

CPI's Asia Column Presents:

Cartels & the Politics of Competition Law Enforcement in Pakistan

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When Pakistan promulgated the Competition Ordinance in October 2007, it became the second South Asian country to adopt a competition law that was in alignment with international competition principles and best practices.² In promulgating the Ordinance, the government of Pakistan hoped to usher in an era of increased economic efficiency, consumer welfare and international investment for the country.³ It was a testament to the government's commitment to giving effect to the Ordinance, that by November 2007 it had also established and operationalized the Competition Commission of Pakistan ("CCP") as the first tier, primary competition law enforcement authority in the country.

Despite the excitement surrounding it, the adoption of the Competition Ordinance was, in fact, Pakistan's second attempt at regulating concentration of wealth in the country. Pakistan had first attempted this task in 1970 when it adopted the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance and established the Monopoly Control Authority ("MCA") to enforce it. However, this first attempt failed, largely due to the MCA's limited powers of enforcement and lack of political autonomy. Given the more elaborate scope of the Competition Ordinance; the fact that it envisaged the CCP as an autonomous statutory body and conferred upon it quite substantial powers of enforcement, it was hoped, and indeed believed, that Pakistan's second attempt in this regard would prove to be a far greater success than its first.

In this article I argue that despite the promise of independence and the arsenal of scope and powers, the CCP has, in fact, only fared marginally better than the MCA in achieving its avowed aims. I explore this argument by focusing on the CCP's decisions in respect of prohibited agreements under Section 4 of the Pakistan Competition Act 2010. To place the discussion in context, I begin by tracing a brief history of competition law in Pakistan, and by outlining the CCP's structure, composition and powers, particularly with regard to prohibited agreements. I then examine the CCP's key decisions in respect of prohibited agreements and the extent to which the CCP has succeeded in enforcing these. I end by outlining factors both intrinsic and extrinsic to the CCP, that have most influenced its operations, for better, or, as is the case, for worse.

The Controversial Beginnings of the Pakistani Competition Law

Pakistan decided to update its monopoly law after becoming a member of the World Trade Organization in 1995.⁴ The membership of the WTO and the interaction with other countries that it entailed, helped Pakistan realize that if it wanted to avail of the benefits of trade and globalization, it needed to improve the competitiveness of its domestic markets and to this end, it needed to adopt a new competition law and policy framework.⁵ After some initial attempts to review its monopoly regime, Pakistan approached the World Bank for technical assistance.⁶ In 2006, a team led by World Bank experts commenced discussions with Pakistani officials, economists, and lawyers, to develop the parameters of a new competition law and policy.⁷ In 2007, the World Bank team submitted its report to the Pakistani government and with it, a draft law prepared by the firm of Jones Day based in Brussels.⁸

Instead of placing the draft before Parliament for consideration and debate, the Pakistani government submitted it directly to the President, and had it promulgated as a temporary Presidential Ordinance⁹ with a shelf life of 120 days.¹⁰ However, in an unexpected turn of events, within a month of promulgating the Ordinance, the military chief turned President

issued an order suspending the Constitution and declaring an emergency in the country.¹¹ Three weeks later, the President issued a further order amending the Constitution and “saving” all Ordinances promulgated by him in the weeks leading up to the declaration of emergency.¹² The Competition Ordinance was one of several “saved” Ordinances and, therefore, remained in force past the 120-day period.

In early 2008, after Pakistan had held general elections and appointed a civilian President, a petition was filed before the Supreme Court challenging the declaration of emergency and all orders issued in pursuance thereof, including the order whereby the Ordinances had been saved. The Supreme Court upheld this petition and directed the government to place all “saved” Ordinances before Parliament on or before November 30, 2009.¹³ However, instead of placing the 2007 Ordinance before Parliament, the government sought time by promulgating a further Ordinance in 2009 and when the 2009 Ordinance lapsed in March 2010, it simply repeated this exercise. It was only in August 2010 that the government placed the competition bill before Parliament. This bill was finally passed in October 2010 as the Competition Act 2010 (the “Act”).¹⁴

The CCP: Between what was Envisaged and what was Established

The Report of the World Bank team envisaged the CCP as a “quasi-autonomous, quasi-judicial institution”¹⁵ “...and a collegial body with a minimum of five and a maximum of seven members.”¹⁶ The Report recommended that the CCP be allowed the power to check prohibited agreements, abuse of dominant position, deceptive marketing practices and to regulate mergers and acquisitions.¹⁷ It further recommended that the CCP be “capable of applying severe penalties on private business in the case of violations of the law whilst remaining accountable to the government’s competition policy, the law and the public...”¹⁸

The Report placed great emphasis on the “quality of appointments” to the CCP, stating that appointments would play a crucial role in creating “an entirely new corporate culture” that would not only attract “top business, legal and economic talent in Pakistan,”¹⁹ but also enable the CCP to perform its functions in a robust manner.²⁰ The Report also insisted on the CCP’s autonomy and sought to ensure it through the security of tenure of its members. The Report, therefore, recommended that persons appointed to the CCP be drawn from diverse, but related, professional backgrounds; be awarded appropriate remuneration packages, and only be removed through a transparent removal process.²¹ However, the Report left it to the government to prescribe a mechanism for appointment or removal of persons appointed to the CCP.²²

In accordance with these recommendations, the CCP was established as a statutory corporation and a collegial body with perpetual succession and with a provision for not less than five and no more than seven members.²³ However, the 2007 Ordinance diluted the CCP’s autonomy by giving the government control over the CCP’s budget and by making it exclusively responsible for appointments of CCP members²⁴ — a power that remains in place even today.²⁵ With regard to the CCP’s mandate, the Ordinance, and later the Act, was in complete alignment with the Report. The CCP is, therefore, allowed jurisdiction over all entities distorting competition within Pakistan,²⁶ and has powers, among others, to check anti-competitive agreements,²⁷ the abuse of dominant position,²⁸ to impose a range of monetary and behavioral penalties for contravention of the provisions of the Act.²⁹

CCP's Major Decisions re Prohibited Agreements: A Strategy of Diminishing Returns

Since the commencement of its operations in 2007, the CCP has passed a range of orders in respect of prohibited, anti-competitive agreements in pursuance of Section 4 of the Act. Section 4 is divided into three sub-sections: Section 4(1) states that a practice may be anticompetitive if it has the *object* or *effect* restricting competition; Section 4(2) provides a non-exhaustive list of the types of agreements that are prohibited under Section 4(1); and Section 4(3) declares that any agreement contrary to Section 4(1) shall be void. Although not considered here, Section 5 of the Act allows parties to obtain exemptions for their agreements if they are able to establish their pro-competitive effects in terms of Section 9.

The majority of the CCP's orders relate to horizontal price fixing, collusive bidding or market allocation and far fewer relate to vertical agreements. In its early years, regardless of the nature of the agreement it was examining, the CCP typically began its decisions by invoking the foreign antecedents of the Act.³⁰ It then proceeded to ascertain the existence of an agreement within the meaning of Section 2(1)(b), and then examined whether or not the agreement was anti-competitive under Section 4. In its more recent orders, the CCP has discontinued the practice of invoking its foreign antecedents, however, it continues to rest the finding of anti-competitiveness of an agreement on a theoretical analysis of the practice and its treatment in foreign, more economically advanced jurisdictions, rather than on an economic analysis in the Pakistani context. More importantly, the CCP's approach towards finding of anti-competitiveness remains formalistic. In fact, over the years its analysis has become increasingly summary in respect of both horizontal and vertical agreements.³¹

Three aspects of the CCP's decisions stand out as particularly interesting: first, that despite the express use of the terminology of "object" and "effect" in Section 4 of the Act, the CCP not only does not consider it necessary to establish whether a particular agreement is anti-competitive by object or by effect but also regularly resorts to the terminology of *per se* rule and rule of reason analysis, often interchangeably with "object" and "effect";³² second that it neither categorizes agreements into horizontal and vertical agreements nor fundamentally differentiates between the two and focuses almost entirely on what it considers to be an anticompetitive and prohibited practice.³³ Finally, despite its close genealogical and semantic links with EU Competition law, it rarely considers the *de minimis* rule in its application of Section 4 of the Act once again focusing entirely on the practice and not on the market share or power of the entity engaging in it.³⁴

Weighing CCP's Performance: A Story of Success or Failure?

Interesting as the CCP's interpretation of Section 4 of the Act may be, it is perhaps more important to consider its effectiveness as a regulator in the Pakistani context. A well accepted measure of effectiveness of a competition regulator is its ability to impose sanctions against the parties in violation of competition law and its ability to enforce these sanctions. In terms of the Act, the CCP has powers to issue a range of orders in respect of anti-competitive agreements, including directions under Section 31(b) and penalties under Section 38.³⁵ It is evident from CCP's orders that it has exercised the full spectrum of these powers in respect of anti-competitive agreements: it has imposed penalties, issued behavioral directions and obtained undertakings or commitments from the parties, as appropriate in the circumstances of the case before it.³⁶

While the CCP has had reasonable success in enforcing behavioral remedies, it has not enjoyed the same luck in recovering penalties. An important factor in this regard is the intervention by Pakistani courts in the form of restraining orders against the CCP. Soon after the CCP commenced operations, parties aggrieved by its orders challenged these before different courts in Pakistan. Even though these courts were not authorized to hear competition appeals,³⁷ and could only entertain these challenges in their inherent constitutional jurisdiction, parties came to them in droves with a single point agenda: to restrain the CCP from recovering the penalties imposed on them. These parties often had first mover advantage and succeeded in obtaining from the courts, orders restraining the CCP from recovering penalties until such time as the petitions pending before them were finally decided. To date, however, the courts have not decided any petitions on merits and the majority of the restraining orders issued against the CCP remain in place.

The courts' failure to decide petitions in respect of orders of the CCP is often blamed on the endemic delay in the court system. This explanation, however, overlooks the fact that a very large number of petitions were filed before the courts, sometimes on spurious grounds, because the aggrieved parties had no other redress available to them. The government initially failed to define a clear path for challenging orders of the CCP,³⁸ and when it did make provision for an appellate tribunal,³⁹ its delay in appointing members to the tribunal,⁴⁰ played a large role in parties turning to the courts and choking up the court system with matters which were beyond the remit of the courts' inherent jurisdiction. Although the tribunal has now been active since 2016, the damage caused in the early years continues to reverberate beyond the CCP's failure to recover penalties, in the absence in Pakistan, of a body of competition jurisprudence that has been tested and endorsed by Pakistani courts, and in the CCP's diminished effectiveness as a regulator.

The Bitter Scandal of the Sugar Cartel

The depletion of the CCP's status and authority as an effective regulator was thrown into stark relief in the course of the crisis in the sugar industry in Pakistan earlier this year. The government had taken notice of an unusual hike in the price of sugar in the country and had constituted a Commission of Inquiry (the "Commission") to investigate the causes of this crisis and to apportion responsibility on different stakeholders. The CCP came under particular fire in the May 2020 report of the Commission in terms of which it was held liable for failing to intervene in the 2019 hike in the price of sugar in the country, and rebuked for failing to "actively discharge" its responsibilities in accordance with its statutory mandate.⁴¹

While the Commission accurately identified the CCP's responsibility to check cartelization and abuse of dominance by the major sugar manufacturers, it appeared confused about the CCP's actual role in the economy,⁴² and was short sighted in ascribing the responsibility of this failure entirely to the CCP.⁴³ On the topic of the CCP's mandate, the Commission suggests more than once in its report that it was the CCP's responsibility to ascertain costs of production, prices, and profit margins in the sugar industry which suggests that the CCP is viewed in government circles as some sort of a supra consumer protection body. It is more disturbing to think that the CCP's actions and its advocacy, at least in recent years, have not been of the quality that could have presented a more accurate picture of its mandate and that even otherwise it was not able to dispel this perception in its hearings before the Commission.

With regard to the question of responsibility, the Commission particularly noted that even though the CCP had been aware of cartelization in the sugar industry since 2009, it had largely “remained a silent spectator” and had thereby allowed matters to come to a head ten years later.⁴⁴ In arriving at this conclusion, the Commission not only absolved the courts for failing to take timely decisions in petitions related to the CCP but also the government which particularly in 2009 had kept the CCP in a legal limbo until the Act was finally enacted in 2010, and which thereafter, had tightened its budget and delayed the appointment of a Chairperson to the CCP for nearly a year.⁴⁵ The CCP that emerged from this period of uncertainty was a much weaker, more deferential regulator. It is no surprise, therefore, that the CCP of 2019 had neither the capacity nor the gumption to take bold action.

Conclusion

Buried deep in its discussion of cartelization in the sugar industry, the Commission of Inquiry bemoans the control of the sugar industry by six large players noting that the “...control of so few, mostly with political background, of the sugar industry shows the strong influence they can exercise on Policy and Administration.”⁴⁶ Although the Commission does not take this line of discussion any further, in making this comment it hints at the inextricable link between political and economic power in Pakistan and the crisis of governance – a crisis which is far deeper than the sugar crisis – that it entails.

In the case of the CCP, this crisis of governance is evident in the failure of the state to take the judiciary and other stakeholders on board at the time of its adopting the competition law, in its neglect in the constitution of the necessary competition implementation infrastructure, and finally, in the state capture of the CCP achieved simply by a tightened control of its budget and in inordinate delays and arbitrariness and lack of appropriate scrutiny in the appointments of its senior officials.⁴⁷ It is no surprise, therefore, that the CCP of today is a mere shadow of its earlier more autonomous self which hesitates to take strong, unpopular decisions that may push against Pakistan’s powerful elite.

On July 15, 2020, Rahat Kaunain Hasan, who had served the CCP first as a Member and then as its Chairperson,⁴⁸ once again took charge as its Chairperson.⁴⁹ Rahat is a competent regulator who not only understands the exigencies of competition regulation but also the perils of operating and surviving in Pakistan’s complex and compromised regulatory environment. However, Rahat alone cannot work miracles in resurrecting the CCP from its ashes unless the government itself commits to supporting it with more than lip service and allowing it the independence it must have to meaningfully perform its mandate. The failure of the government to do so even now will not only strike a death blow to competition enforcement in the country but more damagingly, will further tighten the stranglehold of the political elite on Pakistan’s economic resources.

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- ² India had adopted a modern competition law in 2002.
- ³ Preamble, Competition Act 2010 (hereinafter "the Act").
- ⁴ Eric David Manes, "A Framework for a New Competition Policy and Law: Pakistan." ©2007 The International Bank for Reconstruction and Development, paras 1.5, 1.6.
- ⁵ *Ibid.* Executive Summary, para (iii), (viii) and Acknowledgement.
- ⁶ *Ibid.*
- ⁷ *Ibid.*
- ⁸ Joseph Wilson, "Crossing the Crossroads: Making Competition Law Effective in Pakistan," (2011) 8 *Loyola University Chicago International Law Review* 105, 111.
- ⁹ Voluntary Peer Review. (n. 129.). ch 1A, 2, para 7.
- ¹⁰ Article 89 of the Constitution of Pakistan 1973.
- ¹¹ The Proclamation of Emergency and Provisional Constitutional Order No. 1 of 2007.
- ¹² The Constitution (Amendment) Order 2007. The delay in placing the Ordinances before Parliament was due to the growing political unrest in the country and the need to protect the more overtly political National Reconciliation Ordinance 2007 from Parliamentary scrutiny. The Competition Ordinance became caught up in this impasse simply for having been introduced in the same period as the National Reconciliation Ordinance.
- ¹³ *Sindh High Court Bar Association v. The Federation of Pakistan* PLD 2009 SC 879. para 22(vii).
- ¹⁴ The Competition Ordinance 2010 (Ordinance No. XVI of 2010).
- ¹⁵ Manes (n.4) para 4.1.
- ¹⁶ *Ibid.* Para 4.6.
- ¹⁷ *Ibid.* Ch 3.
- ¹⁸ *Ibid.* Para 4.1.
- ¹⁹ *Ibid.* Para 2.8.
- ²⁰ *Ibid.* para 4.2, 4.6.
- ²¹ *Ibid.*
- ²² *Ibid.* paras 4.6, 6.38.
- ²³ Section 12(2) and Section 14(1), Ordinance 2007.
- ²⁴ Section 14(5), Ordinance 2007 read with "Competition Commission (Salary, Terms and Conditions of Chairman and Members) Rules, 2009."
- ²⁵ Sections 14 and 19 of Act.
- ²⁶ Section 1(3), Ordinance 2007.
- ²⁷ Section 4, Ordinance 2007.
- ²⁸ Section 3, Ordinance 2007.
- ²⁹ Sections 31, 38, 39, Ordinance 2007.
- ³⁰ See for instance CCP's decisions in the *Pakistan Banking Association* case (decided 10.04.2008); the *ICAP* case (04.12.2008); the *Karachi Stock Exchange* case (decided 18.03.2009); the *All Pakistan Newspaper Society* case (decided 23.04.2009); the *All Pakistan Cement Manufacturers Association* case (decided 27.08.2009), and in respect of collusive bidding, the *Dredging Companies* case (decided 23.07.2010) and the *PESCO Tender Order* case (decided 13.05.2011).
- ³¹ CCP's move away from detailed discussions regarding the analytical tests as stipulated in the EU competition and US antitrust law towards a more summary and literal analysis of agreements is evident in its most recent decisions. For instance, CCP makes no reference to the EU and US analytical tests in its decision in *Pakistan Automobile Manufacturers Authorized Dealers Association* case (decided 10.04.2015). In this case, CCP invoked the language of the EU and US systems (para 37) but decided the cases exclusively on the basis of the agreement before it and its earlier decisions. It follows the same practice in the *Pakistan Engineering Council* case (decided 20.04.2016); *Pakistan Poultry Association* case (decided 29.02.2016); *All Pakistan Newspaper Society* case (decided 06.12.2018); *Oil Companies Advisory Council* case (decided 20.06.2019); *Pharma Bureau* case (decided 06.08.2019); *Pakistan Flour Mills Association* case (decided 13.12.2019) and *File KPK Directorate of Agriculture Engineering* case (decided 16.12.2019).
- ³² See, for instance, the *ICAP* case (n.30); the *Karachi Stock Exchange* case (n.30); and the *1-Link* case (decided

28.06.2012).

- ³³ See, for instance, the *GCC Medical Centres* case (decided 29.06.2012); the *LDI* case (decided 30.04.2013); *Wateen Telecom* case (decided 22.03.2011); *Engro Vopak Terminal Limited* case (decided 29.06.2011); *Reliance Paints* case (decided 30.03.2018); and the *NFC Employees* case (decided 27.11.2018).
- ³⁴ See, for instance, CCP's decision in the *Pakistan Banking Association* case (n.30) para 48-50.
- ³⁵ In terms of Section 38(2)(a), CCP had the discretion to impose these penalties in a lump sum subject to a maximum or as a percentage of the annual turnover of the undertaking in question.
- ³⁶ In 2009 CCP issued Guidelines on Imposition of Financial Penalties http://www.cc.gov.pk/images/Downloads/guidlines/imposition_of_financial_panelties.pdf and supplemented these in 2016 with Guidelines on Prohibited Agreements http://www.cc.gov.pk/images/Downloads/guidlines/guidelines_section_4.pdf. However, in the majority of its orders, it does not explicitly refer to its guidelines.
- ³⁷ In terms Sections 41 and 42 of the Act appeals from orders of the CCP were required to be filed either before CCP's Appellate Bench or before an independent Competition Appellate Tribunal.
- ³⁸ The 2007 Ordinance and its 2009 iteration did not envisage an appellate tribunal. Appeals from CCP's final orders, passed by a single member or authorized officer of CCP, lay to its appellate bench and appeals from all its other final orders and those of the appellate bench lay to the Supreme Court. The 2010 Ordinance stipulated that appeals from CCP's filed before the high courts, rather than the Supreme Court.³⁸
- ³⁹ The concept of the appellate tribunal was first introduced in Section 42 of the Act.
- ⁴⁰ Even after the provision for the tribunal had been made, the government appointed its first member and Chairman only in July 2011 and did not appoint the technical members until 2012. In April 2013, the tribunal was rendered dysfunctional when one member resigned and the other retired. The government appointed their replacements in 2015 and 2016 and it was after more than four years after it was stipulated that a tribunal be established that it fully commenced operations.
- ⁴¹ "Report of the Commission of Inquiry constituted by Ministry of Interior to Probe into the Increase in Sugar Prices," May 2020, para 355 and 357.
- ⁴² *Ibid.* Para 205.
- ⁴³ *Ibid.* Paras 352-357
- ⁴⁴ *Ibid.* Para 118-120.
- ⁴⁵ For 14 months, between Nov 2013 and December 2014, CCP remained without a chairperson with Dr. Joseph Wilson managing its affairs as an Acting Chairperson—he had all the responsibility but not security of tenure.
- ⁴⁶ *Ibid.* Para 113.
- ⁴⁷ CCP's chairperson, Vadiyya Khalil was removed from office by a court order in April 2020 on the grounds of improper appointment. She and two other members had been removed once before in 2018 but had then been reinstated. "IHC dismisses CCP chairperson, two others," <https://tribune.com.pk/story/2205135/ihc-dismisses-ccp-chairperson-two-others>.
- ⁴⁸ Kaunain-Hassan had been a member of the CCP since 2007 and was appointed chairperson in 2010. She completed her tenure in November 2013.
- ⁴⁹ "Rahat Kaunain Hassan assumes charge as CCP chairperson," <https://profit.pakistantoday.com.pk/2020/07/15/rahat-kaunain-hassan-assumes-charge-as-ccp-chairperson/>.