

The Competition Ordinance 2007

Current Status of the Ordinance

The Competition Ordinance 2007 was promulgated on October 2, 2007 by the then-President Gen. Pervez Musharraf by way of Presidential Ordinance LII of 2007. Following the July 2009 Supreme Court decision it was one of the Ordinances that were required to be approved by the Parliament by November 28, 2009 or it would lapse. As a result it was laid before the National Assembly on October 14, 2009 by the Minister for Parliamentary Affairs, Senator Babar Awan and considered by the Standing Committee on Finance, which unanimously approved its content. However, when the Ordinance returned to the National Assembly on November 10, 2009, some members of the Committee complained that they had been unable to attend the meeting. The Ordinance was returned to the Committee for further consideration by the Speaker of the National Assembly. As no further sittings of the National Assembly took place before November 28, 2009, the date upon which the Ordinance would lapse, it was re-promulgated by the President on November 27, 2009 and continues in force for four months. It was subsequently approved by the National Assembly on January 27, 2010. It must now be approved by the Senate and receive Presidential assent before becoming law.

About the Legislative Brief

This Brief is a part of PILDAT's Legislative Development Programme. The objective of the Brief is to assist parliamentarians to understand the context, objective and issues relating to the legislation and to enable them to participate in a more informed debate and take well-considered position on the subject. The Brief is also intended to enhance awareness of the Citizens and Media in general so that they may also participate in the process as informed stakeholders and communicate their views to the public representatives.

Highlights of the Ordinance

The Ordinance comprises 59 sections and establishes a body and mechanism for regulating competition in the market. The key features include the following:

- Establishment of the Competition Commission;
- Definition of "dominant position" in the market;
- Prohibition on abuse of dominant position;
- Prohibition on anti-competitive agreements, rendering such agreements void;
- Prohibition of deceptive market practices;
- Requirement for approval of mergers which lessen competition.

Executive Summary

This Ordinance was a response to concerns that some businesses within Pakistan were dominating markets and operating anti-competitive practices, which were damaging to consumers and Pakistan's national and international trade.

The Ordinance establishes the Competition Commission, whose members are appointed by the federal Government. The Commission's role is to police the market, investigate undertakings, initiate proceedings, conduct inquiries and studies, give advice and advocate in favour of competition.

As part of its inquiries and investigations, the Commission has judicial powers to make orders, enter and search premises, copy and seize evidence and to impose significant penalties for market infringements. Appeals against its orders lie to an appellate bench of the Commission and to the Supreme Court thereafter.

The Competition Ordinance 2007**Analysis of the Bill****The Regulation of the Market**

The first part of the Ordinance deals with definitions and defines dominant position as “the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers.” An undertaking is presumed to be dominant if it holds more than 40% of the market share (section 2(e)).

The Ordinance goes on to prohibit the abuse of a dominant position in the market by practices which prevent, restrict, reduce or distort competition (section 3), including the following:

- Limiting production and sales and unreasonable pricing;
- Discriminatory or predatory pricing;
- Tie-ins;
- Contracts containing supplementary and unconnected obligations;
- Contracts which place a party at a competitive disadvantage;
- Boycotts and refusals to deal.

The Ordinance also prohibits agreements whose objective is to prevent, restrict or reduce competition (section 4) and deceptive market practices (section 10). The Competition Commission may grant exceptions for agreements which, whilst anti-competitive, substantially contribute to improving production and distribution, promote technological or economic processes or whose benefits outweigh the adverse effects (section 9).

The Commission is also empowered to approve or prevent mergers using a pre-merger application and clearance process (section 11). Mergers which substantially lessen competition by strengthening or creating a dominant position are prohibited. Applications for clearance are made to the Commission and phase one must be completed within 30 days of the application. An order must approve the merger or, where there are concerns regarding anti-competitive effect, require a phase two investigation. Phase two must be completed within 90 days of the application and a merger which would substantially lessen competition must be rejected unless:

- It contributes to the efficiency of production or distribution;
- Efficiency can not be achieved by less restrictive means;
- The benefits outweigh the disadvantageous effects; or
- It represents the least anti-competitive option.

The Commission

The second part of the Ordinance establishes the Competition Commission as an independent corporate entity based in Islamabad (section 12). The Commission is made up of between five and seven members known for their integrity and expertise and with at least 10 year's experience in a relevant field, each of whom is appointed by the Federal Government (section 14). A member's tenure ends on being convicted of an offence of moral turpitude, becoming insolvent, unfitness, incapacity or failing to declare a conflict of interest (section 14). The Chairman is appointed by the Federal Government from amongst the members and acts as chief executive (section 16). Members serve on renewable three year terms up to age 65 (section 17) and may be removed by order of the Federal government following an impartial inquiry (section 19).

Meetings of the Commission have a quorum of three and the Chairman has the casting vote (section 23). Members must disclose any conflict of interest in writing and can not sit in matters where a conflict arises unless all parties consent (section 25). Staff of the Commission must also declare interests (section 26).

The Commission's expenses are met by a fund established from the following (section 20):

- Government allocations;
- Charges and fees;
- Donor contributions;
- Investment returns;
- A percentage of fees levied by other regulatory bodies.

The Commission can appoint officers, experts and advisors (section 23), who serve as public servants (section 27).

Powers of the Commission

The functions of the Commission are to (section 28):

- Initiate proceedings;
- Conduct studies to promote competition;
- Conduct inquiries;
- Give advice to undertakings; and
- Advocate in favour of competition.

In relation to contraventions, the Commission may make orders

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in proceedings. These orders may require an undertaking to restore competition or previous market conditions, may annul or require amendment of an agreement, may confiscate, or destroy harmful or hazardous goods and may authorize, investigate, undo or prohibit a merger (section 31).

In proceedings or inquiries the Commission has the powers of a civil court and may summon witnesses, require documents, accept evidence and requisition public records (section 33). The Commission may enter and search premises, may seize or copy material or impound equipment (section 34). The Commission may affect forcible entry to premises where a written order is signed by two of the Commission's members (section 35).

The Commissioners are indemnified in respect of all actions in good faith (Section 46), must keep information confidential (section 49) and may make rules under the Ordinance (section 54).

Penalties and Appeals

The Commission has the power to impose penalties for breaches of the Ordinance, failure to comply with orders, furnishing false information and abuse/obstruction of the process (section 38(1)). For breaches of market regulation the penalty is a maximum fine of Rs. 50 million or an amount of up to 15% of turnover. For non-compliance with an order the penalty is a maximum fine of Rs. 1 million (section 38(2)). For continuing violations the penalty can be increased by Rs. 1 million per day. Leniency may be shown where an undertaking has made full and frank disclosure (section 39).

Appeals in respect of orders of the Commission can be made within 30 days to its appellate bench, made up of at least two members who have not been previously involved (section 41). Further appeal may be made to the Supreme Court within 60 days (section 42).

Responses to the Ordinance

The Ordinance represents a robust mechanism in order to maintain market competition and ensure fairness to the consumer. The mechanism mirrors that found in other countries operating a free market economy. India operates a similar legislative regime in which the Competition regulates the market, supervises and approves mergers and under which

abuse of dominant market position and anti-competitive agreement are prohibited. The UK has in place a similar commission and competition issues in Europe and the UK are the subject of European Community regulation.

Concerns in relation to the Commission and its operation have been raised by industry and cartels affected by its remit. Few concerns relating to the scope or exercise of its powers have been raised more generally.

However, some modifications to the existing text of the Ordinance should be considered to increase transparency and fairness.

The first relates to the appointment of the members and chairman of the Commission, who are currently appointed by the Federal government. Such appointments, to prevent any interference of political influence, should be made following consultation with the Opposition.

The current text provides a single mechanism of appeal against the Commission's orders (both procedural and substantive) to the appellate bench of the Commission and Supreme Court. Consideration should be given to providing that procedural appeals are appealable to a lower level of court such as the High Court, rather than burdening the Supreme Court with appeals in wholly procedural matters.

The entry, search and seizure powers of the Commission are extensive. Consideration should be given to limiting these powers to circumstances in which reasonable suspicion of a contravention is present and/or to circumstances in which judicial approval is given.

Recommendations

1. That the Ordinance be approved to ensure continued protection to the market and consumers.
2. That consideration be given to the appointment of members and/or chairman following consultation with the Opposition.
3. That consideration be given to providing a short form appeal mechanism in relation to procedural orders (to a lower level of court than the Supreme Court).
4. That consideration be given to the requirement for judicial approval of procedural orders involving entry, search, seizure, etc., and that such approval be dependent upon reasonable suspicion.

The Competition Ordinance 2007**About PILDAT:** *www.pildat.org*

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PILDAT conducts research on issues including finance, economy, poverty-reduction, regional/international trade, foreign/regional relations, political-economy, inter-provincial relations/federalism, women/youth in politics, etc. PILDAT prepares legislative Briefs on key legislations in consideration before Parliament.

PILDAT has held over 200 capacity-building and issue-based briefings for Parliament/Provincial Assemblies. PILDAT provides forums for comparative political and parliamentary learning through regional/international conferences and organizing study visits to other Parliaments. These work to promote dialogue between Parliaments, especially with India and Afghanistan, for improving relations crucial to South Asian security and prosperity.

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PILDAT also launched the first-ever Youth Parliament of Pakistan to inculcate culture and values of democracy in youth and to prepare them for future leadership roles.

Acknowledgments & Disclaimer

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