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Introducing Settlement Program for Cartel Cases in Pakistan Competition Regime: An Appraisal

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Abstract

A settlement program for handling cartel cases does not exist in Pakistan's competition regime. The Competition Commission of Pakistan (CCP), as a regulatory authority, solely responsible for the implementation of the Competition Act 2010 (CA 2010), aims to prevent the undertakings from restraining, reducing or restricting competition in a market by engaging themselves in anti-competitive practices. There is a need that the CCP may launch an extensive debate on the potential of introducing a settlement program to support the cartel enforcement mechanism. There is a need to assess the impact of the current unavailability of a settlement system in the cartel enforcement mechanism and to assess the impact of an effective system of settlements available in other jurisdictions, such as the European Union. This impact assessment would aim at highlighting the possible economic and social impacts of a settlement procedure, and if available, at ensuring a successful implementation of competition law. This article consists of seven parts. Part I provides the introduction of the topic. Part II reviews the existing settlement program, if any, in the competition regime of Pakistan and the European Union. Part III deliberates on the procedure adopted by the European Commission for settlement. Part IV discusses the objectives, significance, and rewards of the settlement program. Part V argues how to safeguard the discretion of the enforcement agency and parties' right of defense in cases where a settlement procedure is adopted. Part VI discusses the challenges of adopting settlement procedures in Pakistan's competition regime. Part VII contains concluding remarks.

Keywords: Competition law, Settlement procedure, Competition infringement, Pakistan competition regime, Cartel cases

Introduction

The Competition Act 2010 (CA 2010) serves as the main statute which aims to promote sustainable economic development in Pakistan. The Competition Commission of Pakistan (CCP) is the sole competition enforcement authority. The CA 2010 does not provide a settlement program. In 2008, in the European Union, the European Commission introduced a system that enables the Commission to settle cartel cases more efficiently. (European Commission Regulation 622/2008, 2008) A *Notice on the conduct of settlement procedures* was issued which provided the framework to reward party/parties for their cooperation during the proceedings involving cartel violations. The European Commission's settlement procedure is successful since several cartel cases have been settled following this procedure. (European Commission, Statistics on Cartel cases) In 2015, (European Commission Regulation 2015/1348, 2015) the *Notice on the conduct of settlement procedures*, was

renewed to enhance the level of protection provided to parties concerned involved in a settlement procedure.

The article aims to analyze:

1. Whether the introduction of a settlement program in Pakistan's competition regime would help to expedite the disposal of cartel cases.
2. Whether it is appropriate to incorporate a settlement program in Pakistan to handle cartel cases.
3. The potential advantages and disadvantages of the settlement program based on the European Union experience.

This article consists of seven parts. Part I introduces the topic. Part II reviews the existing settlement program, if any, in the competition regime of Pakistan and the European Union. Part III deliberates on the procedure adopted by the European Commission for settlement. Part IV discusses the objectives, significance, and rewards of the settlement program. Part V argues how to safeguard the discretion of the enforcement agency and parties' right of defense in cases where a settlement procedure is adopted. Part VI discusses the challenges of adopting settlement procedures in Pakistan's competition regime. Part VII contains concluding remarks.

Settlement Program in the Competition Regime of Pakistan and the European Union

A true settlement program does not exist in Pakistan. However, sometimes the CCP, informally in its Orders, takes a lenient view due to the continuous cooperation of the undertakings concerned which becomes a mitigating factor in fixing the number of fines. The CCP, in Pakistan Ship's Agents Association, imposed a total penalty of only PKR 1 million for the violation. The CCP took a lenient view in its Order keeping into consideration the factors, such as government pressure on the Pakistan Ship Agents Association (PSAA) to regulate prices, their cooperation throughout the proceedings, and their assurance to support the competition regime in Pakistan. The CCP, in its Order, further directed the PSAA to pass a declaration affirming their adherence to CA 2010. Additionally, they were required to submit a written compliance report in 30 days. On 25 March 2011, before the Order was passed, the PSAA availed their right to be heard. PSAA, during the hearing, in their written statement, formally offered a commitment to observe the CA 2010 in letter and spirits. (Pakistan Ship's Agents Association Order, 2011)

In July 2008, in the European Union competition jurisdiction, the European Commission introduced a system for settling cases involving cartel violations. (Regulation 1/2003, Consideration 13) Indeed, European Commission Regulation 622/2008 amended Regulation 773/2004, determining the rules to administer the procedure for settlement in cases involving cartel infringements. (European Commission Regulation 622/2008, 2008 ; Lorenz, 2013 :359 ; Soltesz and Von Kockritz, 2011 :258-265) In August 2015, Regulation 2015/1348 amended Regulation 773/2004 concerning the European Commission's proceedings following Article 101 TFEU specifically related to rules to conduct settlement proceedings. (European Commission Regulation 2015/1348, 2015) In 2008, the European Commission released a Notice highlighting the principles regarding the applicability of settlement procedures. The purpose of the Notice was to facilitate the European Commission to adopt the decision in cartel cases following Articles 7 and 23 of Regulation 1/2003. This Notice was amended in 2015. (Notice on the settlement procedures, 2008; Amendments to the Commission Notice on the settlement procedures, 2015) The Notice sets out the framework to reward a party for their cooperation throughout the proceedings that commenced following Article 101 of the Treaty on the Functioning of the European Union (TFEU) in cartel violations. (Amendments to the Commission Notice on the settlement procedures, 2015) The parties may, during the investigation of an alleged

activity, acknowledge their involvement in a prohibited activity and their responsibility for it, when they observe the available evidence against the alleged infringement in the file of the European Commission. The European Commission, in return, rewards such parties by settlement and 10% reduction in the amount of fine that it would otherwise have imposed on them. (Kameoka, 2014 :147 ; Gonzalez, 2011 :170-177) When leniency applicants are also involved in settled cases, the reduction in the amount of fine granted to the parties who agree to settle the matter under investigation in addition to their leniency reward. ('Notice on the settlement procedures, 2008' : point 32) Thus, the leniency applicants' reward remains unchanged even in settlement cases or more accurately it increased with a settlement procedure. The European Commission's leniency program is the most effective investigative tool and according to Leniency Notice 2006, an undertaking may be rewarded that voluntarily provides evidence to the European Commission regarding the existence of a cartel and assists the Commission in establishing the alleged infringement. In contrast, the Commission Notice on the settlement procedures rewards the undertaking that significantly contributes by bringing procedural efficacy.

The European Commission's Settlement Procedure

The party that decides to avail the benefit of the settlement procedure during the investigation may submit a "settlement submission" that is considered as the party's formal request to settle. (Notice on the settlement procedures, 2008: point 20) The European Commission receives the settlement submission from the party concerned and sends them a "Statement of Objection" considering the party's view, as contained in its submission. (Notice on the settlement procedures, 2008: point 25) The party concerned is required to reply within two weeks' time duration to unequivocally confirm an absence of any contradiction in the Statement of Objections received by them and their proposed settlement submission. They also need to confirm their adherence to follow the settlement procedure. When a party concerned fails to submit a reply, the European Commission considers it a breach of commitment. The European Commission may, in those circumstances, decide not to follow the settlement procedure, but rather start the investigation of alleged activity following the standard procedure. (Notice on the settlement procedures, 2008: point 26)

The Commission may adopt its final decision with prior consultation of the "Advisory Committee on Restrictive Practices and Dominant Positions". That indicates that once the Commission decides to proceed with the settlement procedure based on the submission made by the party, the latter neither claims its right to an oral hearing hearing nor has access to the Commission's file. (Notice on the settlement procedures, 2008: point 28) According to Whish and Bailey, these examples substantiate the viewpoint that the settlement procedures bring procedural efficacies and swifter decisions. (Whish and Bailey, 2015:277)

The Commission may, using its discretion, decide to reject the party's settlement submission. In that case, the Commission issues a Statement of Objections following the standard procedure ("Amendments to the Commission Notice on the settlement procedures", 2015: point 27) and ignores the parties' acknowledgment. However, the rules protect these undertakings that their acknowledgment of participation in an alleged prohibited activity cannot be utilized as evidence against them. ("Amendments to the Commission Notice on the settlement procedures", 2015: point 29) Thus, according to Amendments to the Commission Notice on the conduct of settlement procedures 2015, enhanced level of protection is provided to parties involved in the procedure for settlement. ("Amendments to the Commission Notice on the settlement procedures, 2015: points 27 & 39")

Objectives, Significance, and Reward of the Settlement Program

A settlement program can act as an efficient instrument that aims to provide simplified and accelerated procedures leading to adopt a formal decision in cartel cases. By shortening the length of procedures, such a program saves human resources in the cartel department and allows freed resources to be used more efficiently. According to Kameoka, the number of follow-on damage actions reduces by the adoption of settlement procedure. As the limited scope of information is publicly available in these decisions. According to one perspective, this may be considered as one of the advantages of settlement decisions. (Kameoka, 2014:147) As discussed earlier, in the European Union competition jurisdiction, all parties that avail the settlement procedure in the same case receive a 10% reduction in the amount of fine as the reward for their substantial contributions to procedural efficiency. (for instance, Case AT.40098, 2015; Case AT.40028, 2016) Thus, the same reduction of the fine (10%) for all parties as a reward is due to their same contribution to procedural savings. Since the announcement of the Commission Notice on the settlement procedures in June 2008 (and amended in 2015), several cartel cases have been settled and most settlements have managed to achieve an overall reasonable outcome. In 2010, the European Commission adopted its first settlement decision (DRAMs). (Case COMP/38.511, 2010) Since then, 40 decisions have been concluded following the settlement procedure (till May 2023). (European Commission, Statistics on Cartel cases)

A settlement procedure is used by the enforcement agency (the CCP, in the case of Pakistan) to accelerate the procedure in cartel cases. (Hofmann, Rowe and Türk, 2011:337; Laina and Laurinen, 2013:302-311) A settlement decision, however, does not only prove the existence of an infringement but parties also admit to their guilt. The settlement system is advantageous both for the parties and the enforcement agency. For the parties participating in cartel activity, the most advantageous outcome is a briefer process and a reduction in the amount of fine. A swifter and shorter administrative procedure is also beneficial for the enforcement agency as it may allow them to use their staff and resources more efficiently in the relevant department of the agency wherein cartel cases are dealt with. Another pertinent advantage is that the number of appeals before the appellate forums also reduces as a result of the approval of the settlement decision. (Kameoka, 2014:147) In other words, an effective settlement system facilitates the enforcement agency in dealing with more instances with the same available means. (Notice on the settlement procedures, 2008: point 1) These conserved resources may be consumed to deal with other competition cases and increase the rate to uncover competition infringements. They may be used to positively impact the overall graph of the agency's enforcement statistics. In this manner, the public interest may be focused on the enforcement agency's performance, such as delivery of effectual and appropriate punishment. Thus, a settlement procedure is expected to achieve the goal of general deterrence. The questions regarding the existence of a violation or the correctness of amount of fine may not be allowed, as per rules. (Notice on the settlement procedures, 2008: point 2) A settlement decision constitutes a valid precedent for similar future breaches and the principle of *res judicata* would be applicable that the enforcement agency is prevented to adopt another decision in situations with the same facts and the same cause of action. (European Commission, MEMO/08/458, 2008)

Safeguarding the Discretion of the Enforcement Agency and Parties' Right of Defence

In settlement cases, the enforcement agency retains extensive discretion to scrutinize and decide regarding the suitability of cases for settlement. (Notice on the settlement procedures, 2008: point 5) The parties to the proceedings cannot claim settlement as a matter of right. (Notice on the settlement procedures, 2008: point 6) Similarly, the enforcement agency does not have the right to impose a settlement procedure on the parties. (Notice on the settlement procedures, 2008: point 4) In cases where the enforcement agency starts an investigation against several parties, the parties are to be provided with an option of whether to apply for a settlement procedure. It must, therefore, not be

mandatory for all the parties involved in the investigation to apply for the settlement procedure. The enforcement agency may discontinue the discussions regarding settlement in a case or for one/more parties involved in the discussion at any time during the procedure when the agency considers that there are lesser chances of achieving the desired outcome. [European Commission Regulation 622/2008, 2008: Art: 10a (4)]

The European Commission Notice on the settlement procedure clarifies that the parties' right of defense should be respected in all circumstances. (Notice on the settlement procedures, 2008: point 4) The parties' right of defense is similar both in the settlement procedure and in the routine/standard procedure. The first step, as discussed earlier, is that the enforcement agency delivers the official notification of objections. The right of defense is merely implemented by means of bilateral oral deliberations or through a written submission. (European Commission, MEMO/08/458, 2008)

According to the competition rules of the European Union, when the European Commission decides to pursue the settlement procedure, it may arrange a communication channel between the settlement candidates and the authorized representative of the Commission. The Commission's "Directorate-General for Competition" ordinarily deals with such matters. (Notice on the settlement procedures, 2008: point 14; Lorenz, 2013:359) The questions regarding the suitability and regulating the conduct of the ongoing discussions regarding settlement with each settlement applicant are at the sole discretion of the European Commission. (Notice on the settlement procedures, 2008:point 15) It means that the enforcement agency may inform the parties taking part in settlement discussions of its objections to their behavior, the evidence that becomes the basis of those objections, all relevant documents (non-confidential version), and the approximate extent of fines likely to be imposed. [European Commission Regulation 622/2008, 2008:Art 10a(2)] The enforcement agency may retain discretion to determine the order in which the settlement discussions take place, and the time to disclose the relevant information, such as disclosing the available evidence in the file of the agency that becomes the ground to validate the objections raised by the agency, and the approximate possible fine. ((Notice on the settlement procedures, 2008: point 15) After the initiation of proceedings, the enforcement agency may disclose to the parties the evidence and documents. In this manner, the parties may prepare their oral/written statements to counter the potential objections raised by the authority. This exercise may enable them to decide on whether to pursue the settlement procedure. [Notice on the settlement procedures, 2008: point 16, read with European Commission Regulation 2015/1348, 2015: Art: 15 (1a)]

The other parties (and their representatives), to exercise their rights of defense, may also be allowed to access the settlement submission through access to the file, but any mechanical/electronic copy of settlement submissions may not be allowed. (European Commission Regulation 2015/1348, 2015: point 15(1b)) In practice, a duration of 15 days minimum, in appropriate cases, may be provided by the Commission for an undertaking so they may introduce a final settlement submission. [Notice on the settlement procedures, 2008:point 17, read with European Commission Regulation 2015/1348, 2015:Artt: 10a(2) and 17(3)] In the European Union's competition regime, the parties may raise objections concerning their right to due process before the Hearing Officer any time during the settlement procedure. The Hearing Officer is bound to ensure that the parties' right of defense is exercised effectively. (Notice on the settlement procedures, 2008: point 18) The standard investigation procedure will be followed when the applicants fail to present a settlement submission according to the rules. (Notice on the settlement procedures, 2008: point 19)

In 2015, the "Notice on the conduct of settlement procedures", was renewed to enhance the level of protection provided to parties concerned involved in a settlement procedure. According to point 15 (1a) of Regulation 773/2004, as amended, when discussions regarding settlements are discontinued with the party/parties concerned, the European Commission, following the standard procedure, issues a "Statement of Objections". The party/parties may, as per rules, be granted access to the

Commission's file. According to the present "Notice on the conduct of settlement procedures", issued in 2015, the European Commission will disregard the acknowledgments of party/parties regarding their involvement in the cartel. These acknowledgments of the party/parties cannot be used as evidence against them. Similarly, settlement discussions cannot be used as evidence before the national courts in private claims for damages in cartel infringement cases. The European Commission ensures not to provide settlement submissions to national courts. The courts may impose effective penalties in case of breach of the disclosure rules. However, according to the previous Notice on the settlement procedures that was issued in 2008, the European Commission could share the settlement submission to the national courts with the approval of the concerned party. It states that the Commission will not transmit settlement submissions to national courts without the consent of the relevant applicants,'. (Emphasis added)

According to point 15 (1b) of Regulation 773/2004, as amended, other parties (and their representatives) are not allowed any mechanical/electronic copy of settlement submissions. There is some limit to the right to access a settlement submission through access to the file. The parties may access a settlement submission file only on the premises of the European Commission and only to exercise their rights of defense. This rule ensures that undertakings are encouraged to voluntarily acknowledge their involvement in competition violations.

Settlement Procedure in Pakistan: What Needs to be Done?

There is a growing awareness of the benefits of settlement procedures and the fact that cases can generally be terminated faster and more easily in settlement procedures. It ensures conserving public resources and is beneficial both for the undertakings and the enforcement agency. However, since fines in the Pakistan competition regime are not as excessive as in the EU competition regime, and the length of cartel proceedings is comparatively shorter as well, it is not clear, at this stage, whether it is worth adopting a settlement system in Pakistan. Nevertheless, short investigative processes, quick determination of cases, reduced number of appeals, and lessened use of available resources certainly seem desirable in Pakistan as well as much as in the European Union wherein the European Commission's settlement procedure is successful since several cartel cases have been settled following this procedure till now.

The CCP is recommended to launch an extensive debate on the potential of introducing a settlement procedure in cases related to cartel conduct. There is indeed a need to assess the impact of the current unavailability of a settlement procedure for cases involving cartels and the impact of an effective system of settlement, by taking guidance from a competition jurisdiction with an effective settlement procedure, such as the European Union. This impact assessment would aim at highlighting the possible economic and social impacts of a settlement procedure, if available, to ensure effective enforcement of CA 2010.

Conclusion

The research paper raised a question concerning the availability of a settlement procedure in Pakistan and the European Union. It assessed the possibility of introducing the settlement procedure in the competition regime of Pakistan. The competition regime of Pakistan may benefit from the European Union experience and make cartel provisions of CA 2010 and its implementation even more effective. In this regard, the relevant statutes, the enforcement practice of the CCP and the European Commission through decision-making, and issuing soft law, the case law of the courts reviewing decisions of the European Commission, and legal scholarship were used. Based on this assessment, keeping in view the European Union experience, it is ascertained that there is room for improvement of the Pakistan regime, specifically to improve the effective enforcement of the cartel provisions of CA 2010 to generate the desired results. As in the European Union, the settlement procedure of the

European Commission is functioning as an efficient instrument that has simplified, expedited, and shortened the duration of the procedures. Since the implementation of the settlement procedure, most cases have been finalized via this procedure. The European Commission is, therefore, effectively performing its responsibility to discover and investigate cartels.

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