand and supply curves, elasticity
 - Markets and welfare, consumer surplus, market failure
 - Objectives of the firm, economic vs. accounting profit
 - Firms and markets, costs of production, short vs. long-run, marginal vs. average costs, economies of scale
 - Perfect competition, welfare effects, consumer and producer surplus
 - Monopoly, welfare effects, consumer and producer surplus
 - Oligopoly, game theory, tacit collusion.

- 2. Accounting for Non-Accountant Competition Policy Caseworkers**
 - Financial statements - Understanding company accounts
 - Management accounts and their financial consequences
 - Understanding accounts over time
 - Trend analysis
 - Financial analysis
 - Investment appraisal
 - Inter-firm comparisons.

- 3. Law for Non-Lawyer Competition Policy Caseworkers**
 - The Courts, higher and lower
 - Other methods of dispute settlement
 - Sources of law
 - Interpretation
 - Position of quasi-judicial public bodies
 - Due process, fairness, natural justice
 - Appeals and grounds for appeal.

II. Training Agenda for Competition Enforcement Work

The above cross-disciplinary professional broadening programs will be carried out in parallel with intensive training focused more specifically on competition enforcement. The following broad agenda of competition enforcement training indicates the ground to be covered. This will be accomplished by a combination of external and internal training courses.

- 1. Market Definition, Market Structure and Market Power**
 - Product and territorial market definition - substitutability
 - Dominance, pricing power
 - Measures of concentration
 - Countervailing buyer power.

2. **Horizontal Agreements & Barriers to Entry**
 - Economic effects of cartels and horizontal agreements
 - Barriers to entry and strategic entry deterrence
 - Contestable markets.
3. **Price Discrimination & Predatory Pricing**
 - Types of Price Discrimination and their economic effects
 - Predatory pricing - tests of predation
 - Relevance of cost, average cost, marginal cost, avoidable cost
 - The competitive price and the cost of capital.
4. **Exclusivity & Vertical Restraints**
 - Exclusive dealing and exclusive distribution
 - Vertical mergers, costs and benefits
 - Resale price maintenance and other vertical restraints.
5. **Dealing with Cartels in Pakistan and other Jurisdictions**
 - The cartel provisions of the Competition Act
 - Detection of cartels in Pakistan and abroad
 - Investigation of cartels in Pakistan and abroad
 - Enforcement and penalties in Pakistan and abroad
 - Evaluating claims of offsetting economic advantages
 - Civil Liability for anti-competitive agreements
 - Managing amnesty programs.
6. **Merger Control in Pakistan and Other Jurisdictions**
 - The merger provisions of the Competition Act
 - Merger control in other jurisdictions
 - Definitions: mergers, substantial lessening of competition
 - Evaluating mergers: assessing the degree of market power
 - Defining the market
 - Identifying barriers to entry
 - Evaluating claims of offsetting economic advantages
 - Authorizing a merger on conditions
7. **Abuse of Dominant Position in Pakistan and other Jurisdictions**
 - The abuse of dominant position in Pakistan's competition law
 - Treatment of dominant positions in other competition policy jurisdictions
 - Defining a monopoly/dominant position
 - Defining the market
 - Assessing the degree of market power
 - Identifying exclusionary conduct
 - Identifying exploitative conduct
 - Enforcement and penalties for abuse of dominant position
 - Civil liability for exclusionary conduct.

III. Technical Training Plan 2007

#	Program Title	Duration	Frequency Per Year	Learning Objective	Participants	In-House /External
1	Twinning Program	1 year	1	Transfer of Skills and Knowledge	Divisional Heads & below	External Mentors
2.	Competition Policy	15 DAYS	2	By the end of this course the participants will be able to understand the competition policies and to analyze various forms of anti-competitive abuse	Managers and below from Monopoly and Cartels division	In house using franchised package
3	Refresher-Competition Policy and Consumer Protection	5 Days	2	By the end of this program participants will be able to refresh the knowledge imparted in the principal course	Managers and Assistant Mangers level from Monopoly and Cartels Divisions	In house
4.	ICN Cartel Workshop	3 Days	1	This workshop will enable Mangers from Cartels Division to network with other International Commission	Directors and Managers	Internal Commission Network
5	Annual ICN Conferences		1	This workshop will enable members of CCP to network and learn more about international competition Commissions	Directors General and Directors	Internal Commission Network
6	Training Workshop for Trade Practice Investigation	2 Days	1	This workshop will enable participants to understand the international perspective of Trade Practices	Directors and Managers	CUTS International
7	Training Seminar on Competition Policy and Law	5 Days	1	This workshop will enable participants to gather best practices on Competition Policy and Law	Directs and Managers	CUTS International

IV. General Management Training Plan

#	Program Title	Duration	Frequency	Learning Objective	Participants	In-House /External
1	Management Course for Senior Managers	5 Days	2	By the end of this course the participants will be able to understand and apply concepts of effective human behavior at workplace	Directors and Managers especially professional staff like Economists and Lawyers	Business School or Private Agency
2	Empowerment & Delegation Skills	3 Days	2	By the end of this course participants will be able to understand the importance and effectiveness of empowerment and delegation in the workplace.	Directors, Managers and Assistant Managers	Business School or Private Agency
3	Inspirational Leadership	2 Days	2	Objective of this program is to communicate the importance of inspirational leadership among senior management	Directors and Managers especially professional staff like Economists and Lawyers	Business School or Private Agency
4	Training as People Managers	3 days	4	By the end of this workshop individuals in supervisory roles will develop competencies for better handling of staff	Managers especially professional staff like Economists and lawyers	Business School or Private Agency
5	Report writing skills	4 days	8	By the end of this course individuals Will be able to improve skills in report writing and analysis	Assistant Managers and below	Business School or Private Agency
6	Performance Management	3 Days	6	By the end of the program participants will be able to objectively complete performance appraisals of their subordinates	All management cadre employees	Business School or Private Agency
7	Coaching and Counseling	3 Days	4	By the end of this course participants will be capable of mentoring their staff as well as motivating them	Directors, Managers and Assistant Managers	Business School or Private Agency

V. Training Program Cost

Description	2007	2008	2009	Basis for Cost Estimate
Twinning Program	90,000	90,000	90,000	US\$ 300,000 per year per specialist 5 Specialists

Technical Training Courses				
Professional broadening courses	9,000			6 courses of 5 days each in year 1 @ US\$ 5,000 per day
Main Competition Policy Course	9,000	9,000	4,500	Two courses of 15 days in each of years 1- 2 @ US\$ 5,000 per day. One course in year 3.
Refresher-Competition Policy and Consumer Protection		6,000	6,000	4 courses of 5 days each in years 2-3 @ US\$ 5,000 per day
ICN Cartel Workshop		900		1 course of 3 days in year 2 @ US\$ 5,000 per day
Annual ICN Conferences	600	600	600	1 course of 2 days in year 1 @ US\$ 5,000 per day
Training Workshop for Trade Practice Investigation		1,200		1 course of 2 days in year 2 @ US\$ 10,000 per day
Seminar on Competition Policy and Law	3,000		3,000	1 course of 5 days in years 1 & 3 @ US\$ 10,000 per day

General Management Training Courses				
Management Course for Senior Managers	3,000	3,000		2 courses of 5 days each in year 1 & year 2 @ US\$ 5,000 per day
Empowerment & Delegation Skills	1,800	1,800		2 courses of 3 days each in year 1 & year 2 @ US\$ 5,000 per day
Training as People Managers	3,600	3,600		4 courses of 3 days each in year 1 & year 2 @ US\$ 5,000 per day
Report writing skills	5,800	5,800		8 courses of 4 days each in year 1 & year 2 @ US\$ 3,000 per day
Performance Management	5,400	5,400		6 courses of 3 days each in year 1 & year 2 @ US\$ 5,000 per day
Coaching and Counseling	3,600	3,600		4 courses of 3 days each in year 1 & year 2 @ US\$ 5,000 per day
TOTAL	134,800	130,900	104,100	

APPENDIX 7

OUTLINE OF HANDBOOK ON ENFORCEMENT CASEWORK

THE COMPETITION ACT & REGULATIONS MADE UNDER IT

HOW TO HOLD AN INVESTIGATION

- Roles of Staff & Commissioners
- Natural justice - Timetables
- Powers in Support of Investigations
- The need for Analysis and Judgment
- Jurisdictional Boundaries of Enforcement Activities
- Hearings
- Final Decisions

HOW TO DEAL WITH MONOPOLY ABUSE

- The Dominant Position Provisions of the Act
- Identifying dominance: What to Look For
- Abusive Conduct: Exploitation
- Exclusionary Practices: Eliminating Competition
- Exclusionary Practices: Preventing Entry
- Exclusionary Practices: Deterring or Preventing Competition
- Procedure for Investigating Monopoly Abuse

HOW TO DEAL WITH CARTELS

- The Cartel provisions of the Act - prohibited agreements
- Horizontal and Vertical Agreements - Commission regulations on this
- Cartels You will Find in Practice
- Detecting Cartels: Sources of Information
- Tell-tale Clues to Price-fixing Cartels
- Tell-tale Clues to Market-Sharing Cartels
- Helping Purchasers to Discourage Bid-Rigging
- How to Investigate Suspected Cartels
- How to deal with claims for Exemption - Offsetting Economic Advantages
- Getting the Most from the Amnesties Announced by the Commission
- Procedure for Investigating Cartels

HOW TO DEAL WITH ANTI-COMPETITIVE MERGERS

- The Merger Provisions of the Act
- Evaluating Mergers & Assessing the Impact on Competition
- Market Definition & Market Structure
- Entry Barriers, Buyer Power
- Vertical Mergers
- Offsetting Economic Advantages
- Allowing a Merger on Conditions
- Joint Ventures
- Procedure for Evaluating Mergers

APPENDIX 8

PERFORMANCE APPRAISAL SYSTEM

Introduction

Performance evaluation is an essential element in the overall development of organizational policy and systems. It provides an important tool for supervisors and managers to assess an employee's performance against his goals and organizational standards. It also serves as a decision-making tool for the management to chart an employee's career, promotion, termination, compensation and training needs.

Performance evaluation is important to employees, because it provides the feedback to their various questions in the following manner.

- Re-assurance that they are contributing and doing the right things.
- Awareness of the impact of performance on desired results (e.g., customer satisfaction)
- A measure of the adequacy of performance (quality, quantity, speed, etc.)
- Recognition of the importance and value of their performance.

A Performance Appraisal System has been prepared for the employees of CCP and is prescribed in the pages below consisting of the following:

- Scope of Policy
- Evaluation Guidelines
- Performance Planning Form
- Competency and their definitions

Scope of Policy

This policy shall extend to all employees of CCP. It carries three set of criteria when appraising the performance (1) Objective Setting form (2) Competency Evaluation (3) Training and Development form. All staff members are expected to read and understand this policy.

Staff Competencies

- **Accountability** Holding self and others accountable to standards of performance and making them comply with your wishes for the sake of the organization
- **Advocacy and Negotiation** Securing win-win agreements while successfully representing a special interest in a decision situation.
- **Analytical Ability** Understanding of a situation or problem by cutting the pieces together, seeing the larger picture. It includes identifying patterns or connections between situations that are not obviously related; identifying key or underlying issues in complex situation. Thinking logically and creatively without undue influence from personal biases.
- **Change Management** Ability to respond to and/or initiate change. The management of change competency will focus n management of change within oneself, managing change within

organization and understanding and responding to dynamic local and international business, economic and political environment.

- **Conflict Management** Managing and resolving conflicts, confrontations, and disagreements in a positive and constructive manner to minimize negative personal impact.
- **Decision Making** sound and well informed decisions; perceiving the impact and implications of decisions; committing to action, even in uncertain situations, in order to accomplish organizational goals; causes change.
- **Impact and Influence** Persuading or impressing others to get them to go along with, or to support your agenda.
- **Integrity** Acting in a way that is consistent with what one says is important; that is, one's behavior is consistent with one's values.
- **Knowledge Management** Ability to develop systems and processes to acquire and share intellectual assets. To increase the generation of useful, actionable and meaningful information and seeks to increase both individual and team learning. In addition, to maximize the value of an organization's intellectual base across diverse functions and disparate locations
- **Leadership** Ability to Inspire, motivate and guide others toward goal accomplishment; coaches, mentors, and challenges subordinates; adapts leadership styles to a variety of situations; models high standards of honesty, integrity, trust, openness, and respect for the individual by applying these values to daily behaviors.
- **Relationship Building** and maintaining friendly, reciprocal and warm relationships with networks of people who may be able to assist in work-related issues
- **Strategic Orientation** Looking to the future to identify opportunities. Identifying patterns from past experience and using this understanding to evaluate current and future opportunities.