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**SANCTIONS IN ANTITRUST CASES**

**Contribution by Pakistan**

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## SANCTIONS IN ANTITRUST CASES

-- Pakistan --

### 1. Determination of Basic Fines

1. The Competition Commission of Pakistan (the Commission) is an autonomous quasi-judicial and quasi-regulatory body primarily vested with civil and administrative jurisdiction. Chapter II of the Competition Act 2010 (the 'Act') envisages four major prohibitions: 'abuse of dominant position,' 'prohibited agreements,' 'deceptive marketing practices,' and 'mergers' which substantially lessen competition by creating or strengthening a dominant position in the relevant market. In terms of Section 30 of the Act when the Commission is satisfied that there has been or is likely to be, a contravention of any provision of Chapter II of the Act, the Commission may pass one or more Orders under Section 31 of the Act.

2. For competition law infringements, sanctions are often imposed in the form of financial penalties and administrative orders. Since its inception in 2007, the Commission has imposed financial penalties of over PKR 26 Billion on undertakings engaged in cartel activities, abuse of dominance, and deceptive marketing practices. To achieve the necessary level of deterrence coupled with compliance, fines are relatively higher in cartel cases in contrast to abuse of dominance and deceptive marketing practices. The penalties vary in accordance with the illicit gains obtained by cartel participants and their ability to pay off the fine on a case-by-case basis.

3. For limited purposes, Section 33 of the Competition Act 2010 (the 'Act') empowers the Commission to invoke certain provisions of the Pakistan Penal Code 1860. These include 'punishment for false evidence' in the course of judicial proceedings with imprisonment for a term, which may extend to seven years and fines. To enforce the above provision, the Commission is authorized to file a reference before a court of competent jurisdiction to initiate criminal proceedings against an individual who intentionally offers any insult or causes any interruption to any public servant presiding judicial proceedings conducted by the Commission. An offender may be punished with simple imprisonment with may extend to six months, or with fine which may extend to PRK 1,000, or both.

4. Moreover, the Commission can pass administrative orders against companies/undertakings and individuals. The definition of undertaking provided under Section 2(1)(q) of the Act includes natural persons, corporate entities as well as governmental or regulatory bodies, an association of undertakings, trust or any other entity, which in any way is engaged, directly or indirectly engaged in commercial or economic activity in Pakistan.

5. In the case of 'abuse of dominant position,' the Commission may require the undertaking(s) concerned to take such actions specified in the order as may be necessary to restore competition, not to repeat the prohibition, and not to engage in any other practice with similar effect. In the case of cartel agreements, the Commission can annul the agreement or require the undertaking concerned to amend the agreement or related practice and not to repeat the prohibition or enter into any other agreement or engage in any other practice with similar object or effect. Where an undertaking is found engaged in 'deceptive marketing practices' the Commission may require the undertaking to take such actions as may be necessary to restore the previous market conditions and not to repeat the conduct in question. Also, the Commission

may confiscate, forfeit or order to destroy any goods having hazardous or harmful effects. In merger situations, the Commission may authorize a merger in the first phase or with or without conditions, undo or prohibit an intended merger after the conclusion of second phase review.

6. After providing an opportunity of being heard, if the Commission finds that an undertaking or an association of undertakings has been engaged in any activity prohibited under Chapter II of the Act, or it has failed to comply with the orders of the Commission, or has failed to furnish copy of agreement(s), or any information required by the Commission, or has made any statement that such undertaking knows or has reason to believe is false, or is found by the Commission to be inaccurate, or it knowingly abuses, interferes with, impedes, or obstructs the Commission's proceedings, the Commission may under Section 38 of the Act impose financial penalties at the following rates:

- for contravention of any provision of Chapter II of the Act, an amount not exceeding PKR 75 million or an amount not exceeding 10 percent of annual turnover of the undertaking(s), depending on the nature and extent of infringement;
- for non-compliance with any order, notice or requisition of the Commission, an amount not exceeding PKR one million, depending on the nature and extent of the contravention; or
- in case of knowingly abusing, interfering with, impeding, impealing, or obstructing the process of Commission in any manner the undertaking concerned (whether individual or a company) may be imposed a financial penalty of up to PKR one million.

7. In case non-compliance with the Commission's order(s) is continuing one, the Commission may also direct the undertaking(s) guilty of such violation and impose a financial penalty of a further sum that may extend to PKR one million for every day after until compliance, as directed by the Commission, is made. Moreover, a failure to comply with an order of the Commission constitutes a criminal offense punishable with imprisonment for a term of up to one year or with a fine up to PKR 25 million. The Commission may in addition to, or in lieu of, the penalties prescribed under the Act, initiate proceedings in a court of competent jurisdiction. In all cases, the ultimate objective of the Commission is to achieve the best possible level of deterrence for competition law infringements and consumer welfare.

8. The Act is the primary legislation providing for imposition of financial penalties, administrative direction/orders, and criminal sanctions. Also, the Commission has in place guidelines on 'Imposition of Financial Penalties' (the 'Fining Guidelines'). While determining and imposing fines, the Commission takes into account the enormity of the infringement keeping in view the circumstances of the case, its context, and its dissuasive effect. Other aggravating and mitigating circumstances may be taken into account on a case-by-case basis.

9. While imposing financial penalties, the Commission pursues two-fold objectives: to deter undertakings from anti-competitive practices, and to reflect the seriousness of the infringement. The quantum of financial penalties depends on the nature and duration of anti-competitive conduct in question, mitigating and aggravating aspects, including the deterrent value of the fines imposed. The practices involving hard core cartel activities *such as* fixing prices, restricting output, limiting technological process or investment, sharing markets or customers or territories, bid-rigging/collusive tendering, the Commission's approach is to achieve deterrence and restore market conditions by imposing higher fines than other forms of prohibited activities. Assessment of seriousness of infringement includes the nature of product or services in question, the prevailing conditions of competition, structure of the market, market share of the undertaking(s), entry and exit conditions, and harm occurred to the business interests of competitors and consumers, and distortion of competition in the relevant market as well as other related markets.

10. The aggravating circumstances may include the role of the undertaking as a leader in or as an instigator of an infringement, the role of senior management and directors, retaliatory or other coercive measures taken against other undertakings to ensure continuation or deviation from the prohibited practice. Other circumstances which may be taken into account, include *inter alia* continuation of the infringement once the Commission has commenced an investigation into the suspected anti-competitive practice, repetition of the infringement, refusal to cooperate with the Commission, the context and dissuasive effects of financial penalties irrespective of the geographic bounds i.e. the whole of Pakistan or in any part of it, in which Infringement is committed.

11. On the other hand, the Commission takes into account the mitigating factors while imposing a financial penalty. These factors may include genuineness of uncertainty on the part of the concerned undertaking(s) as to whether the agreement or practice constitutes an infringement of Chapter II prohibitions, whether the undertaking was participating under duress or deterrence from the other undertakings, availability of evidence, and the conduct and extent of role of an undertaking in a prohibited activity. Other mitigating factors could be the steps taken by an undertaking to deviate from the common understanding, existence of robust competition compliance program, and cooperation with the Commission during the investigation and proceedings. In such cases, the Commission has the discretion to limit the amount of penalties to the base fines.

12. Nevertheless, while prosecuting a cartel or abuse of dominance, the Commission is most considerate to achieve the competition law enforcement and policy objectives in terms of deterrence as well as fostering the overall competition in the economy and to restore the conditions of competition in the market in which infringement has occurred.

13. The Competition (General Enforcement) Regulations of 2007, promulgated under the Act expressly provide for the principle of 'proportionally' while imposing financial penalties, passing administrative directions, and making a criminal reference for sanctions before a court of competent jurisdiction. In determining an appropriate remedy, the Commission always takes into account the principle of proportionality in terms of effectiveness of the remedial measures and other associated costs. Insofar, the Commission has not resorted to imposing the maximum fine i.e. PKR 75 million or 10 percent of the annual turnover the undertaking(s) who has been proven guilty of a violation of Chapter II prohibitions.

14. While calculating the fines, the underlying rationale for the imposition of penalties is generally three-fold: (1) to deter the anticompetitive behaviour of undertakings or their association, (2) to create a reference point for future conduct of the undertakings involved in anti-competitive practices, and (3) to achieve competition policy objectives in terms of competition advocacy, effectiveness, and enforcement, and restore the competitive condition, which have been distorted through anti-competitive practices. Besides, impartiality, transparency, and predictability are the key consideration in determining fines and other directions.

## **2. Adjustment of Basic Fines**

15. To achieve effective deterrence and other objectives of competition law, the Commission frequently takes into account mitigating and aggravating factors on a case-by-case basis. While determining financial penalties and associated administrative direction, the formidable factor in consideration is a market power of undertaking(s) who has committed a violation of Chapter II prohibitions, in particular, abuse of dominant position and cartelization.

16. The Commission is adamant of the principle that dominant firm and, in particular, State Owned Entities have greater responsibility. For instance, in the matter of Urea Manufacturers (2013), which involved seven urea fertilizers manufacturing and marketing companies the main question was whether the undertakings individually or collectively held dominant position and whether they have abused their dominant position by charging unreasonable/excessive prices in contravention of Chapter II prohibitions. In this case, the Commission imposed financial penalties on two dominant undertakings amounting to PKR 8.6 billion. The urea manufacturers were receiving a massive subsidy of around PKR 23.75 Billion per annum from the government, whose supposed beneficiary were the farmers. The Commission concluded that whatsoever the reasons might be, the subsidy given by the government to urea manufacturer has not been transferred to the intended beneficiary rather it has skewed the market, hence an aggravating factor. The urea manufacturers were not only charging unreasonable/excessive prices but even have made the product availability scare. In determining the quantum of fines, the Commission took into account all facts on record, including the accounting comparators, in particular, the facts that the subsidies given by the State to two dominant undertakings, which was up to PKR 15 Billion per annum. Given the nature of the product in the context of agro-economy, the Commission concluded that the ongoing increase in prices of the products in question; it is an essential commodity and holds special significance for Pakistan's economy. The increase in prices by urea manufacturers was observed by all means, astronomical, unfair and unreasonable. Therefore, the violation made it a just and fit case for imposition of maximum penalty.

17. On the other hand, in Jute Mill Case (2010), where ten jute mills, all of them members of Pakistan Jute Mills Association (PJMA), were found guilty of cartelization in the supply of gunny bags to various government departments in violation of Section 4 i.e. 'prohibited agreements' of the Act. The Commission gave due consideration to the fact that PJMA and Jute Mills have made full disclosure of the facts and have admitted the violation of the competition law though inadvertently. The ignore of law is no excuse, however keeping in view the honest and cooperative approach adopted by the parties in identifying the impediments in creating a level playing field and assurance of compliance in the future were taken as mitigating factors in the calculating the fine. The Commission reiterated that the legislative intent of the competition law and enforcement is not limited to detection of cartels and deterrence by the imposition of penalties, it also mandates to accomplish corrective behaviour so as to achieve an enabling free, fair and competitive market structure.

18. Cessation of infringement, once the inspection has taken place or a notice to show cause has been issued, would not always be a mitigating circumstance. However, the undertaking's decision or act not to contest the violation identified by the Commission may be considered as a factor to a reduction in the fines.

19. The Commission carries out a comprehensive assessment of the infringement *such as* culpability of undertakings involved in the violation and the fact of recidivism while imposing fines, which might be considered as an aggravating factor in calculating the fine. In the cases of recidivism, the Commission's approach is likely to increase the amount of financial penalties for ill-gotten gains and non-compliance with the Commission's earlier order involving similar anti-competitive practice.

20. In one of its earlier decisions concerning Pakistan Poultry Association (PPA) in 2010, the principle issue was that through its central and zonal executive committees, sub-committees and wings, PPA adopted certain decision with respect to production and sale of various poultry products. The Commission observed that such decisions by their very object are restrictive of competition led by market forces and violation of Section 4 of the Act. In light of the evidence available, the Commission found it a just case for imposition of highest fine i.e. up to PKR 250 million. However, keeping in view the existing marketing dynamics and the role of association in pre-competition law era and the way businesses are conducted in the country, including the flooding in the country, the Commission took a lenient view and imposed a penalty of PKR 10 Million for each count in different markets amounting to a total of PKR 50 Million. While acknowledging the positive role which association can play in the development of their

respective sectors, the Commission reprimanded the association to adopt immediate corrective behaviour and desist from taking any decision, even if merely suggestive in nature, regarding prices, production and sale of poultry products. PPA was also warned that the Commission would not take a lenient approach in future if any anti-competitive behaviour were to be detected. In 2015, PPA again took certain anticompetitive decisions by advertising and recommending the prices of poultry products in contravention of Section 4 of the Act. Keeping in view the 2010 Order, repetition, and nature the infringement in 2015, the Commission doubled the penalty to PKR 100 Million and directed to file a compliance report with the Commission within two months of the issuance of the Order.

21. The Fining Guidelines provide that in considering how much mitigating value may be accorded to the existence of any compliance program adopted by an undertaking, the Commission may consider, the extent of effectiveness of compliance programs and procedures in place, whether such programs have been actually implemented, and whether it has the support of, and are observed by senior management, including whether such programs are evaluated and are reviewed at regular intervals.

22. Depending on the facts of the case and the effectiveness of an undertaking's competition compliance program, the Commission may take a lenient view in case an undertaking is found guilty of an anti-competitive practice. However, the same can go against the undertaking if it has a shame compliance program. Recently, the Commission has issued guidance on the competition law compliance, which is to be adopted on a voluntary basis. Upon satisfaction of the Commission in terms of undertaking's commitment to competition compliance, the appointment of compliance managers, adequate training of the staff and periodic review of its compliance program could be taken as mitigating factors in the determination of financial penalties.

23. There is no specific provision in the Act providing for joint or several liabilities of parent and subsidiary undertaking. In general, while determining the liability of parent arising out of an anticompetitive practice adopted by a subsidiary, the Commission is likely to take into account the legal construct, the ownership interest, and control of parent, extent of control over the decision making of its subsidiary. In case the parent has decisive control over the subsidiary, a parent can also be held liable for the anticompetitive conduct of its subsidiary and hence the way in which fines is calculated for violation of Chapter II prohibition.

24. In addition, the Fining Guidelines specifically provide that the anticompetitive conduct of an undertaking can be attributed to its parent company where the subsidiary does not independently determine its market behaviour but mainly because of economic and legal ties has essentially followed its instructions in such instances, the Commission may assess whether to attribute the infringement committed by the subsidiary to it or to the parent company as well.

25. The Fining Guidelines provide that in determining fines, the Commission is under no obligation to take account of the financial position of an undertaking. Currently, the Commission is in the process of reviewing its Fining Guidelines, which may propose alternates for undertakings that are unable to pay their fine *such as* payments in installments, among others. As noted above, the Commission adheres to the principle of proportionality and may take a lenient view keeping in view the circumstances and the undertaking's ability to pay off the fines.

### **3. Practical issues in determining the amount of fines**

26. The Act provides for an appeal against the Commission's order that levies fines on an undertaking or association of undertakings that have committed a violation of the Act. There are three appellate forums available. First, an undertaking may file an appeal before the Appellate Bench of the Commission within thirty days of passing the final order of the Commission. In such cases, the

Commission shall constitute a separate Bench comprising not less than two Members of the Commission. Second, the undertaking that is charged with competition law violation may prefer an appeal within 60 (sixty) days from the date on which a certified copy of the Commission's order is received by the appellant. Such an appeal against the order of the Commission is to be filed before the Competition Appellate Tribunal (the "CAT"). Admission of an appeal before the CAT does not automatically suspend the order of the Commission until CAT passes an order as such. Third, an appeal against the decision of the CAT may be preferred before the Supreme Court of Pakistan.

27. In most of the cases, the Commission's orders are challenged before the CAT and before the superior Courts of Pakistan. However, none of them has been decided to the final effect to-date. In theory, the judicial scrutiny of the Commission's order may consider upheld, increase or reduce the fines imposed by the Commission.

28. Since its inception in 2007, the Commission has imposed financial penalties amounting to PRK 26.621 billion and has recovered PKR 23.750 million only. The main reason for non-recovery of the fines is that majority of the Commission's orders are pending before the CAT or the Superior Courts of Pakistan.

29. To recover fines, the Commission may pass upon the concerned person or chief executive or director of such undertaking such orders, requiring them to pay the fine within the time specified in the notice. If the fine is not paid within the prescribed time, the Commission may proceed against the undertaking in default in any one or more of the following manner: attachment of immovable property or sale of any movable property, including bank account of the person or undertaking; appointment of a receiver for the management of movable or immovable property of the person or undertaking; recovery of the amount as arrears of land revenue through the District Revenue Officer (DCO); require any of the following, by notice in writing, the person to deduct and [ay the sum specified in the notice on or before such date as may be so specified, namely: (1) from whom any money is due or may become due to the undertaking; (2) who holds, or control the receipts of or disposal of or may subsequently hold, or control the receipt or disposal of, any money belonging to the undertaking or on account of the undertaking; or (3) who is responsible for the payment of any sum to the undertaking. Moreover, the Commission may, by order, direct any bank, receiver, District Revenue Officer or undertaking which is defaulter to pay by way of penalty, such sum as specified in the order, after giving to the bank, receiver, DCO, or undertaking an opportunity of being heard, it determines that such bank, receiver, DCO or undertaking has willfully failed to comply with the order of the Commission.

30. For the above purposes, the Commission is vested with the same powers as a civil court has under the Code of Civil Procedure 1908. Moreover, the Commission may make rules regulating the procedure for recovery of amounts. All fines recovered are to be credited to the Public Account of the Federation.

31. The Commission endeavours to keep a watchful eye on the undertaking's conduct that has been found in breach of Chapter II prohibition. The Commission's research wing and cartel and trade abuse department regularly conduct sectoral enquiries and market studies to assess the effectiveness of undertaking's behaviour once it has passed an order. The majority of the undertakings that have been imposed financial penalties or given administrative directions are found to have a competition compliant behaviour in the market. Given the unique dynamics of Pakistan's economy, and nascence of the competition regime in force, the Commission is of the considered opinion that the current fine levels are adequate to deter undertaking not to indulge in anticompetitive practices.

32. As noted above, the Commission adheres to the principle of proportionality while calculating/measuring the optimal levels of fines. The Commission considers that the current levels of fines are optimal to achieve effective deterrence for undertakings engaged in a collusive practices or abuse of dominant position by undertaking(s).

33. In 2009, the Commission introduced its leniency program, which was last amended in 2013 to provide more transparency, predictability, and deterrence to the leniency applicants. Under the existing Competition (Leniency) Regulation of 2013, the regulation allowed only one applicant who could avail immunity or reduction in the amount of financial penalties up to 100%. Recently, the Commission is in the process of introducing Marker System and Leniency Plus regimes with an objective to engender competition between the leniency applicants as well as create deterrence to unearth hard core cartels.

34. With the inception of new regime, the Commission will be able to grant immunity to a marker applicant who is able to perfect its marker within the stipulated period of time, whereas the other applicants reserving their place in the marker's queue can avail reduction in financial penalties, provided the evidence furnished by them adds significant value to the information, which is already in the possession of Commission. In the later scenario, the Commission can grant up to 75%, 50%, and 25% reduction in financial penalties. Regarding, grant of immunity or reduction in financial penalties, the Commission always takes into the account the principle of proportionally viz., the illicit gains which cartel members have secured through anticompetitive practices.

#### **4. Alternate to Fines**

35. In addition to fines, the Commission in the exercise of its administrative jurisdiction can pass multiple directions to the undertakings found guilty of violations of the Chapter II prohibitions. Administrative orders may include, among other things, to pass direction to refrain from anticompetitive or misleading practices by the undertakings either unilaterally or with consent. While passing administrative orders, the Commission always requires the undertakings to file the compliance reports on a periodic basis.

36. In the matter of M/s Cinepax (2010), the only multiplex cinema in the city was found guilty of tie-in practices and abuse of dominant position. In order to foster the compliance-based approach, the Commission accepted Cinepax offer to hold five free movies shows for orphans and underprivileged in their multiplex screen, in lieu of the infringement and commitment to comply with the competition law in the future.

37. There are no criminal penalties in terms of imprisonment of individuals except those which are provided in the preceding paragraphs. To date, the Commission has not referred any criminal complaint to the court.

38. The Act and the rules and the regulation promulgated thereunder do not provide a legal basis for private damages or class action regime. Neither does the Civil Procedure Code of 1908 provides for the same, except where a court of a competent jurisdiction may order joinder of suits in cases where any right to relief in respect of, or arising out of, the same cause of action or transaction or series of acts or transaction is alleged to exist in the same person.

39. The competition law of Pakistan does not provide for disqualification order for individuals *such as* directors and senior management of an undertaking.

40. The Commission has not imposed financial penalties on individuals thus far. Nevertheless, the definition of 'undertaking' includes natural persons. In an appropriate case, the Commission can always impose fines on individuals. With respect to reimbursement, the Commission in 2009, ordered Pakistan International Airlines (PIA) to return the additional sums which they have charged from Hajj pilgrims, which in terms of fines amounted to PKR 10 Million. The Commission has found such remedial sanctions effective as PIA has not restored to such misleading practices thus far.

41. The Commission does not distinguish between collusive tendering or bid-rigging and other forms of hard core cartel involving output restrictions, price fixing, market allocation, and agreements to limit technological progress in the market in terms of sanctions. The term 'undertaking' as is defined under the Act also includes governmental bodies and other sector regulators. Thus Public Procurement Regulatory Authority of Pakistan is subject to same competition laws, which the Commission would otherwise apply to ensure transparency in the bidding process in the public contracts.

42. The prohibitions under Chapter II of the Act include false, misleading and deceptive marketing practices. Apart from imposing financial penalties as noted above, the Commission is vested with powers to require undertaking(s) to take such actions as may be necessary to restore previous market conditions and not to repeat the prohibition. In the matter of M/s Tara Crop Sciences (Private) Limited 2014, in addition to imposition of financial penalties, the Commission directed the respondent using the name M/s Tara Group (as an umbrella term) to immediately cease solitary use of the distinct term 'Tara' (Star), as in its present form, including in its exclusive franchise network 'Tara Zarai Markaz'. Furthermore, the respondent was directed to ensure that the franchise network is to be renamed so as to make it perfectly clear that its business has no connection with Complainant's brand and products (an infamous manufacture of chemicals and fertilizers, urea, phosphate and allied products) and file a compliance report for the same. The Commission has generally such sanctions to be effective and useful measures to save the interests of competitors as well as consumers.

43. Many of the Commission's orders are pending adjudication before the CAT and superior Courts of Pakistan. The Commission has been able to recover approximately 0.09% of the total fines imposed thus far. While the Commission continues to impose fines in cases of infringement of Chapter II prohibitions to ensure an adequate level of deterrence, in the recent years it has also increased its focus on competition advocacy in order to enhance awareness of the advantage of competition driven by the market forces alongside the consequences of a breach of competition law.

44. Based on its experience, the Commission is of the considered opinion that given the dynamics of the economy, an increased awareness in terms of the benefits of the competitive economy coupled with the transparency and predictability of the consequences of infringement are the best possible *ex-ante* approaches to enhance the effectiveness of the antitrust sanctions. When management is better educated about the benefits of competition compliance and what risks are involved in an infringement, they are expected to make sound decisions concerning their corporate strategies, and better able to decide whether or not to abuse their dominant position or indulge in other prohibited activities.

45. Nonetheless, the competition agencies should be able to distinguish between futile deterrence and effective deterrence. Where an anti-competitive conduct directly results in consumer harm and distortion of market structure, the level of the fines needs to be higher in comparison to harm which is otherwise influencing the market forces and business activities of competitors and undertakings in the vertical chain of competitive relationship. Likewise, the market power of an undertaking must be taken into account. The dominant firms, in particular, state-owned entities have more responsibility than less dominant firm. From an economic viewpoint, such an approach will also enable the competition authorities to better allocate their resources in terms of the cost of monitoring markets, detection of violations, best possible deployment of their human resource and imposition of the financial penalties.