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law in Pakistan

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PAKISTAN

Competition Ordinance 2007 – the dawn of a new era in competition law in Pakistan

BY SAMIYA FIKREE, SANA SHAIKH FIKREE AND FERZEEN BHADHA

Back in 1963, the Government of Pakistan established an anti-cartel study group. The efforts of the said group led to the enactment of the very first antitrust legislation, Monopolies and Restrictive Trade Practices Ordinance 1970 (MRTPO) and the establishment of the Monopoly Control Authority (MCA). The principal objective of MRTPO was to provide measures to eliminate undue concentration of economic power, unreasonable monopoly power and unreasonably restrictive trade practices.

The MCA was empowered to register certain undertakings, individuals and agreements which came within the ambit of the thresholds provided therein; to conduct enquiries into the affairs of undertakings and individuals thought to be violating the provisions of MRTPO; and to provide advice to persons or undertakings relating to the compliance of the provisions of MRTPO. MRTPO specified certain situations and practices which were deemed to constitute undue concentration of economic power, unreasonable monopoly power and unreasonably restrictive trade practices, but allowed for exceptions where the effect was nevertheless beneficial. The MCA was also empowered to notify after public debate additional situations and practices which would be deemed to contravene the provisions of MRTPO.

The provisions of MRTPO were applicable to all undertakings and persons, other than governments or government owned or controlled entities and did not apply to anything done pursuant to an order of a government. Further, since the early 2000s any undertaking which was licensed by a regulatory authority was also exempted from the application of MRTPO. Also, punitive measures were limited to fines which was Rs. 100,000 (approximately US\$1250) plus Rs. 10,000 (approximately US\$125) for every day of default in the case of a continuing default.

Realising the deficiencies of MRTPO and the limitations faced by MCA, on 2 October 2007, the government enacted a new competition

law, the Competition Ordinance 2007 (CO). The CO, as stated in its preamble, has been enacted with a view to ensure free competition in all spheres of commercial and economic activity, to enhance economic efficiency, and to protect consumers from anti-competitive behaviour. The CO further establishes the Competition Commission equipped with powers to promote and protect competition in Pakistan.

In contrast with MRTPO which contained specific exemptions for government owned or controlled entities from its applicability, the CO applies to all undertakings within Pakistan, and to all actions or matters that distort competition within Pakistan. Thus, the CO is very broad in its purview.

The CO has introduced the concept of 'abuse of dominant position'. While dominant position (that is, where an entity has a 40 percent or more share of the market in which it operates) per se is not prohibited, it is the abuse of such position which has been condemned under the CO. In this regard, the CO identifies certain practices which are indicative of being abusive of dominant position. Previously, under MRTPO, it was assumed that an entity was in a situation of unreasonable monopoly power if it had a one-third market share for the services provided or goods supplied by it.

The CO has done away with the concept of undue concentration of economic power which under MRTPO was used to require private companies whose asset value exceeded Rs. 4bn (approximately US\$50m), to convert to public companies and also dealt with dealings between associated companies which unfairly benefited one set of shareholders to the detriment of the other set of shareholders.

The requirement of compulsory registration of certain individuals, agreements and undertakings under the provisions of MRTPO has not been retained in the CO. However, the CO prohibits certain agreements (which contain provisions inter alia for fixing prices, price discrimination, territorial restrictions, exclusivity, tie-ins, anti-competitive provisions) and re-

strictive trade practices which have the object or effect of preventing, restricting or reducing competition within the relevant market, unless such arrangements have, prior to being commenced, been exempted by the Commission upon application by the concerned party.

Further, the Commission has power to grant block exemptions to a defined category/class of agreements on grounds of efficiency or economic merit, which power did not exist under MRTPO. However, the CO does not make any distinction between vertical and horizontal arrangements and the regulations and guidelines so far issued by the Commission do not provide any guidance in this regard.

MRTPO did not define markets and market shares. The CO defines markets geographically and also by product/services. A geographic market comprises the area in which the concerned undertakings are involved in the supply of products/services and in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring geographic areas. A product market comprises all those products/services which are regarded as interchangeable by the consumer by reason of the products' characteristics, prices and intended uses.

MRTPO and rules framed thereunder required a company whose total asset value exceeded the prescribed threshold to furnish to the MCA, annually, certain information regarding its shareholding, ownership and control and its production market share and its dealings with and investments in or by associated companies. The CO does not provide for the annual submission of company information.

MRTPO did not provide for mandatory pre-merger notifications. The CO, however, provides for mandatory pre-merger notification, with provision for phase 1 review and, where required, also phase 2 review.

In order to create awareness regarding competition issues and promote competition in all sectors of the economy, the Commission is empowered to conduct public hearings on matters ►►

affecting the state of competition in Pakistan and to issue non-binding opinions, which is an area that was not provided for under MRTPO.

Under the CO, the Commission is empowered to forcibly enter and search any premises and to seize documents and to grant leniency or a reprieve to any undertaking. The MCA had no such powers.

The CO allows the Commission to penalise not only any breach of the law but also any disregard of its orders, whereas the MCA could only impose penalties for not complying with its orders and for failure to register with the MCA. Penalties under the CO are higher, up to Rs. 50m (approximately US\$625,000) plus Rs. 1m (approximately US\$12,500) per day for a continuing default or 15 percent of turnover, whichever is higher) and therefore are a stronger deterrent to would-be violators.

Orders of the MCA were appealable to the High Court, while under the CO, an order by a single member or an authorised officer can be appealed before an Appellate Bench of the Commission (consisting of at least two members). Appeals from the orders of the Commission (and the appellate bench of the Commission) lie to the Supreme Court of Pakistan.

The CO also prohibits deceptive marketing

practices and further indicates those practises which are considered to be deceptive, such as distribution of false information in relation to the business or products of an undertaking, misleading comparison of goods and fraudulent use of another's trademarks, firm names or product labelling or packaging.

The CO is now more aligned with EU's Competition Law. Also, the Commission is fairly receptive to comments made by the industry on refinements that may be brought in the law to further facilitate the promotion of free competition within Pakistan. While the MCA was not so proactive, recently, having regard to comments received from various industries, the Commission has amended the rules and regulations relating to mergers and acquisitions by exempting certain mergers where a 'holding' company increases its stake in its 'subsidiary' or where a 'holding' company merges with its 'subsidiary', from obtaining pre-merger exemptions from the Commission.

As mentioned above the CO was promulgated on 2 October 2007. In accordance with the Constitution of Pakistan, Ordinances are required to be ratified by both houses of Parliament within four months of promulgation, otherwise they lapse. However, following

the declaration of emergency on 3 November 2007, the Constitution was amended to include a new Article 270AAA which provided that all laws which were in force on 3 November 2009 would remain in full force and effect without further ratification by both houses of Parliament.

However, the Supreme Court of Pakistan in its decision of 31 July 2009 has declared Article 270AAA invalid and has declared that all Ordinances affected by Article 270AAA would continue to remain in force for a period of 120 days from 31 July 2009, and will thereafter lapse unless ratified by both houses of Parliament. Thus, the CO will continue to remain effective until 28 November 2009 and must by that date be ratified by both houses of Parliament, otherwise it will lapse. If Parliament does not ratify the CO by that date it is possible that another Presidential Ordinance may be promulgated (which has been the practice in the past) continuing the effect of the CO. If by 28 November 2009 the CO is not ratified and no new Ordinance is promulgated, then MRTPO will be revived. It is expected that the government will promulgate a fresh CO or will succeed in getting the CO ratified by both houses of Parliament before that date. ■



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