

Journal of Law & Social Studies (JLSS)

Volume 5, Issue 3, pp 491-506

[www.advancelrf.org](http://www.advancelrf.org)

## Cartels under Competition Act 2010 of Pakistan: An Appraisal

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### Abstract

*Cartels are considered the most serious anti-competitive infringements. The scope of the Competition Act 2010 includes provisions related to cartels and the procedures for enforcing measures against them. Penalties under the Competition Act 2010 are administrative. The Competition Commission of Pakistan has improved its image and integrity by performing well and enforcing the law in a meaningful manner within its limited resources. It has not only busted some of the most harmful cartels in various sectors but also fined a few major undertakings that are proven to breach the relevant provision of the Competition Act 2010. However, a different approach needs to be adopted by promoting corporate culture in the country that would make cartel enforcement more viable in the future. The article aims to appraise cartel provisions of the Competition Act 2010 and compare them with Pakistan's previous law and the European Union competition rules, where necessary. The Competition Act 2010 of Pakistan finds its roots in the European Union competition rules. The article intends to emphasize various implementation procedures of the Competition Commission of Pakistan including, the power of investigating; types of decisions, and appeals filed against the Order of the Competition Commission of Pakistan. It gauges the effectiveness of the Competition Commission of Pakistan as the sole enforcement authority in charge of the application of principles set out in Section 4 of the Competition Act 2010 to prevent or remedy possible violations of the law.*

**Keywords:** Anti-competitive infringement, Competition Commission of Pakistan, Competition Act 2010, Cartel enforcement procedure, Corporate culture, Cartels

### Introduction

#### Brief Overview of Competition Law in Pakistan

The enactment of the Competition Act in September 2010 serves as an important legal milestone in the journey for promoting sustainable economic development in Pakistan. Beginning with the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance of 1970 and finally adopting the Competition Act of 2010, several attempts have been made at reinventing the competition law to meet the challenges of the 21st century. (Fatima, 2012: 41-60)

#### Free and Fair Competition

The purposes of the Competition Act 2010 are fairly clear that is to benefit from productive and dynamic efficiency, enhance economic efficiency by guaranteeing free and fair competition in all

economic and commercial spheres, and safeguard consumers from competition infringements. (Competition Act, 2010: Preamble) Therefore, the path of the Competition Commission of Pakistan, as a principal authority to conduct enforcement activities, after the new competition regime came into force in Pakistan is a demanding and challenging task.

### **Prioritizing Enforcement Activities with Emphasis on Cartels**

Competition agencies around the world have prioritized their work and have identified the most dangerous practices that are harmful to the economy and society. Developing countries like Pakistan are also required to do the same as it is practically difficult to achieve all the goals simultaneously due to many constraints such as inadequate means. There is an acute need to focus on the most harmful behaviors first to efficiently utilize the available resources. All jurisdictions around the world that have enacted Competition Laws, denounce cartels and emphasize anti-cartel provisions. The international organizations OECD, UNCTAD, and ICN have come up with different strategies and designs for effective anti-cartel legislation that reflect that the harm caused by cartels is severe on the competition. According to Richard Whish "There is a very real sense today among the world's competition authorities that, if competition law is about one thing above all, it is the detection and punishment of hard-core cartels". (Whish, 2007:39-58)

The article aims to appraise cartel provisions of the Competition Act 2010 and compare them with Pakistan's previous law and the European Union competition rules, where necessary. The Competition Act 2010 of Pakistan finds its roots in the European Union competition rules. The article intends to emphasize various implementation procedures of the Competition Commission of Pakistan including, the power of investigating; types of decisions, and appeals filed against the Order of the Competition Commission of Pakistan. It gauges the effectiveness of the Competition Commission of Pakistan as the sole enforcement authority in charge of the application of principles set out in Section 4 of the Competition Act 2010 to prevent or remedy possible violations of the law.

### **Cartels under the Competition Act 2010**

#### **What is the Legal Basis?**

Section 4 of the Competition Act 2010 (CA 2010) states that an agreement is declared void when its object or effect is to "prevent, restrict or reduce competition within the relevant market". The Competition Commission of Pakistan (the CCP) is the sole authority responsible for conducting enforcement activities, in general, and regarding Section 4 of CA 2010 in particular. Where the CCP is satisfied after providing the concerned parties an opportunity to be heard that there has been or is likely to be a contravention of law it may make appropriate orders that are specified in Section 31 of CA 2010 and it may also impose financial penalties as prescribed in Section 38 of CA 2010.

#### **Specific Objectives of Competition Act 2010**

The CA 2010 (Competition Act, 2010:§ 4) came up with a distinct approach as compared to the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance (MRTPO70)and excludes any agreement that aims to reduce competition within the relevant market (Competition Act, 2010:§ 2(k)), whether or not it is 'unreasonably restrictive'.

Back in 1970, the MRTPO 70 was enacted establishing the Monopoly Control Authority (MCA) for regulating and enforcing MRTPO 70. The term "cartel" was not used under MRTPO 70. It prohibited only "restrictive" trade practices that "unreasonably" lessened competition, (MRTPO 70, § 2 (1) (n)) and provided a list of practices that were presumed to be restrictive. (MRTPO 70, § 6 (1)) MRTPO 70 pointed out the instances when restrictive trade practices might be defended, such

as when they substantially contributed to efficiency, technical advancement, or exports. (MRTPO 70, § 6 (2)) Facts show that the MCA had no or little deterrence effect on the companies involved in cartel activities and the issue of the MCA's jurisdiction was raised many times. (Ilyas, 1999; X, The Dawn 2002)

### Specific Substantive Provisions under the Competition Act 2010

The CA 2010 has not used the term 'cartel' instead the term 'agreement' is used and defined by the Law. Section 4 of the CA 2010 which is primarily based on Article 101 of the Treaty on the Functioning of the European Union (TFEU) defines prohibited agreements as any agreement that has the "object or effect of preventing, restricting or reducing competition within the relevant market". (Competition Act, 2010:§§2(1)(k), 4) That means Section 4 of the CA 2010 requires undertakings to examine their agreement/arrangement proposals thoroughly to determine their effect on competition in the market in the distant future. The provision applies to an 'undertaking', (Competition Act, 2010:§ 2(1)(q)) which is commonly described as a "unitary organization of personal, tangible and intangible elements, which pursues a specific economic aim on a long-term basis" regardless of its legal status and how it is financed. (Case C-41/90, 1991: para 21; Case T-9/99, 2002: para 54) To come within the prohibition laid down in Section 4 CA 2010, the agreement either aims or has an effect to "prevent, restrict or distort competition within the relevant market". The conjunction 'or', between 'object or effect' indicates that the requirement laid down in Section 4 is an alternative to determine whether an agreement restricts the competition. (Guidelines on the Application of Article 101 (3) TFEU, 2004:97; Case 56/65, 1966:249) Thus, the CCP, in case of infringement of the cartel prohibition under Section 4 CA 2010, does not normally require establishing any actual "anti-competitive effect" when an "anti-competitive object" of that behavior is already ascertained. (Case T-62/98, 2000: para 178; Joined Cases 56/64 and 58/64, 1966:para 342; Case C-219/95 P, 1997: para12-14; European Commission-Press Release, 2001:IP/01/1198) It is worth mentioning that the term 'object' does not mean to analyze the intention of the parties subjectively but rather the content of the agreement and the objective aims pursued by it. (Guidelines on the Application of Article 101(3) TFEU; Case T 213/00, 2003: para 183)

Certain agreements, such as price fixing agreements are considered to have the "object of restricting competition" and are violations of law even without having to establish their effect. (Cases 56&58/64, 1966: para 342) The CA 2010 provides an inclusive list of such practices. These include agreements to fix prices, divide/share markets, limit production/distribution/technical advancement /investment, collusive tendering, and tying bargains. (Competition Act, 2010:§ 4) Additionally, the CA 2010 identifies other practices that may fall under the same category, for example, "restrictions in distribution agreements" in certain circumstances. Some agreements are *per se* illegal as they by nature always hamper competition. In such cases, their impact on competition becomes irrelevant.

### Scope and Nature of the Prohibition of Cartels under the Competition Act 2010

#### Scope of the Prohibition

An agreement under CA 2010 has been defined to include "any arrangement, understanding or practice whether or not it is in writing, and whether or not it is intended to be legally enforceable". (Competition Act, 2010:§ 2(1)(b)) The dictionary meaning of the term "arrangement" is "the act or process of arranging". This means the way of arranging things. The term "understanding" means "an agreement, of an implied or tacit nature". The term "practice" means "repetition of certain events". (Pakistan Banking Association and other Order, 2008:30; Case C-49/92 P, 1999: para 115; Case C-199/92 P, 1999: para 158) That means a written agreement is not necessary. There is no obligation regarding any contractual approvals and implementation procedures. The agreement may be expressed or implicit in the conduct of the parties. CA 2010 by including this important

provision assents that the CCP can take cognizance of unwritten collusive arrangements as they fall within the definition of an agreement. (Case COMP/E-1/37.027, 2003:para 196; Joined Cases T-305/94, 1999:para 715; Case 41/69, 1970:para112; Case T-41/96, 2000: para 67,173) As mentioned earlier cartel arrangements are mostly accomplished by word of mouth between the members in informal gatherings or meetings. Sometimes members implicitly appoint one of them as leader and the others follow his lead in prices. (Dibadj, 2010:590) Agreements or understandings that may *prima facie* restrict competition, in certain circumstances, are compatible with the provisions of the CA 2010 provided certain conditions are fulfilled. Additionally, the scope of Section 4 cannot be restricted by confining its application to only those agreements that were entered into after the promulgation of the Act. According to the CCP, such limited interpretation would defeat the very purpose and scheme of the Act. (Pakistan Cement Manufacturers Association Order, 2009:61)

### **Nature of the Prohibition**

The list of agreements included in Section 4(2) of CA 2010 read with Section 4(1) of CA 2010 are considered as having, “the object or effect of preventing, restricting or reducing competition within the relevant market” unless exempted under Section 5 of the CA 2010. This verifies that participation in cartel activities is illegal *per se*. (Competition Act, 2010:§ 4(3)) However, the CA 2010 lays down certain exemption criteria from the general prohibition. (Competition Act, 2010:§§ 5,7,9) That indicates that such an agreement is unenforceable and does not retain any liability of finding of an infringement, on the CCP. The offense under the CA 2010 is considered administrative and the Code of Civil Procedure 1908 governs recovery of penalties (Competition Act, 2010:§ 40(6)) in case of contravention of the law. (Competition Act, 2010:§ 38) However, failure to fulfill the requirements of the CCP specified in its Order constitutes a criminal offense punishable with imprisonment for a prescribed term along with a maximum fine of PKR twenty-five million. The CCP in such cases may initiate proceedings in a competent court. (Competition Act, 2010:§ 38(5); Bahria University Order, 2010) There has been no official record of any individual subjected to a sentence till the year 2020.

### **Defenses Provided under the Competition Act 2010**

The CA 2010 pointed out the circumstances in which the practices that otherwise are prohibited, might be justified. For instance, the practices that are otherwise violated but significantly contribute to enhancing efficiency, technical progression, and exports, and their benefits prevail over their adverse effect on competition within the relevant market might be allowed. (Competition Act, 2010:§ 9) The burden of proof lies on the person/company setting up such justification. As mentioned earlier, Section 4 CA 2010 is based on Article 101 TFEU. There is a two-step assessment procedure for an agreement/arrangement under Article 101 TFEU. (Guidelines on the Application of Article 101 (3) TFEU, 2004:97) The first step of assessment analyze the "object or actual or potential effects" of an agreement between undertakings to determine whether or not it is anti-competitive. Article 101(3) TFEU can be invoked only when it is established that an agreement between undertakings restricts competition as prescribed in Article 101(1) TFEU. (Guidelines on the Application of Article 101 (3) TFEU, 2004:97; Regulation 1, 2003:Art 1(1)and (2)) The second step is relevant only when it is established that an agreement is restrictive of competition. In this assessment, it is determined whether or not the "pro-competitive benefits" are generated by that agreement. It is also assessed whether these "pro-competitive effects outweigh the anti-competitive effects". According to that any agreement or arrangement is justified when there is a significant improvement statistically in the production/distribution of goods/services, technical/economic development is evident and the resulting benefits reach the consumers, thus, attaining "consumer welfare enhancing" objectives as well. (Treaty on the Functioning of the European Union, 2016:47) The above-mentioned four conditions all must be fulfilled for the applicability of the exception granted under Article 101(3), (Case T-185/00, 2002: para 86; Case T-17/93, 1994: para 85; Joined

Cases 43/82 and 63/82, 1984: para 61) otherwise it must be refused. (Case T-213/00, 2003:para 226; Regulation 1, 2003) However, the cartel conducts rarely qualify for the above exemption as these agreements by their very nature generally fail to satisfy the conditions under Article 101(3) TFEU and Section 9 CA 2010 of creating objective economic benefits and they are also not beneficial for consumers.

### **Implementing Procedures under the Competition Act 2010**

An effective enforcement policy comprised of two main elements first active enforcement powers of the competition agency where the possibility of severe punishment would not be disregarded and a leniency policy. These are two sides of a coin where there is a threat of strict punishment for those who are engaged in illegal behavior if uncovered; and on the other hand, cartel participants are rewarded in the form of getting lenient treatment to help the competition authority in prosecuting a cartel. So, both these elements are interdependent since the threat of heavy fines is needed to be there for an efficient leniency policy. At this point, the enforcement powers of the competition agency are aimed to be underscored. The stealthy spirit of most cartel cases makes it difficult to detect violations of the competition law. The competition authority's power of investigation must be adequately supplemented to protect competition effectively.

The CCP is the sole decision-making authority in cartel cases. The Department of Cartels and Trade Abuses conducts inquiries and investigations to determine the possible infringements of the relevant provision of the CA 2010, such as inquiries on the conduct of trade associations for suspected cartelization.

### **Power of Investigation of the Competition Commission of Pakistan**

As mentioned earlier the CCP opens administrative proceedings where there is a contravention of the CA 2010. Many probing procedures are available to enforcement agencies globally, such as data collection, searches/raids, electronic searches, expert opinion, etc., and the Law in certain cases indicates that such measures require a court warrant or authority from an independent body. In the case of Pakistan, the CA 2010 stipulates various investigative measures for the smooth operational function of the CCP that include requests for information, (Competition Act, 2010: § 36) searches/inspection, (Competition Act, 2010: § 34) electronic or computer searches, (Competition Act, 2010: § 34) expert opinion, (Competition Act, 2010: § 34), etc. The expression 'any premises' (Competition Act, 2010: § 34) is used under the Law highlighting the CCP's powers to enter and search premises ( Pakistan Vanaspati Manufacturers Association Order, 2011; Pakistan Poultry Association Order, 2010) that reflects the CCP's wide authority to search private locations such as residences, automobiles, persons, etc. for investigation. It is mentioned elsewhere, (Fatima, 2012:41-60) that delegation of power is permitted under CA 2010 and any officer of CCP may be authorized to "enter and search premises". (Competition Act, 2010: § 34(1)) However, the power to enter and search the premises is available only when certain conditions are fulfilled. For example, the author highlighted that some jurisdictions require a court order to enter into "private dwellings" and in other jurisdictions, an urgent situation may justify searches even without a warrant, for instance, when there is a "danger in delay". The CA 2010 ensures to prevent the abuse of this power by mentioning that reasonable grounds in writing must be recorded before taking any action. ((Competition Act, 2010: § 34(1))) When undertaking concern shows resistance "without reasonable cause" to impede the CCP's officials from performing their assigned task under section 34 of the CA 2010, the CA 2010 allows the investigating officer to enter the premises forcibly.(Competition Act, 2010: § 35(1); Fatima, 2012:41-60;Chaudhry, 2011)

The CCP has wide discretion to exercise appropriate investigating powers provided by the CA 2010. The law provides some safety measures to ensure that the provision of "forcible entry" is not

misused and is always applied lawfully. For this purpose, an investigating officer is under obligation to obtain “the written order of the CCP signed by any two members”. (Competition Act, 2010: § 35(2)) In other words, relevant power must be exercised when it is necessary to successfully enforce the law and it must always be proportionate. An aggrieved party may file a complaint against an investigating officer taking the plea of misuse of power and *mala fide* intention of the investigating officer. The CCP conducts an inquiry according to the prescribed rules. When it is established that the investigating officer “acted vexatious”, abused his powers, and acted with *mala fide* intention, the CCP not only dismisses the officer from his service but he may financially be penalized. (Competition Act, 2010: § 35(3) and (4)) Therefore, corporate entities need to comprehend that search and inspections are tools of investigation and do not in any way signify that the parties concerned are guilty of an offense under Section 4 CA 2010. Rather these are preliminary steps in investigations into suspected cartels and are measures used by the CCP as an enforcement strategy. The CCP only recovers necessary documents that are directly connected to violation from the business premises of an undertaking concerned. The CCP is permitted to request further assistance from any agency and expert to perform its functions effectively under the CA 2010. (Competition Act, 2010: § 53) Conversely, the CA 2010 does not provide for the time limits or deadlines to initiate or complete investigative procedures or make an appropriate order keeping in view the merit of the case.

### **Driving Force for Initiating Investigations**

The CCP may commence inquiry on receiving information (Enquiry Report-Cartelization in Poultry Industry, 2010) or complaints from consumers or businesses, matters highlighted by newspapers, (Enquiry Report-Cartelization in Cellular Mobile Telecommunication Services Market, 2010) reference made by the Government, and/or the authority on its motion on suo-moto basis) may take action. For instance, in the matter of cartelization among “Ghee and Cooking Oil manufacturers/Association” and with “Transporters of Imported Edible Oil”, the CCP initiated the proceedings based on its Sector Study Report in the relevant field and media reports. (Enquiry Report, Ghee and Cooking Oil Manufacturers Cartelization, 2011; Competition Act, 2010: § 37; read with General Enforcement Regulations, 2007:Regulation 16) Fatima pointed out that MRTPO 70 lacked a systematic approach due to which systematic sectoral research studies could not be performed. (Fatima, 2012:41-60) However, the CCP initiated regular studies of various sectors of the economy.

Similarly, under European Union competition rules, the Commission can start an investigation on its initiative or following a complaint, in case of a reference forwarded by an NCA, and/or on a leniency application. (Treaty on the Functioning of the European Union, 2010:Art 105; Regulation 1, 2003) The CA 2010 is silent in prescribing any specific form for complaining. A complaint may be put up using fax, email, or through post. However, General Enforcement Regulations 2007 elucidates that name, postal and electronic address for correspondence, telephone and fax number, in addition to the address of the respondent, are mandatory elements of the complaint/application/reference. (General Enforcement Regulations, 2007:Regulation 18)

### **Who Can Initiate Complaints and How?**

Complaints are one of the most pivotal sources of information to establish a breach of law. Clear, well-defined, and efficient procedures to handle complaints are desirable. Complainant (General Enforcement Regulations, 2007:Regulation 2(e)) under the CA 2010 can be an undertaking and the Federal Government may also file a reference. A complaint is then submitted to initial investigation to determine whether there exist the necessary grounds to establish a violation and validate formal proceedings.

In European Union competition rules, to be admissible, the complaint must contain certain specified information. (Regulation 773, 2004:Form C) In case the complainant is an undertaking, it should highlight certain details regarding its business pursuits, identify the respondents, and specify its position concerning respondents. (Regulation 773, 2004:Form C)

Therefore, both in Pakistan and the European Union, all complaints are submitted to initial investigation, subsequently, an action is initiated provided the CCP and European Commission are satisfied that they have sufficient grounds to establish an infringement. (Regulation 773, 2004:Art 2) The CCP and European Commission then issue a 'show cause notice' and 'statement of objections' respectively in writing to the respondents informing them of the objections raised. (Regulation 773, 2004:Art 6 (1) The show cause notice/statement of objections contains the charges against the parties concerned, grounds that became the basis of such allegations, and the actions the CCP/European Commission proposes to take. The parties are given a specified time duration within which they make their views known to the CCP/European Commission in writing. The parties' right to be heard must also be protected by the CCP/ European Commission. (Regulation 773, 2004:Art 12) The office of the hearing officer ensures that the parties can exercise their right to be heard effectively. (Regulation 773, 2004:Art 14) The CCP fails to provide any such separate office for hearings. All hearings are conducted before the adjudicating members of the CCP for that particular case.

The European Commission assesses the evidence and the submission to draw its conclusion when the right to be heard is duly exercised. Where it determines that infringement still exists it prepares its preliminary draft decision specifying the violation it has found and the action it intends to take by way of levying penalties on each party. However, the “Advisory Committee on Restrictive Practices and Dominant Positions” must be consulted before adopting a final decision. (Regulation 1, 2003:Art 14(1)) The “College of Commissioners” takes the final decision and notifies the parties. However, the Commissioner in charge of competition policy presents the proposal in this regard. The TFEU assured that the Commissioners should “refrain from any action incompatible with their duties” (Treaty on the Functioning of the European Union, Art: 101) and each Member State also refrains from influencing the members of the Commission in performing their assigned functions. (Treaty on the Functioning of the European Union, Art: 101) Such a model does not exist in Pakistan's competition regime.

The European Commission may reject a complaint on insufficient grounds to initiate proceedings. (Regulation 773, 2004:Art 7; Lianos, 2012:417) Complainants are informed regarding the reasons for rejection. They may also be provided an opportunity to express their views. (Regulation 773, 2004:Art 7; Lianos, 2012:417) Likewise, the CCP is also authorized to reject a complaint due to a lack of evidence substantiating the complaint. (Competition Act, 2010:§ 37; read with General Enforcement Regulations, 2007: Regulation 20 (1)) It is pertinent to reiterate here that no specific legal mandate is provided in the CA 2010 prescribing any limitation period, to initiate the matter and to take decision accordingly, from the date of receiving a complaint by the CCP. The length of the administrative procedure varies considerably from case to case. A report (Rating Enforcement, 2011) pointed out that the average length of cartel investigation by the CCP was 4 months which indicates the CCP's commitment to efficacious enforcement. The report further comments that this “may construe to be reflective of the fact that anti-competitive behavior in Pakistan, due to the recent origin of the enforcement drive against it, is so flagrant that it is relatively easy to spot and penalize”. (Rating Enforcement, 2011) Similarly, the length of the administrative procedure in the European Union jurisdiction also varies significantly from case to case and it depends on various things including the availability of leniency applicants to corroborate the Commission's case. A study has revealed that the usual length of a cartel investigation is well above 40 months and even often exceeds 55 months. (Ascione and Motta, 2009: Appendix 2:15)

## Types of Decisions taken by the Competition Commission of Pakistan

### Interim Orders

In some jurisdictions, the investigating agency or decision-making authority may have the discretion to make interim orders keeping in view various factors, such as an urgency of the matter when the "risk of serious and irreparable damage" to competition invariably exists. The interim order is issued before taking a final decision on the merit of the case. The CA 2010 authorized the CCP to issue interim orders during the conduct of cartel proceedings where it is considered necessary in the public order and the undertaking concerned if not ordered "to do or refrain from doing or continuing to do" any specified act/thing, serious and irreparable damage would be a consequence. (Competition Act, 2010:§ 32(1); Appellate Bench-Stock Exchange Order, 2009) The order remains in force for a specified duration and expires before the date of the final order. (Competition Act, 2010:§ 32(2)) However, the CCP is permitted to review, modify, or cancel an interim order. (Competition Act, 2010:§ 32(1)) The European Commission under Regulation 1/2003 may by decision order interim measures applicable for a specified duration, (Regulation 1, 2003:Art: 8 (2)) under similar circumstances underscored above, based on a *prima facie* evidence of a violation. (Regulation 1, 2003:Art: 8 (1))

### Final Orders

To bring the violation of Section 4 CA 2010 to an end, the CCP is empowered to impose on the undertaking concerned a behavioral remedy proportionately to effectively end the violation. The CCP, therefore, may demand, the undertaking concerned, in its order to terminate the agreement, revise the agreement, and avoid repeating such prohibited practice either by entering into another agreement or engaging itself in any other similar practice that aims to restrict competition.(Competition Act, 2010:§ 31(1)(b)) It is also necessary to consider that cartel activities take place covertly and in most cases, establishing an anti-competitive practice/agreement is inferred from several "coincidences and indicia" that combined may, due to a lack of any other "plausible explanation", constitute confirmation of a violation (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, 2004: para 55-57) of CA 2010. However, in the case of prohibited agreements other than cartels, where after preliminary assessment the CCP expressed its concerns via a show cause notice addressed to the undertakings concerned and that undertaking offers commitments to meet those concerns. The commitment is binding on the undertakings when the CCP deems so.

### Penalties Provided by the Competition Act 2010

The competition laws worldwide ensure that the principal regulatory authority, in competition matters, should be empowered to impose fines on undertakings/associations of undertakings that violate the law. Fines should not only seek specific deterrence objectives to penalize the undertakings concerned but also pursue general deterrent effects to prevent other undertakings from participating in/continuing the prohibited activities. Cartel under the CA 2010 is a civil/administrative offense. In the case of Pakistan, the CCP considers that the inclusion of criminal penalties is not appropriate yet. However, the finance ministry insisted on incorporating criminal penalties. They claimed that the CCP may, in this manner, not only impose financial penalties on undertakings involved in cartels but their directors/owners are also subject to jail sentence. (Chaudhry, 2011) The CCP maintained that the "appellate forums" were not "well equipped" with competition law. Additionally, by introducing criminal penalties, the burden of proof would shift, the standard of proof would alter, and the list of infringements needs to be ascertained. (Chaudhry, 2011)



## Penalties for Procedural Breaches

A case of non-fulfillment of procedural obligations mentioned in the CA 2010 is a civil and administrative offense and the CCP can impose monetary fines. The sanctions are imposed on undertakings, including natural/legal persons, governmental organizations, business entities, associations of business entities, and any other entity involved in the “production, supply, distribution” of goods/services. (Competition Act, 2010:§ 2(q)) Similarly, Regulation 1/2003 provides for an undertaking-focused model of civil penalties. (Regulation 1, 2003:Art: 23 (5)) It applies only to companies engaged in cartel conduct and not to individuals. (Regulation 1, 2003:Art: 23 (1)(2)) If individuals are subjected to penalties either administrative or criminal the deterrent effect of competition rules enforcement might significantly increase. Moreover, the inclusion of individual penalties might contribute to correct behaviors of business enterprises and raise awareness among individuals of the competition rules. Thus, an overall change in cultural perception will appear concerning the illegality of infringements of competition law. Price fixing agreements will also be considered immoral like robbery, and theft by the general public.

The CA 2010 underlined some grounds warrant levying penalties. The CCP imposed fines it determines the involvement of the undertaking in prohibited activity under the Law for instance, in Pakistan Vanaspati Manufacturers Association Order, 2011, a penalty of PKR 50 million was imposed by the CCP that was required to be submitted within 30 days of the Order. The fines may be imposed in case of failure to comply with an order of the CCP, failure to produce an agreement's copy/other relevant documents and required information, knowingly providing false information/fabricated statements to the CCP, and in case of inaccuracy of submitted information. Additionally, knowingly abuse, "interferes with, impedes, imperils, or obstructs" the process of the CCP, in any manner, which may justify financial liability. (Competition Act, 2010:§ 38(1)) The law has also specified the maximum (Competition Act, 2010:§ 38(2)(b)(c)) sanctions in certain cases, such as failure to comply with the CCP's order/notice/requisition an amount up to PKR one million may be imposed. For intentionally abusing, interfering with/obstructing/jeopardizing the process of the CCP, in any manner, a maximum amount of PKR one million may be imposed.

## Penalties for Substantive Breaches

As identified earlier the cartel under CA 2010 is considered an administrative offense and penalties fall under civil procedures. When the undertaking's involvement in prohibited activities is established, the CCP imposes penalties depending on the circumstances of the case. The maximum fine for cartel infringement is PKR seventy-five million or ten percent of the annual turnover of the undertaking concerned. (Competition Act, 2010:§ 38 (2)(a)) In 2010, the CCP fined three companies (The Pakistan Poultry Association, Dredging International, and Takaful Pakistan Ltd & Travel Agents Association of Pakistan) for acting in contravention of Section 4 of the CA 2010 and imposed total fines of €2.6 million which means average fine per cartel is €958,702. (Rating Enforcement, 2011) In 2011, the CCP passed 6 orders, 3 in 2012, 2 in 2013, 1 in 2015, and 2 in April 2016. In 2014-2015, it initiated 10 inquiries on cartels and trade abuses, granted 24 exemptions to undertakings, and convened 14 hearings/public hearings. (CCP-Press Release, 9 April 2015) Qureshi states that since 2007 (till 2015), total financial penalties of over PKR 26 billion were imposed on undertakings for various competition law breaches. The rationale behind financial liabilities was consumer protection and restoration of free competition in the economy. (Qureshi, 2015) In 2016 (till April, self-calculated statistics), the CCP imposed total penalties of PKR 150 million on undertakings for various infringements of CA 2010. The Audit Report of the Auditor General of Pakistan 2014-15 states that the CCP failed to fully recover the penalties imposed on undertakings for violation of the law. (Abrar, Pakistan Today 2015) The report recommended that "rigorous efforts should be made for recovery of the outstanding amount". In

2019, the CCP imposed a PKR 75 million fine on the Pakistan Flour Mills Association over Price Fixing. (CCP-Annual Report, 2020:20)

### **Enforcement of Penalties**

An effective mechanism to recover penalties is essential to maintain enforcement statistics of the competition authority. For this purpose, clear rules must be determined that the enforcement agency is required to follow to efficiently collect the amount of fine from the undertaking concerned for its involvement in competition law violation.

The CCP may serve a notice in a prescribed form to the undertaking concerned/director of the undertaking concerned. The notice comprises the specified amount that is needed to be paid along with the time duration within which all payments are expected to be made. (Competition Act, 2010:§ 40 (1)) Where the payments are not made within a specified duration, the CCP is authorized to recover the penalty by adopting other measures as provided by law. (Competition Act, 2010:§ 40 (2)) For the recovery of the amount the CCP acts as a "civil court" following the "Code of Civil Procedure 1908". (Competition Act, 2010:§ 40 (6)) The other measures provided by the CA 2010 are the attachment of immovable property, sale of movable property, sale of the defaulter's bank account, (Competition Act, 2010:§ 40 (2)(a)) appointment of a receiver to administer both the movable and immovable property, (Competition Act, 2010:§ 40 (2)(b)) recovery as arrears of "land revenue through District Revenue Officer". (Competition Act, 2010:§ 40 (2)(c)) There is a possibility to recover the amount of penalty from the one who holds the power/control over the receipt/disposal of the undertaking concerned money and from whom any money is due or may become due to the undertaking (Competition Act, 2010: § 40 (2) (d) (i) (ii) (iii)) In this case, the CCP is required to notify the person in writing the specified time on or before that he is required to pay the amount directed in the notice. (Competition Act, 2010:§ 40 (2)(d)) Any bank, receiver, District Revenue Officer, or undertaking will be considered to discharge his/their liability where he /she pays any sum fulfilling the requirement of the CCP's notice and the CCP issues a receipt referring to the said amount. (Competition Act, 2010:§ 40 (3)) The receipt will therefore constitute a sufficient discharge of liability to the extent of the amount mentioned in the receipt. (Competition Act, 2010:§ 40 (3)) When any "bank, receiver, District Revenue Officer" and undertaking fail to meet the terms of the notice of the CCP then he/it will be treated as a defaulter. (Competition Act, 2010:§ 40 (4)) Where the CCP determines after providing the defaulter an opportunity to be heard that there is a wilful failure to comply with its order, the CCP is authorized to recover the specified amount as a penalty from the defaulter by directing him/it via an order to pay the sum specified. (Competition Act, 2010:§ 40 (5)) All penalties and fines recovered under the CA 2010 are to be credited to the "Public Accounts of the Federation". (Competition Act, 2010:§ 40 (8)) The CCP, ever since its establishment, is confronting some difficult challenges which include recovery of penalties. Aggrieved parties, instead of filing an appeal before appropriate forums, as mentioned in CA 2010, challenge the Order of the CCP before different courts in Pakistan to obtain a restraining order against the CCP's Order.

In the European Union, following the European Commission decision, fine or penalty payments are required to be made within three months from the date of the advice of delivery (C(2011) 4212 final, 2011:Art:5) through the notification of the Commission decision to the relevant debtor. (C(2011) 4212 final, 2011:Art:20) When the appeal is filed to a court of the European Union, against a decision of the Commission to impose a fine or a penalty for breach of Article 101 TFEU the debtor has been requested either to provisionally deposit the amounts concerned or to lodge a financial guarantee. (C(2011) 4212 final, 2011:Art:22) Where the Court upheld the decision of the Commission the amount enters into the accounts as revenue otherwise repaid proportionately.

## Appeals against Final Orders

The CA 2010 provides for three forums of appeal. The CCP's Appellate Bench hears appeals against an order of one Member or an authorized officer of the CCP. An aggrieved party may file an appeal within thirty days from the date of the Order. The Appellate Bench has jurisdiction to hear appeals on a question of law, fact, and procedural breaches of the law. (Competition Act, 2010:§ 41(1)) To hear appeals the CCP constitutes an Appellate Bench comprising of two or more members (Competition Act, 2010:§ 41 (2)) other than the member who issued the original order being appealed against. (Competition Act, 2010:§ 41 (4)) The CA 2010 emphasized the unanimous decision of the Appellate Bench by making it mandatory. However, the decision of the majority prevails when the Appellate Bench comprises more than two members. When there is no clear majority, the original order which is appealed against upheld and considered as the final order of the CCP. (Competition Act, 2010:§ 41 (3)) An original order of the CCP issued by two or more Members and the Appellate Bench's order may be appealed against within sixty days from the date of the respective order before the Competition Appellate Tribunal. (Competition Act, 2010:§ 43) An order of the Competition Appellate Tribunal within a time duration of sixty days may be appealed against before the Supreme Court. (Competition Act, 2010:§ 44)

The judgments by the courts are vital as they prevent attempts by the competition authorities to abuse their powers when prosecuting wrongdoers and force the competition authorities to conduct more rigorous investigations to prevent legal challenges. In Pakistan, certain challenges need to be addressed to strengthen the implementation of competition law. There is a need to establish a jurisprudence of competition law. The judgments of courts can set useful precedents. However, the dysfunctional status of the appeal court since its establishment, the judges' lack of experience in the area of competition law, and certain other aspects need to be focused on to firm up competition law in Pakistan.

The effective functioning of the CCP is hindered by the slow disposal of appeal cases in the courts. The CCP has produced several decisions over some time, but various appellate forums have been endlessly prolonging hearing appeals, filed against the CCP. The statistics and reports show quite a large number of cases are still pending in the appellate courts. (Rana, *The Express Tribune*, 2012) Wilson highlighted that same issue. He declared the slow "disposal of appeals" by the appellate forums as one of the biggest challenges. (Wilson, 2014) Qureshi highlighted that the appellate courts usually grant a stay order to the undertaking concerned instead of deciding the appeal on its merit. (CCP Press release, 2014; X, *The Nation*, 2014; CCP Report, 2013:8) Wilson argued that the dysfunctional status of the CAT is hindering its smooth functioning. (Wilson, 2014) The competition regime of Pakistan still encountering the same challenges (X, *Daily Times*, 2012; X, *Business Recorder*, 2014; Ministry of Law and Justice of Pakistan, 2015)

## Challenges and Inadequacies of Pakistan's Competition Law

### Difficulties Despite Robust and Comprehensive Competition Rules

It is noteworthy that while the principles are robust and comprehensive in Pakistan's competition jurisdiction, the application of these principles, however, encounters difficulties as a result, the cartel enforcement procedures have been modified several times during the last decade or so.

### Healthy Competition Culture and Effective Competition Advocacy

Pakistan's competition regime aims to promote sustainable economic development and to improve and maximize consumer and producer welfare. These aims can only be achieved if competition in the economy is protected and promoted. Hence, a properly planned competition policy and well-administered law are not only beneficial for consumer welfare as they may enjoy lower prices,

quality products, and numerous choices but also promote overall economic growth. However, the policies alone are not enough unless substantiated by well-defined laws. For a good competition regime and healthy competition culture, competition advocacy which includes a review and analysis of the law regularly is necessary.

### **Effective Enforcement Mechanism**

Various obstacles prevent effective enforcement of the law such as the lack of competition culture in a country, inadequate means available to competition authority, lack of trained staff within competition authority, undue political influence, resistance to reforms, and conflicting jurisdictions of competition authorities and sectoral regulators. The CCP is indeed in a crucial phase of enforcement of competition principles particularly, cartel provisions, since the approval of the CA 2010 which is considered to be an improved legislation as some crucial legal instruments such as dawn raids, leniency programs, and searches are introduced in it. These powers were missing in MRTPO 70 so without these powers the then cartel enforcement was considered toothless. Hitherto, the CCP's efforts in curtailing cartels are momentous and reflect signs of maturity in cartel implementation procedures. Indeed, the leniency program of Pakistan is not that effective; the lack of competition culture results in hindrances from the undertaking involved in alleged cartel conduct while searches and inspections; hiring the services of criminal lawyers as compared to corporate lawyers by undertakings in cartel litigation which in no way assist in developing and promoting corporate culture in the country. Corporate lawyers are normally well-versed in the nuances of competition law and they may assist the undertakings involved in cartels in a better manner as compared to criminal lawyers.

### **Effective Appellate Forums**

The appellate forums need to play their role in developing domestic jurisprudence or setting precedents in competition law. There was no "original contemporary competition law jurisprudence" existed in Pakistan before the Competition Ordinance 2007. (Javed, 2012:179) The lack of internal/national jurisprudence/precedents in the competition law field is quite evident from the Orders of the CCP. It is also clear from the analysis of the CCP's Orders and inquiry reports that our jurisprudence is emerging gradually by understanding the "legal and economic principles" observed by various settled competition jurisdictions. Additionally, the review shows that the CCP mostly depends on "principles and precedents" set up by the EU and US competition jurisdictions (decisions of both their competition authorities and courts). The question of whether principles and precedents of other jurisdictions, relied upon by the CCP, are transplanted into national competition law, is yet to be answered. The decisions of the courts in appeals can clarify whether or not they agree with the interpretation of the law adopted by the CCP.

### **Conclusion**

The cartel activities in Pakistan are considered as dangerous as in any part of the world. However, jurisdictions such as the European Union are efficiently fighting against cartels as compared to Pakistan. The article analyzed the cartel provisions and implementation procedures in Pakistan since the introduction of the CA 2010 and compared them with Pakistan's previous law and the European Union Competition Rules, where necessary. The cartel provisions under the TFEU and enforcement policy through Regulation (EC) No. 1/2003 have also been discussed. Given this assessment and drawing from the European Union's experience, it is established that there is an opportunity for enhancing Pakistan's cartel regime to enhance its effectiveness and achieve the desired outcomes.

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