

IN-DEPTH

Cartels And Leniency

PAKISTAN



LEXOLOGY

Cartels and Leniency

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In-Depth: Cartels and Leniency (formerly The Cartels and Leniency Review) provides a practical overview of the laws and policies aimed at combating cartel activity across key jurisdictions worldwide. It addresses major emerging and unsettled issues surrounding unlawful agreements with competitors, and analyses recent enforcement trends and regulatory changes – offering valuable insights to practitioners and corporates alike.

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Pakistan

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Summary

INTRODUCTION

YEAR IN REVIEW

ENFORCEMENT POLICIES AND GUIDANCE

COOPERATION WITH OTHER JURISDICTIONS

JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

LENIENCY PROGRAMMES

PENALTIES

'DAY ONE' RESPONSE

PRIVATE ENFORCEMENT

OUTLOOK AND CONCLUSIONS

ENDNOTES

Introduction

The evolution of competition law in Pakistan has been a dynamic process marked by significant legislative developments and policy shifts. The initial foundations were laid with the promulgation of the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance in 1970, the aim of which was to curb anticompetitive practices in the country. It was not until the Competition Ordinance of 2007, however, that a comprehensive framework was established, providing the Competition Commission of Pakistan (CCP) with the authority to enforce competition laws. This represented a crucial milestone, aligning Pakistan with international best practices and fostering a competitive business environment. Subsequent amendments and revisions, including Act No. XIX of 2010 (the Competition Act),^[2] have further refined the legal framework, empowering the CCP to investigate and penalise anticompetitive behaviour, mergers and acquisitions that may have adverse effects on competition. The evolving landscape reflects Pakistan's commitment to fostering fair market competition and ensuring consumer welfare in its rapidly developing economy.

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Year in review

The CCP has earned significant international recognition by receiving a prestigious three-star rating from Global Competition Review. This accolade places the CCP among the world's top antitrust and competition authorities.

The combined statistics of the past two years show that the CCP is taking decisive actions in various sectors, such as sugar, cement, cooking oil, poultry, automobiles, paint, real estate and so on. It started 22 inquiries into cartels and trade abuses, finished 14 and gave orders against 93 businesses. The biggest penalty, 43.59 billion Pakistan rupees, was imposed on the Pakistan Sugar Mills Association and its 84 mills. Further, Haier Pakistan was fined 1 billion Pakistan rupees for unfair practices. In dealing with deceptive marketing, the CCP concluded 23 cases, started 15 new ones and provided two policy notes on the sugar and wheat sectors to the government. The CCP also approved 171 mergers and acquisitions at Phase I and three at Phase II, granted 131 exemptions under the law

and continued advocacy initiatives to raise awareness while conducting capacity-building programmes for its employees.^[3]

A notable development is the CCP's launch of its Market Intelligence Unit (MIU), marking a shift to proactive enforcement. The MIU uses advanced technology and data analytics to identify collusive practices and cartels in the market. Through collaborations with entities such as the Urban Unit in Punjab and the Pakistan Bureau of Statistics, the MIU gathers comprehensive data on essential commodities and various sectors. Aligned with international best practices, this initiative demonstrates the CCP's commitment to curbing market abuse, employing tools such as market surveys and econometrics models. The MIU aims to ensure economic fairness by monitoring price movements and effectively combating collusion and cartel activities.

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Enforcement policies and guidance

i The statutory framework, key policies and formal guidance

The cartel enforcement regime in Pakistan includes:

1. the Competition Act;
2. the Guidelines on Prohibited Agreements;^[4] and
3. the Competition (Leniency) Regulations 2019.^[5]

Section 4 of the Competition Act prohibits undertakings or associations from entering into any agreement or making any decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services, which have the object or effect of preventing, restricting, reducing or distorting competition within the relevant market.

These agreements include, but are not limited to:

1. fixing the purchase or selling price;
2. market sharing;
3. fixing quantities for production, distribution or sale;
4. limiting technical developments;
5. collusive tendering or bidding;
6. application of dissimilar conditions; and
7. making conclusion of the contract subject to acceptance by other parties of supplementary obligation.

Under the Competition Act, 'agreement' and 'undertaking' are defined as follows:

1. An agreement includes any agreement, understanding or practice, whether it is in writing or intended to be legally enforceable.
2. An undertaking means any natural or legal person, government body, including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and includes an association or undertaking.

The CCP is responsible for the implementation of the Competition Act in Pakistan. The Guidelines on Prohibited Agreements have been issued by the CCP and indicate the process that would be undertaken to give effect to the provisions of the Competition Act and associated rules and regulations. Accordingly, agreements between undertakings and decisions by associations of undertakings that restrict competition are prohibited; however, the CCP offers lenient treatment to undertakings and individuals that come forward as a whistle-blower about a prohibited agreement (cartel) in which they are or have been a party.

Apart from lenient treatment, the CCP plays a role in competition advocacy.^[6] Like other developing countries, Pakistan faces a challenge in building competition culture. Consequently, the CCP is vigorously pursuing an advocacy agenda to inform, educate and persuade stakeholders on the need and implementation of competition law. The CCP is giving its full attention to building a competition culture through aggressive public relations and dissemination of information.

The procedure for cartel investigation is that the CCP conducts a detailed assessment of the agreements or concerted practices and applies a multi-step approach to assessing whether an agreement or decision is anticompetitive in terms of Section 4. The investigation includes, but is not limited to:

1. identification of undertaking and associated undertaking;

2. identification of agreement, concentrated practices and decision;
3. identifying the relevant market;
4. assessing whether the undertakings or association of undertakings have entered into an agreement or made a decision; and
5. assessing whether the agreement or decision has the object or effect of preventing, restricting or reducing competition in violation of Section 4.

ii Grey areas

The Competition Act 2010 empowers the federal government to:

1. exempt any undertaking from application of the Competition Act or any provision for such period as it specifies if it is necessary for the security of the state or public interest and any practice assumed by Pakistan under any treaty, agreement or convention with any state or undertaking performing a sovereign function; and
2. issue policy directives to the CCP.

No more than two members of the CCP can be employees of the federal government. By virtue of these provisions in the Competition Act, the federal government may influence the CCP's decision-making.

Cooperation with other jurisdictions

The CCP's Department of International Affairs was established as the focal coordinating point to liaise with the United Nations Conference on Trade and Development, the Organisation for Economic Co-operation and Development and the International Competition Network. In addition, the department is responsible for exploring bilateral relations with competition agencies and donor agencies for possible technical assistance. In essence, the Department of International Affairs is the communication focal point of the CCP for all international activities.

As per the Competition Act,^[7] the CCP cooperates with other jurisdictions regarding investigation of anticompetitive practices by:

1. entering into an agreement with competition agencies in any part of the world for the exchange and assistance in performance of its function under the Competition Act;
2. assisting a foreign country in performing a function, or exercising a power, conferred by a law in force in that foreign country; and
3. producing a document or disclosing information that is required or permitted by any law of another jurisdiction.

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Jurisdictional limitations, affirmative defences and exemptions

i Extraterritoriality

The Competition Act applies to all agreements between undertakings located in Pakistan and outside Pakistan if their activities have any effect on competition within Pakistan.^[8]

ii Parent company liability

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 the parent company's instructions. In such instances, the CCP can choose whether to attribute the infringement committed by the subsidiary to it or to its parent company.^[9]

iii Affirmative defences and exemptions

Certain agreements that fall under the categories listed in Section 4 of the Competition Act could qualify for exemption under Section 5 (Individual Exemption) or Section 7 (Block Exemption) if they fulfil the criteria laid down in Section 9, which stipulates that exemptions may be granted to agreements that:

1. improve production or distribution;
2. promote technical or economic progress; or
3. result in benefits that clearly outweigh any adverse effects of lessening of competition.

Individual exemption

An undertaking can apply to the CCP for an individual or template exemption that may be granted subject to conditions and obligations and for a limited period.

Block exemption

The CCP may grant a block exemption to a particular category of agreements. For instance, a certain distribution agreement in a specific industry may benefit from a block exemption. The benefit of a block exemption is that similar agreements can be examined at the same time, which allows the CCP to provide a better overall assessment of the anticompetitive impact and assessment of the claimed benefits, and may also relieve undertakings of having to submit separate individual applications.

Exemptions may be granted subject to certain conditions determined case by case. Compliance with conditions prescribed in the exemption certificate is mandatory. Depending on material changes in the agreements, exemptions may be extended or cancelled, as per provisions of the Competition Act, Rules and Regulations.

Leniency programmes

i Lenient treatment

Undertakings can apply for lenient treatment^[10] by confessing to the CCP about their involvement in anticompetitive activities (i.e., being part of a prohibited agreement). This encourages cartel parties to admit to taking part in cartel activities. The leniency programme provides for the following.

Total immunity from financial penalty

This is available where:

1. the undertaking is the first to apply;
2. there is no pre-existing cartel investigation; and
3. the evidence submitted by the undertaking enables the CCP to carry out an investigation.

The Competition Act provides 100 per cent immunity from a financial penalty for an undertaking that is the first to apply.

The duties of undertakings that receive leniency are as follows:

1. to provide evidence to the CCP in a timely manner;
2. not to conceal, destroy, manipulate or remove any evidence;

3. to make available current or former persons associated with the cartel parties to be interviewed by the CCP;
4. to maintain continuous and complete cooperation throughout the investigation;
5. to refrain from further participation in the alleged cartel agreement; and
6. not to have taken any steps to coerce another undertaking to take part in the cartel agreement.

Reduction in the amount of financial penalty

This is available where:

1. the undertaking is the first to apply;
2. there is a pre-existing cartel investigation; and
3. the additional evidence submitted by the undertaking to the CCP adds significant value to evidence already gathered, thus further substantiating the existence of the alleged prohibited agreement.

The amount of reduction in penalty is at the discretion of the CCP. In applying this discretion, the CCP will take into account:

1. the stage of the investigation at which the undertaking comes forward;
2. the evidence already in the CCP's possession; and
3. the quality and nature of the evidence provided by the undertaking.

Leniency plus

This is available where an undertaking fails to provide sufficient evidence for immunity to be granted in relation to a cartel agreement in one market; however, it may be considered for a reduction in the amount of the financial penalty based on its cooperation in relation to a cartel agreement in another market.

To qualify for total immunity or a reduction in the financial penalty in relation to activities regarding a second cartel agreement, the undertaking must provide the CCP with sufficient evidence to take forward a credible investigation or to provide significant added value to the CCP's investigation.

For a reduction in the financial penalty and leniency plus, the undertaking's application can only be entertained for a reduction in the financial penalty if it:

1. admits to an infringement of Section 4 of the Competition Act;
2. abandons its participation in the alleged cartel agreement; and
3. makes a full disclosure of all the facts within its knowledge.

ii Marker

An undertaking applying for immunity must initially apply through a properly authorised representative for a marker^[11] to reserve its place in the queue for a period determined by the CCP, thus allowing the undertaking to gather the necessary evidence.

iii Duties of cooperation

To reserve a marker place, an undertaking or applicant must provide information to the CCP as mentioned in Regulation 6(A)(2) of the Competition (Leniency) Regulations 2019. This includes identity and contact details, contact details of parties to the prohibited agreement, affected products and markets, affected territory, estimated market volume affected, nature of alleged prohibited agreement, estimated duration of the alleged infringement, all evidence available at the time of applying for a marker and information about any past or possible future leniency application to any other competition authority around the world.

Where a status of marker is granted, an undertaking is required to submit information to the CCP proving the existence of a cartel in the market, enabling the undertaking's eligibility to qualify for immunity from a financial penalty under the Regulation.

iv Representation by counsel of the corporate entity

In the absence of conflicts of interests, there are no absolute legal restrictions that prevent a law firm from representing both the business and its employees under investigation as long as the firm consistently maintains its responsibility for professional conduct.

v Access of private litigants to leniency materials

An undertaking whose accounts, documents or computers have been impounded and retained in a dawn raid may examine and make an extract or copy therefrom during regular office hours under such supervision as the CCP may determine.^[12]

Penalties

i Penalties

The principal sanction that may be imposed for a breach of Section 4 of the Competition Act is a financial penalty of 75 million Pakistani rupees or an amount not exceeding 10 per cent of the annual turnover of the undertaking^[13] during the next preceding year as may be decided by the CCP based on circumstances.

If the violation of the order of the CCP is a continuing one, the CCP may also direct that the undertaking guilty of this violation must pay by way of penalty a further sum that may extend to 1 million Pakistani rupees for every day after the first violation.

Failure to comply with the CCP's order constitutes a criminal offence punishable with imprisonment for a term that may extend to one year or with a fine of up to 25 million

Pakistani rupees.^[14] The CCP may also initiate proceedings in a court of competent jurisdiction against that undertaking.

The right of appeal is as follows:

1. A person aggrieved by the CCP order made by any member or authorised officer may submit an appeal to the appellate bench of the CCP within 30 days of the passing of an order.
2. A person aggrieved by the CCP order passed by two or more members of the appellate bench of the CCP may within 60 days of receiving the order prefer an appeal before the Competition Appellate Tribunal.
3. A person aggrieved by an order of the Competition Appellate Tribunal may submit an appeal to the Supreme Court within 60 days.

ii Factors that may be considered in adjusting fines

The financial penalty imposed by the CCP^[15] will be calculated taking into consideration the following factors:

1. the seriousness of the infringement and how widespread it is. For assessing the seriousness, the CCP may consider a number of factors that include:
 - the nature of the product;
 - the structure of the market;
 - the market share of the undertaking;
 - the entry conditions; and
 - the effect on competitors or third parties;
2. the duration of the infringement;
3. aggravating factors, which may include:
 - the role of the undertaking as a leader or an instigator of the infringement;
 - the involvement of directors or senior management;
 - retaliatory or other coercive measures taken against other undertakings; and
 - the continuance of infringement after the start of the investigation and refusal to cooperate with the CCP;
4. mitigating factors, which may include:
 - genuine uncertainty on the part of the undertaking as to whether the agreement or conduct constitutes an infringement;
 - whether the undertaking was acting under severe pressure;
 - adequate steps taken by the undertaking to ensure compliance with competition law; and
 -

cooperation that enables enforcement process to be concluded effectively;
and

5. other relevant factors such as economic or financial benefit derived or likely to be derived from the infringement, taking into account not only the specific circumstance but also the general context of the infringement and attribution of any anticompetitive conduct of the undertaking to its parent company.

iii Early resolutions and settlement procedures

The following settlement procedures are seen in practice by the CCP:

1. A penalty may be reduced where an undertaking admits a breach of the Competition Act and commits to streamline those of its administrative procedures that are in violation of the Competition Act.
2. A penalty may not be imposed where an undertaking admits a breach of the Competition Act and responds quickly to the CCP's recommendations for the removal of practices and agreement clauses that are anticompetitive.
3. The CCP also takes a lenient view if the undertaking is a new entrant in the market and puts in place the compliance procedures, admits the infringement was made unconsciously and commits to abide by the law.

'Day one' response

The CCP may on its own, or upon reference made to it by federal government, conduct inquiries into matters relevant to the purpose of the Competition Act. Where the CCP receives from an undertaking or a registered association of consumers a complaint in writing of such facts as appear to constitute a contravention of the provision of the Competition Act, it will – unless it is of the opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by prima facie evidence – conduct an inquiry into the matter to which the complaint relates.

For fact finding, the CCP may decide to conduct a dawn raid at the premises of the undertaking on whom an allegation of violation is levelled. A dawn raid is a surprise investigation conducted on the site or premises of the undertaking by the CCP.

CCP officials, after obtaining an authorisation letter, may enter and search business premises and have full and free access to any part of the premises, place, account, document or computer and may:

1. stamp or make an extract or copy of any accounts, documents or computer-stored information;
2. impound any accounts or documents and retain them for as long as may be necessary for the purpose of the Competition Act;
- 3.

where hard copy or computer disk information stored on a computer is not made available, impound and retain the computer for as long as is necessary to copy the information required; and

4. make an inventory of articles impounded from the premises or place.

If an undertaking refuses, without reasonable cause, to allow the CCP to exercise the powers to enter and search, an officer of the CCP may by written order, signed by any two members, enter any place or building by force. The undertaking is obliged to allow the officer to conduct the investigation if a formal order is shown; otherwise, the undertaking would be fined for preventing the dawn raid.

It is important for every undertaking to have a coordinated strategy for dealing with an inspection, which may cover the following measures:

1. Reception staff are the first to have contact with CCP officials and should immediately inform the senior executive about the arrival of the officials.
2. The staff should not engage in any conversation or discussion with the inspectors or comment on any other matter raised by them.
3. As soon as the senior executive arrives, the senior executive makes sure the entitlement of the CCP officials by obtaining the authorisation order to undertake the inspection.
4. The senior executive would make sure that each inspector is accompanied at all times by the undertaking's officer.
5. They will arrange a separate room for the inspectors, provide the desired documents and make oral explanations in that room.
6. The senior executive will:
 - immediately consult legal counsel for advice;
 - advise all personnel involved in the investigation that no document should be destroyed;
 - arrange for an IT system expert to be available in the event that the inspector requires details of or access to the undertaking's computer systems;
 - take note of all documents and files inspected, whether or not the inspectors take copies;
 - make copies of every document requested by the inspector;
 - ensure confidential business information and documents are identified as such to the inspectors (although the undertaking cannot refuse to provide these documents, if notified to the inspectors as confidential, the CCP would avoid their subsequent disclosure to third parties); and
 - make notes of all oral explanations sought by the inspector and of the given explanations.

Besides dawn raids, the CCP may issue information requests under the Competition Act as a means of obtaining information concerning activities of an undertaking, including

information relating to its organisation, accounts, business, trade practices, management and connection with any other undertaking. Non-supply of information requested by the CCP is punishable with fines.

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Outlook and conclusions

Pakistan has made significant headway despite the many challenges it has faced. It has been able to transform itself into a semi-industrial economy and a hub for business activities by removing entry barriers and promoting competition.

Our economic vision is to shape a brighter future for Pakistan's economy by improving efficiency, enhancing productivity, increasing investment and creating wealth by unleashing the entrepreneurial energies of the private sector. Trade liberalisation and the provision of a level playing field to all the players through effective competition law compliance is at the centre of policy initiatives.

The aspiration is to put the economy on a greater growth trajectory through higher investment efficiency and enhanced productivity. Economic policy is focused on establishing and strengthening the economy so that it is not only self-reliant but also capable of competing with its competitors around the globe.

These measures will enable people, particularly those in the private sector, to play their respective roles, providing equal opportunities for all and assign the CCP a very specific role as a facilitator, regulator and performance-driven competition policy enforcement body.

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i Supreme Court upholds unprecedented CCP powers

In a landmark decision, the Supreme Court of Pakistan delivered a historic judgment unanimously affirming the expansive statutory powers of the CCP. The CCP faced legal opposition from a company in the food sector regarding an inquiry into pricing strategies in respect of cooking oil and ghee products. The Islamabad High Court initially set aside the CCP's information requests, imposing restrictive requirements but a recent Supreme Court ruling overturned these restrictions, reinforcing the CCP's authority to initiate inquiries without detailed prior reasoning and solidifying its role in promoting fair competition.

The three-member bench ruled that there are no restrictions on the CCP's general regulatory authority to demand information under Section 36 of the Competition Act. The Court underscored the obligation of undertakings to fully comply with the directives of the CCP for information provision, thus reinforcing the Commission's crucial role in overseeing fair competition practices. Additionally, the Supreme Court clarified that the initiation of an inquiry under Section 37 of the Competition Act is not considered an adverse action but a fact-finding exercise separate from subsequent show-cause proceedings.

ii CCP endorses Pakistan Advertisers Society self-regulatory initiative

The CCP has expressed its support for the Pakistan Advertisers Society (PAS) and its self-regulatory initiative aimed at ensuring compliance with the Competition Act by member organisations in their marketing practices. The PAS, comprising leading local and international brands, focuses on responsible marketing across various sectors. The CCP endorses the PAS Code of Advertising Practice as a significant step towards self-regulation, aligning with competition law provisions to deter deceptive marketing. The collaboration also addresses the challenge of misleading information on digital platforms, emphasising the importance of responsible advertising and ethical practices. This engagement also involves discussions on emerging challenges, emphasising joint efforts to protect consumers.

iii CCP research study highlights recommendations for business growth

In a recent study, the CCP delved into the challenges facing small and medium-sized enterprises (SMEs) in the country. The findings underscore the critical need for reforms in defining SMEs, streamlining access to finance, simplifying regulatory frameworks and fostering women's participation in the SME sector. Proposals include revisiting SME definitions, setting specific lending targets, simplifying licensing processes, reviewing import duties and advocating for tax system reforms, including the introduction of Micro, Small, Medium Enterprise Act.

The CCP's comprehensive study emphasises a multifaceted approach towards enhancing economic efficiency for SMEs in Pakistan. By addressing issues spanning definitions, finance accessibility, regulatory complexities and gender inclusivity, the study lays out a roadmap for policymakers to cultivate a conducive environment for SME growth. These recommendations, if implemented, have the potential to catalyse positive changes in the SME landscape, promoting economic resilience and fostering a more inclusive and dynamic business ecosystem in Pakistan.

Endnotes

- 1 Saifullah Khan is the managing partner at S U Khan Associates Corporate and Legal Consultants. [^ Back to section](#)
- 2 https://na.gov.pk/uploads/documents/1306740606_319.pdf. [^ Back to section](#)
- 3 See <https://www.brecorder.com/news/40269635>. [^ Back to section](#)
- 4 Draft Guidelines – Section 4: Prohibited Agreements (August 2016), available at https://cc.gov.pk/assets/images/guidelines/guidelines_section_4.pdf. [^ Back to section](#)
- 5 Available at <https://cc.gov.pk/home/regulations>. [^ Back to section](#)
- 6 Act No. XIX of 2010 (Competition Act), Section 28(e). [^ Back to section](#)
- 7 id., Sections 49, 51(6)(c) and 52(1)(d). [^ Back to section](#)

- 8** id., Section 1(3). [^ Back to section](#)
- 9** 'Guidelines on Imposition of financial penalties (Fining Guidelines)', Guideline 9.4, available at https://cc.gov.pk/assets/images/guidlines/imposition_of_financial_panelties.pdf. [^ Back to section](#)
- 10** Competition (Leniency) Regulations 2019, Regulations 3, 4 and 5. [^ Back to section](#)
- 11** 'Marker' is defined in the Competition (Leniency) Regulations 2019 as the indication of a reserved position of an applicant undertaking in a queue of applicants for the granting of immunity. [^ Back to section](#)
- 12** Competition Act, Section 34(7). [^ Back to section](#)
- 13** id., Section 38(2). [^ Back to section](#)
- 14** id., Section 38(5). [^ Back to section](#)
- 15** 'Guidelines on Imposition of financial penalties (Fining Guidelines)', Guideline 4, available at https://cc.gov.pk/assets/images/guidlines/imposition_of_financial_panelties.pdf. [^ Back to section](#)



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