



COMPETITION COMMISSION OF PAKISTAN
GOVERNMENT OF PAKISTAN
4-C, G-5 Markaz,
Diplomatic Enclave
Islamabad

No. 07/SY/CCP/Misc/2007

17 November 2009

Syed Adil Gilani, Chairman
Transparency International – Pakistan
5-C, 2nd Floor, Khayaban-e-Ittehad, Phase VII,
Defence Housing Authority, Karachi

Subject: Request to CCP for investigating into the affairs of Builders in DHA Karachi for hoodwink money received from public

Dear Sir,

This is with reference to your letter dated 10-11-2009 and in continuation of this Commission's letter No. 07/SY/CCP/Misc/2007 dated 13 November 2009 on the subject cited above.

2. The Transparency International - Pakistan has requested this Commission to take up the matter and investigate into the conduct of two builders i.e. (1) M/s EMAAR –Giga JV Project Crescent Bay and (2) M/s Meinhardt Project Creel Marina. The main allegations include the following:

- (i) Both the aforesaid builders are deducting 30% of the unit prices/total price, in case of cancellation of residential unit(s);
- (ii) whereas the Clifton Cantonment Board Building Bye laws do not permit penalty of more than 4% of the paid installments. Similar provision exists in the Clifton (Karachi) Building Bye-laws, 2007;
- (iii) the agreements under which 30% deductions are being made, are illegal; and
- (iv) in case of delay by Builders in constructing the project within the time, the Builders are liable to pay penalty at the rate of 15% (current bank interest rate) on all amount paid by the purchasers, till the completion of the project. In the instant case, the Builders are paying penalty on account of delay, to the extent of Rs. 25,000 to Rs. 45,000 per month, which is much less than the penalty at the rate of 15% (current bank interest rate).

3. You might be aware that CCP has been established under the Competition Ordinance, 2007 (the Ordinance) for specific objectives to promote free competition in all spheres of commercial and economic activities. Statutory provisions of the Ordinance, against abuse of dominant position, prohibited agreements (cartelization), envisage that such practice/agreement prevent, restrict, reduce or distort competition in the relevant market. The nature and form of anti-competitive activities has also been outlined in the Ordinance. Extracts from the major relevant provisions 3, 4, 10 and 11 of the Ordinance are annexed for ready reference.

4. The complaint has been examined objectively. It has been observed that –

- (i) the Builders are giving refund to the defaulting purchasers of residential units under the condition 12 (ii) of the agreement signed by the parties;
- (ii) although the rate of 30% deduction seems to be excessive, yet it is strictly in terms of the agreement;
- (iii) to declare an agreement illegal in such matters is within the jurisdiction of Civil Courts and not of the CCP;
- (iv) the CCP having been established with specified objects, cannot go beyond its statutory powers and if it does, the action would be *ultra vires*.

5. In views of the position explained, unless a contravention is made out or pointed out under the Ordinance, it is not within the domain of this Commission to investigate into the matter and initiate against the Builders in the projects of Phase VIII of DHA, Karachi, , as *prima facie*, there is no competition issue involved in terms of the Competition Ordinance, 2007.

With regards,

Yours faithfully,



(Mohammed Hayat Jasra)
Secretary

Extract of sections 3, 4, 10 & 11 of Competition Ordinance, 2007:

3. **Abuse of dominant position.** — (1) No Person shall abuse dominant position.

(2) An abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restrict, reduce or distort competition in the relevant market.

(3) The expression "practices" referred to in sub-section (2) shall include, but are not limited to—

- (a) limiting production, sales and unreasonable increases in price or other unfair trading conditions;
- (b) price discrimination by charging different prices for the same goods or services from different customers in the absence of objective justifications that may justify different prices;
- (c) tie-ins, where the sale of goods or service is made conditional on the purchase of other goods or services;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of the contracts;
- (e) applying dissimilar conditions to equivalent transactions on other parties, placing them at a comparative disadvantage;
- (f) predatory pricing driving competitors out of a market, prevent new entry, and monopolize the market;
- (g) boycotting or excluding any other undertaking from the production, distribution or sale of any goods or the provision of any service; or
- (h) refusing to deal.

4. **Prohibited agreements.** — (1) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings, shall make a 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 or reducing competition within the relevant market unless exempted under section 5 of this Ordinance.

(2) Sub agreements include, but are not limited to—

- (a) fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any service;
- (b) dividing or sharing of markets for goods or services, whether by territories, by volume of sales or purchases, by type of goods or services sold or by any other means;
- (c) fixing or setting the quantity of production, distribution or sale with regard to any goods or the manners or means of providing any services;

- (d) limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of any service; or
 - (e) collusive tendering or bidding for sale, purchase or procurement of any goods or service;
 - (f) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage; and
 - (g) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- (3) Any agreement entered into in contravention of the provision in sub-section (1) shall be void.

10. **Deceptive marketing practices.** — (1) No undertaking shall enter into deceptive marketing practices.

(2) The deceptive marketing practices shall be deemed to have been resorted to or continued if an undertaking resorts to—

- (a) the distribution of false or misleading information that is capable of harming the business interests of another undertaking;
- (b) the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods;
- (c) false or misleading comparison of goods in the process of advertising; or
- (d) fraudulent use of another's trademark, firm name, or product labeling or packaging.

11. **Approval of mergers.** — (1) No undertaking shall enter into a merger which substantially lessens competition by creating or strengthening a dominant position in the relevant market.

(2) Notwithstanding the provisions contained in the Ordinance where an undertaking, intends to acquire the shares or assets of another undertaking, or two or more undertakings intend to merge the whole or part of their businesses, and meet the pre-merger notification thresholds stipulated in regulations prescribed by the Commission, such undertaking or undertakings shall apply for clearance from the Commission of the intended merger.

(3) The concerned undertakings shall submit pre-merger application to the Commission as soon as they agree in principle or sign a non-binding letter of intent to proceed with the merger.

(4) Application referred to in sub-section (3) shall be in the form and accompanied by a processing fee as may be prescribed by the Commission. The concerned undertakings shall not proceed with the intended merger until they have received clearance from the Commission.

(5) The Commission shall by way of an order referred to in section 31, decide on whether the intended merger meets the thresholds and the presumption of dominance as determined in section 3. Such order shall be made within thirty days of receipt of the application.

(6) If so determined, the Commission shall initiate a second phase review and for that purpose the Commission may require the concerned undertakings to provide such information as it considers necessary to enable the Commission to make the necessary determination.

(7) Failure to make a determination within the prescribed period of thirty days for the first phase review shall mean that the Commission has no objection to the intended merger.

(8) On initiation of the second phase review the Commission shall, within ninety days of receipt of the requested information under sub-section (6), review the merger to assess whether it substantially lessens competition by creating or strengthening a dominant position in the relevant market, and shall give its decision on the proposed transaction. In case concerned undertakings fail to provide the information requested, the Commission may reject the application.

(9) Failure to render a decision within ninety days shall be deemed to mean that the Commission has no objection to the intended merger.

(10) If after the second phase review, the Commission determine that the intended merger substantially lessens competition by creating or strengthening a dominant position, it may nonetheless approve the transaction, if it is shown that, —

- (a) it contributes substantially to the efficiency of the production or distribution of goods or to the provision of services; .
- (b) such efficiency could not reasonably have been achieved by a less restrictive means of competition;
- (c) the benefits of such efficiency clearly outweigh the adverse effect of the absence or lessening of competition; or
- (d) it is the least anti-competitive option for the failing undertaking's assets, when one of the undertakings is faced with actual or imminent financial failure:

"Provided that the burden of proof shall lie with the undertaking seeking the approval.

(11) In case the Commission determines that the transaction under review does not qualify the criteria specified in sub-section (10), the Commission may: —

- (a) prohibit the consummation of the transaction;
- (b) approve such transaction subject to the conditions laid by the Commission in its order; or
- (c) approve such transaction on the condition that the said undertakings enter into legally enforceable agreements specified by the Commission in its order.

(12) Where an undertaking has consummated the merger without complying with the provisions of sub-section (1) to sub-section (4), the Commission shall, after giving the undertaking an opportunity of being heard, make appropriate orders under section 31.

(13) Where the Commission has granted approval subject to conditions, the Commission may, within one year, review the order of approval of merger on its own or on the application of the undertakings concerned on the ground that it is satisfied that the circumstances of the relevant market or the undertakings have so changed as to warrant review of the conditions imposed.

(14) If the Commission determines that the approval was based on false or misleading information submitted by the undertaking, or the conditions prescribed in the relevant order of the

Commission have not been fully complied with, the Commission may after affording the undertakings concerned an opportunity of being heard, —

- (a) undo such merger or acquisition; or
- (b) prescribe modifications or additions in the original order.