

# PARALLEL PASTS, DIVERGENT DESTINIES

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A COMPARATIVE ANALYSIS OF TRANSFERRING AND IMPLEMENTING  
COMPETITION LAWS IN INDIA AND PAKISTAN

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## DECLARATION

I, Amber Darr, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I have indicated this in the thesis.

Signed \_\_\_\_\_

AMBER DARR

## ABSTRACT

In this thesis, I compare the impact of processes through which India and Pakistan adopted their competition laws, on the subsequent implementation of these laws in the countries. To this end, I construct a theoretical framework by integrating principles from Legal Transplant, Policy Diffusion and Policy Transfer and Development Economics literatures, which allows for the examination of the adoption process from deliberation to formal adoption through to the implementation stage, in a single continuum. I also develop a typology of mechanisms through which laws may be transferred, particularly from developed to developing countries.

In reviewing the adoption processes for competition laws in India and Pakistan, I examine and identify the transfer mechanisms and political and legal institutions, engaged by the two countries. I argue that the Indian competition law, that has been acquired through *socialization* and by engaging a wide range of bottom-up, participatory and inclusive institutions is more likely to be compatible with the context of the country and to have greater legitimacy in it, than the Pakistani competition law, which has been acquired through *coercion* and by engaging only a limited range of top-down and exclusive institutions.

At the implementation stage I focus on the independent performance of the national competition authorities created by the competition laws and the interaction of these authorities with the courts pre-existing in the countries. This analysis confirms that the Indian competition law is more compatible with and enjoys greater legitimacy in India than its Pakistani counterpart does in Pakistan. However, it also indicates that no transfer mechanism is unequivocally superior to another and that in settling upon transfer mechanisms and institutions for adopting competition laws, it is important for countries to understand the trade-offs they may be making with respect to the implementation of these laws.

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## TABLE OF CONTENTS

List of Tables	8
List of Figures	9
Map of India and Pakistan	10
1. Introduction	11
2. The Integrated Theoretical Framework	20
2.1. Legal Transplants Literature: Relevance and Limitations	21
2.1.1. Legal Transplants and the Relevance of ‘Context’	21
2.1.2. Different Meanings of ‘Context’ in Legal Transplant Literature	23
2.1.3. Limitations of Legal Transplant Literature	26
2.2. Insights from Diffusion and Transfer Literatures	31
2.2.1. Why Diffusion and Transfer and Whether Diffusion or Transfer	31
2.2.2. Understanding Mechanisms of Transfer and their Outcomes	34
2.2.3. Adapting Transfer and Diffusion Literatures	41
2.3. The Contribution of Development Economics	48
2.3.1. Significance of Institutional Analysis	48
2.3.2. Identifying Links between Adoption Process and Implementation	49
2.3.3. Lessons of Development Economics for Understanding Adopted Laws	52
2.4. The Theoretical Framework	54
2.4.1. Selecting Relevant Concepts from the Three Literatures	54
2.4.2. Integrating Principles and Concepts for a Step-wise Analysis	55
2.5. Concluding Remarks	58
3. A Comparison of the Adoption Processes In India and Pakistan	59
3.1. ‘Pre-conditions of Transfer’ in India and Pakistan	59
3.1.1. 1947: Creation of India and Pakistan as Independent States	60
3.1.2. 1969 & 1970: Enactment of the Anti-monopoly Laws	62
3.1.3. 2002, 2007, 2010: Adopting the Competition Laws	65
3.2. The Adoption Process in India	69
3.2.1. India’s Motivation for Acquiring the Law	69
3.2.2. Deliberating, Adopting and Amending the Indian Competition Law	70
3.2.3. Evolution of the Indian Competition Law	73
3.3. The Pakistani Competition Law Experience	77
3.3.1. Motivation for adopting Competition Law in Pakistan	77
3.3.2. Deliberations, the Ordinances and Finally the Act	79
3.3.3. The Progress of the Pakistani Competition Law	83
3.4. Unpacking the Adoption Processes in India and Pakistan	88
3.4.1. Transfer Mechanism(s) and Institutions employed by India	88
3.4.2. Transfer Mechanism(s) and Institutions in Pakistan	90

3.5.	Impact of Adoption Processes on Competition Laws in India and Pakistan	94
3.5.1.	Adoption Processes and the Content of Competition Laws	94
3.5.2.	Adoption Process and Compatibility and Legitimacy of the Laws	104
3.6.	Concluding Remarks	105
4.	Implementing Competition Laws in India and Pakistan: An Overview	107
4.1.	The Implementation Stage and Orders as Proxies for Implementation	108
4.1.1.	The Implementation Stage	108
4.1.2.	Reasons for which Orders of the NCAs are Appropriate Proxies	111
4.2.	Analytical Framework for Examining Orders of CCI and CCP	114
4.3.	Examining and Comparing the Indicators	116
4.4.	Links between the Implementation Stage and Adoption Processes	136
4.4.1.	The Implementation of Competition Laws in India and Pakistan	136
4.4.2.	Impact of Adoption Processes on Implementation of the Competition Laws	140
4.5.	Concluding Remarks	151
5.	Indian and Pakistani Strategies for Interpreting Competition Laws	152
5.1.	Understanding ‘Rule of Reason/Per se Rule’ and ‘Object/Effect’ Analysis	153
5.1.1.	Rule of Reason/Per se Rule	154
5.1.2.	The Objects/Effects Analysis	158
5.1.3.	Distinctions and Commonalities between the US and EU Approaches	162
5.2.	Analytical Tests in the Indian and Pakistani Competition Laws	164
5.2.1.	The Analytical Test in the Indian Competition Law	164
5.2.2.	Anti-competitive Agreements under the Pakistani Competition Act	170
5.2.3.	Projections Regarding Interpretation of Analytical Tests	173
5.3.	CCI’s Interpretation and Application of the Analytical Tests	174
5.3.1.	A Historical Review of CCI’s Orders	175
5.3.2.	India’s Present Approach towards Anti-competitive Agreements	185
5.4.	CCP’s Interpretation of the Analytical Tests	186
5.4.1.	A Review of CCP’s Early Orders	186
5.4.2.	Pakistan’s Present Approach Towards Anti-competitive agreements	192
5.5.	Relating Interpretive Strategies to Adoption Processes	192
5.5.1.	Interpretive Strategies adopted by CCI and CCP	192
5.5.2.	Present Interpretive Strategies and the Adoption Processes	196
5.6.	Concluding Remarks	197
6.	Interaction Between Competition Laws and the Pre-Existing Legal Systems	198
6.1.	The Nature of Interaction between NCAs and the Courts	199
6.1.1.	The Nature of Interaction between CCI and the Courts	200
6.1.2.	Relationship between CCP and the Courts in Pakistan	206
6.1.3.	Comparing the Interaction with Courts in India and Pakistan	211
6.2.	Possible Explanations for Interactions between CCI, CCP and the Courts	213

6.3.	Competition Appellate Systems and Interaction with the Courts	219
6.3.1.	History and Operations of the Indian Tribunal	219
6.3.2.	The Situation in Pakistan	222
6.3.3.	Competition Appellate Systems and Interactions with the Courts	224
6.4.	Competition Appellate System versus the Constitutional Challenge System	225
6.4.1.	The Operation and Effect of the Competition Appellate System in India	226
6.4.2.	The Operation and Effect of the Constitutional Challenge System in Pakistan	231
6.4.3.	Comparing the Indian and Pakistani Situations with regard to Recoveries	236
6.5.	Concluding Remarks	237
7.	Conclusion	239
Annexe A		267
Annexe B		282
Annexe C		283
Annexe D		285
Annexe E		289
Annexe F		293
Annexe G		294
Annexe H		300
Annexe I		303
Annexe J		306
Annexe K		309
Annexe L		310
Annexe M		339
Annexe N		343
Bibliography		345

## LIST OF TABLES

Table 2.1 Correlating Typology for Transfer of Laws with Typology for Transfer of Policies	43
Table 2.2 The Source and Application of Relevant Principles and Concepts	55
Table 3.1 Summary of India's Adoption Process	89
Table 3.2 Summary of Pakistan's Adoption Process	92
Table 3.3 Comparing Provisions of Indian and Pakistani Competition Laws	95
Table 4.1 Indicators & their Significance for Implementation of Competition Laws	114
Table 4.2 CCI's Orders re Anti-competitive Agreements and Abuse of Dominance	116
Table 4.3 CCP's Orders re Anti-competitive Agreements and Abuse of Dominance	117
Table 4.4 Sector-wise Distribution of CCI's Orders (2009-2016)	118
Table 4.5 Sector-wise distribution of Orders of CCP (2007-2016)	119
Table 4.6 Year-wise Breakdown of CCI's Orders by Source	120
Table 4.7 Year-wise Breakdown of CCP's Orders by Source	121
Table 4.8 Orders in which CCI imposed Penalties and/or Directions	124
Table 4.9 Orders in which CCP imposed Penalties and/or Directions	125
Table 4.10 Reliance on Case Law and Materials in CCI's Orders	127
Table 4.11 Reliance on Case Law and Materials in CCP's Orders	128
Table 4.12 Year-wise breakdown of Orders of CCI according to strength	130
Table 4.13 Year-wise breakdown of CCP Orders according to strength	131
Table 4.14 Number of CCI's Orders in respect of which Dissent is Recorded	132
Table 4.15 CCI Proceedings challenged before Courts and Response thereto	134
Table 4.16 CCP Proceedings challenged before Courts and Response thereto	134
Table 5.1 Categories listed in Article 101(1) TFEU and section 3(3) of Indian Competition Law	166
Table 5.2 Comparing Article 101(3) TFEU and Section 19(3) Indian Competition Law	167
Table 5.3 Comparing Article 101(1) TFEU and section 4(2) Pakistani Competition Law	171
Table 5.4 Comparing Article 101(3) TFEU and Section 9 Pakistani Competition Law	172
Table 6.1 Number of Final Orders of CCI appealed before the Tribunal	226
Table 7.1 Breakdown of Adoption Processes in India and Pakistan and their Outcomes	246
Table 7.2 Comparing the Indicators in Final Orders of CCI and CCP	251
Table 7.3 CCI and CCP's Interpretive Strategies for Analytical Tests	255

## LIST OF FIGURES

Figure 4.1 Implementation Process Envisaged by Competition Laws in India and Pakistan	109
Figure 4.2 Interactions between Competition Laws and Pre-existing Legal Systems	110
Figure 4.3 Comparison of Total Number of Orders of CCI and CCP 2007-2016	117
Figure 4.4 Sector-wise Distribution of Orders of CCI and CCP	120
Figure 4.5 Year-wise Comparison of CCI and CCP Orders by Source	122
Figure 4.6 Year-wise Comparison of Suo Motu Notices versus Complaints decided by CCP	123
Figure 4.7 Year-wise Comparison of Suo Motu Notices versus Complaints decided by CCI	123
Figure 4.8 Comparison of Orders of the CCI and CCP by Nature of Sanctions Imposed	125
Figure 4.9 Year-wise Trend of Sanctions imposed by CCI	126
Figure 4.10 Year-wise Trend of Sanctions Imposed by CCP	126
Figure 4.11 Comparing Reliance on Case Law and Materials in CCI and CCP's Orders	129
Figure 4.12 CCI's Reliance on Case Law and Materials Refined by Source	129
Figure 4.13 CCP's Reliance on Case Law and Materials Refined by Source	130
Figure 4.14 Comparing the Strength of CCI and CCP in passing Orders	132
Figure 4.15 Year-wise trend of CCI's Dissenting Orders	133
Figure 4.16 Comparing Interaction between CCI, CCP and the Courts	135
Figure 4.17 Response of Courts to Challenges Filed Against CCI and CCP	135
Figure 6.1 Possible Interactions between NCAs and Pre-existing Legal Systems	199
Figure 6.2 Total Orders of CCI and Challenges filed before the High Courts in respect thereof	201
Figure 6.3 Comparison of Types of Orders Passed by Indian Courts 2009-2016	201
Figure 6.4 Number of Challenges filed in respect of Proceedings pending before CCP	206
Figure 6.5 Comparison of the Types of Orders Passed by Pakistani Courts 2008-2016	207
Figure 6.6 Comparison of Cases pending before Supreme Courts of India and Pakistan	214
Figure 7.1 Breakdown of Analytical Steps in the Integrated Theoretical Framework	244
Figure 7.2 Competition Enforcement Routes in India and Pakistan	257

## MAP OF INDIA AND PAKISTAN<sup>1</sup>



<sup>1</sup> Nancy Swarbrick, 'Indians - Indian communities', Te Ara - the Encyclopedia of New Zealand, <<http://www.TeAra.govt.nz/en/map/1819/india-pakistan-and-bangladesh>> (accessed 3 September 2017).

## 1. INTRODUCTION

In 2003, India became the first South Asian country<sup>1</sup> to enact a modern competition law—the Competition Act 2002. Less than five years later, Pakistan followed suit by promulgating the Competition Ordinance 2007.<sup>2</sup> Although India and Pakistan had anti-monopoly laws in place since 1969 and 1970 respectively,<sup>3</sup> their replacement of these laws by modern competition laws declared their individual commitment to achieving greater economic efficiency and consumer welfare at the domestic front<sup>4</sup> and their intention to enter a rapidly growing international competition community.<sup>5</sup> It also advertised to the world their attractiveness as potential partners for international trade and investment.<sup>6</sup>

However, enactment of the competition laws is only a first step. The real task for both India and Pakistan is to implement these laws in a manner that enables them to realise the goals for which they have acquired the laws. Whilst it is premature, at the time of writing this, to assess the extent to which India and Pakistan have realised their respective competition goals, it is possible to evaluate the *foundations* they have laid and the *progress* they have made in this regard. However, it is important to clarify at the outset that I am interested in the legal foundations and progress rather than economic impact of the competition laws for the reason that the economic goals of the countries in adopting competition laws may be only be realised if these laws succeed as legal instruments in their

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<sup>1</sup> “South Asia” means the region comprising Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. (<<http://saarc-sec.org/about-saarc>> accessed 11 August 2017).

<sup>2</sup> Unless referring to a specific amendment or iteration, I refer to the Competition Act 2002 and any amendments thereto, as the ‘Indian competition law’ and to the Competition Ordinance 2007 and its subsequent iterations as the ‘Pakistani competition law’. I refer to these collectively as ‘the competition laws’ or ‘the laws’.

<sup>3</sup> I refer to the Indian Monopolies and Restrictive Trade Practices Act 1969 and the Pakistani Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 individually as the ‘Indian anti-monopoly law’ and the ‘Pakistani anti-monopoly law’ and collectively as ‘anti-monopoly laws’.

<sup>4</sup> These goals are declared in the preambles of the Indian and Pakistani competition laws.

<sup>5</sup> Until the mid 20th century less than 10 competition regimes existed worldwide. However, after World War II, Asia, there was a proliferation of Competition Laws and presently there are over 110 competition regimes in place of which over 80 of these were created after 1980.

<<http://unctad.org/en/Pages/DITC/CompetitionLaw/ResearchPartnership/Benchmarking-Competition.aspx>> (accessed 28 February 2016).

And para 3.2 in Report on International Cooperation in Competition Law Enforcement issued as part of the meeting of the OECD Council at Ministerial Level 2014 <[http://www.oecd.org/mcm/C-MIN\(2014\)17-ENG.pdf](http://www.oecd.org/mcm/C-MIN(2014)17-ENG.pdf)> (accessed 26 February 2016).

<sup>6</sup> I discuss the motivations of the countries in Chapter 3.

respective contexts. This analysis helps understand not only whether the countries are implementing their competition laws in a manner which ensures that they are on course for realising their competition goals but also offers an insight into the factors that have charted the implementation of the Laws in their earliest years.

My primary interest in this research is to explore the impact of one of the factors that have influenced the implementation of these Laws and that is the process through which India and Pakistan have acquired their competition laws ('the adoption process'). It is my hypothesis that the unique combination and interplay of mechanisms and institutions engaged by each country in the Adoption Process has a significant, discernible and essentially twofold impact on the implementation of the competition laws:<sup>7</sup> it influences the performance of the national competition authorities (NCAs) established by the competition laws,<sup>8</sup> and shapes the extent and nature of the interaction between the competition laws, as represented by the NCAs, and pre-existing legal systems of the countries as represented by their constitutionally established courts (the courts).<sup>9</sup>

My core argument is that the mechanisms and institutions engaged by a country in the adoption process, determine the extent of the *compatibility* of the competition law with the context of the country and its *legitimacy* in the country and, thereby, its performance and interaction with the courts. The concepts of compatibility and legitimacy are interconnected and are relative rather than absolute. Whilst the compatibility of a law is commensurate with the extent to which the adoption process brings it in harmony with the pre-existing legal system of the country, its legitimacy is proportionate to the extent to which this process ensures that the law is accepted as a valid legal instrument. A law that is more compatible with and

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<sup>7</sup> "Institutions" refer to the social, legal and political organization of a society either through formal or informal rules. Statutes such as the Indian and Pakistani competition laws may be considered formal rules and, therefore, institutions within this meaning of the term. See, in particular, Douglass C North, *Institutions, Institutional Change, and Economic Performance* (Cambridge University Press 1990). Although North is not always clear in this regard, for the purposes of this research, I include 'organizations' within the meaning of 'institutions'.

<sup>8</sup> NCAs include the Indian and Pakistani Competition Commissions and/or the Competition Appellate Tribunals. Individually, I refer to the Indian Competition Commission as 'CCI' and the Pakistani Competition Commission as 'CCP'; the Indian Appellate Tribunal as the 'Indian Tribunal' and the Pakistani Competition Appellate Tribunal as the 'Pakistani Tribunal'.

<sup>9</sup> The constitutionally established courts include the high courts and Supreme Courts of the two countries. I refer to these collectively as the 'courts' and individually as the Indian or Pakistani high courts or Supreme Courts as a may be appropriate.

enjoys greater legitimacy in the adopting country is likely not only to be better understood, applied and utilised in the country but also is likely to interact more productively with and integrate more easily into the country's pre-existing legal system.

My reasons for exploring this hypothesis in the Indian and Pakistani context is partly attributable to my direct experience with the Pakistani competition law when it was first introduced in Pakistan.<sup>10</sup> It is also partly due to my interest in the South Asian region and in exploring the possibility of convergence in competition laws across the region for the purposes of which studying the Indian and Pakistani competition laws makes sense as the countries are leading competition law reform in the region. My choice of a comparative analysis is due to the fact that 'the study of domestic law' may generate a 'great optical illusion founded on the synchronic view' which may only be rejected by demonstrating that 'in different legal systems... identical statutes or scholarly formulas give rise to different applications...'<sup>11</sup> The Indian and Pakistani competition laws are natural counterpoints for each other as much for the considerable similarities between the laws and the contexts in which they have been adopted, as for the critical differences in their respective adoption processes.

The similarities in the laws and the contexts of the two countries are immediately evident: (i) the Indian and Pakistani competition laws are enacted within a few years of each other; (ii) they express similar goals and espouse comparable competition principles, and (iii) they provide for establishing NCAs with substantially similar structures, mandates, and appointment and removal mechanisms for members. The laws also operate in nearly identical geographic, historic, and legal landscapes: (i) India and Pakistan share an approximately 3,000 km long border; (ii) a history that can be traced to antiquity, and (iii) a common legal culture and system that had been gradually introduced by the British from the

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<sup>10</sup> I was a practicing barrister in Pakistan when the Law was introduced in 2007 and was one of the first to co-author a critique of the Law. Amber Darr, Khozem Haidermota & Munib Akhtar 'The Competition Commission Ordinance 2007—A Critical Analysis' *CLD 2008 Journal* 37.

<sup>11</sup> Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39 *The American Journal of Comparative Law* 343, 385.

18<sup>th</sup> century onwards and retained by India and Pakistan, with limited modifications, after they were created as independent states.<sup>12</sup>

The differences in the adoption processes are subtler. Although both the Indian and Pakistani competition laws have been enacted in accordance the respective constitutions of the countries, in introducing the Indian competition law, the country followed the detailed legislative procedure provided in the Indian constitution, whilst the Pakistani competition law was first introduced as a temporary presidential ordinance and only enacted as an Act of the Pakistani parliament, after three years and many tribulations. This difference belies a more fundamental disparity between the political and legal histories and traditions of the two countries. India has been, a democracy since its independence in 1947 and has throughout maintained a functioning legislature and an independent judiciary, which work with the executive to govern the country. Pakistan on the other hand, has spent nearly half of its 70 year life under military or quasi-military rule, during which the Pakistani constitution and legislature have been either suspended or under the sway of a military chief turned President.<sup>13</sup> These differences, when examined against the backdrop of the considerable commonalities between the two countries, provide an important insight into my hypothesis.

In order to explore this hypothesis, I first construct a framework for examining the adoption processes and the implementation of the laws in a single continuum (Chapter 2). My aim in doing so is to provide a theoretical structure for understanding mechanisms through which India and Pakistan adopted their competition laws; the nature and range of institutions that were engaged in the processes; the extent of compatibility and legitimacy that this interplay of mechanisms and institutions generated, and finally, the links between the adoption processes and the implementation of the laws in the countries. To this end, I draw upon concepts and principles from the comparative law (legal transplant) literature, the literatures on policy diffusion (diffusion) and policy transfer (transfer) from international law and political science and from post-Washington Consensus

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<sup>12</sup> I discuss these issues more fully in Chapter 3.

<sup>13</sup> *ibid.*

development economics or new institutional economics (development economics) literatures.<sup>14</sup>

I integrate principles from each of these literatures at each step of the adoption process and at the implementation stage. In respect of the adoption process, the legal transplant literature indicates the significance of compatibility between the adopted law and the context of the adopting country and the role played by lawmakers in this regard,<sup>15</sup> whilst in respect of implementation of the laws, it identifies the ability of the adopted law to ‘grow and become a part of’ the context of the country<sup>16</sup> and to engage productively with legal institutions pre-existing in the country<sup>17</sup> as possible benchmarks for assessing the quality of operation of the adopted law in the country.

The diffusion and transfer literatures discuss possible ‘causal mechanisms’<sup>18</sup> through which policies may be diffused across regions or transferred from one country to another and thereby help address the adoption process more fully.<sup>19</sup> The definition of policy used in these literatures is sufficiently wide to encompass laws and therefore easily adaptable for the purposes of my research. Whilst I recognise and draw upon both diffusion and transfer literatures, I rely more heavily on the latter given its focus on bilateral transfer of policies which is more akin to the manner in which the competition laws have been adopted in India and Pakistan. Diffusion and transfer literatures provide the framework for examining the institutional conditions in the country in which the transfer takes place; catalogue the possible motivations for and mechanisms through which a country may transfer a law from another and suggest process-tracing as an appropriate methodology for examining this transfer.

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<sup>14</sup> I set out and explain the theoretical framework in Chapter 2.

<sup>15</sup> For example, Charles de Secondat Montesquieu and others, *The Spirit of the Laws* (Cambridge University Press 1989); Otto Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) 37 *The Modern Law Review* 1.; Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2<sup>nd</sup> edn. University of Georgia Press 1993).

<sup>16</sup> Watson (n 15), 27.

<sup>17</sup> Gunther Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences’ *The Modern Law Review*, vol. 61, no. 1, 1998 11, 12.

<sup>18</sup> The term ‘causal mechanisms’ derives from Kurt Gerhard Weyland *Bounded Rationality and Policy Diffusion: Social Sector Reform in Latin America* (Princeton University Press 2006).

<sup>19</sup> From hereon, I refer to these as ‘transfer mechanisms’ or simply ‘mechanisms’.

The development economics literature helps link the process through which laws are adopted and their performance. Although this literature does not specifically refer to laws, it defines institutions sufficiently widely to include laws. The focus of this literature on the performance of economic institutions in developing countries makes it particularly relevant for examining competition laws in the Indian and Pakistani contexts. This literature contributes to the understanding of the adoption process by providing criteria for evaluating pre-existing legal and political institutions in a country that may be engaged in the process of creating or adapting economic institutions. It argues that legal and political institutions that are bottom-up, participatory, and inclusive are capable of aggregating local knowledge, and, therefore, more likely to generate economic institutions that are compatible with the context of the country than institutions that are top-down and exclusive and have no means or interest in aggregating local knowledge.<sup>20</sup> The literature also contributes to the analysis of the implementation of the competition laws by identifying the extent to which a law is converted from being a ‘law in the books’ to ‘law in action’ as a further benchmark for its performance.<sup>21</sup>

After constructing this integrated theoretical framework, I trace the adoption processes engaged by India and Pakistan for acquiring their competition laws in order to identify the mechanisms employed by the two countries in the adoption process and to identify the range and nature of institutions engaged in delivering these mechanisms (Chapter 3). I discuss three outcomes of the adoption process in each country, the content of the competition laws, particularly inasmuch as it relates to the structure, mandate and appointment and removal mechanisms of members of the NCAs, the likely compatibility of the laws with the contexts of their countries, and their legitimacy in these countries. For the purposes of understanding the pre-existing conditions in which India and Pakistan activated the adoption process, I rely on published political and legal histories of the two

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<sup>20</sup> For instance, Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions, and Economic Growth* (Princeton University Press 2007); Daron Acemoglu and James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Crown Publishers 2012). I discuss this more fully in Chapter 2.

<sup>21</sup> David M Trubek and Alvaro Santos, *The New Law and Economic Development a Critical Appraisal* (Cambridge University Press 2006).

<<http://search.ebscohost.com/login.aspx?direct=true&scope=site&db=nlebk&db=nlabk&AN=171880>> accessed 10 March 2014.

countries; for mechanisms of transfer and the institutions engaged in this regard I refer to the official published reports of the committees set up by the two countries for adopting the competition laws, as well as on information gathered through interviews with members of CCI and CCP and other persons with direct experience or knowledge of the adoption process in either country.<sup>22</sup> For the content of the Indian and Pakistani competition laws, I refer to texts of these laws as officially notified in the two countries.

For analysing the implementation of these Laws in both countries, I focus almost entirely on the operation of the first tier NCAs, the CCI and CCP, due to the paucity of data and information for the second tier NCAs, the Indian and Pakistani tribunals (Chapter 4).<sup>23</sup> To this end, I rely on the final rather than interim orders of CCI and CCP as published on their official websites or in their Annual Reports; orders of the courts in respect of competition related matters filed before them, and interviews of persons having experience or knowledge of the implementation of these laws in India or Pakistan.<sup>24</sup>

I begin the analysis of the implementation stage by taking a broad overview of the performance of CCI and CCP and their interaction with the courts in their countries. I focus only on final orders in respect of anti-competitive or prohibited agreements<sup>25</sup> and abuse of dominant position,<sup>26</sup> and analyse these on the basis of 10 different indicators which illustrate different aspects of the performance of the laws or their interaction with the courts, and also reflect the impact of the adoption processes employed by the countries. I examine and compare the recurrence of each of these indicators in order to make an overall assessment of the links between the Indian and Pakistani adoption processes and the implementation of their competition laws.

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<sup>22</sup> A complete list of persons interviewed in India and Pakistan is provided in Annexe B.

<sup>23</sup> See n. 8.

<sup>24</sup> *ibid.*

<sup>25</sup> Although the concepts of anti-competitive agreements in the Indian and Pakistani laws is broadly similar, the Indian competition law uses the term 'anti-competitive agreements', whilst the Pakistani competition law prefers 'prohibited agreements'. From hereon, I use the term 'anti-competitive agreements' to refer to both.

<sup>26</sup> In addition to anti-competitive agreements and abuse of dominant position, CCI and CCP also have in common the power to regulate mergers. However, merger control provisions in the Indian Competition Law were only brought into force in 2011 and at present there is not sufficient data to carry out a comparative analysis.

In order to deepen the understanding of the links between the adoption process and the implementation stage, I evaluate and compare the strategies employed by CCI and CCP for interpreting the competition laws (Chapter 5). I focus particularly on the manner in which they have interpreted the analytical tests for establishing anti-competitive agreements provided in their respective competition laws. I infer CCI and CCP's respective interpretative strategies from the reasoning adopted by them in their orders in respect of anti-competitive agreements and explore the extent to which these interpretive strategies may be attributed to the mechanisms and institutions engaged by India and Pakistan in their respective adoption processes.

I explore the implementation of the laws in the two countries, from yet another angle, by investigating the nature and extent of the interaction between CCI, CCP and the courts in their respective countries (Chapter 6). I examine the nature and extent of the interaction between the competition and the general legal systems and the extent to which it has been shaped by the mechanisms and institutions engaged by the countries in the adoption process. I particularly examine the types of proceedings and orders of CCI and CCP that have been challenged before the courts, the grounds on which these have been challenged and the response of the courts to these challenges. I also investigate the existence of alternative routes for challenging the proceedings and orders of CCI and CCP that may be available in either country; the impact of these alternative routes on the traffic between CCI, CCP and the courts they engage with, and the extent to which each of these may also be traced to the adoption processes.

In conclusion, I find that the adoption processes followed by India and Pakistan and the mechanisms and institutions engaged by them in this regard have a clear impact on the manner in which the competition laws are being implemented in the two countries. However, I also find that no adoption process, mechanism or set of institutions is inherently or completely superior to the other and that each confers its own benefit on the country whilst exacting its own cost. Most encouragingly, perhaps, I find that the impact of the adoption processes is not immutable and provided that a country is clear about and committed to its competition goals, it may re-align its performance and interaction strategies to attain these goals. I maintain, however, that a meaningful re-evaluation and re-direction is only

possible if the country understands the potential impact of its adoption process, not merely hypothetically, but specifically, in light of its particular motivation in acquiring the law, its legal and political context and the nature and strength of its institutions.

This research has considerable academic as well as practical significance. At an academic level it makes an important contribution to the field of comparative law by providing additional tools for understanding and analysing the transfer of laws from one country to another. Further, it not only examines the process of adopting laws from the perspective of adopting countries but also presents a rare south-south comparison, which takes into account the specific exigencies of developing countries. It also provides an insight into a largely ignored aspect of the Asian competition experience, which has been focused on East rather than South Asia.

At a more practical level, this research offers India and Pakistan a deeper understanding of the operations of their competition laws and, should they choose to take it, invaluable insight into the extent to which the implementation of their laws is in alignment with their competition goals and whether there may be a future possibility of convergence and regionalisation of competition laws in South Asia. However, the reverberations of this research extend beyond India and Pakistan and the South Asian region. It provides to multilateral agencies, and competition authorities, that may be interested, an understanding of factors that help achieve meaningful competition law reform in developing countries. It also offers guidance to other developing countries interested in adopting competition laws (or other comparable regulatory laws) as to the manner in which they may proceed and the likely outcomes of their decisions in this regard.

## **2. THE INTEGRATED THEORETICAL FRAMEWORK**

The process of adopting a law commences long before the law actually appears on the legal scene of the adopting country. The starting point of the process is either an internal realization on the part of a country that it requires a law on a particular subject matter or external pressure from multilateral agencies or other countries, whether express or implied, that the country should do so.<sup>1</sup> This is often followed by a period of deliberation during which the adopting country debates the parameters of the proposed law and culminates in the enactment of the law by the country in accordance with its legislative procedures. Once the country has formally adopted the law, the law is ready for implementation. The manner in which the adopted law is implemented is fundamentally, though not always obviously, influenced by the mechanisms and institutions engaged by the country in the adoption process.<sup>2</sup> In this chapter, I draw upon legal transplant literature, diffusion and transfer literatures and development economics literature to construct a framework to explore the theoretical links between the deliberation, formal adoption and implementation stages of an adopted law.

This chapter is organized as follows: in section 1, I examine the continued relevance of the legal transplants literature and also highlight its shortcomings with respect to the present enquiry. In section 2, I review diffusion and transfer literatures and the typology of mechanisms through which policies are diffused and transferred. I also adapt the typology of mechanisms provided in these literatures for the transfer of laws from developed to developing countries. In section 3, I turn to development economics literature to identify the likely impact of institutions pre-existing in the adopting country and engaged in the adoption process on the subsequent performance of these laws. In section 4, I integrate principles from these literatures to construct a holistic framework to analyse the deliberation, adoption and implementation stages in succession, as a continuum. In the final section, I conclude.

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<sup>1</sup> For the purposes of this thesis, I assume that at the initial adoption, law is adopted wholesale, as a statute, whereas in interpreting the adopted law, it is adopted piecemeal as legal principles.

<sup>2</sup> The term 'institutions' includes both formal and informal systems of rules as well as organizations to the extent that they are engaged in implementing the Laws.

## **2.1. Legal Transplants Literature: Relevance and Limitations**

### 2.1.1. Legal Transplants and the Relevance of ‘Context’

Legal transplants, or legal rules or systems of law that move from one country to another or from one people to another,<sup>3</sup> are a historical reality. However, scholars have often warned against borrowing and adopting laws without taking into consideration the context of the country from which the legal transplant originates (the originating country) and that of the country for which it is intended (the adopting country).

Montesquieu writing in 1748, cautions that ‘whenever there is a design of adopting the civil law of another nation, it would be proper to examine beforehand whether they have both the same institutions and the same political law’. His argument was that laws, whether they form the government or support it, are related to the nature and principle of the government of the country in which they are made.<sup>4</sup> Kahn-Freund, writing more than two centuries later, echoes Montesquieu’s views. He argues that ‘any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection’ because legal rules ‘which organize constitutional, legislative, administrative or judicial institutions and procedures...are...”organic” [to the context of the country of origin and, therefore,]...are most resistant to transplantation’.<sup>5</sup> He, therefore, advises countries to acquire ‘knowledge not only of the foreign law, but also of its social, and above all its political, context’ before deciding to adopt it.<sup>6</sup>

A number of subsequent scholars have adopted and extended these arguments. Legrand, for instance, places such an emphasis on the abiding impact of the context of the originating country on the law that he declares legal transplants to be altogether impossible. He argues that whilst it may be possible to transplant the *words* of a law, it is not possible to transfer their *original meaning*. His reason for stating this is that whilst the meaning of the law is intrinsically connected to the

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<sup>3</sup> Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2<sup>nd</sup> edn. University of Georgia Press 1993) 21.

<sup>4</sup> Charles de Secondat Montesquieu and others, *The Spirit of the Laws* (Cambridge University Press 1989) 8, 610.

<sup>5</sup> Otto Kahn-Freund, ‘On Uses and Misuses of Comparative Law\*’ (1974) 37 *The Modern Law Review* 1. 12, 13.

<sup>6</sup> *ibid* 27.

context of the originating country, the ‘epistemological assumptions [of interpreters of the law]... are...historically and culturally conditioned’ to the adopting country and, therefore, the same words may be interpreted differently in a new context.<sup>7</sup> Teubner, on the other hand, acknowledges the significance of compatibility between the contexts of the originating and adopting countries and considers legal transplants to be possible with the caveat that they are likely to be ‘legal irritants’ that can cause, indeed force, the legal system of the adopting country to develop in unexpected directions.<sup>8</sup>

Alan Watson is a prominent outlier in this discussion. He argues that ‘a foreign rule can be successfully integrated into a very different system... which is constructed on very different principles from that of the donor’<sup>9</sup> because ‘usually legal rules are not peculiarly devised for the particular society in which they now operate’.<sup>10</sup> However, even Watson’s approach towards the context of the adopting country is not as cavalier as it first appears and he too recognizes that the law of one country may diverge from that of another due to the impact of ‘the Spirit of a People’ on the law.<sup>11</sup> Ewald explains this apparent dichotomy in Watson’s writings by drawing a distinction between ‘Strong Watson’, who takes the rigid position that there is no ‘interesting relationship to be discovered between law and society’, and ‘Weak Watson’, who argues that compatibility between the legal transplant and the context of the borrowing country must be examined with ‘cautious awareness of [its]...complexity...’.<sup>12</sup> Grossfeld attempts to square Watson’s thesis with that of Montesquieu and Kahn-Freund by arguing that whilst the ‘recurrence of legal forms’ endorses ‘Watson’s observation that the native element in the law of any country is relatively slight’ it is necessary to draw a distinction between legal rules, which may be transplanted relatively easily, and institutions that are more attuned to the context of their country of origin. In respect of institutions he cautions that ‘(t)o import anything without such

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<sup>7</sup> Pierre Legrand, ‘The Impossibility of Legal Transplants’ (1997) 4 *Maastricht J. Eur. & Comp. L.* 111, 114.

<sup>8</sup> Gunther Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences’ *The Modern Law Review*, vol. 61, no. 1, 1998 11, 12.

<sup>9</sup> Watson (n.3), 55, 56.

<sup>10</sup> *ibid* 95, 96.

<sup>11</sup> Alan Watson, *The Evolution of Law* (Johns Hopkins University Press 1985) 42.

<sup>12</sup> William Ewald, ‘Comparative Jurisprudence (II): The Logic of Legal Transplants’ (1995) 43 *The American Journal of Comparative Law* 489, 491, 509.

evaluation [of compatibility with the context of the adopting country] is ‘*un grand hasard*’.<sup>13</sup>

The significance of context is also evident in specific discussions regarding competition law transplants. Whilst discussing the design of competition agencies, Trebilcock and Iacobucci, urge the need for a ‘locally optimal substantive law...’ because ‘...no single institutional model of a competition agency will be optimal for all countries....given particularities of history, initial conditions, institutional traditions, and political economy considerations’.<sup>14</sup> Similarly, Gal while discussing the Israeli competition law experience argues that ‘the receiving state’s knowledge, commonality with the state of origin...’ are essential pre-conditions for it to be receptive to the legal transplant.<sup>15</sup> Shahein not only appears to share these views but also seems to echo Legrand<sup>16</sup> in stating that competition laws, like most other laws, are embedded in a specific political, economic and social environment and must be appropriately ‘contextualised’ for the purposes of the adopting country.<sup>17</sup>

#### 2.1.2. Different Meanings of ‘Context’ in Legal Transplant Literature

Despite the evident emphasis of the legal transplant literature on the need for compatibility between a legal transplant/context of the originating country and the context of the adopting country, there is little clarity, let alone consensus, on the *factors* within the context of the adopting country that the legal transplant law must be compatible with. Montesquieu and Kahn-Freund are of the view that the legal transplant must be compatible with the institutions, political law, social and political context of the adopting country,<sup>18</sup> whilst Trebilcock and Iacobucci, writing specifically about competition law transplants, emphasize the need for

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<sup>13</sup> Bernhard Grossfeld, *The Strength and Weakness of Comparative Law* (Clarendon Press ; Oxford University Press 1990) 43, 46. Grossfeld does not explain the distinction between ‘legal rules’ and ‘institutions’. I understand that his use of the term ‘legal rules’ refers to individual legal principles, whereas ‘institutions’ means systems of laws.

<sup>14</sup> Michael J Trebilcock and Edward M Iacobucci, ‘Designing Competition Law Institutions’ (2002) 25 *World Competition* 361, 471.

<sup>15</sup> Michal Gal, ‘The ‘Cut and Paste’ of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant’ (2007) 9 *European Journal of Law Reform* 467 473.

<sup>16</sup> Legrand (n 7).

<sup>17</sup> Heba Shahein ‘Designing Competition Laws in New Jurisdictions: Three Models to Follow’ in Richard Whish and Christopher Townley (eds) *New Competition Jurisdictions: Shaping Policies and Building Institutions* (Edward Elgar 2012) 51, 55.

<sup>18</sup> Montesquieu and others (n 4); Kahn-Freund (n 5).

commonalities between ‘particularities of history, initial conditions, institutional traditions, and political economy considerations’ of the originating and adopting countries.<sup>19</sup> For Gal, the ‘commonality’ between the contexts of the originating and adopting countries encompasses ‘almost all issues which relate to the relationship between law and society’ whereas Shahein underscores the importance of examining the ‘specific political, economic and social environment’ of the two countries.<sup>20</sup> Mattei somewhat fine-tunes this discussion by referring particularly to the need for the legal transplant to be compatible with the ‘machinery of justice’ in the adopting country.<sup>21</sup>

Certain scholars highlight the importance of different ‘actors’ in the adopting country but only cursorily discuss the links between actors and context. Watson points in the direction of ‘lawmakers’ who in their capacity ‘as legislators, jurists, or judges’ allow and enable the ‘social economic, and political factors [of the adopting country to] impinge on legal development’ and suggests that ‘this culture [of the lawmakers] has to be understood and injected into the equation before one can begin to erect a theory of law and society.’<sup>22</sup> Watson further suggests that the ‘culture’ of the ‘lawmakers’ is more likely to be attuned to that of the originating country (and, therefore, to the legal transplant) than to the context of the adopting country. It is not clear whether his discussion of lawmakers extends to those lawmakers that deliberate upon and adopt a law through the legislature as well as to those who subsequently implement the law in the adopting country.<sup>23</sup>

Grossfeld also alludes to the relevance of actors in the adopting country. He claims that the culture of a country permeates its ‘legal thinking’ and differentiates the manner in which that country develops and applies its laws from that of another.<sup>24</sup> It may be assumed that Grossfeld’s use of the term ‘legal thinking’ implies the existence of actors whilst his focus on applying the law suggests that he is thinking of actors in the implementation stage of the law in the adopting country. These

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<sup>19</sup> Trebilcock and Iacobucci (n 14).

<sup>20</sup> Gal (n 15).

<sup>21</sup> Ugo Mattei, ‘Efficiency in Legal Transplants: An Essay in Comparative Law and Economics’ (1994) 14 IRL International Review of Law & Economics 3, 17.

<sup>22</sup> Watson, *Evolution of Law* (n.11) 118.

<sup>23</sup> *ibid.*

<sup>24</sup> Grossfeld (n 13) 111. For Grossfeld, ‘culture’ is a catchall term for the geography, language and religion of a country.

interpreters are likely to impose their thinking on the legal transplant in interpreting it and, in doing so, are likely to shape the course along which it develops in the country. Like Watson, Grossfeld does not examine the role of actors in any particular depth and ignores the possibility of different actors interacting with the adopted law at different stages of the adoption process, as well as the combined impact of their varied legal thinking on the overall evolution of the law in the adopting country.

Sacco identifies actors as critical to the manner in which a country interprets a legal transplant and argues that the meaning of a transplanted law is likely to be influenced by all such factors as may be capable of influencing the convictions of an interpreter, including ‘cryptotypes’ ie linguistic and behavioural patterns which may be implicit in the context.<sup>25</sup> However, Sacco does not explicitly limit the interpretative function to the implementation stage, suggesting thereby, that the interpretive function is not limited to the implementation stage but that a certain degree of interpretation may also take place as the adopting country deliberates the parameters of the law it proposes to acquire.

Unlike Sacco, Legrand focuses on actors that come into contact with the adopted law in interpreting it at the implementation stage and is of the view that the thinking of interpreters is more likely to be shaped by and, therefore, attuned to the context of the adopting country context than to the thinking that had shaped the law in the originating country<sup>26</sup>. Mindy Chen-Wishart echoes Legrand’s views regarding the importance of the role of interpreters in determining the manner in which the adopted law develops in that country. However, also like Legrand she does not take into account the possible impact of actors that may interact with the adopted law prior to its formal adoption in the adopting country.<sup>27</sup>

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<sup>25</sup> Rodolfo Sacco, ‘Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)’ (1991) 39 *The American Journal of Comparative Law* 343, 384, 385.

<sup>26</sup> Legrand (n 7).

<sup>27</sup> Mindy Chen-Wishart, ‘Legal Transplant and Undue Influence: Lost in Translation or a Working Misunderstanding?’ (2013) 62 *The International and Comparative Law Quarterly* 1.

### 2.1.3. Limitations of Legal Transplant Literature

#### (a) *Limitation 1: Limited Attention to Factors that Create Compatibility*

Whilst the legal transplant literature highlights the importance of compatibility between the legal transplant (and the context of the originating country to the extent that it is embodied and reflected in the transplant) and the context of the adopting country, it pays little or no attention to factors that may create or enhance this compatibility. Although the literature recognizes a possible role of actors and institutions in the adopting country in making the transplant compatible with the adopting country, it neither explores the relationship between actors and the institutions within whose constraints they may be acting nor recognises the possibility of new actors and institutions at different stages of the adoption process.

Montesquieu,<sup>28</sup> Kahn Freund<sup>29</sup> and Watson<sup>30</sup>, despite the different focuses of their discussions on legal transplants, share an interest in comparing the contexts of the originating and adopting country immediately before or at the time at which the legal transplant is injected into the latter. However, their discussion of factors that create or enhance compatibility remains somewhat limited. Whilst Kahn Freund indicates that institutions may have a role to play in determining compatibility, Montesquieu and Watson speak of actors rather than of institutions and are in any event vague as to their role. Montesquieu, despite his emphasis on the ‘spirit of the people’ in shaping the laws of a country, views adoption almost as a disembodied process and makes no reference to the specific impact of the ‘spirit’ or thinking of the actors that may be involved in the process.<sup>31</sup> Although Watson refers specifically to actors, he appears to be more interested in their impact in the post-adoption stage and in any event does not examine the nature and range of their role or the precise manner in which it affects the compatibility of the legal transplant.<sup>32</sup>

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<sup>28</sup> Montesquieu and others (n 4).

<sup>29</sup> Kahn-Freund (n 5).

<sup>30</sup> Watson (n 3).

<sup>31</sup> Montesquieu and others (n 4).

<sup>32</sup> Watson *Evolution of Law* (n 11).

*(b) Limitation 2: Limited Exploration of Link between Adoption Process and Compatibility*

The second important shortcoming of the legal transplant literature is its neglect of the link between the process of adoption and compatibility. Whilst Legrand,<sup>33</sup> Teubner<sup>34</sup> and Chin-Wishart<sup>35</sup> highlight the significance of compatibility between the legal transplant and the context of the adopting country when the legal transplant is being interpreted in the country, their analysis does not extend to understanding the process through which the country had acquired the legal transplant and the compatibility it may have generated in doing so.

Legrand, despite his very significant contribution in highlighting the importance of interpreters in the post-adoption, implementation stage, fails to consider that an adopting country may be more invested in initial compatibility at the time of adopting the law rather than in retaining its original meaning when the law is implemented in the country. Further, whilst he recognizes that historical and cultural factors in the adopting country may affect the interpretive function, he does not isolate specific features of these factors that may have a bearing on the interpretive function; he also does not indicate the manner in and points at which these historical and cultural factors may interact with the legal transplant particularly to the extent these points of interaction are located in the adoption process. He also does not identify the specific impact of these factors on the interpretive function.<sup>36</sup>

Teubner, like Legrand, emphasizes the importance of a positive relationship between the adopting country's legal system and the legal transplant for the subsequent development of the transplant in the adopting country. However, like Legrand, he does not identify the features of the transplant or the country's pre-existing legal system that may be relevant in this regard; the nature of interaction between the two, or the points in the adoption process at which this interaction may occur.<sup>37</sup> Mindy Chen-Wishart not only reaffirms the role of interpreters of

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<sup>33</sup> Legrand (n 7).

<sup>34</sup> Teubner (n 8).

<sup>35</sup> Chen-Wishart (n 27).

<sup>36</sup> Legrand (n 7).

<sup>37</sup> Teubner (n 8).

legal transplants in the adopting country but also takes the discussion a step further by declaring that it is no longer interesting to consider whether or not legal transplants are possible and that it is far more important to consider the question of ‘how the transplant develops in the recipient legal system.’<sup>38</sup> However, she too stops short of considering whether or not this development may be linked with the manner in which the country may have acquired the legal transplant.

Sacco, Mattei and Berkowitz et al introduce new aspects of the discussion of legal transplants. Sacco identifies and explores the manner in which actors at different points during the adoption process as well as in the implementation stage may impact the selection and interpretation of a legal transplant and, recognises them as crucial links between the legal transplant and the context of the adopting country. However, he stops short of examining the process or identifying the motivations for which a country may transplant a law in the first place.<sup>39</sup> Mattei, on other hand identifies the ‘efficiency’ of a legal doctrine as a possible motivation for a country preferring to adopt it as a legal transplant and whilst he also recognizes the importance of compatibility of the adopted law with the ‘machinery of justice’ in the adopting country, but does not explore the links between the two.<sup>40</sup>

Berkowitz et al are amongst the rare scholars who examine the links between the transplantation process and implementation of a transplant.<sup>41</sup> They recognize the necessity of compatibility between the transplant and the adopting country context and argue that legal transplants that are imposed directly or through colonization are likely to be incompatible with the adopting country because the country is unable to adapt them to their context. Consequently local actors (comprising interpreters as well as users of the legal transplant), remain unfamiliar with the substance of these transplants and, therefore, unable to ascribe meaning to the transplant or to properly utilise it. However they too do not consider other possible

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<sup>38</sup> Chen-Wishart (n 27) 3.

<sup>39</sup> Sacco (n 25).

<sup>40</sup> Mattei (n 21).

<sup>41</sup> D Berkowitz, K Pistor and JF Richard, ‘Economic Development, Legality, and the Transplant Effect’, *European Economic Review*, 2003, Vol.47(1)165’ 174.

motivations for and mechanisms through which countries may adopt foreign laws.<sup>42</sup>

*(c) Limitation 3: Limited Assessment of the Impact of Compatibility on the Implementation of the Legal Transplant*

Another significant shortcoming of the legal transplant literature is its disinterest in exploring the specific impact of compatibility (or lack thereof) on the subsequent implementation of the law in the adopting country. This is evident in its cursory treatment of the benchmarks for evaluating the quality of performance of a legal transplant or its ‘success’ in the adopting country.

Kahn-Freund, for instance, speaks of the legal transplant being rejected in the adopting country if certain features in that country are not compatible with those in the originating country. However, he does not offer an explanation for what he means by rejection or the manner in and stage in the life of the transplant at which it may occur.<sup>43</sup> Similarly, whilst Watson states that for a transplant to be successful, it must continue to grow in and become part of the borrowing country and that ascribing a different meaning to the legal transplant should not be confused with its rejection in the country, he neither explains what he means by growth of the legal transplant nor explores the factors that may contribute to (or hinder) this growth in the adopting country.<sup>44</sup>

Mattei provides some more insight in this regard by speaking of the need for a legal transplant to be compatible with the ‘machinery of justice’ in the adopting country failing which its ‘impact’ in the adopting country may be lost.<sup>45</sup> However, Teubner and Berkowitz et al are perhaps more incisive in this regard: Teubner indicates that the success of a legal transplant lies in its ability to interact productively with other elements in the legal organism in which it is transplanted,<sup>46</sup> whilst Berkowitz et al are of the view that the performance of a

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<sup>42</sup> *ibid.*

<sup>43</sup> Kahn-Freund (n 5).

<sup>44</sup> Watson (n.3).

<sup>45</sup> Mattei (n 21).

<sup>46</sup> Teubner (n 8).

transplant may be judged by the extent to which actors in the adopting country are able to understand, apply and utilize it.<sup>47</sup>

Scholars writing specifically about competition law transplants appear to be more consistently interested in the performance of the transplants and the possibility of their success. Trebilcock and Iacobucci suggest that the quality of performance of a competition law transplant is directly linked to its compatibility with and suitability for the context of the adopting country. However, even Trebilcock and Iacobucci do not provide an explanation as to the manner in and the points in the adoption process at which the competition law transplants may be brought into alignment with the context of the adopting country.<sup>48</sup>

In her article on the Israeli competition law, Gal refers extensively to the success of a legal transplant and recognizes, very importantly, that the concept of success may vary from the adoption to the implementation stage due to the different goals that a country may have for each stage. In the Israeli context she observes that whilst in the course of transplantation, actors were motivated by the desire to meet the country's international political objectives, in the implementation stage their focus had shifted to having their decisions understood and accepted within the country.<sup>49</sup>

For Shahein, the success of a legal transplant depends on the ability of the host country to appropriately 'contextualize' the transplant for its purposes. She particularly highlights the link between the transplantation process and the implementation stage of the transplant. However, whilst Shahein offers some suggestions as to the manner in which the adopting country may contextualize a competition law transplant, she appears to assume that contextualization is complete at the end of the transplantation process and does not explore challenges that may arise as the transplanted competition law is implemented in the adopting country.<sup>50</sup>

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<sup>47</sup> Berkowitz, Pistor and Richard (n 41).

<sup>48</sup> Trebilcock and Iacobucci (n 14) 466.

<sup>49</sup> Gal (n 15) 482.

<sup>50</sup> Shahein (n.17).

## **2.2. Insights from Diffusion and Transfer Literatures**

### **2.2.1. Why Diffusion and Transfer and Whether Diffusion or Transfer**

Over the years, a number of scholars have expressed dissatisfaction with legal transplant literature as a theoretical construct for examining the movement of laws from one country to another. Some have argued that the study of legal transplants has not only failed to venture beyond the western world and to examine legal rules in their procedural and institutional contexts but also has rarely shown itself capable of generating a deep insight into the structure and development of legal systems.<sup>51</sup> Others have asked for a reconsideration of the literature generally,<sup>52</sup> whilst others still have suggested that the literature learn from the social science experience of ‘diffusion of policy’ given that both traditions address the phenomenon of the spread and communication of ideas from one country to another and across regions.<sup>53</sup> Competition law academics have also criticised the state of affairs in the discipline for not taking into account the different patterns of diffusion of competition laws and the spin-offs of EU competition and US antitrust systems generated due to these patterns.<sup>54</sup>

Diffusion is most often described as the study of the impact of ‘interdependencies’ on the spread of ideas<sup>55</sup> and over time, has been recognized as an important, albeit ‘one explanation among several’, for the adoption of a policy or a practice.<sup>56</sup>

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<sup>51</sup> Mathias Reimann, ‘The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century’ (2002) 504 *American Journal of Comparative Law* 671, 685.

<sup>52</sup> Esin Örüçü, ‘Law as Transposition’ (2002) *The International and Comparative Law Quarterly* 51(2), 205.

<sup>53</sup> William Twining, ‘Social Science and Diffusion of Law’ (2005) *Journal of Law and Society*, 32 203.

<sup>54</sup> Ioannis Lianos ‘Global Governance of Antitrust and the need for a BRICS Joint Research Platform in Competition Law and Policy’ in Tembinkosi Bonakele, Eleanor Fox, Liberty Mncube (eds) *Competition Policy for the New Era* (forth. OUP 2017).

<sup>55</sup> Fabrizio Giraldi ‘Transnational Diffusion: Norms, Ideas and Policies’ in Walter Carlsnaes, Thomas Risse-Kappen and Beth A Simmons (eds) *Handbook of International Relations* (SAGE Publications 2012).

Also Charles R Shipan and Craig Volden, ‘Policy Diffusion: Seven Lessons for Scholars and Practitioners’ (2012) 72 *Public Administration Review* 788 <<http://onlinelibrary.wiley.com/doi/10.1111/j.1540-6210.2012.02610.x/full>> accessed 8 March 2014.

<sup>56</sup> Dietmar Braun, Fabrizio Gilardi, Katharina Füglistner, and Stéphane Luyet (2007), ‘Ex Pluribus Unum: Integrating the Different Strands of Policy Diffusion Theory’, *Politische Vierteljahresschrift* S38, 40.

For similar views in respect of Transfer, see David P Dolowitz and David Marsh, ‘Learning from Abroad: The Role of Policy Transfer in Contemporary Policy-Making’ (2000) 13 *GOVE Governance* 5.

Giraldi defines diffusion as ‘a consequence of interdependence’ and claims that ‘it can lead to the spread of all kinds of things’ including specific instruments, standards and institutions (both public and private), to broad policy models, ideational framework, institutional settings.<sup>57</sup> He also emphasizes that in its essence ‘diffusion is a process as opposed to an outcome’<sup>58</sup> and is inextricably linked to transfer:

...policy diffusion has been studied by policy analysts under the label “policy transfer,” which is defined as “the process by which knowledge about policies, administrative arrangements, institutions and ideas in one political system (past or present) is used in the development of policies, administrative arrangements, institutions and ideas in another political system”...This definition is very similar to that of diffusion indeed, the underlying phenomenon is essentially the same.<sup>59</sup>

Giraldi’s view not only echoes similar views expressed by transfer scholars but also responds to the call made by scholars in both disciplines for integrating the two literatures for a more robust understanding of transnational spread of policies and ideas. Newmark, in particular, locates transfer and diffusion along a single ‘theoretical continuum’.<sup>60</sup> He is of the view that diffusion is a *general term* often encompassing cases where structural or modernizing factors account for policy adoption whereas transfer is a *specific form* of diffusion referring only to cases where conscious external knowledge of a policy, programme or idea is utilized in developing domestic policy.<sup>61</sup> Similarly, Evans is of the view that transfer originates from diffusion studies<sup>62</sup> whilst Marsh and Sharman maintain that ‘the two literatures are complementary’.<sup>63</sup> Indeed, at their core, both diffusion and

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Jack L Walker, ‘The Diffusion of Innovations Among the American States’ (1969) 63 *The American Political Science Review* 880.

<sup>57</sup> Giraldi in Carlsnaes, Risse-Kappen and Simmons (n 55). Weyland adds templates (principles) and concrete policies (models) to this list. According to Weyland a principle is a general guidelines for designing programmes or institutions whereas a model is a specific option from the menu offered by a policy model. Kurt Gerhard Weyland *Bounded Rationality and Policy Diffusion: Social Sector Reform in Latin America* (Princeton University Press 2006).

<sup>58</sup> Giraldi in Carlsnaes, Risse-Kappen and Simmons (n 55) 3.

<sup>59</sup> *ibid* 6, 7.

<sup>60</sup> Adam J Newmark, ‘An Integrated Approach to Policy Transfer and Diffusion’ (2002) 19 *Policy Studies Review* 151, 170, 171.

<sup>61</sup> *Ibid* 171.

<sup>62</sup> Mark Evans, ‘Policy Transfer in Critical Perspective’ (2009) 30 *Policy Studies* 243 244.

<sup>63</sup> David Marsh and JC Sharman, ‘Policy Diffusion and Policy Transfer’ (2009) 30 *Policy Studies* 269.

transfer scholars emphasize the need to examine mechanisms through which a country adopts policies from another and to explore the underlying causes and motivations that may activate one or more of these mechanisms.<sup>64</sup>

Both diffusion and transfer literatures are instrumental for arriving at a deeper understanding of the motivations for and mechanisms through which a country may borrow policies from another. However, the more narrowly defined transfer, rather than the umbrella theory of diffusion, appears to be more suited for the present analysis because like much of legal transplant literature and also like the adoption processes employed in India and Pakistan,<sup>65</sup> it is concerned with:

...a *bipolar* relationship between two countries, involving a direct one-way transfer of legal rules or institutions [or policies as the case may be] through the agency of governments...<sup>66</sup>

Specifically, transfer rather than diffusion is more appropriate for the purposes of the present enquiry because:

(i) Transfer is also described as ‘process tracing’<sup>67</sup> and typically involves cases in which one nation or government intentionally imports knowledge of policies or programs that exist abroad.<sup>68</sup> Diffusion, on the other hand, is sometimes described as ‘pattern finding’<sup>69</sup> and relates to the spread of ideas and policies across a number of countries with variegated socio-economic, political and cultural characteristics. It occurs in waves and is usually characterized by strong geographical clustering.<sup>70</sup> Given that transfer of laws in India and Pakistan has taken place consciously through the agency of governments, transfer literature is more relevant for the present purposes.<sup>71</sup>

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<sup>64</sup> Giraldi in Carlsnaes, Risse-Kappen and Simmons (n 55).

<sup>65</sup> I discuss these more fully in Chapter 3.

<sup>66</sup> Twining (n 53) 205. (Emphasis added)

<sup>67</sup> Marsh and Sharman (n 63) 276.

<sup>68</sup> Newmark (n 60).

<sup>69</sup> Marsh and Sharman (n 63) 276

<sup>70</sup> Weyland (n 57) 19. However, according to Giraldi in Carlsnaes, Risse-Kappen and Simmons (n 55) 10, 11. whilst some spatial or temporal clustering is often a starting point for investigating the existence of diffusion, space is more than geography and there is no reason to define distance exclusively in geographic terms.

<sup>71</sup> I discuss this in Chapter 3.

(ii) The element of intentionality in transfer implicitly recognizes that there may be a series of agents at work either simultaneously or at different points in the transfer process,<sup>72</sup> acting within the institutional and structural constraints existing in the country.<sup>73</sup> Conversely, actors are not essential to diffusion and certain scholars have even suggested that ‘diffusion implies that no central actors are coordinating the spread of a policy’.<sup>74</sup> Once again transfer literature is more appropriate for the present purposes because agents and institutions, within whose constraints the actors have been working, have played an important role in the adoption of competition laws in India and Pakistan.<sup>75</sup>

(iii) Transfer advocates a more qualitative approach focusing particularly on ‘preconditions for transfer in the recipient state’, the ‘kind of actors pushing...the transfer process’ etc,<sup>76</sup> whilst diffusion tends to rely on quantitative, statistical methods of analysis. Although there is sufficient information available regarding the pre-conditions of transfer and the adoption processes employed in India and Pakistan in acquiring the competition laws, there is little or no data available for a quantitative analysis as required for studying diffusion.

Consequently, for the purposes of this framework, whilst I draw upon both diffusion and transfer literatures, where there is any disagreement between the two, I rely upon transfer literature.

### 2.2.2. Understanding Mechanisms of Transfer and their Outcomes

Although there is wide-ranging agreement amongst scholars of diffusion and transfer as to possible motivations for and mechanisms through which countries may acquire policies from others, the terminology employed in the literatures is often inconsistent and confusing. Further, whilst the literatures allude to the outcomes of transfer mechanisms they do not consolidate the discussion in this regard.

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<sup>72</sup> Evans (n 62) .

<sup>73</sup> David Dolowitz and David Marsh, ‘Who Learns What from Whom: A Review of the Policy Transfer Literature’ (1996) 44 *Political Studies* 343, 354.

<sup>74</sup> Martino Maggetti and Fabrizio Gilardi, “Problems (and Solutions) in the Measurement of Policy Diffusion Mechanisms” (2016) 36 *Journal of Public Policy* 87, 4.

<sup>75</sup> I discuss this more fully in Chapter 3.

<sup>76</sup> Marsh and Sharman (n 63) 270, 279.

(a) *The Typology of Mechanisms*

In terms of diffusion and transfer literatures, a country may acquire a policy from another through one or more of the following mechanisms:

(i) *Coercion*. This refers to situations in which policies are transferred or diffused at the behest of international organizations or countries that have the power to pressure states to adopt a policy, most often by ‘recommending’ its adoption as a conditionality of financial assistance.<sup>77</sup> Coercion may be direct (direct coercive transfer), when the transfer of a policy takes place from one government to another or through supra national institutions, or indirect (indirect coercive transfer), when the transfer is brought about by externalities such as advancements in technology and economic pressures.<sup>78</sup> Direct coercion, usually involves regulatory policies forced by IFIs on their members,<sup>79</sup> or when a state promotes its rules through the use of material power, whether military or economic, which may either be imperialistic or a result of indirect imposition.<sup>80</sup> However, indirect coercion may take place if ‘IFIs...exert influence less by pressuring governments to adopt unpalatable changes than by convincing them that these changes are actually palatable’ by relying on ‘knowledge provision, advice and insinuation.’<sup>81</sup> Further, coercion, especially when institutions such as the IMF and World Bank are involved, is likely to exert a stronger influence in developing countries because in cases of conditional lending, the influence is more likely to be felt in the developing recipient rather than developed donor countries.<sup>82</sup>

(ii) *Competition (also ‘international economic competition’ or ‘regulatory competition’)*. This mechanism is activated when countries influence the adoption of policies or laws by one another, by anticipating or reacting to each other’s behaviour because they are competing for economic resources, which they hope to

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<sup>77</sup> Giraldi in Carlsnaes, Risse-Kappen and Simmons (n 55) 13, 14.

<sup>78</sup> Dolowitz and Marsh, ‘Who Learns What from Whom’ (n 73) 348, 349.

<sup>79</sup> Newmark (n 60) 155. Marsh and Sharman (n 63) 272.

<sup>80</sup> Jean-Frédéric Morin and Richard E Gold, ‘An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries’ [2015] *International Studies Quarterly* 782.

<sup>81</sup> Weyland (n 57) 39.

<sup>82</sup> Marsh and Sharman (n 63) 272.

attract or retain.<sup>83</sup> ‘Regulatory competition’ may be said to be at play when lawmakers adopt foreign rules, whether or not these are effective for addressing domestic issues, in order to better position their country in a competitive world. Regulatory competition may be a ‘race to the bottom’, in which law-makers adopt the lowest regulatory standards of competing countries to avoid capital flight, or ‘race to the top’, in which law-makers focus on reputational rather than economic competition.<sup>84</sup>

(iii) *Contractualization*. This is related to yet distinct from ‘coercion’.<sup>85</sup> It is stated to occur when states bargain with one another in relation to a legal rule and their negotiations include trade-offs linking two or more issue areas, and the results are formalized by an international treaty (or any other form of bilateral agreement). Importantly, however, contracting parties do not necessarily negotiate as equals and their contractual agreements do not always result in balanced outcomes.<sup>86</sup>

(iv) *Copying*. This refers to a process whereby a country adopts a programme in use elsewhere without making any changes to it,<sup>87</sup> however, the boundaries separating copying from emulation, learning and lesson-drawing are not always clear.<sup>88</sup>

(v) *Emulation*. Although this term is often used interchangeably with ‘learning’,<sup>89</sup> it has also been independently defined as a mechanism in which the normatively and socially constructed characteristics of policies matter more than their objective content or consequences.<sup>90</sup> It is also described as a process in which a country rejects copying in every detail but accepts that a particular programme elsewhere provides the best standard for designing legislation at home. It is also distinguished from copying<sup>91</sup> and hybridization/synthesis.<sup>92</sup> At times, however, it

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<sup>83</sup> Giraldi in Carlsnaes, Risse-Kappen and Simmons (n 55) 15-17. Also Marsh and Sharman (n 63) 271, 272.

<sup>84</sup> Morin and Gold (n 80) 782, 783.

<sup>85</sup> See (i) above.

<sup>86</sup> Morin and Gold (n 80) 782.

<sup>87</sup> Dolowitz and Marsh, ‘Who Learns What from Whom?’ (n 78) 351.

<sup>88</sup> See (v) and (vi) below.

<sup>89</sup> See (vi) below.

<sup>90</sup> Giraldi in Carlsnaes, Risse-Kappen and Simmons (n 55) 22-25.

<sup>91</sup> See (iv) above.

is simply defined to as a process ‘whereby knowledge of policy innovations is borrowed from other entities’<sup>93</sup> and has been used interchangeably with ‘mimicry’, ‘socialization’ and ‘copying’<sup>94</sup> as well as with lesson-drawing, cost-saving and problem solving approach.<sup>95</sup>

(vi) *Learning*. This refers to situations in which the experience of other countries supplies useful information on the likely consequences of a policy, to a country contemplating adopting that policy. Learning may be ‘rational or comprehensive’, in which policymakers aggregate information according to the laws of statistics, or it may be ‘bounded’ where policymakers rely on cognitive shortcuts in arriving at their conclusions regarding the attractiveness or appropriateness of a policy and even though doing so may introduce errors in the process.<sup>96</sup>

‘Rational or comprehensive’ learning has also been characterized as ‘Bayesian updating’ which suggests that policy makers have prior beliefs, which they reconsider on the basis of information coming from other countries and thereby, shift their already held beliefs towards results seen from the experience of others.<sup>97</sup> In ‘bounded’ learning, although policymakers *intend* to learn from the experience of others, they are inherently limited by their inability to systematically compute extensive information. Therefore, they end up (a) placing excessive importance on information, that for logically accidental reasons, has special immediacy and grabs their attention (‘availability’); (b) attaching undue weight to the short term success or failure which they mistake for proof of the inherent quality of the underlying programme or model (‘representativeness’), and (c) relying more on an initial value which strongly affects their subsequent judgments (‘anchoring’).<sup>98</sup>

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<sup>92</sup> Dolowitz and Marsh, ‘Who Learns What from Whom’ (n 78) 351. Also see n. 101.

<sup>93</sup> Newmark (n 60) 156.

<sup>94</sup> Marsh and Sharman (n 63) 272.

<sup>95</sup> Morin and Gold (n 80) 782; Colin J Bennett, ‘What Is Policy Convergence and What Causes It?’ (1991) 1991 *British Journal of Political Science* 215, 220-221.

<sup>96</sup> Weyland (n 57) ch 1.

<sup>97</sup> Giraldi in Carlsnaes, Risse-Kappen and Simmons (n 55) 18.

<sup>98</sup> *ibid*; Weyland (n 57) ch 1.

In certain cases, learning has been defined to include emulation<sup>99</sup> because it represents a rational decision by governments to adopt foreign institutions and practices in the expectation that these measures will produce more efficient and effective policy outcomes than their alternatives.<sup>100</sup> It has also been referred to as ‘lesson drawing’ and has been defined to include copying, emulation, hybridization and synthesis<sup>101</sup> and to represent different degrees of learning.<sup>102</sup> These different forms of learning serve as shortcuts to problem-solving where solutions to problems may already exist.<sup>103</sup> Learning has also been described as ‘socialization’ in situations where it ‘clearly frames the cognitive dimension of the appropriate rule...as well as the internalization of international norms and policies and their domestic counterparts’<sup>104</sup> which is considered necessary for convincing a state, of the appropriateness of a foreign rule and of establishing that the legal rule in question resonates with established social norms and fits with the collective identity of the adopting country.<sup>105</sup>

In addition to describing the different mechanisms of transfer, the diffusion and transfer literatures also categorise them as ‘voluntary or coercive’ and ‘horizontal or vertical’:

(i) *Voluntary or Coercive Mechanisms.* The mechanisms of competition, learning, emulation, copying and, to a lesser extent contractualization are often identified as forms of ‘voluntary transfer’.<sup>106</sup> The motivation of a country in engaging in voluntary transfer may be dissatisfaction with existing policy,<sup>107</sup> policy failure, elections, need to reduce uncertainty or to legitimate previous

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<sup>99</sup> See (iv) below.

<sup>100</sup> Marsh and Sharman (n 63) 271, 272.

<sup>101</sup> Dolowitz and Marsh, ‘Who Learns What from Whom’ (n 78) 351. also argue that copying, emulation, hybridization and synthesis are different degrees (rather than kinds) of Transfer. Indeed, their definition of hybridization and synthesis as a process of combining elements of programmes in two or more countries to develop a policy best suited to the adopting country may be considered as a form of learning.

<sup>102</sup> Richard Rose, ‘What Is Lesson-Drawing?’ (1991) II *Journal of Public Policy* 3.

<sup>103</sup> Newmark (n 60) 154.

<sup>104</sup> Morin and Gold (n 80) 783; Torben Heinze, ‘Mechanism-Based Thinking on Policy Diffusion: A Review of Current Approaches in Political Science’ (Freie Univ Berlin, FB Politik- und Sozialwiss, Kolleg Forschergruppe ‘The Transformative Power of Europe’ 2011) 3, 19-20.

<sup>105</sup> Morin and Gold (n 80) 783.

<sup>106</sup> Newmark (n 60) 156. indirectly refers to ‘competition’ as the ‘middle ground between voluntary and coercive policy transfer’ because it entails a country adopting a policy to avoid falling behind other nations which have already adopted the policy.

<sup>107</sup> *ibid.*

decisions.<sup>108</sup> Coercion on the other hand is recognized as a ‘coercive transfer’ for the reason that it is activated by direct or indirect pressure by foreign governments or IFIs rather than by the voluntary impulse of the adopting country.<sup>109</sup> Contractualization may also be categorised as coercive transfer where it takes place between countries of unequal bargaining power.

(ii) *Horizontal or Vertical Mechanisms.* The literatures also distinguish between horizontal and vertical mechanisms of transfer. Horizontal mechanisms are activated when states learn about different policies from other states, compete with each other, or adopt a policy that neighbouring states may have adopted. Vertical transfer occurs when states receive incentives for adopting the policy innovation from politically or economically superior bodies.<sup>110</sup>

It appears from the preceding that horizontal transfer mechanisms are also likely to be voluntary whilst vertical transfer mechanisms are likely to be coercive.

(b) *Transfer Mechanisms and Legitimacy*

The literatures agree that an important, though often tacit, motivation for a country activating any of the transfer mechanisms is to achieve ‘legitimacy’. According to Weyland, in the case of learning, whether rational or bounded, the need to ‘look good before global public opinion’ and concern for ‘international legitimacy’ is an important factor that motivates a country to adopt outside influences,<sup>111</sup> and Marsh and Sharman go so far as to assert that ‘emulation may be a deliberate ploy by governments to acquire legitimacy.’<sup>112</sup> These scholars are further of the view that the need for legitimacy is particularly overwhelming for developing countries that seek to ‘legitimize themselves by mimicking developed states’.<sup>113</sup>

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<sup>108</sup> Dolowitz and Marsh, ‘Who Learns What from Whom’ (n 78) 346-347.

<sup>109</sup> *ibid.*; Newmark (n 60). Certain scholars such as Heinze (n 104) and Maggetti and Giraldi (n 74) argue that diffusion relates only to voluntary processes of adoption and adaption whilst policy transfer includes both voluntary and coercive mechanisms, however, there does not appear to be a consensus in this regard.

<sup>110</sup> Dorothy Daley, James Garand, ‘Horizontal Diffusion, Vertical Diffusion, and Internal Pressure in State Environmental Policymaking, 1989-1998’ (2005) 33 *American Politics Research* 615, 620.

<sup>111</sup> Weyland (n 57) 39-42.

<sup>112</sup> Marsh and Sharman (n 63) 272.

<sup>113</sup> *ibid.*

Despite acknowledging the significance of ‘legitimacy’ as an important underlying driver of transfer, the majority of scholars refer only to international rather than domestic legitimacy. However, Giraldi is an important exception in this regard. He links a country’s desire for international legitimacy as a means of attaining domestic legitimacy when he argues (in respect of emulation) that states ‘are sensitive to the reaction of the international community because it can affect their domestic legitimation and power’.<sup>114</sup> Linos, further develops the idea of domestic legitimacy when she argues that mechanisms of transfer activated through democratic institutions have the potential of conferring ‘critical domestic legitimacy’ on the transferred law.<sup>115</sup> However, even Linos stops short of discussing the precise manner in which this domestic legitimacy is generated, its nature and significance for the adopted law, or the possible links between international and domestic legitimacy.

*(c) Possible Outcomes of Transfer*

Although scholars in both transfer and diffusion literatures maintain that examining the outcomes of transfer or diffusion is not a ‘critical component’ of their work. They identify possible outcomes of mechanisms of transfer and diffusion. Amongst these, ‘convergence’ is perhaps most commonly referred to, however, there is no agreement that diffusion always results in convergence. Scholars also clarify that even if convergence takes place in cases of transfer, it is likely to be a matter of degree rather than of absolute convergence.<sup>116</sup>

However, a number of scholars identify certain factors that may affect potential outcomes of transfer and diffusion mechanisms. For instance, Marsh and Sharman alluding to outcomes other than convergence, suggest that outcomes brought about by different mechanisms may vary according to settings including the initial conditions under which they spring into action and on intervening factors that condition their operation and force.<sup>117</sup> Dolowitz and Marsh argue that all

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<sup>114</sup> Giraldi in Carlsnaes, Risse-Kappen and Simmons (n 55), 23.

<sup>115</sup> Katerina Linos, *The Democratic Foundations of Policy Diffusion: How Health, Family and Employment Laws Spread across Countries* (Oxford University Press 2013) ch 1, 2; ch 2.

<sup>116</sup> Marsh and Sharman (n 63), 271, 278-279; Giraldi in Carlsnaes, Risse-Kappen and Simmons (n 55), 3, 31. Weyland (n 57) ch 1.

<sup>117</sup> Marsh and Sharman (n 63) 279.

institutional constraints of rules, norms, expectations and traditions, that limit free play of individual will and calculation, structure the actions and values of agents transferring policies through these institutions, and thereby impact the outcomes of transfer.<sup>118</sup> However, Marsh and Sharman suggest a symbiotic relationship between institutional structures and agents and argue that whilst structures shape the actions of the agents, the agents too change the structures in interpreting them.<sup>119</sup> Dolowitz and Marsh also indicate that as a policy or law develops and moves through the policy cycle, new actors and institutions become involved in its development and not only bring different sets of knowledge and interests to bear on the transfer process but also pursue or engage different strategies for the further transfer and use of information, which further influence the outcomes of the transfer process.<sup>120</sup>

### 2.2.3. Adapting Transfer and Diffusion Literatures

In order to utilize transfer and diffusion literatures for the transfer of competition laws in India and Pakistan, it is necessary to rationalize the typology to reflect possible mechanisms that may be engaged by developing countries transferring laws from developed countries. It is also important to clarify the links between transfer mechanisms and the legitimacy they are likely to generate. Given that both India and Pakistan are developing countries gaining legitimacy is likely to have been an important factor in their adoption of competition laws and will be helpful in deepening the understanding of their processes and outcomes.

#### (a) *Rationalizing the Typology*

In rationalizing the typology of mechanisms it is necessary in the interests of consistency, to locate the new typology within the existing terminology.<sup>121</sup> With this in mind, I propose as follows:

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<sup>118</sup> Dolowitz and Marsh, 'Who Learns What from Whom' (n 78), 354-356.

<sup>119</sup> Marsh and Sharman (n 63), 275.

<sup>120</sup> David P Dolowitz, and David Marsh, (2012), 'The Future of Policy Transfer Research' Political Studies Review, 10: 339, 341.

<sup>121</sup> My sensitivity in this regard is borne out of Evans' critique of Rose's work on lesson drawing: 'A critique of Rose's work would rest on...lack of a discussion about the relationship between the concept of lesson drawing and the broader literature of policy transfer...it is important for Rose to clarify his term within this context to lend clarity to the debate for students and scholars alike'. Evans (n 62) 250.

(i) *Coercion*. I retain this term despite its potentially negative connotations for multilateral agencies for the reason that it is consistently used throughout the literatures to describe this particular process. For laws, as for policies, this term may be used to refer to the mechanism by which a country adopts the law of another country due to pressure of another country or of international organizations (such as IMF or the World Bank). This pressure may be either direct (exerted through material power, whether military or economic) or indirect (exerted by imposing a condition for providing financial assistance or through persuasion on the basis of superior knowledge). This term includes ‘contractualization’ provided that it takes place between countries of unequal bargaining power for the reason that only in such situations is the stronger party able to exert either direct or indirect pressure on the weaker party in order to achieve its preferred outcome.

(ii) *Emulation*. My use of this term represents a process through which an adopting country acquires a law only for its normative value and potential to confer legitimacy on its government. The concept of emulation in this typology is akin to and includes copying and mimicry, however, it allows for the possibility that the degree of emulation, copying or mimicry may vary from case to case.

(iii) *Regulatory Competition*. I use this term to refer to the mechanism described in the transfer and diffusion literatures simply as ‘competition’ or as ‘international economic competition’. I opt for the term ‘regulatory competition’ to distinguish the mechanism from the subject of competition and because this mechanism is most often employed when a country adopts regulatory laws in order to remain at the cutting edge of legal creativity or in order to generate legitimacy or political rent for its government, or both.

(iv) *Socialization*. My use of this term includes all mechanisms through which a country may learn from the law of another to develop a law suitable for its domestic context. The mechanism of socialization in my typology represents all learning whether it is rational, comprehensive and objective or bounded by

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In an alternative typology of mechanisms devised for competition laws, the mechanisms of *coercion*, *competition* and *contractualization* have been categorized under the head of ‘externalities’. Lianos ‘Global Governance of Antitrust’ (n. 54) 9-10.

cognitive biases of the lawmakers. The only requirement is that the mechanism should essentially be directed towards the internalization by the adopting country of the principles, beliefs and norms of a foreign community and should have been activated in order for the adopting country to persuade itself of the appropriateness of the law for its domestic context rather than because it seeks to copy a law due to its normative or legitimation value. My use of the term also includes the mechanisms of ‘hybridization’ or ‘synthesis’ because they describe processes through which elements of programmes in two or more countries are combined to develop a law best suited to the context of the adopting country. My preference for the term ‘socialization’ over any of the available alternatives is also due to the fact that it is relatively less contaminated than learning and lesson-drawing which have been used interchangeably with emulation, copying and mimicry.

**Table 2.1 Correlating Typology for Transfer of Laws with Typology for Transfer of Policies**

Transfer of Laws	Transfer of Policies
Coercion	Coercion; Contractualization*
Emulation	Copying; Mimicry
Regulatory Competition	Competition; International Economic Competition
Socialization	Learning; Lesson-drawing (excluding emulation); Hybridization, Synthesis

\*Only when it takes place between countries of unequal bargaining power.

*(b) Relationship between Transfer Mechanisms and Domestic Legitimacy*

As discussed in 2.2.2 (b) above, transfer and diffusion literatures often refer to legitimacy-seeking as a motivation for which a country adopts a foreign law. However, the bulk of these references are to international rather than domestic legitimacy with the exception of Giraldi, who links the desire for international legitimacy as a means of attaining domestic legitimacy<sup>122</sup> and Linos, who suggests that mechanisms of transfer activated through democratic institutions are more likely to generate ‘critical domestic legitimacy’ for the transferred law.<sup>123</sup> In this section, I explore the concept of domestic legitimacy and identify reasons for

<sup>122</sup> See n 114.

<sup>123</sup> See n 115.

which it is relevant for the transfer of laws. I also explore the legitimacy-generating potential of difference transfer mechanisms.

(i) *What is domestic legitimacy?* The concept of ‘legitimacy’ is discussed in political philosophy<sup>124</sup> and political science and sociology.<sup>125</sup> Whilst these discussions do not explicitly refer to domestic legitimacy, their definition of legitimacy as ‘the *belief* that a rule, institution or leader has the right to govern’,<sup>126</sup> is an appropriate starting point for the discussion of domestic legitimacy. ‘Legitimacy’ so defined is essentially a subjective concept and is related to, yet distinct from legality,<sup>127</sup> authority<sup>128</sup> and justice,<sup>129</sup> which may be considered attributes of legitimacy rather than substitutes for it.

The relationship between ‘legitimacy’ and ‘justice’ is particularly significant. Some scholars argue that legitimacy comprises the independent concepts of fairness (or justice), efficiency, expertise and accountability, where fairness relates to the substantive goals of a policy, law or legal system and efficiency, expertise and accountability relate to its procedural effectiveness.<sup>130</sup> However, others are of the view that although legitimacy and justice are closely related and have a common basis in fundamental political values (such as equality), they do not place the same demands on society and, are, therefore, not interchangeable.<sup>131</sup> In particular, Rawls suggests, that legitimacy is a *weaker* idea than justice and that

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<sup>124</sup> Peter, Fabienne, "Political Legitimacy", The Stanford Encyclopedia of Philosophy (Summer 2017 Edition), Edward N. Zalta (ed.), URL = <https://plato.stanford.edu/archives/sum2017/entries/legitimacy/> (accessed 14 August 2017).

<sup>125</sup> Ian Hurd, ‘Legitimacy’ <<http://pesd.princeton.edu/?q=node/255>> (accessed 14 August 2017); Routledge, ‘Authority v. Legitimacy’ <<http://cw.routledge.com/textbooks/alevelphilosophy/data/AS/WhyShouldIBeGoverned/Authorityandlegitimacy.pdf>> (accessed 14 August 2017).

<sup>126</sup> Ian Hurd (n 125).

<sup>127</sup> *ibid.* It is argued that not all legal acts are necessarily legitimate and not all legitimate acts are necessarily legal because there is always the possibility that rulers might legally impose laws which the followers *find* illegitimate.

<sup>128</sup> Routledge (n 125). Authority too may exist independently of legitimacy. For example, a state has authority if it maintains public order and makes laws that are generally obeyed by its citizens. However, it is only when the citizens *perceive* these laws to be right, justified and supported by good reasons that the authority of the state (or indeed of a law made by the state) may be deemed to be legitimate.

<sup>129</sup> Ian Hurd (n 125). Justice denotes adherence to an external moral standard.

<sup>130</sup> Rizwaan Jameel Mokal, ‘On Fairness and Efficiency. The Modern Law Review, 66 (2003) 452, 453.

<sup>131</sup> Fabienne. (n 124).

laws or decisions made by particular political institutions may be legitimate without being just.<sup>132</sup>

In view of the preceding discussion, it may be possible to distinguish between *substantive legitimacy*, which relates to a belief in the justness of the policy or law, and *procedural legitimacy* which relates to a belief in the legality of the procedures through which the policies or laws are created and in the authority of the creating institutions.<sup>133</sup> It follows, therefore, that a policy or law may have substantive legitimacy without having procedural legitimacy and vice versa. Arguably, however, the optimum outcome for the performance of a policy or law would be for it to have a degree of both substantive and procedural legitimacy.

(ii) *Why is domestic legitimacy important?* Domestic legitimacy (whether substantive, procedural or both), like its international counterpart, is directly related to the mechanism of transfer activated and employed by a country for transferring a law and is an important motivation for a country acquiring a foreign law. However, unlike international legitimacy, which is often cited as a direct motivation for a country acquiring a foreign law, domestic legitimacy has been referred to, if at all, only as an indirect motivation and a by-product of international legitimacy.

Domestic legitimacy is nevertheless important and relevant not only because it has considerable bearing on the implementation of an adopted law in the context of the adopting country, (which is possibly the reason for which Linos refers to it as ‘critical domestic legitimacy’<sup>134</sup>) but also because, to the extent that the process through which domestic legitimacy is acquired also has the power to shape the content of the adopted law, it is deeply linked with the very content of the law and through it, to its implementation.<sup>135</sup>

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<sup>132</sup> *ibid.*

<sup>133</sup> For instance, Tom Tyler argues that ‘the antecedents of legitimacy lie in people’s judgment about the procedures through which legal authorities make rules...people defer to rules primarily because of their judgments about how those rules are made, not their evaluation of their content’. Tom R Tyler and others, ‘Procedural Fairness and Compliance with the Law’ *Swiss Journal of Economics and Statistics (SJES)*, 1997, vol. 133, issue II, 219 (1997) 225.

<sup>134</sup> Katerina Linos (n 115) 2.

<sup>135</sup> Section 2.3.3 below.

(iii) *How is domestic legitimacy generated?* According to Weber, legitimacy may be derived from ‘tradition’ (i.e. people may have faith in a particular political or social order because it has been there for a long time); ‘charisma’ (because they have faith in the rulers), and ‘legality’ (because they trust its lawfulness).<sup>136</sup> Other scholars, such as Locke, however, have highlighted the importance of ‘benefit’ and ‘consent’ in the creation of legitimacy.<sup>137</sup> Specifically, Locke is of the view that consent is necessary for the original institutionalization of a political authority as well as the on-going evaluation of the performance of a political regime.<sup>138</sup> However, whilst express consent is necessary for the original institutionalization, either express or tacit consent may suffice for its continued evaluation.

Simmons adds to this discussion by arguing that because legitimate authority depends on people’s *actual* consent to the commands of a particular state, there is no content-independent duty to obey the state.<sup>139</sup> Simmons’ notion of consent creates a direct nexus between consent and benefit because people are likely to *actually* consent only to those rules, institutions or systems that benefit them.<sup>140</sup> Contrary to Simmons, however, other scholars argue that people may obey rules of a state or body on the basis of their procedural legitimacy which stems from the trust people have in the rule making body, quality of interpersonal treatment, evidence of the body’s neutrality and the extent of participation that the body allows in the formulation of the rules.<sup>141</sup>

This discussion highlights the distinction between *substantive legitimacy* and *procedural legitimacy* discussed in (i) above, and suggests that procedural legitimacy may exist even in the absence of substantive legitimacy because people are likely to see as legitimate, policies, laws and institutions that are created

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<sup>136</sup> Fabienne. (n 124).

<sup>137</sup> Although Locke speaks of legitimacy of political authority, his ideas may be extended to laws, which are evidence of the exercise of such authority.

<sup>138</sup> Fabienne. (n 124) section 3.

<sup>139</sup> *ibid.*

<sup>140</sup> Routledge. (n 125). states that in the *Republic*, Plato argues that legitimate authority was not founded on consent or even giving people what they want. It is further argued that democracy is based on freedom to do what you want. But if you do not know what is good for you then this kind of freedom is harmful.

<sup>141</sup> Tom R. Tyler and others. (n 133).

through a process which is seen as basically fair, legal or correct even if these policies or laws do not actually benefit them.<sup>142</sup>

It may be concluded, therefore, that a law may be considered *procedurally legitimate* if it is created through a transfer mechanism that engages institutions that have authority and legality in the adopting country and are able to engage a broad spectrum of stakeholders. However, it may only be considered *substantively legitimate* if these institutions also allow people a genuine opportunity to evaluate the contents of the law, its justness, or at the very least, its benefit to them. It further suggests that most transfer mechanisms are likely to fall somewhere between the two extremes of creating no *procedural* or *substantive* legitimacy to generating complete *procedural* and *substantive* legitimacy depending upon the range and nature of institutions they engage in the adoption process.

For the purposes of this research I argue that a law may be presumed to have constructive consent and, therefore, a degree of procedural and substantive legitimacy, if it has been introduced in the adopting country through a transfer mechanism that engages institutions that have authority and legality in the adopting country as well as a broad spectrum of stakeholders from different branches of state. The extent of legitimacy enjoyed by an adopted law is, therefore, directly commensurate with the extent to which the transfer mechanism engages with a wide range of institutions and with the public in the adopting country.

On the basis of the descriptions of transfer mechanisms provided in 2.2.3 (a) above, it may be argued that *socialization* is more likely to engage with a broader range of institutions (and actors operating through these institutions) and with the public in the adopting country, and therefore, may be deemed to have the highest possible legitimacy generating potential. On the other hand, *coercion* is likely to engage with a limited range of institutions, actors and people in the adopting country and therefore, has the lowest legitimacy generating potential. The legitimacy generating potential of the remaining two mechanisms is likely to fall somewhere between the two extremes. However, the actual legitimacy generated by these mechanisms can only be judged on a case-to-case basis.

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<sup>142</sup> Ian Hurd (125).

## **2.3. The Contribution of Development Economics**

### **2.3.1. Significance of Institutional Analysis**

Post-Washington Consensus development economics, or new institutional economics (NIE) as it is sometimes called, gives ‘institutions’ and institutional analysis centre stage in its discussions. Development economics literature defines ‘institutions’ broadly, to include both formal and informal rules that organize social, legal and political aspects of a society and ‘any form of constraint that human beings devise to shape human interaction’ whether formal or informal, created or evolved over time.<sup>143</sup> Institutions, so defined, include laws formally enacted by a country (regardless of whether these are generated locally or imported from elsewhere) as well as formal and informal patterns of behaviour either explicitly or implicitly operating in the country. Whilst the literature itself is not clear as to whether organizations are included in this definition, I include them for the purpose of my analysis provided that they created by and are engaged in implementing institutions.

However, more than for its inclusive definition of ‘institutions’, development economics is relevant, indeed central, to the present enquiry due to its interest in the understanding the role of institutions pre-existing in the country on the performance of economic institutions, which, by definition, include competition laws.<sup>144</sup> To this end, development economics scholars examine not only particular characteristics of economic laws but also, the institutions that play a role in creating them. They argue that the performance of economic laws in a country is correlated to the processes and institutions through which the economic laws have been created by or adopted/adapted in that country. In highlighting this link between institutions engaged in the creation or adoption/adaptation of economic laws and their subsequent performance in the country, development economics bridges a critical gap in the legal transplant and diffusion and transfer literatures which only allude to the possibility of such links, without fully exploring them.<sup>145</sup>

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<sup>143</sup> Douglass North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press 1990), ch 1 p 4.

<sup>144</sup> To avoid confusion from here onwards I refer to economic institutions as ‘economic laws’.

<sup>145</sup> Sections 2.1.3 and 2.2.2 above.

Indeed competition law literature itself, recognizes the significance of institutional analysis and laments that whilst ‘economic literature has examined how institutional quality affects public policy’ and ‘a number of economists have concentrated on the structure and operations of antitrust authorities’, ‘antitrust legal literature is rich in substantive concepts and lean in the study of institutions’.<sup>146</sup> Utilizing institutional analysis from development economics offers an opportunity to examine not only the manner in which the design of competition law affects its implementation, but also the manner in which the design was shaped and formed by legal and political institutions pre-existing in the adopting country.

### 2.3.2. Identifying Links between Adoption Process and Implementation

North argues that economic laws are more likely to be compatible with the context of a country if they evolve organically from its context, through an evolutionary process.<sup>147</sup> He explains that formal rules introduced by ‘a discontinuous change’—that is, a change brought about by revolution or conquest rather than through organic evolution—are likely to not be compatible with the context of the country and, therefore, not able to perform in a way that yields economic growth in that country.<sup>148</sup> Although North does not explain what he means by an organic, evolutionary process, it may be assumed that he intends any process, which allows economic laws to germinate domestically, in a voluntary response to the indigenous needs of the country. He, therefore, excludes from this discussion all processes of adoption of laws from other countries.

Rodrik takes North’s analysis further by describing the possible processes and institutions through which a country may acquire an economic law. He also predicts the impact of these processes and institutions on the subsequent

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<sup>146</sup> W.E. Kovacic ‘The Institutions of Antitrust Law: How Structure Shapes Substance’ (2012) 110 Michigan Law Review 1019, 1020.; Ioannis Lianos, Abel Mateus, Azza Raslan ‘Is There a Tension Between Development Economics and Competition?’ in D Daniel Sokol, Thomas K Cheng, Ioannis Lianos eds *Competition Law and Development* (Stanford University Press 2013) 42-45.

<sup>147</sup> Although North uses the term ‘compatibility’, he does not define it. I, therefore, understand it to have been used in its ordinary dictionary meaning of ‘able to exist or occur together without problem or conflict’ <https://en.oxforddictionaries.com/definition/compatible> (accessed 13 June 2017).

<sup>148</sup> North (n 143), 101.

performance of these laws. He is of the view that economic laws are a form of ‘technology’ which may either be: (i) ‘a general purpose ... codified and ... readily available on world markets’,<sup>149</sup> or (ii) ‘highly specific to local conditions’ and containing ‘a high degree of tacitness’ due to the fact that ‘much of the knowledge that is required [about the technology] is in fact not written down...’.<sup>150</sup>

He is further of the view that in cases where the desired ‘technology’ is of the generic variety, the country may simply import a blueprint from more developed economies by following a ‘largely top down’ approach which relies ‘on expertise on the part of technocrats and foreign advisors’. However, if the technology desired by the country is highly specific to context, it has to rely on ‘bottom up’... mechanisms for eliciting and aggregating local information in devising the technology.<sup>151</sup> Rodrik further states that although the institutions through which a country may elicit and aggregate local information may be ‘as diverse as the institutions that they help create...the most reliable forms of such mechanisms are participatory political institutions’,<sup>152</sup> because whilst authoritarian regimes are not restricted from or incapable of using local knowledge, ‘nothing compels them to do so’.<sup>153</sup>

Rodrik also explains that his categories of generic or highly specific technologies or economic laws are ‘only caricatures’, and that in actual fact, the distance between the two types is not as great as it may appear to be, because ‘an imported blueprint requires domestic expertise for successful implementation’ and even ‘when local conditions differ greatly, it would be unwise to deny the possible relevance of institutional [or legal] examples from elsewhere.’<sup>154</sup> This blurring of lines between the two categories suggests that Rodrik is of the view that even when a country acquires the blueprint of an economic law from another country, it must still adapt it for local context, in light of local knowledge, aggregated through bottom-up participatory institutions.

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<sup>149</sup> Dani Rodrik, *One Economics, Many Recipes: Globalization, Institutions and Economic Growth* (Princeton University Press 2007), ch 5.

<sup>150</sup> *ibid.*

<sup>151</sup> *ibid.*

<sup>152</sup> *ibid.*

<sup>153</sup> *ibid.*

<sup>154</sup> *ibid.*

In addition to the need for compatibility, advocated by North and Rodrik, Acemoglu and Robinson argue that in order to ensure the quality and performance of economic laws it is equally important to consider whether these are ‘inclusive’ or ‘extractive’.<sup>155</sup> In their view an economic law is inclusive when it ‘encourage(s) participation by the great mass of people in economic activities’ and extractive when it is ‘designed to extract income and wealth from one subset of society to benefit a different subset’.<sup>156</sup> Importantly, however, Acemoglu and Robinson argue that whether economic laws are inclusive or extractive depends in large measure upon the nature of the political institutions through which they are created.

They argue that there is a strong synergy between economic and political institutions. Extractive political institutions concentrate power in the hands of a narrow elite and place few constraints on the exercise of this power. They also structure economic institutions to extract resources from the rest of society. For this reason, extractive economic institutions naturally accompany extractive political institutions. Inclusive economic institutions in turn are forged on foundations laid by inclusive political institutions, which distribute power more broadly in society. Such political institutions make it harder for others to usurp power and undermine their foundations and thereby are able to create economic institutions that distribute resources more equitably.<sup>157</sup>

It is evident from the preceding discussion, that irrespective of whether the quality and performance of an economic law may be attributed to its compatibility with the context of the borrowing country<sup>158</sup> or its inclusiveness,<sup>159</sup> it is critically linked to the political process and institutions through which the economic law is created or adapted in the country. In summary, there appears to be agreement amongst these scholars that an economic law performs better and is likely to be more successful (in yielding economic growth) if it organically evolves from the context

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<sup>155</sup> Daron Acemoglu and James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Crown Publishers 2012). ch 15, 429-430.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid. (emphasis added)

<sup>158</sup> North (n 143); Rodrik (n 149); Dani Rodrik, ‘*Institutions for High-Quality Growth: What They Are and How to Acquire Them*’ (2000) 35 *Studies in Comparative International Development (SCID)* 3.

<sup>159</sup> Acemoglu and Robinson (n 155).

of the country<sup>160</sup> or is generated or adopted/adapted through bottom up, participatory<sup>161</sup> and inclusive institutions.<sup>162</sup>

### 2.3.3. Lessons of Development Economics for Understanding Adopted Laws

Development economics thinking is not alien to legal transplant literature. Indeed, when Berkowitz et al argue that legal transplants that are received in a country via *imposition or colonization*, rather than being developed locally and indigenously, are less likely to be compatible with the context of the country,<sup>163</sup> they seem to echo North's view that institutions created through organic and evolutionary processes are more likely to be compatible with the context of the adopting country.<sup>164</sup>

However, Rodrik's discussion clarifies that the emphasis on indigenous, evolutionary processes does not obviate legal transplants altogether. He introduces the possibility of voluntary legal transplants by referring to 'blueprints' of economic laws that a country may borrow from elsewhere and then adapt for its purpose. Rodrik also adds to the understanding of adopted economic laws by suggesting that economic laws that are appropriately adapted through bottom-up, participatory institutions are more likely to be compatible with the context of the adopting country and therefore, are likely to perform better in that country.<sup>165</sup> Acemoglu and Robinson add the attribute of 'inclusiveness' of political institutions for generating more inclusive and, therefore, better performing economic laws.<sup>166</sup>

Trubek's writings in respect of the performance of legal transplants in the context of the 1960's Law and Development movement also emphasize the importance of adopting laws through bottom-up, participatory processes. Specifically, Trubek traces the causes of the 'failure' of the movement to its misplaced belief in the workability of generic legal transplants. He recounts that the movement had

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<sup>160</sup> North. (n 143).

<sup>161</sup> Rodrik. (n 149).

<sup>162</sup> Acemoglu and Robinson (n 155).

<sup>163</sup> Berkowitz, Pistor and Richard (n 41).

<sup>164</sup> North. (n 143).

<sup>165</sup> Rodrik. (n 149).

<sup>166</sup> Acemoglu and Robinson. (n 155).

encouraged countries to transplant laws without requiring them to adapt these to their particular contexts. Consequently, some laws did not ‘take at all’; others ‘promoted by the reformers remained on the books but were ignored in action’; whilst others still ‘were captured by local elites and put to uses different from those the reformers intended’.<sup>167</sup>

Recasting Trubek’s findings in Rodrik’s terminology, it may be said that countries participating in the Law and Development movement of the sixties would have introduced generic transplants through top-down methods—or, restating these in Acemoglu and Robinson’s language, it may be said that these had been generated through exclusive political institutions. It is not surprising, therefore, that these laws were neither compatible with the context of the adopting country (and, therefore, remained only on the books) nor inclusive (and could be captured by local elite for their own purposes). Trubek also indicates that the realization that compatibility with context and inclusiveness of economic laws was essential for the subsequent success of these laws has not remained confined to academic circles, and that there is ‘explicit recognition’ even at the World Bank ‘of the failures of transplants and of top-down methods, which has led to a rejection of one-size-fits-all approach and has placed a renewed stress on the need for context specific project development based on consultation of all “stakeholders”’.<sup>168</sup>

Development economics’ emphasis on bottom-up, participatory and inclusive processes of law-making also resonates with the Linos’s discussion on links between the operation of diffusion and transfer mechanisms in countries characterized by participatory, inclusive institutions,<sup>169</sup> and legitimacy generation.<sup>170</sup> Linos argues, much like Rodrik, that laws spread not only through elite networks of technocrats but also through domestic democracy.<sup>171</sup> She is of the view that when laws spread through domestic democracy, elected leaders have an interest in maintaining their popularity to win re-election and, therefore, are

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<sup>167</sup> David M. Trubek, ‘The “Rule of Law” in Development Assistance: Past, Present, and Future’ in David Trubek, Alvaro Santos eds. *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press 2006), 79.

<sup>168</sup> *ibid.* 91.

<sup>169</sup> Linos uses voter participation as the benchmark for democracy. However, her discussion is equally likely to hold true for other participatory bottom up institutions. Linos. (n 115).

<sup>170</sup> *ibid.*

<sup>171</sup> *ibid.*

likely to pay greater attention to what ordinary citizens and domestic interest groups want rather than blindly following their foreign colleagues or international organizations.<sup>172</sup> However, despite emphasizing the power of voters in determining the parameters of an adopted law, Linos stops short of suggesting that laws spread that through democratic pressures are ‘better’ than laws that may be introduced through elite networks.<sup>173</sup> Rather she suggests that mechanisms of diffusion and transfer employed in conjunction with democratic institutions have a greater opportunity of engaging with a broader range of stakeholders in that country and thereby conferring ‘critical domestic legitimacy’ on the adopted law.<sup>174</sup>

## **2.4. The Theoretical Framework**

### **2.4.1. Selecting Relevant Concepts from the Three Literatures**

Legal transplant, transfer and diffusion and development economics literatures relate to different stages of the process through which a country acquires a foreign law and to the subsequent implementation of the adopted law in the country. The adoption process comprises the deliberation and formal adoption stages<sup>175</sup> whereas the implementation stage includes all aspects of the interpretation and enforcement of the adopted law in that country. The contributions of each of these literatures may be related to the adoption process and implementation stage as follows.

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<sup>172</sup> *ibid.* With reference to Section 2.2.3(b) above, it is important to clarify that whilst elected leaders may have a vested interest in listening to their voters, this interest does not *dictate* their choice of transfer mechanism which follows, in all likelihood, from the institutions engaged by the transfer mechanism in that country. Consequently, legitimacy is more a by-product of the mechanism engaged by the country than a motivation for engaging it.

<sup>173</sup> *Ibid.* Indeed, Linos is of the view that when decision-makers are shielded from public opinion, they have the freedom to experiment and choose a model law that may be better suited for the needs of the adopting country. This is because voters are often more easily swayed by their media based knowledge and impressions of a foreign country and are, therefore, likely to be pre-disposed to a model emanating from that country irrespective of its merit. Politicians are also more likely to present their proposals to voters only to the extent they consider necessary to obtain their votes and are likely to be motivated by the need to gather votes rather than to educate the voting public.

<sup>174</sup> *ibid.*

<sup>175</sup> The ‘deliberation stage’ refers to the stage at which the adopting country debates and settles upon the parameters of the law it proposes to adopt, whereas the ‘formal adoption’ stage means the stage at which the adopting country formally introduces the law into its pre-existing legal system. It includes any discussions which take place in the course of this formal adoption as well as amendments to the law that are similarly formally adopted.

**Table 2.2 The Source and Application of Relevant Principles and Concepts**

Source Literature	Principles, Concepts and their Application	
	Principles Relevant to the Adoption Process	Principles Relevant to the Implementation Stage
<b>Legal Transplant</b>	<ul style="list-style-type: none"> <li>• There must be compatibility between the adopted law and the context of the adopting country.</li> <li>• Context includes social, political and legal institutions.</li> <li>• Actors play an important in shaping the adopted law.</li> </ul>	<ul style="list-style-type: none"> <li>• The law must not be rejected in the adopting country.</li> <li>• It must continue to grow in and become a part of the context of the adopting country.</li> <li>• It should be compatible with the machinery of justice in the country.</li> <li>• The law must interact productively with other elements in the legal organism.</li> <li>• It must be understood, utilized and applied by actors in the adopting country.</li> <li>• Actors play an important role in interpreting the adopted law.</li> </ul>
<b>Transfer or Diffusion</b>	<ul style="list-style-type: none"> <li>• Transfer (or diffusion) occurs through one of the following mechanisms:               <ol style="list-style-type: none"> <li>a) Coercion;</li> <li>b) Emulation;</li> <li>c) Regulatory Competition</li> <li>d) Socialization</li> </ol> </li> <li>• The specific mechanism that a country activates depends on its motivation for acquiring the law as well on the institutional conditions pre-existing in the country.</li> <li>• The mechanism activated by the country and its pre-existing conditions impact the extent of the legitimacy that the law has in the country.</li> <li>• Transfer takes place through the agency of actors, however, actors act within the constraints of the institutions to which they belong.</li> </ul>	<ul style="list-style-type: none"> <li>• The examination of outcomes is not critical to a study of transfer.</li> <li>• Convergence though a possible outcome, is likely to be a matter of degree in transfer cases.</li> <li>• The legitimacy of the law in the adopting country derives from the combination of the mechanism and institutions engaged in the delivery of the mechanism.</li> </ul>
<b>Development Economics</b>	<ul style="list-style-type: none"> <li>• Compatibility of the adopted law with the context of the country is important.</li> <li>• The nature of institutions engaged in the process must be examined.</li> <li>• Are institutions bottom-up and participatory and inclusive? Or are they exclusive and top down?</li> </ul>	<ul style="list-style-type: none"> <li>• The law must be activated in the country.</li> <li>• It should not remain ‘law in the books’ and become ‘law in action’.</li> <li>• The law should not be captured by local elites for their own ends</li> </ul>

2.4.2. Integrating Principles and Concepts for a Step-wise Analysis

(a) *The Adoption Process*

As recommended by the legal transplant and transfer/diffusion literatures, the first step in the examination of the adoption process (including the deliberation and the

formal adoption stages) is a review of the legal and political institutions pre-existing in the context of the adopting country immediately prior to adopting the law.

The next step of the analysis is dominated by transfer literature with its emphasis on ‘process-tracing’. This step requires first, a careful tracking of the motivations of the adopting country at the deliberation and formal adoption stages as well as the range of institutions engaged by the country at each of these stages. This is followed by locating this process within the typology of mechanisms developed for the transfer of laws in section 2.2.3(a) above. Also at this step it is important to examine and note the *nature* and *range* of institutions engaged by the country at each of the two stages (ie are they bottom-up participatory and inclusive or top-down and exclusive and are they distributed in different organs of state or concentrated in one) as recommended by both the transfer and development economics literatures.

This second step of the analysis is expected to yield a clear understanding of the content of the adopted law and the manner in which it has been shaped by the transfer mechanisms and institutions engaged by the country in the adoption process. From the analysis of the *nature* of the institutions, I aim to assess its compatibility with the context of the adopting country (emphasized in the legal transplant and development economics literatures) whereas from an assessment of the *range* of institutions engaged at this stage, I aim to gauge the extent of legitimacy of the adopted law (the relevance of which is indicated in the discussion on transfer literature).

In accordance with the discussions in the transfer and development economics literatures, throughout this analysis I focus on institutions rather than actors. I assume, as transfer literature suggests, that references to institutions include references to actors through whose agency the institutions operate, however, I do not examine the separate or individual roles of these actors in this regard primarily because reliable, micro-level information regarding the epistemological orientation and motivations of individual actors is nearly impossible to obtain.

*(b) The Implementation Stage*

In integrating concepts and principles for examining the implementation stage, I take into account the important distinction between the legal and the economic aspects of adopted economic laws and clarify that for the purposes of this research, I focus exclusively on the operation of the economic laws as legal instruments. Consequently, the benchmarks I rely on for assessing the manner in which the adopted law is implemented in the adopting country, focus on the legal rather than economic performance of the competition laws, and may be grouped in two categories: (i) the performance of the adopted law as an independent institution; and (ii) the performance of the adopted law in relation to the pre-existing legal system of the country in which it is injected.

In category (i), I include benchmarks derived from concerns expressed in the legal transplant literature that the law must not be rejected by and continue to grow in, and be understood, utilized and applied by actors in the adopting country. I also include the recommendation of development economics literature that the law must be a ‘law in action’ rather than remain merely a ‘law in the books’. The category (ii) benchmarks derive from the recommendation of the legal transplant literature that the adopted law should be compatible with the machinery of justice in the country and be able to interact productively with other elements in the ‘legal organism’. The extent to and pace at which the law integrates with the context of the country is the benchmark for the overall implementation of the law in its new context.<sup>176</sup>

The benchmarks listed in categories (i) and (ii) may be deemed to reflect the compatibility of the adopted law with the context of the country as well as its legitimacy in that country. According to both legal transplant and development economic literatures, a law that is compatible with the context of the adopting country is likely to be better understood, utilized and applied in the country. And even though the literatures do not explicitly highlight the impact of legitimacy on

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<sup>176</sup> Except briefly in Chapter 5, I do not investigate the extent of convergence of the adopted law with the source law for the reasons that (a) the transfer literature itself is not convinced of the importance of establishing convergence, and (b) an understanding of convergence does not add to the understanding of the performance of the adopted law in the adopting country, except to the extent of its need to seek international legitimacy which I address independently where relevant.

the implementation of the adopted law, it may be argued that if an adopted law has legitimacy in the country it is likely to be better utilized and applied by stakeholders in the adopting country, face fewer legal challenges to its legitimacy before the courts and have a lesser need to adopt measures simply to assert its international legitimacy (which it may then leverage for greater domestic legitimacy).

In the analysis of this stage, as in the analysis of the adoption process, I focus on institutions rather than actors. However, at this stage the relevant institutions are those entrusted with interpreting and enforcing the adopted law rather than those deliberating and enacting the law through the adoption process. For the same reasons as stated in 2.4.2(a) above, I assume actors to be included in the institutions through which they operate and I do not examine their separate or individual roles.

## **2.5. Concluding Remarks**

The literatures suggest that in adopting a foreign law, a country may be motivated by a combination of domestic and international factors and may respond to these by its unique mix of mechanisms and institutions. This interplay of mechanisms and institutions in the country shapes the content of the adopted law including the provisions related to the structure, mandate and composition<sup>177</sup> of the NCAs that it establishes. This interplay also determines the extent of the compatibility of the law with and its legitimacy in the context of the adopting country. I demonstrate over the next chapters, that the combined impact of these factors on the implementation of the law in the country, though both discernible and significant, is not always predictable.

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<sup>177</sup> This includes not only the qualifications of future members of the NCAs but also the mechanisms through which members may be appointed or removed. I discuss this more fully in Chapter 3.

### **3. A COMPARISON OF THE ADOPTION PROCESSES IN INDIA AND PAKISTAN**

To establish links between the processes through which India and Pakistan adopted their respective competition laws and the manner in which these laws have subsequently been implemented in the countries, it is first important to understand the transfer mechanisms activated and institutions engaged by each country in these adoption processes with reference to the pre-existing conditions of transfer in the two countries. The aim in doing so is to discover how the interplay of transfer mechanisms and legal and political institutions has shaped the content of the competition laws and determined the extent of their compatibility with and legitimacy in their respective contexts.

To this end, this chapter is organized as follows: section 1 establishes the ‘pre-conditions of transfer’ of the two countries and identifies key political and legal institutions in the countries and their engagement with competition related issues over time. Sections 2 and 3 explore India and Pakistan’s motivations for adopting a competition law and trace the processes followed by the countries in this regard. Section 4 locates the mechanisms employed by each country in the adoption process, within the typology developed for the transfer of laws. It also examines the nature and range of institutions engaged by each country in the course of the adoption process and categorises them as bottom-up participatory and inclusive or top-down and exclusive as may be appropriate. Section 5, compares the impact of the transfer mechanisms employed by India and Pakistan on the content of the Indian and Pakistani competition laws and on the compatibility and legitimacy of these laws in their respective contexts. The final section concludes.

#### **3.1. ‘Pre-conditions of Transfer’ in India and Pakistan**

In reviewing the pre-conditions of transfer in India and Pakistan, I examine the political and legal institutional landscapes of the two countries at three points in time that are important for understanding the pre-existing conditions at the time they adopted their competitions laws. These points in time are (a) when the countries became independent from the British Empire in 1947; (b) when they

adopted anti-monopoly Laws in 1969 and 1970 respectively,<sup>1</sup> and (c) immediately prior to when they acquired their respective competition laws as are presently in force in the two countries. This means 2002 and 2007 for India and 2007 and 2010 for Pakistan.<sup>2</sup> At each point in time, I explore the nature and strength of the political and legal institutions available to the two countries; their respective understanding of competition related issues, and their levels of preparation for adopting modern competition laws.

### 3.1.1. 1947: Creation of India and Pakistan as Independent States

India and Pakistan came into being at midnight on 14<sup>th</sup> August 1947, when in pursuance of the British Indian Independence Act 1947 ('the 1947 Act'),<sup>3</sup> they were created as independent 'dominions'.<sup>4</sup> Neither India nor Pakistan had a constitution at the time of independence.<sup>5</sup> Therefore, the 1947 Act established an independent constituent assembly for each country,<sup>6</sup> with the twofold mandate to draft a constitution for the countries and to act as the legislature until such time as the constitution<sup>7</sup> and independent legislature for the country had been put in place.<sup>8</sup> The 1947 Act further stipulated that throughout this period, the constituent assemblies would govern the countries in accordance with the government of India

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<sup>1</sup> I refer to the Indian Monopolies and Restrictive Trade Practices Act 1969 and the Pakistani Monopolies and Restrictive Trade Practices and Prevention) Ordinance, 1970 individually as the 'Indian anti-monopoly Law' and the 'Pakistani anti-monopoly Law' and collectively as 'anti-monopoly Laws'. I refer to the authorities created by these laws, as 'the anti-monopoly authorities' or 'Indian' or 'Pakistani anti-monopoly Authority' as may be appropriate.

<sup>2</sup> India and Pakistan adopted their competition laws in two phases, as I discuss more fully in section 3.1.3 below. India has amended its competition law once again in 2017, however, this amendment does not impact any data under consideration in this research and, therefore, is not immediately relevant.

<sup>3</sup> Section 1, 1947 Act.

<sup>4</sup> See <[http://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga\\_19470030\\_en.pdf](http://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga_19470030_en.pdf)> (accessed 3 September 2016).

<sup>5</sup> The Indian constituent assembly held its first meeting on 9th December 1946, prior to independence. Although all Indian political parties were expected to participate in this meeting, the Pakistan Muslim League did not attend and demanded a separate constituent assembly. In its plan of 3<sup>rd</sup> June 1947 the British government approved this demand and the Pakistani constituent assembly was convened on 11th August 1947, merely three days before independence. CL Anand *Constitutional Law and History of Government of India* (8th ed, Universal Law Pub Co 2008) ch 2.; Hamid Khan, *Constitutional and Political History of Pakistan* (Oxford University Press 2001) ch 4. Also see <<http://historypak.com/first-constituent-assembly-of-pakistan-1947-1954/>> (accessed 3 September 2016).

<sup>6</sup> Section 8, 1947 Act.

<sup>7</sup> Section 8(1), 1947 Act.

<sup>8</sup> Section 6, 1947 Act.

Act 1935 ('the 1935 Act'),<sup>9</sup> and all British laws, in force in undivided India would remain applicable in both India and Pakistan.<sup>10</sup>

In terms of the 1935 Act, both India and Pakistan were organized as federations divided into provinces.<sup>11</sup> The executive authority of the federation was vested in a Governor General,<sup>12</sup> who was to be assisted in his functions by a Council of Ministers'.<sup>13</sup> The task of legislating was entrusted to the federal legislature comprising an upper house, the 'Council of State', and a lower house, the 'Federal Assembly'.<sup>14</sup> The upper and lower houses independently had the power to initiate legislation for the federation<sup>15</sup> or, if the legislature was not in session, the Governor General had the authority to initiate and promulgate law in its stead.<sup>16</sup> The provincial executives and legislatures mirrored the federal executive and legislature, however, the exercise of their powers was circumscribed to matters within their constitutional purview.<sup>17</sup>

Further, in terms of the 1935 Act, the judicial function in both India and Pakistan was vested in a 'Federal Court', which had original jurisdiction in disputes arising between the federation and the provinces,<sup>18</sup> and appellate jurisdiction in respect of decisions of the high courts. Appeals from decisions of the Federal Court were referred to the King's Privy Council<sup>19</sup> and decisions of the Privy Council and the Federal Court were binding on all courts subordinate to them.<sup>20</sup> The 1935 Act also

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<sup>9</sup> See <[http://www.legislation.gov.uk/ukpga/1935/2/pdfs/ukpga\\_19350002\\_en.pdf](http://www.legislation.gov.uk/ukpga/1935/2/pdfs/ukpga_19350002_en.pdf)> 3 September 2016).

<sup>10</sup> Section 18, 1947 Act.

<sup>11</sup> Section 5, 1935 Act.

<sup>12</sup> Section 7, 1935 Act.

<sup>13</sup> Section 9, 1935 Act.

<sup>14</sup> Section 18, 1935 Act.

<sup>15</sup> Section 30, 1935 Act.

<sup>16</sup> Section 42, 1935 Act. An ordinance promulgated by the Governor General took effect as an act of the legislature, however, it lapsed unless ratified by the legislature within six weeks of its re-assembly.

<sup>17</sup> Provisions relating to the provinces are detailed in sections 46 to 90 of the 1935 Act. Section 100 details the division of legislative activity between the federation and the provinces. The Legislative Lists are provided in the Seventh Schedule to the 1935 Act. List I (Federal Legislative List) lists all matters falling within the purview of the federation, List II (Provincial Legislative List) lists matters within the purview of the provincial legislatures, and List III (Concurrent Legislative List) lists matters in respect of which the federation and the provinces have concurrent powers.

<sup>18</sup> Section 203, 1935 Act.

<sup>19</sup> Section 207, 1935 Act.

<sup>20</sup> Section 212, 1935 Act.

established high courts<sup>21</sup> and prescribed qualifications for judges of the Federal Court and the high courts.<sup>22</sup>

### 3.1.2. 1969 & 1970: Enactment of the Anti-monopoly Laws

#### (a) *India 1969*

In 1969, when India enacted the Indian anti-monopoly law,<sup>23</sup> the Indian constitution had been in force for nearly 20 years,<sup>24</sup> and the political and legal institutional landscape it had created had remained remarkably stable. India was a federation—a ‘Union of States’—whose democratic institutions operated in accordance with its constitution under which they had been created.<sup>25</sup>

The executive power of the federation was vested in the president, who was assisted by a ‘Council of Ministers’ headed by the prime minister.<sup>26</sup> The legislative powers were exercised by the parliament comprising an upper house, ‘the Council of States’, and a lower house, ‘the House of the People’.<sup>27</sup> Either house had the authority to initiate a bill, (other than a money bill)<sup>28</sup> however, the bill could only be passed into law with the agreement of both houses and with the assent of the president.<sup>29</sup> The president had the power to promulgate ordinances, only if the parliament was not in session, and if he was satisfied that circumstances existed, which rendered it necessary for him to take immediate action. Although ordinances promulgated by the president took effect as ‘Acts of Parliament’, they

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<sup>21</sup> Sections 210- 231, 1935 Act.

<sup>22</sup> Section 253,1935 Act.

<sup>23</sup> S Chakravarthy, ‘Why India Adopted A New Competition Law’ <<http://www.cuts-international.org/pdf/wiancl.pdf>> accessed 4 March 2014), 5-12.

And, Amitabh Kumar ‘The Evolution of Competition Law in India’ in Vinod Dhall (ed.,) *Competition Law Today: Concepts, Issues, and the Law in Practice* (Oxford University Press 2007).

<sup>24</sup> India adopted its constitution (‘the Indian Constitution’) on 16<sup>th</sup> November 1949. Whilst some Articles came into force on 26<sup>th</sup> November 1949, the Constitution was fully effective from 26th January 1950. (Anand (n 5).

<sup>25</sup> Article 1, Indian constitution. For a list of Indian Presidents and Prime Ministers from 1947 to date, see Annexe C.

<sup>26</sup> Articles 52, 53, 76, Indian constitution.

<sup>27</sup> Article 79, Indian constitution.

<sup>28</sup> Articles 109, 110, Indian constitution.

<sup>29</sup> Articles 107, 111, Indian constitution.

lapsed if they were not submitted to the parliament for its approval and agreement within six weeks of its reassembly.<sup>30</sup>

The executive and legislative structure of the provinces mirrored that of the federation.<sup>31</sup> However, whilst the federation had the power to legislate in respect of matters listed in the federal and concurrent legislative lists, the provinces had the power only to legislate in respect of matters listed in the provincial legislative list and an option to legislate in respect of matters listed in the concurrent legislative list.<sup>32</sup>

The Indian judiciary comprised a Supreme Court and the high courts. The Supreme Court had original jurisdiction to hear disputes between the federation and the provinces or between one province and another. It also had appellate jurisdiction in respect of orders issued by any of the high courts in their civil or criminal jurisdiction.<sup>33</sup> Each province had a high court, which was subordinate to the Supreme Court and had the power to issue writs to any person or authority, including the government, operating within its territory.<sup>34</sup> Each high court was also required to superintend all subordinate courts and tribunals operating in the territories in which it exercised jurisdiction.<sup>35</sup>

Judges of the Supreme Court and high courts were appointed in accordance with the qualifications and procedures stipulated in the constitution.<sup>36</sup> The law as declared by the Supreme Court in its decisions was binding on all courts and that declared by the high courts was binding on all courts and tribunals below the high courts.<sup>37</sup> India also had an Inquiry Act 1952, which authorized the federal and provincial governments to appoint ‘Commission(s) of Inquiry’<sup>38</sup> for inquiring into any matter of public importance.<sup>39</sup>

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<sup>30</sup> Article 123, Indian constitution.

<sup>31</sup> Part IV, Chapters 1-IV, Indian constitution.

<sup>32</sup> Article 245, Indian constitution.

<sup>33</sup> Article 130, 132, 133, 134 Indian constitution.

<sup>34</sup> Article 226, Indian constitution.

<sup>35</sup> Article 227, Indian constitution.

<sup>36</sup> Article 123, 217, Indian constitution. For an overview of the Indian legal system, see Annexe D.

<sup>37</sup> Article 14, Indian constitution.

<sup>38</sup> Section 3, 1952 Act.

<sup>39</sup> In terms of Section 4, 1952 Act, a Commission of Inquiry has extensive powers,

Interestingly, however, the Indian constitution did not expressly provide for regulation of monopolies. Therefore, in order to enact the anti-monopoly law, the parliament relied on the more general articles 38 and 39(b) of the Indian constitution<sup>40</sup> and referred to items 42 and 52 of the federal legislative list.<sup>41</sup> The Indian anti-monopoly law was substantially based on the UK Monopolies and Restrictive Practices (Inquiry and Control) Act 1948 and the jurisprudence that had developed around it.

*(b) Pakistan 1970*

In 1970 when Pakistan promulgated the Pakistani anti-monopoly law, its institutional landscape was vastly different from that of India.<sup>42</sup> Pakistan remained without a constitution until 1956 when it framed its first constitution broadly along the lines of the 1935 Act. However, this constitution was abrogated in October 1958 in the wake of a military takeover and all fundamental rights provided in the constitution were suspended.<sup>43</sup>

In 1962, whilst still under military rule, Pakistan framed a second constitution, which dramatically altered the structure of the state, by establishing a unicameral legislature, adopting a presidential form of government and conferring extensive powers on the president. However, in 1969, this constitution was also abrogated pursuant to a second military takeover. As before, the military regime suspended the fundamental rights provided in the constitution but directed the new regime to

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including the power to (a) summon and enforce the attendance of any person from any part of the country and examine him on oath; (b) require the discovery and production of any document; (c) receive evidence on affidavits; (d) requisition any public record, and (e) issue commissions for the examination of witnesses and documents.

<sup>40</sup> Article 38 empowered the state to promote ‘the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political, shall inform all institutions of the national life’. Article 39(b) affirmed that the state was committed to directing its policy towards ensuring ‘that the ownership and control of the material resources of the community are so distributed as best to subserve the common good’.

<sup>41</sup> These items conferred on the federation the power to legislate in respect of ‘inter-state trade and commerce’ and ‘industries, the control of which...is declared by the Parliament by law to be expedient in public interest.’

<sup>42</sup> For a list of Pakistani Presidents, Prime Ministers and Martial Law Administrators 1947 to date, *see* Annexe C.

<sup>43</sup> Upon taking over the governance of Pakistan, the military issued the Laws (Continuance in Force) Order dated 10<sup>th</sup> October 1958 which provided that the country should be governed as nearly as possible, in accordance with the abrogated constitution with the exception of enforcement of fundamental rights.

govern the country, as far as possible, in accordance with the abrogated constitution.<sup>44</sup>

Consequently, when the president promulgated the Pakistani anti-monopoly law he did so in exercise of his powers *in accordance with* the 1962 constitution rather than under it. Interestingly, however, even this constitution did not expressly provide for regulation of monopolies and the government had to resort to the more general article 131(2) which allowed the federation to legislate in respect of a matter necessary for the “economic and financial stability” of the country even in the absence of express provision for such legislation.<sup>45</sup> Like its Indian counterpart, the Pakistani anti-monopoly law was substantially based on the UK Monopolies and Restrictive Practices (Inquiry and Control) Act 1948 and the jurisprudence that had developed around it.

### 3.1.3. 2002, 2007, 2010: Adopting the Competition Laws

#### (a) *India 2002 and 2007*

In 2002, when India enacted its competition law, its political and legal landscape was not very different from what it had been in 1969 when it had enacted the anti-monopoly law.<sup>46</sup>

The Indian constitution had been in force for more than 50 years without any substantial amendment to the provisions setting out the country’s political and legal institutional structure.<sup>47</sup> Elections had been held regularly at five yearly intervals in accordance with the procedure stipulated in the constitution and transfer of power had been completed smoothly each time. The legislature, executive and judiciary continued to exercise their respective powers uninterrupted and in accordance with the constitution. The Inquiry Act 1952

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<sup>44</sup> These terms were stipulated in the Provisional Constitution Order issued by the military on 4<sup>th</sup> April 1969.

<sup>45</sup> Amber Darr, Khozem Haidermota & Munib Akhtar ‘The Competition Commission Ordinance 2007—A Critical Analysis’ CLD 2008 Journal 37.

<sup>46</sup> Although the Indian competition law was notified on 14th January 2003 it is titled the Competition Act 2002.

<sup>47</sup> Between 1949 and 2002 the Indian constitution was amended more than 80 times. However, in light of the ruling of the Indian Supreme Court in *His Holiness Kesavananda Bharati Sripadagalvaru and others v. State and Kerala and another* (AIR 1973 SC 1461), none of these amendments altered the basic institutional structure of the country.

remained in force and had been utilized from time to time. Even in 2007, when India substantially amended its competition law, there was no change in its political and legal institutions.

*(b) Pakistan 2007 and 2010*

Pakistan had faced considerable political and legal turmoil since 1970 when it had promulgated the Pakistani anti-monopoly ordinance: it had lost its eastern wing,<sup>48</sup> created the remaining western wing as a federation with four provinces, and had framed its third and final constitution.<sup>49</sup>

In terms of the Pakistani constitution, the President was designated the head of state and the prime minister the head of the executive.<sup>50</sup> The bicameral legislature ('the parliament') comprising the upper house, 'senate', and the lower house, 'national assembly' was restored,<sup>51</sup> however, the president was given the power to dissolve the parliament.<sup>52</sup> Each house had the power to initiate a bill (except a money bill). However, this bill could only be made into law when passed by both houses and after receiving presidential assent.<sup>53</sup> The President had the power to promulgate ordinances provided the parliament was not in session and he was satisfied that immediate action was required. However, any ordinance promulgated in this manner had a life of only 120 days and expired thereafter unless it was approved by the Parliament within the 120 day period.<sup>54</sup>

The political and legislative structure of the provinces mirrored that of the federation.<sup>55</sup> However, whilst the federal legislature had the power to legislate in respect of all matters listed in the Federal Legislative List, the provinces were authorized to legislate only in respect of matters listed in the Provincial Legislative

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<sup>48</sup> In the aftermath of the 1970 general elections, East and West Pakistan went to war against each other. This war resulted in East Pakistan claiming its independence as the People's Republic of Bangladesh and West Pakistan being renamed as Pakistan.

<sup>49</sup> This refers to the Constitution of the Islamic Republic of Pakistan 1973 which came into force on 14<sup>th</sup> August 1973 (hereinafter 'the Pakistani Constitution').

<sup>50</sup> Articles 50, 90, Pakistani Constitution.

<sup>51</sup> Articles 51, 59, Pakistani Constitution.

<sup>52</sup> Article 58(2)(b), Pakistani Constitution.

<sup>53</sup> Articles 70, 73, Pakistani Constitution.

<sup>54</sup> Article 89, Pakistani Constitution.

<sup>55</sup> Articles 101-140, Pakistani Constitution.

List,<sup>56</sup> and had the option to legislate in respect of matters listed in the Concurrent Legislative List.<sup>57</sup> Interestingly, regulation of competition was not listed in either the Federal or the Concurrent Legislative Lists and was, therefore, not a federal matter. However, Article 18 of the constitution indirectly recognized the right of the state to regulate competition<sup>58</sup> and Article 151 empowered the state to regulate inter-provincial trade.<sup>59</sup>

The constitution established the Supreme Court as the apex court of the country and set up high courts in each of the provinces. The Supreme Court had original jurisdiction in disputes arising between governments as well as for the enforcement of fundamental rights. It had appellate jurisdiction in respect of all decisions of the high courts.<sup>60</sup> The high courts also had original and appellate jurisdiction as well as the jurisdiction to issue writs against the government in appropriate cases.<sup>61</sup> Decisions of the Supreme Court were binding on all courts and those of the high courts on all subordinate courts.<sup>62</sup> The constitution also provided for the qualifications and mode of appointment of Supreme Court and high court judges.<sup>63</sup>

In 1980 Pakistan amended its Constitution to provide for the establishment of a 'Federal Shariat Court' (the 'FSC') with the limited mandate to examine whether a Pakistani statute or provision of law was 'repugnant to the injunctions of Islam'. The FSC was given the power to take cognizance of matters either of its own

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<sup>56</sup> Article 142, Pakistan constitution.

<sup>57</sup> The Concurrent Legislative List was deleted from the constitution in 2010 by the 18<sup>th</sup> Amendment. This means that the federation and provinces no longer have any overlapping powers.

<sup>58</sup> Article 18 of the constitution states that every citizen has the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business. Article 18(b), however, clarifies that this fundamental right does not prevent the state from regulating trade, commerce or industry in the interest of free competition.

<sup>59</sup> Article 151 of the constitution states *inter alia* that whilst trade, commerce and intercourse throughout Pakistan shall be free, the parliament may by law impose such restrictions on the freedom of trade, commerce or intercourse between one Province and another or within any part of Pakistan as may be required in the public interest.

<sup>60</sup> Articles 184, 185 Pakistani constitution.

<sup>61</sup> Article 199 Pakistani constitution.

<sup>62</sup> Articles 189, 203 Pakistani constitution.

<sup>63</sup> Articles 175, 176, 193 Pakistani constitution.

accord or on the basis of petitions filed before it. Decisions of the FSC were appealable to an especially constituted bench of the Supreme Court.<sup>64</sup>

The Pakistan constitution was suspended in 1977 and 1999, in the wake of military takeovers. Further, the operation of the legislature and the judiciary was interrupted in 1977 and 1999 after military takeovers and in 1988 when the military chief turned president exercised his constitutional power to dismiss the elected government.<sup>65</sup> The constitution was also amended 17 times, of which the 8<sup>th</sup> (in 1985) and 17<sup>th</sup> (in 2003) were introduced by military chiefs turned presidents.

In the periods in which the constitution and the legislature remained suspended (1977-1981 and 1999-2002), the judiciary operated under oath to support the military takeovers. Throughout this time, the judiciary was also restrained from hearing petitions for the enforcement of fundamental rights. The effect of these oaths lingered even after the constitution and the legislature was resorted, particularly in periods in which the country was governed by military chiefs turned presidents (1981-1985, 1988 and 2002-2007), and made itself felt in the form of the judiciary's deference to the military chief turned president. This is most evident in the 2002 decision of the Supreme Court by which it authorized the military chief to amend the constitution.<sup>66</sup>

It was a quasi-military government in 2006 that initiated the process of adopting a competition Law. Although the Supreme Court had endorsed the initial military takeover and had supported the government subsequently established by the military chief, the relationship between the judiciary and the executive had become deeply strained over time. In March 2007, the military chief turned president had suspended the Chief Justice of Pakistan on grounds of misconduct. The president's action had been challenged before the Supreme Court and in July 2007, the Supreme Court had reinstated the Chief Justice.<sup>67</sup> The president's

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<sup>64</sup> Articles 203C, 203D, 203F, Pakistan constitution. For a detailed overview of the Pakistani Legal System, see Annexe E.

<sup>65</sup> See text to n. 52.

<sup>66</sup> *Syed Zafar Ali Shah v. General Parvez Musharraf, Chief Executive and others* PLD 2000 SC 869.

<sup>67</sup> *Chief Justice of Pakistan, Mr. Justice Iftikhar Muhammad Chaudhry v. The President of*

actions led to a simmering resentment amongst the three organs of state, which was reaching boiling point towards October 2007 just as the competition law was being introduced in Pakistan.

Between 2007 and 2010 when the Pakistani competition law was finally enacted as an act by the parliament, the legal and political landscape of the country had changed once again. Most importantly, the country had held general elections and had replaced the military chief turned president, by a constitutionally appointed president. Although the legislature was no longer accountable to an all-powerful president, the judiciary's relationship with the executive and the legislature remained complicated and at times even appeared to have become hostile.

### **3.2. The Adoption Process in India**

#### **3.2.1. India's Motivation for Acquiring the Law**

In acquiring its competition law India was motivated by an internal process of reflection and assessment of domestic needs as well as by external developments.

##### *(a) India's Self-Reflection*

Between 1969, when India enacted its anti-monopoly law, and 2002 when it first enacted the competition law, the Indian government re-visited its monopoly regulation regime several times, each time following a similar procedure.<sup>68</sup> In 1977, the Indian government established the 'Sachar Committee', to examine the anti-monopoly law in order to make it more effective.<sup>69</sup> In 1984, in light of the recommendations of the Sachar Committee, the parliament amended the anti-monopoly law for the first time.<sup>70</sup> In 1991, the parliament further amended the

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*Pakistan through the Secretary and others* PLD 2010 SC 61.

<sup>68</sup> Chakravarthy (n 23), 4. The Indian Anti-monopoly Law was itself enacted following recommendations in (a) the Hazari Committee Report 1965 which concluded that the working of the licensing system had resulted in disproportionate growth of some of the big business houses in India; (b) the Mahalonobis Committee Report 1964 which concluded *inter alia* that big business houses were emerging because of the 'planned economy' model practiced by the government and suggested the need to collect comprehensive information relating to the various aspects of concentration of economic power; and (c) the Report of the Monopoly Inquiry Committee set up under the 1952 Act which suggested a number of reforms to the monopoly regime.

<sup>69</sup> Kumar in Dhall (n 23) 486-489. The Sachar Committee observed that in the period from 16<sup>th</sup> June 1970 to 31<sup>st</sup> December 1977, the Indian government had referred only 59 out of 618 applications to the anti-monopoly authority and between 1<sup>st</sup> January 1977 and 30<sup>th</sup> June 1978 had passed 84 orders without seeking its advice.

<sup>70</sup> Kumar in Dhall (n 23) 488. These amendments introduced the concept of deemed

anti-monopoly law to bring it in line with India's economic liberalization programme. However, these amendments were soon deemed inadequate in light of India's liberalization agenda.<sup>71</sup>

*(b) Impact of External Developments*

By the mid-90s, India had joined the World Trade Organization (WTO).<sup>72</sup> Consequently it had become increasingly preoccupied with the idea of introducing a domestic competition regime to address issues arising out of the WTO agreements particularly the threat that in the absence of a strong regulatory regime, the Indian economy may become infiltrated by international cartels.<sup>73</sup> India was also acutely aware of the need to remain relevant and attractive as a destination for foreign investment.<sup>74</sup>

3.2.2. Deliberating, Adopting and Amending the Indian Competition Law

*(a) The Deliberation Stage*

In 1999, in response to this combination of domestic and external factors, the Indian government set up a nine-member 'High Level Committee on Competition Law and Policy' ('the Raghavan Committee') with the mandate to propose the most appropriate competition law for the country. In particular, the committee was asked to advise whether there was need for a new law or whether amendments to the anti-monopoly law and the Consumer Protection Act 1986 would suffice. The

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illegality for exclusionary behavior, tie-in sales, resale price maintenance, bid-rigging, market allocation, predatory pricing etc. and the concept of unfair trading practices.

<sup>71</sup> Chakravarthy (n 23), 19. The law was considered inadequate because it did not define and cater for certain activities harmful to a truly competitive society such as abuses of dominant position, cartels, bid-rigging and predatory pricing. My interviewees, Dr. Aditya Bhattacharjea Professor, Delhi School of Economics, University of Delhi (New Delhi, India, 8 October 2015), Dr. Geeta Gauri, Former Member Competition Commission of India (New Delhi, India, 6 October 2015); Mr. Dhanendra Kumar, Former Chairman Competition Commission of India (New Delhi, India, 8 October 2015) and Mr. M S Sahoo, Member Competition Commission of India (New Delhi, India, 6 October 2015) corroborated this position.

<sup>72</sup> India joined the WTO on 1<sup>st</sup> January 1995. <[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)> (accessed 22 June 2017).

<sup>73</sup> SV. Raghavan, 'Report of High Level Committee on Competition Policy and Law' (2000).

<[http://www.globalcompetitionforum.org/regions/asia/India/Report\\_of\\_High\\_Level\\_Committee\\_on\\_Competition\\_Policy\\_Law\\_SVS\\_Raghavan\\_Committee29102007.pdf](http://www.globalcompetitionforum.org/regions/asia/India/Report_of_High_Level_Committee_on_Competition_Policy_Law_SVS_Raghavan_Committee29102007.pdf)> accessed 6 March 2014.) para 1.22.

<sup>74</sup> *ibid.* My interviewees, Dr. Bhattacharjea, Dr. Gauri, Mr. Kumar and Mr. Sahoo corroborated this position.

Raghavan Committee was chaired by Mr. S V S Raghavan, a retired senior Indian government official and comprised among others, chairman of a large consumer good manufacturing company, a consumer activist, an economic journalist, a chartered accountant, an advocate and a government secretary from the Department of Company Affairs dealing with competition law.<sup>75</sup>

In the course of its deliberations which lasted for nearly two years, the Raghavan Committee engaged with, and obtained evidence from, representatives of chambers of industries and commerce, professional institutes, consumer organizations, experts, academics and government officials.<sup>76</sup> The Raghavan Committee also consulted competition laws of nearly 80 countries—including competition/antitrust laws of the European Union (EU), the United Kingdom (UK), the United States (US), and Japan—and examined competition reports and texts authored by leading Indian and international scholars and competition experts.<sup>77</sup> In 2000, the Raghavan Committee submitted its report to the government.<sup>78</sup>

*(b) The Adoption and Amendment Stage*

(i) Initial Enactment 2002. On 14<sup>th</sup> January 2003, India formally enacted the competition law in accordance with the procedure prescribed in the Indian constitution. The government introduced a bill in parliament, outlining the objects and reasons for the enactment of the law and the parliament remitted it to the relevant standing committee for scrutiny. The standing committee met with representatives of financial institutions, chambers of industry and commerce, consumer organizations, professional institutes, experts, academics and relevant ministries of the government and presented its report to the parliament. In December 2002, after considering the recommendations of the standing committee,

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<sup>75</sup> Raghavan Committee comprised Mr. S V S Raghavan (Chairman), Ms. Mala Banerjee, Dr. S. Chakravarthy, Mr. K B Dadiseth, Dr. Rakesh Mohan, Mr. Sudhir Mulji, Mr. P M Narielvala, Ms. Pallavi Shroff and Mr. G P Prabhu. <<http://www.thehindu.com/2000/06/22/stories/0622000d.htm>> accessed 6 December 2016.

<sup>76</sup> Chakravarthy (n 23), 21.

<sup>77</sup> For a list of texts consulted by the Raghavan Committee see Annexe F.

<sup>78</sup> My interviewees, Dr. Bhattacharjea, Dr. Gauri and Mr. Kumar corroborated this position.

the parliament passed the bill with some modifications. It then submitted the bill to the president for his assent, which was granted on 13<sup>th</sup> January 2003.<sup>79</sup>

(ii) First Amendment 2007. Soon after enactment the Indian competition law was challenged before the Supreme Court on the ground that it did not conform with the constitutional principle of separation of powers.<sup>80</sup> On 20<sup>th</sup> January 2005, the supreme court disposed of the petition on the basis of assurances and commitments of the government that it would form a tribunal to hear appeals from decisions of the CCI. However, the Supreme Court observed that if an expert body is to be created, ‘consistent with what is said to be the international best practice’ then it might be appropriate for the government to consider two separate bodies, one with advisory and regulatory and the other with adjudicatory expertise.<sup>81</sup>

On 9<sup>th</sup> March 2006, in compliance of the order of the Supreme Court, the Indian government introduced the Competition (Amendment) Bill in Parliament, which, among other amendments, provided for the establishment of an independent competition appellate tribunal with the mandate to hear appeals from CCI’s decisions. The parliament referred the bill to the relevant standing committee, which recommended some amendments to the government’s proposal. On 9<sup>th</sup>

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<sup>79</sup> Chakravarthy (n 23), 22. The competition law did not immediately come into force upon enactment. In terms of section 1(3) of the competition law, the Law was to come into force on such dates as the government decided and the government had the power to appoint different dates for bringing different sections into force. In exercise of these powers, the government brought certain sections into force on 31<sup>st</sup> March 2003 and the remaining on 19<sup>th</sup> June 2003. The government established CCI by notification no. S.O. 1198 (E). dated 14.10.2003. For the dates on which different sections were brought into force *see* Annexe G.

<sup>80</sup> *Brahm Dutt v. Union of India* (2005) 2 *Supreme Court Cases* 431. On 4th April 2003, the government notified the ‘Competition Commission of India (Selection of Chairperson and other Members of the Commission) Rules 2003’, which provided the mechanism for the appointment of the CCI chairperson and members.

The petition challenged these rules on the ground that the appointment procedure violated the principle of separation of powers stipulated in the constitution and that given that CCI had adjudicatory powers, its members should be appointed according to the procedure prescribed in the constitution for appointment of judges. [See *Brahm Dutt Case*, page 434 (b), (c) and (d).]

In response, the government argued that CCI was an expert regulatory body that must be operated by persons with special expertise, rather than by judges. The government further argued that as long as the power of judicial review of the Supreme Court and the high courts remained in place, the government’s power to appoint members to CCI could not be challenged on the grounds of separation of powers. [*Brahm Dutt Case* page 434 (e) (f) and (g)].

In the course of the proceedings, however, the government agreed to entrust the appointment of members to a committee chaired by the Chief Justice of India provided that the committee selected experts in the field rather than judges or retired judges. The government also agreed to constitute a tribunal, in the nature of a judicial body, to hear appeals from CCI’s decisions. [*Brahm Dutt Case*, page 435(h) and 436(a)].

<sup>81</sup> *ibid.*

August 2007, the government re-submitted the bill to the parliament and on 27<sup>th</sup> September 2007, after receiving presidential assent, the bill was enacted as the Competition (Amendment) Act 2007.<sup>82</sup>

### 3.2.3. Evolution of the Indian Competition Law

The content of the Indian competition law evolved considerably from the deliberation stage to the adoption and amendment stage. In tracing the evolution of the law, I focus on provisions relating to the structure of the proposed CCI, its mandate, and its composition, which includes the qualification of its members and the mechanisms provided for appointment and removing these members.

#### *(a) Proposed Structure*

At the deliberation stage, the Report of the Raghavan Committee ('the Raghavan Committee Report') emphasized the need for a specialized competition implementing institution for the reason that 'the judiciary may be inexperienced in dealing with free market problems'.<sup>83</sup> The Report, therefore, recommended the establishment of a single competition implementation authority, which it sometimes referred to as the 'Competition Law Tribunal' and at others as 'the Competition Commission of India'<sup>84</sup> and described it varyingly as 'a specialized court/tribunal',<sup>85</sup> 'multi-member body', 'independent and insulated from political and budgetary controls of the Government'.<sup>86</sup> The Report further suggested that this authority be divided into separate investigative, prosecutorial and adjudicative wings,<sup>87</sup> and have adequate powers for advocacy, adjudication and implementation of its decisions.<sup>88</sup>

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<sup>82</sup> *ibid.* The amended competition law was brought into force in stages: provisions relating to anti-competitive agreements and abuses of dominant position came into force on 20<sup>th</sup> May 2009 by notifications no. S.O. 1241(E) and S.O. 1242(E) both dated 15<sup>th</sup> May 2009; provisions relating to mergers or 'combinations' came into effect only in 2011. Also on 15<sup>th</sup> May 2009, the government established the Tribunal by notification no. S.O. 1240(E). For dates on which different sections of the competition law were brought into force, *see* Annexe G.

<sup>83</sup> Raghavan (n 73), para 6.1.2

<sup>84</sup> *ibid.* para 2.9.7.

<sup>85</sup> *ibid.* para 6.1.4.

<sup>86</sup> *ibid.* para 4.8.4 at 2 and 3.

<sup>87</sup> *ibid.* para 4.8.4 at 4 and para 6.1.8 .

<sup>88</sup> *ibid.* para 4.8.4 .

At the initial adoption stage, the parliament interpreted the recommendations of the Report to provide for the establishment of a single, multi-member, 'Competition Commission of India'.<sup>89</sup> CCI was to be an autonomous, statutory body corporate with perpetual succession;<sup>90</sup> it was to establish 'benches' for the exercise of its powers and comprise at least one 'judicial member' who had served or was qualified to serve as a judge of the high court. However, at the time of the First Amendment 2007 the parliament repealed the requirement of benches as well as judicial members and simply designated CCI as a collegial, regulatory body. The adjudicatory function was transferred to the tribunal.<sup>91</sup>

*(b) CCI's Mandate*

The Raghavan Committee relied extensively on international precedents in arriving at CCI's mandate,<sup>92</sup> which according to the Report was to 'act as a [competition] watchdog', 'promote the introduction of required changes in the policy environment' and 'perform a proactive advocacy function'.<sup>93</sup> The Report further recommended that CCI should be given the power to check 'cartelization, price-fixing and other abuses of market power'.<sup>94</sup>

Although the Report included merger control in CCI's list of activities, it cautioned against 'premature implementation of Competition Law in this area' as it 'could act as a disincentive for ... mergers' necessary to complete India's transition from a protected to a liberalized economy.<sup>95</sup> The Report also emphasized that the 'ultimate raison d'être of competition is consumer interest...[and that]...competition policy [is]...an instrument to achieve efficient allocation of resources, technical progress, consumer welfare and regulation of

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<sup>89</sup> In terms of section 8, Initial Enactment 2002, CCI was to comprise a chairman and a minimum of two and maximum of 10 other members. However, after the First Amendment 2007, this was changed to a minimum of two and a maximum of six other members.

<sup>90</sup> Section 7, Indian competition law.

<sup>91</sup> Section 17, First Amendment 2007 amended section 22, Initial Enactment 2002.

<sup>92</sup> Raghavan (n 73) para 1.1.1, 4.3.1. Also n. 77 and text thereto.

<sup>93</sup> Raghavan (n 73) para 2.9.7.

<sup>94</sup> *ibid.*

<sup>95</sup> *ibid.* para 4.7.8.

concentration of economic power.<sup>96</sup> It, therefore, recommended that consumer welfare should be a guiding principle in competition enforcement in India.

In the Initial Enactment 2002, the parliament closely followed the recommendations of the Report with regard to CCI's mandate. Accordingly, the competition law allowed CCI an advocacy as well as an enforcement role, with specific powers to investigate anti-competitive agreements, check abuse of dominant position and regulate mergers along the lines detailed in the Report. However, the placement of the advocacy section in Chapter VII, section 49 of the competition law suggests that in contrast to the Raghavan Committee, the parliament considered advocacy ancillary to CCI's enforcement functions which were detailed, with greater precedence, in Chapter II sections 3, 4 and 5 of the law. The concerns and fears expressed in the Report regarding the future of India in a globalized economy found expression in section 32 of the Law, which gave CCI powers in respect of international acts that had an impact on domestic Indian competition.

*(c) CCI's Composition*

Provisions relating to CCI's composition evolved most significantly from the deliberation stage to the adoption and amendment stage. The Raghavan Committee Report had recommended that CCI be 'comprised of eminent and erudite persons of integrity from the fields of judiciary, economics, law, international trade, commerce, industry, accountancy, public affairs and administration' who may only be removed with the concurrence of the 'apex court' (the Indian Supreme Court).<sup>97</sup> The Report had also specifically warned against 'staffing [the institution]...with civil servants on deputation'.<sup>98</sup>

More importantly, the Report had emphasized the need for a transparent procedure for selecting these persons, and had recommended a 'Collegium Selection Process', that would weed out political favourites and allow competent and qualified persons to be appointed who would then be able to exercise their powers

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<sup>96</sup> *ibid.* para 1.1.9.

<sup>97</sup> *ibid.* para 4.8.4 at 2, para 6.3.5.

<sup>98</sup> *ibid.* para 4.8.6.

free of political influence.<sup>99</sup> The Report had further recommended that appointment decisions arrived at through this collegium process should be binding on the government and the government only be able to remove persons appointed to CCI, with the concurrence of the Supreme Court.<sup>100</sup>

However, whilst the parliament accepted the recommendations of the Report with respect to the qualifications of members of CCI, it added to these recommendations by providing for appointment of judges of the high courts as members (or chairpersons) of CCI.<sup>101</sup> Further, whilst the parliament also accepted the proposal that the government only be able to remove CCI members upon the findings of an independent inquiry by the Supreme Court,<sup>102</sup> it ignored the recommendation regarding a transparent, collegial selection and appointment process and vested the power of appointment of CCI members exclusively in the government.<sup>103</sup> In doing, so, the parliament rendered CCI and its members vulnerable to political influence, and thereby ignored the recommendation of the Raghavan Committee that CCI be kept independent of all politics. The parliament further compromised CCI's independence by allowing the government to control its budget,<sup>104</sup> and by conferring on it the power to supersede CCI in certain circumstances.<sup>105</sup>

Through the First Amendment 2007, the parliament reverted to a number of recommendations made by the Raghavan Committee. Specifically, a judge of the

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<sup>99</sup> *ibid.* para 6.3.3, 6.3.4.

<sup>100</sup> *ibid.* para 6.3.6.

<sup>101</sup> Section 8(2), Initial Enactment 2002.

<sup>102</sup> Section 11(2), Indian competition law.

<sup>103</sup> Sections 8 (1) and 9, Indian competition law. Although parliament vested the power of appointment of members in the Indian government, the government itself accommodated the views of the Raghavan Committee in the 'Competition Commission of India (Selection of Chairperson and other Members of the Commission) Rules 2003'. In terms of these rules, the government undertook to constitute a committee 'for the selection of Chairperson and other Members of the Commission'. However, this move on part of the government, fell short of recommendations of the Raghavan Committee in (a) that the recommendations of the appointing committee were not binding on the government, and (b) that the government had the power to amend the rules.

<sup>104</sup> Section 51(b), Initial Enactment 2002 had established a Competition Fund to pay salaries of CCI members and to meet its operating expenditures. The Competition Fund comprised of grants received by CCI from the government as well as monies collected by it by way of costs or fees received by it in discharge of its functions under the Law. This section was omitted by the First Amendment 2007.

<sup>105</sup> Section 56, Indian competition law.

high court could no longer be appointed as a member (or chairperson) of CCI;<sup>106</sup> appointments of members were to be made on the recommendation of a ‘Selection Committee’, comprising the Chief Justice of India, secretaries of the ministries of corporate affairs and law and justice, and two experts in fields related to competition law and policy. It was incumbent upon the government to appoint persons from amongst those recommended.<sup>107</sup> Whilst the government retained control over CCI’s budget, CCI was barred from using monies received by it as costs of proceedings to meet its expenditures, although fees received by CCI were still allowed to form part of CCI’s fund.<sup>108</sup> The government also retained the power to supersede CCI in certain specified circumstances.<sup>109</sup>

### **3.3. The Pakistani Competition Law Experience**

#### **3.3.1. Motivation for adopting Competition Law in Pakistan**

In Pakistan, external forces formed the primary motivation for the adoption of competition law at least partly, due to the near absence of domestic self-reflection in the country in respect of its anti-monopoly regime.

##### *(a) Lack of domestic reflection*

Pakistan’s relationship with and treatment of its anti-monopoly law was arbitrary at best. Pakistan initially adopted its anti-monopoly law partially in response to domestic factors and in consultation with domestic institutions.<sup>110</sup> The 1960s had been a decade of rapid economic growth in Pakistan during which nearly 2/3<sup>rd</sup> of the industrial assets, 80% of banking and 70% of insurance in the country had become heavily concentrated in the hands of only 20 family groups. In 1963, the government constituted an ‘Anti-Cartel Laws Study Group’ to study the trade, commerce, and industry of the country. The study group reported the existence of monopolies, cartels, and vertically-integrated situations in the country and recommended an anti-monopoly law. On 28<sup>th</sup> June 1969, the government sought

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<sup>106</sup> Section 6 First Amendment 2007 amended section 8 Initial Enactment 2002.

<sup>107</sup> Section 7, First Amendment 2007 amended section 9 Initial Enactment 2002.

<sup>108</sup> Section 41 First Amendment 2007 amended section 51 Initial Enactment 2002.

<sup>109</sup> See n. 105.

<sup>110</sup> I was not able to find any evidence of international evidence at this stage. However, I assume that there is likely to have been some, given Pakistan’s long-standing relationship with multi-lateral agencies.

public comments in respect of a draft anti-monopoly law and on 26<sup>th</sup> February 1970, the President promulgated the anti-monopoly law as a temporary ordinance, which was later given constitutional cover.<sup>111</sup>

However, the Pakistani government abandoned this consultative strategy for the four subsequent amendments to this anti-monopoly law. The anti-monopoly law was amended twice in 1980 and once each in 1982 and 2002 respectively, however, there is no reference to, let alone record of, any public deliberations that may have been held at these times.<sup>112</sup> In 1972, the government curtailed the scope of operation of the anti-monopoly law as part of its nationalization process. It further curtailed the scope of the anti-monopoly law in 1976 to provide for the promotion and protection of foreign private investment in Pakistan. In 1981, the government merged the anti-monopoly authority with the then newly formed corporate law authority.<sup>113</sup>

*(b) The Impact of External Forces*

In 1993, perhaps also due to developments in India, the Pakistani government expressed renewed interest in competition matters. However, proposals floated domestically in this regard focused on reinforcing laws relating to companies, securities and exchange etc. rather than on the reviewing or bolstering the anti-monopoly law.<sup>114</sup> However, Pakistan's interest in competition gained momentum after the Doha Ministerial Conference in 2001,<sup>115</sup> when it actively sought capacity building assistance from UNCTAD for developing a competition law.<sup>116</sup> Due to its

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<sup>111</sup> Joseph Wilson, 'At the Crossroads: Making Competition Law Effective in Pakistan Symposium on Competition Law and Policy in Developing Countries' (2006) 26 *Northwestern Journal of International Law & Business* 565, 567-568.

<sup>112</sup> The anti-monopoly law was amended in 1980 by Ordinance No. XXVI of 1980 and Ordinance No. LVI of 1980; in 1982 by Ordinance No XIV of 1982; and in 2002 by Ordinance CI of 2002.

<sup>113</sup> Wilson, 'At the Crossroads' (n 110), 583.

<sup>114</sup> *ibid.* 589.

<sup>115</sup> Pakistan had become a WTO member on 1<sup>st</sup> January 1995 <[http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm)> (accessed 12 October 2016).

<sup>116</sup> After the Doha Ministerial Conference in November 2001, Pakistan seriously considered revamping its anti-monopoly law regime. However, Pakistan's ambitions at this stage were limited capacity building and technical assistance within the existing infrastructure. (See 'Communication Submitted by Pakistan to UNCTAD 20<sup>th</sup> June 2002' <<http://siteresources.worldbank.org/INTCOMPLEGALDB/Resources/unpak.pdf>> accessed 22 June 2017).

extensive interaction with multilateral agencies in this period,<sup>117</sup> and participation in international comparative competition studies,<sup>118</sup> Pakistan had become increasingly aware that in order to integrate successfully with international markets in an increasingly globalized world, it needed to improve the competitiveness of its domestic markets.<sup>119</sup> Consequently, Pakistan formally approached the World Bank for technical assistance for developing a new competition law and policy framework.<sup>120</sup>

### 3.3.2. Deliberations, the Ordinances and Finally the Act

#### (a) *The Deliberation Stage and the Role of the World Bank*

The Pakistani government requested the World Bank to establish and lead a team to recommend a new competition law and policy framework; to draft a competition law, and to design a new competition agency for implementing the law.<sup>121</sup> The team set up in response to this request was led by the World Bank and comprised World Bank officials, Pakistani economists, lawyers and academics, international consultants and chartered accountants ('the WB-led team').<sup>122</sup> The team submitted its report to the Pakistani government in 2007 ('the Report').<sup>123</sup>

For its deliberations, the WB-led team relied on 'perception indicators' and 'broad indicators from the market' rather than on sectoral surveys. This was primarily due to the fact that Pakistan specific data, necessary for conducting such surveys, simply did not exist.<sup>124</sup> The team also drew upon its experience and understanding of competition regimes in the developed world including competition models of

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<sup>117</sup> 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. Pakistan had recently completed the first generation reforms under the guidance and with the technical assistance of the World Bank. By 2005, it was once again engaged with the World Bank for the second-generation reforms, which were geared *inter alia* towards improving Pakistan's 'international competitiveness in an increasingly globalized world'.

<sup>118</sup> 'Competition Regime in Pakistan: waiting for a shake-up' © CUTS 2002 (<<http://www.cuts-international.org/Pakistan-report.pdf>> accessed 22 June 2017). Pakistan was part of the 7-Up Project, which was a DFID supported comparative study of the competition regimes of India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia.

<sup>119</sup> Manes (n.117). Executive Summary, para (iii), (viii).

<sup>120</sup> *ibid.* Acknowledgment.

<sup>121</sup> *ibid.*

<sup>122</sup> *ibid.*

<sup>123</sup> Manes (n.117).

<sup>124</sup> Manes. (n.117) ch 1, paras 1.15, 1.16, 1.17.

the EU, UK and the US,<sup>125</sup> and consulted competition laws that had been designed for other developing countries. In identifying relevant developing countries for this purpose, the team focused on their economic conditions, stage of development and parameters of the competition regimes they had adopted rather than on their political and legal institutional environment.<sup>126</sup>

Throughout the process, the WB-led team worked closely with the Pakistani government (ministry of finance) and with the anti-monopoly authority. The team also consulted a number of international and Pakistani experts who were not part of its core team,<sup>127</sup> and held public consultation workshops in May 2006 and a Growth and Competitiveness Conference in Lahore in December 2006.<sup>128</sup> Upon completion of its discussions in January 2007, the WB-led team commissioned a Brussels based law firm based to prepare a draft based on its recommendations.<sup>129</sup>

(b) *The Extended Adoption Stage: from the Ordinances to the Act*

(i) The First Ordinance 2007. Instead of placing the draft competition law before the parliament, the Pakistani government submitted it directly to the military chief turned president, who promulgated it as an ordinance in October 2007.<sup>130</sup> Making laws through ordinances was not unusual in Pakistan,<sup>131</sup> however,

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<sup>125</sup> *ibid.*, para 2.2 n.8. The Team also consulted competition models of Brazil, Canada, Italy, India, Mexico, Republic of Korea and Russia.

<sup>126</sup> *ibid.*

<sup>127</sup> *ibid.* Acknowledgments. The persons consulted included Dr. Asad Sayeed (The Collective for Social Sciences Karachi, Pakistan), Paolo Coerra (The World Bank) who formally reviewed the World Bank Report, Anjum Ahmed, Guiliana Cane, Mark Dutz, R. Shyam Khemani and Peter Kyle (The World Bank), John Preston, Karen Ellis, Haroon Sharif and Tim Hatton (DFID). My interviewee Mr. Salman Akram Raja, Advocate of the Supreme Court of Pakistan (Lahore, Pakistan 20 September 2014) particularly indicated that he had met with certain members of the WB-led Team who were working from a pre-prepared draft competition law and were more interested in technical competition issues rather than making the law compatible with the legal landscape of the country.

<sup>128</sup> *ibid.* Although the exact number of consultations held is not known these could not have been too many or too wide ranging given that the Report suggests that these were all held in the month of May and in the same city.

<sup>129</sup> Joseph Wilson, 'Crossing the Crossroads: Making Competition Law Effective In Pakistan' (2011) 8 Loyola University Chicago International Law Review 105, 111.

Also 'Voluntary Peer Review of Competition Law and Policy—Pakistan' published by UNCTAD in 2013. <[http://unctad.org/en/PublicationsLibrary/ditccpl2013d4\\_overview\\_en.pdf](http://unctad.org/en/PublicationsLibrary/ditccpl2013d4_overview_en.pdf)> ch 1, 1, para 5 (accessed 23 June 2017). Also see Annexe A.

<sup>130</sup> Voluntary Peer Review. (n . 129). ch 1A, 2, para 7.

<sup>131</sup> For President's power to promulgate Ordinances, see n.54 and text thereto.

Pakistan has a long-standing tradition of legislating through Ordinances. Other than the Anti-monopoly Law, laws made through Ordinances include the Securities and Exchange

the case of competition law was complicated due to the fact that there was some confusion as to whether the subject of competition regulation fell within the federation's (and, therefore, the president's) legislative competence.<sup>132</sup>

In the ordinary course, the competition law promulgated as an ordinance, would have lapsed in 120 days unless parliament approved it during this period.<sup>133</sup> However, in November 2007, the military chief turned president issued an order declaring an emergency in the country and suspended the constitution.<sup>134</sup> Three weeks later, the President issued a further order, amending the constitution and validating and saving 'all actions taken and all ordinances promulgated by him in the weeks leading up to the declaration of emergency.'<sup>135</sup> The competition law was one of the ordinances 'saved' by this order and, therefore, continued in force even after the expiry of the 120-day period allowed to it under the constitution.

(ii) The Second Ordinance 2009. In early 2008, Pakistan held general elections and appointed a civilian President. However, relations between the executive and the judiciary remained strained. In November 2007, for the first time in the history of the country, a majority of the judges of Pakistani superior courts refused to take an oath to support the military takeover and were, therefore, automatically dismissed from office.<sup>136</sup> In 2008, when the civilian led government took over, there was wide public expectation that it would restore the dismissed judges, however, it did so only in March 2009 and that too after countrywide public agitation calling for the restoration.<sup>137</sup>

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Ordinance 1969, Companies Ordinance 1984, National Accountability Bureau Ordinance 1999, Insurance Ordinance 2000 and National Reconciliation Ordinance 2007. However, the number of Ordinances promulgated between 2002-2007 is far greater than in any previous period. The President promulgated 134 Ordinances during the National Assembly's 5-year term as compared to 88 bills presented to the Parliament during the same period. See *A Five-Year Report on: Performance of Women Parliamentarians in the 12<sup>th</sup> National Assembly (2002-2007)* published by the Aurat Foundation, Pakistan.

<sup>132</sup> See n. 58 and text thereto.

<sup>133</sup> See n. 54 and text thereto.

<sup>134</sup> The Proclamation of Emergency and Provisional Constitutional Order No. 1 of 2007.

<sup>135</sup> The Constitution (Amendment) Order 2007. The President's actions were in response to growing political unrest in the country and the need to 'save' the National Reconciliation Ordinance 2007 pardoning his former political rivals turned allies. The Competition Law was saved simply for having been introduced in the same period as the National Reconciliation Ordinance.

<sup>136</sup> Section 3 of the Oath of Office Order (Judges) Order 2007.

<sup>137</sup> 'New Pakistan promises to restore judges' <<http://www.ft.com/cms/s/0/9558dd4a-0b4b->

Soon after restoration of the dismissed judges, the Supreme Court in deciding a petition filed before it, ordered that the declaration of emergency issued by the military chief turned president in November 2007 and all orders (including the order amending the Constitution) issued by the president in pursuance of the declaration were illegal.<sup>138</sup> The Supreme Court also directed the government to place all ordinances 'saved' by the constitution amending order, before parliament within 120 days of the date of the order of the Supreme Court ie on or before 30<sup>th</sup> November 2009.<sup>139</sup>

However, instead of placing the First Ordinance 2007 before the parliament within the stipulated period, on 26<sup>th</sup> November 2009 ie immediately before the expiry of the period stipulated by the Supreme Court, the government promulgated the Second Ordinance 2009 and thereby, gained a further period of 120 days in which to have it ratified by the parliament.<sup>140</sup>

(iii) The Third Ordinance 2010. However, even the Second Ordinance 2009 lapsed in March 2010, before the government could place it before parliament. On 20<sup>th</sup> April 2010, after a gap of nearly one month,<sup>141</sup> the government promulgated the Third Ordinance 2010 and made it effective from date on which the Second Ordinance 2009 had lapsed.<sup>142</sup> Although the government placed a draft Competition Bill before the parliament for its consideration whilst the Third Ordinance 2010 was still in force, the bill was not approved in time and the Third Ordinance 2010 also lapsed in August 2010 without an Act to replace it.<sup>143</sup>

(iv) The Act 2010. The Pakistani competition law was finally enacted on 13<sup>th</sup> October 2010 after being vetted by a standing committee and debated in

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[11dd-8ccf-0000779fd2ac.html#axzz4JeKcyFGy](http://11dd-8ccf-0000779fd2ac.html#axzz4JeKcyFGy) (accessed 7 September 2016).

<sup>138</sup> See n. 134, 135, 136 and text thereto.

<sup>139</sup> *Sindh High Court Bar Association v. The Federation of Pakistan* PLD 2009 SC 879. para 22(vii).

<sup>140</sup> The Competition Ordinance 2009 (Ordinance No. XLVI of 2009). The government's delayed placing the First Ordinance 2007 before Parliament in order to buy time for placing the National Reconciliation Ordinance before the Parliament for its approval. Once again, Competition Law was merely caught in the power struggle between state institutions.

<sup>141</sup> My interviewee Ms. Rahat Kaunain-Hassan, Former Chairperson, Competition Commission of Pakistan (Islamabad, Pakistan 14 September 2014) indicated that this was a particularly uncertain and vulnerable period for CCP in which its credibility was challenged not only by the public but also by the Courts.

<sup>142</sup> The Competition Ordinance 2010 (Ordinance No. XVI of 2010).

<sup>143</sup> Wilson 'Crossing the Crossroads' (n 129) 108-109.

parliament. However, confusion regarding the federation's power to legislate in this regard persisted, as competition regulation was still not listed in the Federal Legislative List. Whilst the three Ordinances had been substantially similar to each other, the Act provided, for the first time, for the establishment of a competition appellate tribunal to hear appeals from CCP's orders and for appeals from orders of the tribunal to lie to the Supreme Court.<sup>144</sup>

### 3.3.3. The Progress of the Pakistani Competition Law

The Pakistani competition law evolved considerably less than its Indian counterpart as it progressed from the deliberation to the extended adoption stage. As in the case of the Indian competition law, I examine this evolution with reference to provisions of the law relating to CCP's structure, mandate and composition.

#### *(a) CCP's Structure*

Perhaps the greatest emphasis of the Report of the WB-Led team was on the structure of the Competition Commission of Pakistan.<sup>145</sup> The Report envisaged CCP as a 'quasi-autonomous, quasi-judicial institution...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...'.<sup>146</sup> It further emphasized that CCP be a collegial body with a minimum of five and a maximum of seven members<sup>147</sup> and recommended that findings of

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<sup>144</sup> The Second Ordinance 2009 was an almost exact replica of the First Ordinance 2007 and provided for appeals from orders of CCP to be made directly to the Supreme Court. However, the Third Ordinance 2010 appointed the High court as the final appellate authority for competition matters.

<sup>145</sup> Manes (n.117) para 2.18 states that 'The Government realizes that an independent and efficacious agency, with strict accountability safeguards *is the key success factor* for the effective implementation of competition law and policy.' [Emphasis added].

Further, Preamble to Chapter 4 states, 'The organizational structure, scope and powers of the competition agency are *essential determinants* for the successful implementation of competition policy and law. The competition agency shoulders the burden of implementation, while at the same time maintains a level of stature and integrity which it could only achieve if it is independent and accountable.'

<sup>146</sup> *ibid.* para 4.1.

<sup>147</sup> *ibid.* para 4.6.

CCP be appealable to an ‘internal Appellate Bench’ and subject to judicial review on appeal to the Supreme Court.<sup>148</sup>

The First Ordinance 2007 reflected the recommendations of the Report inasmuch as it established CCP as a collegial body corporate with perpetual succession and with not less than five and no more than seven members.<sup>149</sup> Also in accordance with the Report, the First Ordinance 2007 constituted an ‘Appellate Bench’ within CCP to hear appeals from orders of a single member or orders of CCP’s authorized officers,<sup>150</sup> and provided for appeals from orders of two or more members of CCP or from orders of the Appellate Bench to be filed before the Pakistani Supreme Court.<sup>151</sup>

However, the First Ordinance 2007 compromised the autonomy of CCP even whilst declaring it to be independent:<sup>152</sup> it gave the government control over CCP’s budget; granted it the power to exempt certain categories of entities or agreements from the application of the First Ordinance 2007;<sup>153</sup> gave it the power to issue directives to CCP, which CCP was bound to comply with,<sup>154</sup> and authorised it to make rules for CCP’s governance and operations.<sup>155</sup> Further, contrary to the express recommendations of the Report, the First Ordinance 2007 adversely affected the transparency and objectivity of CCP’s enforcement actions by allowing CCP to utilise penalties collected by it to meet its operational expenditures.<sup>156</sup>

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<sup>148</sup> *ibid.* para 5.5.

<sup>149</sup> Section 12(2) and section 14(1), First Ordinance 2007.

<sup>150</sup> Section 41, First Ordinance 2007.

<sup>151</sup> Section 42, First Ordinance 2007.

<sup>152</sup> In terms of section 12(3), First Ordinance 2007, CCP was to be administratively and functionally independent of the government and the government was to use its best efforts to promote, enhance and maintain this independence.

<sup>153</sup> Section 52, First Ordinance 2007 allowed the government to exempt (i) any class of undertaking from the operation of the Law if necessary for the security of the state or in the public interest; (ii) any practice or agreement arising out of and in accordance with any obligation assumed by Pakistan under any treaty or agreement with another state, and (iii) any undertakings which performed a sovereign function on behalf of the government.

<sup>154</sup> Section 54, First Ordinance 2007.

<sup>155</sup> In terms of Section 55, First Ordinance 2007, CCP also had the power to make rules albeit with the approval of the government.

<sup>156</sup> In terms of section 20, First Ordinance 2007, CCP was to fund its activities from the Commission Fund, which comprised *inter alia* the penalties collected by it.

The provisions relating to CCP's structure remained unchanged in successive iterations of the competition law in Pakistan until the enactment of the Act of 2010.<sup>157</sup> The Act revoked the provision allowing CCP to utilise penalties collected by it towards meeting its expenditures.<sup>158</sup> It also stipulated that appeals from orders of the appellate bench and or two or more members of CCP should lie to the tribunal rather than directly to the Supreme Court, and that orders of the tribunal be appealed before the Supreme Court.<sup>159</sup>

*(b) The CCP's Mandate*

In respect of CCP's mandate, the Report recommended that CCP (a) exercise autonomy in its day to day work,<sup>160</sup> (b) ensure that its powers are applied within legal limits and carried out transparently<sup>161</sup>, (b) follow due process<sup>162</sup> and (c) remain accountable for its actions.<sup>163</sup>

The Report also recommended that CCP have the power to check prohibited agreements (both vertical and horizontal), abuse of dominant position, deceptive marketing practices and to regulate mergers and acquisitions.<sup>164</sup> Although the Report also suggested an advocacy function for CCP,<sup>165</sup> it emphasized that its primary function was enforcement backed by the 'credible threat' of both

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<sup>157</sup> For a comparison of the First Ordinance 2007 and the Act of 2010, *see* Annexe H.

<sup>158</sup> Section 20, Pakistani competition law.

<sup>159</sup> Section 42 and 44, Act of 2010.

<sup>160</sup> Manes (n.117) para 2.18, 4.4 4.7. The Report explains that autonomy does not mean complete freedom for CCP 'but rather independence from external influences—particularly those coming from political quarters and the business community—in carrying out day to day business activities and especially decision making.' The Report also cites the importance of independent sources of funding for CCP to ensure that it remained free from risks of becoming politicized.

<sup>161</sup> *ibid.* para 4.2.

<sup>162</sup> *ibid.* para 4.8. The Report states it is important for 'an agency to embody confidence and legitimacy, appropriate case-preparation, processing and decision-making is essential to project fairness and adherence to the natural laws of justice.' Somewhat naively, however, the Report appears to believe that 'appeal mechanisms would [be] limited to points of law and be rarely used.'

<sup>163</sup> Manes (n 117) para 3.2.3, 4.1 and 4.12. CCP was to be accountable to the Parliament (by publishing and presenting to it an annual State of Competition Report) to the government and the public. To this end, the Report recommended that it maintain an 'enforcement database [that] will provide better understanding and analysis, inside and outside the agency, of trends in enforcement activity... Dissemination of information to business and the public would encourage compliance and build confidence in the market and the agency.'

<sup>164</sup> Manes (n 117) ch 3.

<sup>165</sup> Manes (n 117) para 3.13 to 3.14. 'The need for a two-front approach to competition policy [i.e. through enforcement and advocacy] is particularly strong in economies emerging from a legacy of state intervention.'

behavioural and structural sanctions proportional to the infringement committed.<sup>166</sup>

The provisions of the First Ordinance 2007 closely followed these recommendations. These allowed CCP jurisdiction over all entities and all actions or matters taking place in Pakistan and distorting competition within Pakistan.<sup>167</sup> These conferred on CCP the power to check the abuse of dominant position;<sup>168</sup> to review vertical and horizontal prohibited agreements and, in certain cases, to exempt these from the application of the Ordinance;<sup>169</sup> to check deceptive marketing practices and to approve, prohibit or regulate mergers and acquisitions.

The First Ordinance 2007 also gave CCP extensive powers of investigation and enforcement, of imposing both lump sum and proportional penalties (and, in certain circumstances, of exercising leniency) thereby codifying the Report's recommendation that enforcement be CCP's highest priority.<sup>170</sup> The First Ordinance 2007 also entrusted CCP with the task of competition advocacy, which the Report had identified as an important and necessary aspect of a two-pronged approach to improving competitiveness in the country.<sup>171</sup>

The provisions in the competition law relating to CCP's mandate have remained unchanged since the First Ordinance 2007 and even the Act of 2010 stipulated exactly the same mandate for CCP as its predecessor ordinances.<sup>172</sup>

### *(c) CCP's Composition*

The Report of the WB-led team had highlighted that the 'quality of appointments' to CCP 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',<sup>173</sup>

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<sup>166</sup> Manes (n.117). para 3.11.

<sup>167</sup> Section 1(3), First Ordinance 2007.

<sup>168</sup> Section 3, First Ordinance 2007.

<sup>169</sup> Section 4, First Ordinance 2007. Section 5 allowed individual exemptions whereas section 7 provided for block exemptions. Section 9 laid down the criteria for these exemptions. I discuss this more fully in Chapter 5.

<sup>170</sup> Chapter 4, sections 31, 38, 39, First Ordinance 2007.

<sup>171</sup> Section 29, First Ordinance 2007.

<sup>172</sup> Sections 3 and 4 of the Act of 2010. I discuss these more fully in Chapter 5. Also see Annexe H for a comparison of the First Ordinance 2007 and Act of 2010.

<sup>173</sup> Manes (n.117) para 2.8.

but also enable CCP to perform its functions in a robust manner.<sup>174</sup> The Report was further of the view that the quality of the appointments to CCP combined with the security of tenure of the members would bolster CCP's autonomy.<sup>175</sup> It recommended that persons appointed to CCP be drawn from diverse, but related, professional backgrounds; be awarded appropriate remuneration packages, and be given security of tenure through a transparent removal process.<sup>176</sup> However, the Report did not, prescribe a mechanism for appointment or removal of such persons.<sup>177</sup>

In adopting the recommendations of the Report, the First Ordinance 2007 stipulated that only persons known for their 'integrity, expertise, eminence and experience for not less than ten years in any relevant field including industry, commerce, economics, law accountancy or public administration' be appointed as CCP's members (or chairperson).<sup>178</sup> However, also in accordance with the Report, the First Ordinance 2007 did not provide a mechanism for appointment of such members and simply entrusted the government with the power to make such appointments.<sup>179</sup> It only added, in this regard, that a person appointed as a member of CCP would hold office for three years and will be eligible for reappointment up

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<sup>174</sup> Manes. (n.117). para 4.2, 4.6.

<sup>175</sup> See n. 160.

<sup>176</sup> *ibid.*

<sup>177</sup> Manes. (n.117). paras 4.6, 6.38. Rather than suggesting an appointment mechanism that would enhance, if not ensure, CCP's much-emphasized autonomy, the Report stressed the need for providing the highest quality training to those appointed to the highest offices in CCP. In particular, it recommended that 'twinning' be arranged with up to 5 international experts for a period of 3 years—1 consultant will be twinned with each of the functional Director Generals and one with the Chairman. The Report gave only marginally more attention to the removal mechanism in stating that the government may adopt the '[p]rocedure specified by Article 209 of the Constitution (i.e. Supreme Judicial Council) [which] provides for a clear and transparency [sic] procedure'.

<sup>178</sup> In terms of 14 (4), First Ordinance 2007 only two of such members could be from the government. Section 14 (6) of the First Ordinance 2007 listed factors that would render a person ineligible for appointment.

<sup>179</sup> In terms of 14(5), First Ordinance 2007 appointments to CCP were to be made 'in such manner as may be prescribed'. The term 'prescribed' though not defined in the Ordinance is ordinarily understood in Pakistan to refer to rules that may be made under a primary legislation. Under section 55, First Ordinance 2007, CCP itself has the power to make rules though with the approval of the government. However, under section 17, the government has the specific power to make rules stipulating the salary, terms and conditions of service of CCP's chairman and members.

In pursuance of these powers, on 9<sup>th</sup> September 2009, the government, made the 'Competition Commission (Salary, Terms and Conditions of Chairman and Members) Rules, 2009'. The only stipulation in respect of procedure for appointment of chairman and members in these rules was that 'the government would appoint members in consultation with the chairman of the Commission' (Rule 3 sub rule 2).

to the age of 65.<sup>180</sup> The First Ordinance 2007, also conferred upon the government the power to remove a member from office on any of the grounds for which such person may have been ineligible for appointment in the first place,<sup>181</sup> and upon an inquiry conducted by an ‘impartial person or body of persons.’<sup>182</sup> Significantly, however, the First Ordinance 2007 neither identified persons who may conduct such an enquiry nor provided criteria for their identification. It also allowed the government exclusive power to prescribe rules for calling and conducting such inquiry.<sup>183</sup>

The provisions relating to CCP’s composition have remained unchanged in the successive iterations of the competition law as well as in the Act of 2010.<sup>184</sup>

### **3.4. Unpacking the Adoption Processes in India and Pakistan**

The transfer mechanisms employed by India and Pakistan in adopting their respective competition laws may be categorized on the basis of the motivations of the countries in seeking competition laws and the manner in which they deliberated and adopted these laws.<sup>185</sup>

#### **3.4.1. Transfer Mechanism(s) and Institutions employed by India**

Whilst it is evident that India was motivated by both domestic and international factors in seeking a competition law it is difficult to assess which of these factors outweighed the other.<sup>186</sup> However, it is possible to state that India’s policy of economic liberalization and periodic reviews of its anti-monopoly law had gained sufficient momentum by the mid-nineties for India to understand that it needed a modern competition law as much to address domestic needs as it did in order to attain international legitimacy. Further, India’s membership of WTO and participation in the Doha Ministerial Conference suggests that India may have

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<sup>180</sup> Section 17, First Ordinance 2007.

<sup>181</sup> Section 14 (6), First Ordinance 2007. Also see n. 178.

<sup>182</sup> Section 19(1), First Ordinance 2007. No inquiry was required if the person in question was disqualified from continuing as a member by a judgment or order of a court or tribunal. (Section 19(2) First Ordinance 2007).

<sup>183</sup> Section 19(2), First Ordinance 2007.

<sup>184</sup> Particularly sections 14 and 19 of Act of 2010.

<sup>185</sup> Chapter 1, section 1.2.3(a).

<sup>186</sup> Section 3.2.1 above,

been under some pressure from international quarters to modernize its competition regime.<sup>187</sup>

India's strategy for deliberating the Initial Enactment 2002 and the First Amendment 2007 was consultative and directed towards understanding and adapting competition principles that it proposed to adopt. The Raghavan Committee not only made an effort to understand competition principles by reviewing international competition models but also consulted with a range of local stakeholders and future users of the law, in order to tailor its learning to suit India's unique needs. However, it appears that the committee's 'learning' of international models was bounded rather than rational to the extent that it was derived from consulting and textually analysing readily available foreign models rather than through a detailed statistical analysis of the economies in which these laws had been operating. This overwhelmingly indicates the mechanism of *socialization* at play, albeit with elements of *emulation*<sup>188</sup> and *regulatory competition*.<sup>189</sup>

**Table 3.1 Summary of India's Adoption Process**

Stage	Pre-Conditions of Transfer	Motivation	Strategy	Institutions
<b>Deliberation 1999-2002</b>	<ul style="list-style-type: none"> <li>• Strong tradition of domestic committees for legal reform;</li> <li>• Strong tradition of parliamentary governance;</li> <li>• Independent judiciary.</li> </ul>	<ul style="list-style-type: none"> <li>• Changes in domestic economic policy;</li> <li>• Realization of changing external environment.</li> </ul>	<ul style="list-style-type: none"> <li>• Review of existing law;</li> <li>• Review of international models;</li> <li>• Extensive consultations with relevant stakeholders.</li> </ul>	<ul style="list-style-type: none"> <li>• Executive;</li> <li>• Domestically-formed and led committee.</li> </ul>
<b>Initial Enactment</b>	<ul style="list-style-type: none"> <li>• Same as above</li> </ul>	<ul style="list-style-type: none"> <li>• To give effect to the proposals made at the</li> </ul>	<ul style="list-style-type: none"> <li>• Draft tabled before Parliament;</li> <li>• Referred to</li> </ul>	<ul style="list-style-type: none"> <li>• Executive;</li> <li>• Parliament;</li> <li>• Parliamentary</li> </ul>

<sup>187</sup> Whilst I have not come across any documentation that confirms that India was under such pressure my interviewees Dr. Bhattacharjea, Dr. Gauri and Mr. Kumar consider it highly likely that such pressure would have been there.

<sup>188</sup> India's then ongoing negotiations with the WTO are likely to have influenced it into adopting a competition law that was in conformity with international competition principles.

<sup>189</sup> Whilst initially India may have been in conscious of developments in other WTO member countries, by the time of the First Amendment 2007 it is also likely to have been aware that Pakistan too was in the process of enacting a competition law drafted along similar lines, which may have influenced its decisions in this regard.

<p><b>2002</b></p>	<p>deliberation stage.</p>	<p>Standing Committee;  <ul style="list-style-type: none"> <li>• Further input sought from domestic stakeholders;</li> <li>• Finally passed by Parliament.</li> </ul> </p>	<p>Standing committee.</p>
<p><b>First Amendment 2007</b></p>	<ul style="list-style-type: none"> <li>• Same as above</li> <li>• To give effect to judgment of the Supreme Court.</li> </ul>	<ul style="list-style-type: none"> <li>• Government proposed amendments to the Supreme Court;</li> <li>• Supreme Court accepted government's proposal;</li> <li>• Government then tabled a draft before Parliament;</li> <li>• Draft passed after further appropriate amendments</li> <li>•</li> </ul>	<ul style="list-style-type: none"> <li>• Executive;</li> <li>• Judiciary;</li> <li>• Parliament;</li> <li>• Parliamentary Standing committee</li> </ul>

A closer look at the institutions engaged by India in deliberating and adopting its competition law indicates that these were as wide ranging as they were bottom-up, participatory and inclusive. At the deliberation stage, the Raghavan Committee (set up by the executive) and at the Initial Enactment 2002, the parliament (and its standing committees) sought and considered the opinions of a range of experts, elected representatives and stakeholders. Further, the events leading up to the First Amendment 2007 introduced the country's pre-existing legal system, (as represented by the advocate/petitioner who challenged the competition law before the Supreme Court and by the Indian Supreme Court itself) to the list of institutions that had considered and examined the competition law. The passage of the First Amendment 2007 through the parliament re-engaged the legislature, its standing committee as well as the stakeholders consulted by the committee.

### 3.4.2. Transfer Mechanism(s) and Institutions in Pakistan

As in the case of India, Pakistan's decision to adopt a Competition Law was partly driven by its recognition of domestic needs and goals and partly due to the influence of on-going WTO negotiations.<sup>190</sup> However, in Pakistan's case, the external influence outweighed the domestic impulse, perhaps because Pakistan had

<sup>190</sup> See n. 115 and n. 119 and text thereto.

not engaged in any periodical review of its anti-monopoly law and, therefore, did not have the capacity to understand and appreciate its needs in this regard.<sup>191</sup> In the period in which Pakistan began considering the possibility of acquiring a modern competition law it was deeply engaged with the World Bank in the delivery of the first and second-generation reforms and it was persuaded by the World Bank that a modern competition law was a necessary part of these reforms. All these factors suggest *coercion*, albeit implied, as Pakistan's primary motivation for acquiring the law. The fact that Pakistan sought technical assistance from the World Bank further suggests that Pakistan was keen to acquire a law based on international models as much for its benefit to the country as for its normative value. This suggests that *emulation* was also a factor at this stage.<sup>192</sup> Further, even though there is no evidence of such motivation, it is likely that Pakistan may also have been spurred to acquire the competition law, because India had recently done so. This suggests an element of *regulatory competition*.

The mechanism of *coercion* is also evident at the deliberation stage and in the promulgation of the First Ordinance 2007. Pakistan entrusted the deliberation of the law to a WB-led team, which, in turn, engaged a Brussels based law firm, to draft the law. The WB-led team expressed only limited interest in domestic legal conditions in Pakistan and relied mostly on international models in recommending the parameters of competition in Pakistan rather than on understanding the nuances of Pakistan's domestic needs. The fact that the WB-led team shared its view of competition policy with a select group of stakeholders introduces a limited possibility of *socialization* although by all accounts this consultation was limited and hurried.<sup>193</sup> Even otherwise, the potential benefit of even this limited attempt at *socialization* was lost when the law was promulgated as an Ordinance without feedback from the legislature or from stakeholders.

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<sup>191</sup> By its own admission, Pakistan did not have the necessary institutional infrastructure, awareness or capacity to translate its competition needs into law. *See* Section 3.3.1(b) n. 116. Whilst my interviewee Mr. Raja and some others corroborated this view, Ms. Kaunain-Hassan was alone in suggesting that the local team played an important in the drafting process.

<sup>192</sup> *ibid.*

<sup>193</sup> *See* n. 128 and text thereto. There is no record of what was actually discussed at these consultations. Given that these consultations are described as discussing the report in 'its early forms' it is unlikely that the draft Law was included in these discussions. My Interviewee Mr. Raja emphasized the disinterest of the foreign members of the team in understanding the Pakistani context.

Table 3.2 Summary of Pakistan's Adoption Process

Stage	Pre-Conditions of Transfer	Motivation	Strategy	Institutions
<b>Deliberation 2006</b>	<ul style="list-style-type: none"> <li>• Military chief turned President;</li> <li>• Young and fragile Parliament;</li> <li>• Judiciary weakened by military takeovers;</li> <li>• Strained relationship between executive, Parliament and judiciary.</li> </ul>	<ul style="list-style-type: none"> <li>• Minimum domestic realization;</li> <li>• Persuasion on part of the World Bank</li> </ul>	<ul style="list-style-type: none"> <li>• WB-led Team;</li> <li>• Internal consultations with the government;</li> <li>• Limited public consultations;</li> <li>• Law drafted by a Brussels based law firm.</li> </ul>	<ul style="list-style-type: none"> <li>• Executive;</li> <li>• Multilateral agencies.</li> </ul>
<b>First Ordinance 2007</b>	<ul style="list-style-type: none"> <li>• Same as above.</li> </ul>	<ul style="list-style-type: none"> <li>• To implement the recommendations of the WB-led Team.</li> </ul>	<ul style="list-style-type: none"> <li>• Presidential Ordinance;</li> <li>• Passed without any deliberations.</li> </ul>	Executive.
<b>Second Ordinance 2009</b>	<ul style="list-style-type: none"> <li>• A civilian President;</li> <li>• Elected Parliament;</li> <li>• Relationship with judiciary continues to be strained.</li> </ul>	<ul style="list-style-type: none"> <li>• To implement the directions of the Supreme Court.</li> </ul>	<ul style="list-style-type: none"> <li>• Supreme court recommendations not aimed specifically at the law;</li> <li>• Presidential Ordinance;</li> <li>• Passed without any deliberations.</li> </ul>	Executive.
<b>Third Ordinance 2010</b>	<ul style="list-style-type: none"> <li>• A civilian President;</li> <li>• Elected Parliament;</li> <li>• Relationship with judiciary somewhat less strained.</li> </ul>	<ul style="list-style-type: none"> <li>• To gain more time for enacting the law.</li> </ul>	<ul style="list-style-type: none"> <li>• Presidential Ordinance;</li> <li>• Passed without any deliberations.</li> </ul>	Executive.
<b>The Act 2010</b>	<ul style="list-style-type: none"> <li>• A civilian President;</li> <li>• Elected Parliament;</li> <li>• Relationship with judiciary improving.</li> </ul>	<ul style="list-style-type: none"> <li>• To give legal cover to Competition law in accordance with recommendations of WB-led Team and order of the Supreme Court.</li> </ul>	<ul style="list-style-type: none"> <li>• Deliberations and public consultations by the Standing Committee</li> <li>• Limited debate in Parliament.</li> </ul>	<ul style="list-style-type: none"> <li>• Executive;</li> <li>• Parliament;</li> <li>• Parliamentary Standing Committee</li> </ul>

When Pakistan enacted the Act of 2010, the strategy of *coercion* appears to have been replaced by *socialization*. The standing committee made an attempt to

understand the domestic needs of the country in consultation with a broader group of stakeholders. However, the benefits of this exercise were limited and lawmakers only tweaked certain provisions of the law rather than considering the entire law afresh let alone engaging in statistical analysis to arrive at an understanding of the type of competition regime may be most appropriate for Pakistani purposes. Further, even though I have not come across any documentation that suggests that the World Bank played a role at this stage, there is a high probability that it was a factor in the background urging Pakistan to provide more stable and permanent legal cover to its competition law reforms. This continuing influence of the World Bank points towards the lingering effect of the earlier *coercion*, if not a certain degree of implied *coercion*.

The institutions engaged by Pakistan, particularly in the deliberation and promulgation of the First Ordinance 2007 were located in the executive and were exclusive and top down. Amongst these, the WB-led team made some effort to aggregate local knowledge. However, this effort was most often made in a controlled environment (under the influence, if not control, of the ministry of finance), and even the limited consultations that were held, were completed within a very short period of time. This did not allow for a meaningful exchange of ideas between the WB-led team and the stakeholders. The impact of this effort, if any, was further diminished because the First Ordinance 2007 and the Second and Third Ordinances 2009 and 2010 respectively, were promulgated without any debate in parliament or through the standing committee and without any public consultations whatsoever.<sup>194</sup>

The enactment of the Act of 2010, for the first time, engaged the parliament (and its standing committee) in the adoption process. Whilst the parliament was theoretically a bottom-up, participatory and inclusive institution, it had only recently emerged from under the shadow of quasi-military rule. This meant that not only that the parliament's ability to and interest in aggregating, comprehending and utilizing local knowledge was limited but also that it had still not fully realised its status as a representative body and remained the domain of the Pakistani

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<sup>194</sup> Ms. Kaunain-Hassan recounted the cursory, almost thoughtless manner in which the Second and Third Ordinances were promulgated.

political elite. Also, the judiciary and the legal profession still remained excluded from the adoption process and made no attempt either to understand the substance of the competition law or to determine whether or not it was compatible with the pre-existing legal system of the country.

### **3.5. Impact of Adoption Processes on Competition Laws in India and Pakistan**

The choice of transfer mechanisms employed for adopting competition laws and the institutions engaged by India and Pakistan in this regard may be rightly considered political decisions of the two countries. However, these political decisions have distinct and significant legal implications because the choice of transfer mechanisms and institutions shapes the content of the competition laws, their compatibility with the context of their countries, and their legitimacy in these contexts, which in turn have a significant impact on the manner in which the Laws are ultimately implemented.

#### **3.5.1. Adoption Processes and the Content of Competition Laws**

A merely textual comparison of the content of the Indian and Pakistani competition laws suggests remarkable similarities between the two. However, a more dynamic evaluation of these Laws, which takes into account the influence of the transfer mechanisms and institutions in shaping the content, indicates considerable underlying differences, which are likely to have an impact on the subsequent implementation of these laws. In this section, I compare the impact of the transfer mechanisms and institutions engaged by India and Pakistan in adopting the competition laws on the content of these laws, particularly the provisions relating to the structures, mandates and compositions of the CCI and CCP as proposed to be established by these laws.<sup>195</sup> To this end, Table 3.3 juxtaposes the relevant provisions of these laws:

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<sup>195</sup> The Indian and Pakistani Competition Laws set up first and second tier NCAs, the commissions and the tribunals. However, for the purposes of this comparison I focus only on the first tier NCAs, the CCI and CCP, rather than the tribunals because the Pakistani tribunal was introduced in Pakistan much later than the Indian tribunal and at present has not generated sufficient data for studying its operations.

Also for the comparison of the texts, I refer to the Indian competition law as amended by the First Amendment 2007 and the Pakistan Act of 2010.

**Table 3.3 Comparing Provisions of Indian and Pakistani Competition Laws<sup>196</sup>**

	Indian Competition Law	Pakistani Competition Law
<b>Provisions related to Structure</b>	<ul style="list-style-type: none"> <li>• Autonomous statutory collegial body comprising a chairperson and between two and six members.<sup>197</sup></li> <li>• Bound by policy directions issued by the government.<sup>199</sup></li> <li>• Government may supersede CCI in certain specified circumstances.<sup>201</sup></li> <li>• Government has the power to exempt certain enterprises or agreements from the operation of the Law if required by international obligations or in the interest of the country to do so.<sup>202</sup></li> <li>• Expenses of CCI to be met out of government grants and the Commission Fund.<sup>204</sup></li> <li>• No parallel provision in the Indian Law.<sup>206</sup></li> <li>• Exclusive jurisdiction in respect of matters within its mandate.</li> <li>• Jurisdiction of civil courts expressly ousted.<sup>208</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Autonomous statutory collegial body comprising a chairperson and between five and seven members.<sup>198</sup></li> <li>• Bound by policy directives of the government.<sup>200</sup></li> <li>• No express parallel provision.</li> <li>• Government has the power to exempt (a) any class of undertaking if such exemption is necessary in the interest of security of the State or public interest; (b) any practice or agreement arising out of and in accordance with any obligation assumed by Pakistan under any treaty, agreement or convention with any other State or States; or (c) any undertaking which performs a sovereign function on behalf of the Federal Government or a Provincial Government.<sup>203</sup></li> <li>• Expenses of CCP to be met by the Commission Fund, which included government grants.<sup>205</sup></li> <li>• CCP to set up an internal Appellate Bench for hearing appeals from orders of single members of the Commission or its officers.<sup>207</sup></li> <li>• No express parallel provision.</li> </ul>

<sup>196</sup> For an overview of Indian and Pakistani competition laws *see* Annexes G and H.

<sup>197</sup> Sections 7(2) and 8(1), Indian competition law.

<sup>198</sup> Sections 12(2) and 14(1), Pakistani Act of 2010.

<sup>199</sup> Section 55, Indian competition law.

<sup>200</sup> Section 56, Pakistani Act of 2010.

<sup>201</sup> Section 56, Indian competition law.

<sup>202</sup> Section 54, Indian competition law.

<sup>203</sup> Section 54 Pakistani Act of 2010.

<sup>204</sup> Sections 50 and 51, Indian competition law.

<sup>205</sup> Section 20 Pakistani Act of 2010.

<sup>206</sup> Sections 23 to 25, Initial Enactment 2002 provided for ‘Benches’. However these benches were to exercise CCI’s mandate rather than to hear appeals from its orders. In any event these sections were omitted by the First Amendment 2007.

<sup>207</sup> Section 41, Pakistani Act of 2010.

<sup>208</sup> Section 61, Indian competition law.

Provisions relating to Mandate	Areas of operation	Areas of operation	
	<ul style="list-style-type: none"> <li>• Anti-competitive agreements<sup>209</sup></li> <li>• Abuse of dominant position<sup>210</sup></li> <li>• Regulation of combinations (mergers &amp; acquisitions)<sup>211</sup></li> <li>• No parallel provision for deceptive marketing practices.</li> <li>• Express extra-territorial jurisdiction if effect of practice felt in India.<sup>212</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Prohibited agreements<sup>213</sup></li> <li>• Abuse of dominant position<sup>214</sup></li> <li>• Regulation of mergers &amp; acquisitions (combinations)<sup>215</sup></li> <li>• Deceptive marketing practices<sup>216</sup></li> <li>• Jurisdiction in respect of all matters whose effects are felt inside Pakistan.<sup>217</sup></li> </ul>	
	Types of Orders <sup>218</sup>	Types of Orders <sup>228</sup>	
	<ul style="list-style-type: none"> <li>• Order party to discontinue anti-competitive practice or abuse of dominant position and refrain from re-entering such agreement or continuing abuse.<sup>219</sup></li> <li>• Amend anti-competitive agreement.<sup>220</sup></li> <li>• Recommend division of dominant entity.<sup>221</sup></li> <li>• Impose penalties for entering into anti-competitive agreements or engaging in abuse as percentage of turnover or income.<sup>222</sup></li> <li>• Grant leniency.<sup>223</sup></li> <li>• Approve, restrain or modify combinations.<sup>224</sup></li> <li>• Pass any other order CCI deems fit as to costs or otherwise.<sup>225</sup></li> <li>• Pass interim orders.<sup>226</sup></li> <li>• Rectify orders.<sup>227</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Order parties that had abused their dominant positions to take measures to restore competition and to refrain from activities that led to abuse.<sup>229</sup></li> <li>• Annul prohibited agreements or order parties that had entered into prohibited agreements to amend the agreement and not to continue or engage with such agreements in the future.<sup>230</sup></li> <li>• Approve a merger or acquisition with or without conditions, order a further review of the merger or acquisition or undo or prohibit it.<sup>231</sup></li> <li>• Impose penalties either as fixed sums or as percentage of turnover<sup>232</sup></li> <li>• Grant leniency.<sup>233</sup></li> </ul>	

<sup>209</sup> Section 3, Indian competition law.

<sup>210</sup> Section 4, Indian competition law.

<sup>211</sup> Section 5, Indian competition law.

<sup>212</sup> Section 32, Indian competition law.

<sup>213</sup> Section 4, Pakistani Act of 2010.

<sup>214</sup> Section 3, Pakistani Act of 2010.

<sup>215</sup> Section 11, Pakistani Act of 2010.

<sup>216</sup> Section 10, Pakistani Act of 2010.

<sup>217</sup> Section 1(3), Pakistani Act of 2010.

<sup>218</sup> This list is non- exhaustive and excludes CCI's administrative orders.

<sup>219</sup> Section 27(a), Indian competition law.

<sup>220</sup> Section 27(d), Indian competition law.

<sup>221</sup> Section 28, Indian competition law.

<sup>222</sup> Section 27(b), Indian competition law.

<sup>223</sup> Section 46, Indian competition law.

<sup>224</sup> Section 31, Indian competition law.

<sup>225</sup> Section 27(c), Indian competition law.

<sup>226</sup> Section 33, Indian competition law.

<sup>227</sup> Section 38, Indian competition law.

<sup>228</sup> This list excludes the CCP's administrative orders and those it may pass in respect of deceptive marketing practices.

<sup>229</sup> Section 31(1)(a), Pakistani Act of 2010.

<sup>230</sup> Section 31(1)(b), Pakistani Act of 2010.

<sup>231</sup> Section 31(1)(d), Pakistani Act of 2010.

<sup>232</sup> Section 38, Pakistani Act of 2010.

The Adoption Processes

		<ul style="list-style-type: none"> <li>• Pass interim orders.<sup>234</sup></li> <li>• Review, cancel or modify orders with respect to individual exemptions granted by it as well as interim orders.<sup>235</sup></li> </ul>
	<p><i>Who may approach CCI</i></p> <p>Any party, including the government, may invoke CCI's jurisdiction.<sup>236</sup></p>	<p><i>Who may approach CCP</i></p> <p>Any party, including the government, may invoke CCP's jurisdiction.<sup>237</sup></p>
<b>Provisions relating to Composition</b>	<p><i>Who may be appointed</i></p> <ul style="list-style-type: none"> <li>• Persons of ability, integrity and standing having special knowledge or professional experience of minimum 15 years in fields of international trade, business, commerce, law, finance, accountancy, management, industry, public affairs, administration or any other area which the government deems useful for CCI.<sup>238</sup></li> </ul>	<p><i>Who may be appointed</i></p> <ul style="list-style-type: none"> <li>• Persons of integrity, expertise, eminence and experience of a minimum of 10 years in industry, commerce, economics, finance, law, accountancy or public administration or hold such further qualifications as the government may prescribe.<sup>239</sup></li> <li>• Only two members may be government employees.<sup>240</sup></li> </ul>
	<p><i>Tenure</i></p> <ul style="list-style-type: none"> <li>• Five years</li> <li>• Eligible for reappointment unless reached age of retirement.<sup>241</sup></li> </ul>	<p><i>Tenure</i></p> <ul style="list-style-type: none"> <li>• Three years</li> <li>• Eligible for reappointment unless reached age of retirement.<sup>242</sup></li> </ul>
	<p><i>Appointment Mechanism</i></p> <ul style="list-style-type: none"> <li>• Appointment to be made by selection committee that includes Chief Justice of the country and government representatives to recommend a panel to the government who may select from the panel.<sup>243</sup></li> <li>• Appointment to be made by the government from amongst the panel recommended by the selection committee.<sup>244</sup></li> </ul>	<p><i>Appointment Mechanism</i></p> <p>Appointments to be made by the government in consultation with the chairman.<sup>245</sup></p>

<sup>233</sup> Section 39, Pakistani Act of 2010.

<sup>234</sup> Section 32, Pakistani Act of 2010.

<sup>235</sup> Section 6 and 32(2), Pakistani Act of 2010.

<sup>236</sup> Section 19, Indian competition law.

<sup>237</sup> Section 37, Pakistani Act of 2010.

<sup>238</sup> Section 8(2), Indian competition law.

<sup>239</sup> Section 14(5), Pakistani Act of 2010.

<sup>240</sup> Section 14(4), Pakistani Act of 2010.

<sup>241</sup> Section 10(1)(e), Indian competition law.

<sup>242</sup> Section 17, Pakistani Act of 2010.

<sup>243</sup> Section 9(1), Indian competition law.

<sup>244</sup> Section 8(1), Indian competition law.

<sup>245</sup> Section 14(5), Pakistani Act of 2010.

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<i>Removal Mechanism</i>	<i>Removal Mechanism</i>
By the government, on grounds specified in the Act and after a Supreme Court inquiry in this regard. <sup>246</sup>	By the government, on grounds specified in the Act and after an impartial inquiry (under rules made by the government) unless removal ordered by a competent court. <sup>247</sup>

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(a) *Shaping the Structure through the Adoption Process*

The evolution of the *structure* of CCI and CCP through successive stages of deliberating, adopting and amending the competition laws, reveals the influence of the respective transfer mechanisms and institutions employed by India and Pakistan in the adoption process.

In India, the effect of *socialization* is evident in the fact that institutions engaged at each stage have provided their input as to the most appropriate structure for CCI. Consequently, CCI's structure as recommended in the Raghavan Committee Report has evolved considerably in light of the feedback from the parliament (and parliamentary standing committees) and particularly in light of the Supreme Court's decision in the *Brahm Dutt Case*, which brought CCI's structure into alignment with India's pre-existing legal system.<sup>248</sup>

The impact of *coercion* in Pakistan on provisions related to CCP's structure is evident from the fact that there was little or no change between the structure as recommended by the WB-led team and as stipulated in the First Ordinance 2007. There is also no record of any debates or discussions that may have been held between the time the WB-led team finalised its recommendations and the promulgation of the First Ordinance 2007. Both these factors suggest that the Pakistani government accepted whatever structure the WB-led team recommended to it. Interestingly, CCP's structure has remained unchanged even in the Act of 2010, which was introduced through *socialization*. This suggests the lingering power of the initial *coercion* in determining the CCP's structure.<sup>249</sup>

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<sup>246</sup> Section 11, Indian competition law.

<sup>247</sup> Section 19, Pakistani Act of 2010.

<sup>248</sup> See n. 80. The impact of *socialization* is also evident in the case of the tribunal, which was introduced in India at the behest of the Supreme Court through the First Amendment 2007. I discuss this more fully in Chapter 6.

<sup>249</sup> Although the Pakistani Act of 2010 introduced the tribunal and thereby changed the

(b) *Effect of the Adoption Process on the Mandate of CCI and CCP*

Unlike their structure, the mandate of CCI and CCP has remained substantially unchanged through the successive stages of deliberation, enactment, amendment etc. This suggests that in transferring the provisions relating to the mandate of CCI and CCP, both India and Pakistan have relied more on the strategies of *emulation* and *regulatory competition* rather than on their otherwise dominant strategies of *socialization* and *coercion*.<sup>250</sup>

The reasons for both countries relying on *emulation* and *regulatory competition* for the mandates of CCI and CCP are understandable. Firstly, the internationally prevalent competition principles from which the mandates of the CCI and CCP, are drawn were not only absent in the pre-existing legal contexts of India and Pakistan but also desirable for both countries in order for them to be recognised for having adopted modern competition law regimes that were in accordance with international best practices. Even though the avowed reason for doing so in India was the need to remain competitive internationally and in Pakistan, to meet World Bank requirements, it is highly likely that both countries also sought internationally legitimacy by acquiring these laws.

Secondly, there is likely to have been a need, in both India and Pakistan, to convince the lawmakers (in case of India) or government officials (in case of Pakistan) that the competition principles proposed to be adopted were derived from authoritative and highly regarded sources and, were, therefore, appropriate for the country. The normative value of the mandate of the CCI is further evident from the fact that provisions relating to mandate remained unchanged *in spite of* India's primary transfer mechanism of *socialisation* even though it had significantly shaped CCI's structure and composition. In the case of Pakistan, the normative value of CCP's mandate is manifest in the fact that Pakistan sought to

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implementation path for competition law in the country, it did not re-examine the structure of CCP itself.

<sup>250</sup> It may be argued that Pakistan was employing *emulation* and *regulatory competition* even if it merely acquiesced to the recommendations of the WB-led Team. Arguably, however, given that the *emulation* and *regulatory competition* took place under the auspices of the WB-led team *coercion* may still be considered the dominant mechanism.

transfer the law through *coercion* rather than undertaking an indigenous exercise of understanding what mandate, if any, may be appropriate for its context.

In the Pakistani context, this means that discussion on CCP's mandate was led almost entirely by the World Bank and finalised in accordance with the recommendations of the WB-led team. There was little or no meaningful effort to engage a larger, more diverse group of stakeholders in discussions on these principles or to translate the core principles into a conceptual language and epistemology that may be more accessible and understood in the country.

However, in the Indian context there is evidence in the Raghavan Committee Report that CCI's mandate was discussed and debated at length amongst local experts who also made a considerable effort to understand the extent to which core competition principles and, therefore, the mandate of the proposed NCA was suited to India's specific needs. In fact a small but meaningful impact of *socialization* is evident from the fact that the Indian competition law recast these core principles in a style and language that would be more readily understood in India, often adding explanations to the relevant sections to ensure that their meaning was clear.

(c) *The Impact of the Adoption Process on Composition*

The effect of *socialization* in India is perhaps most evident in respect of CCI's composition given that the relevant provisions in the competition law evolved considerably as the law progressed through the successive stages of deliberation, adoption and amendment and at each stage, absorbed and reflected the impact of the wide range of institutions engaged in the transfer of the law.

Whilst the Raghavan Committee had recommended the setting up of an independent committee for the appointment and removal of CCI chairperson and members, the parliament in the Initial Enactment 2002, had vested the power to appoint such persons entirely in the government. However, the First Amendment 2007 not only re-introduced the idea of a selection committee, but also prescribed its membership. Although the provisions for removal of members stipulated in the Initial Enactment 2002 remained unchanged and CCI members could still only be removed subject to an enquiry by the Supreme Court, this still qualifies as

*socialization* given that this provision had been first recommended by the Raghavan Committee.

In contrast, the effect of *coercion* in Pakistan is not immediately evident in CCP's composition. It may be argued that had *coercion* been a decisive factor in prescribing CCP's composition (including the mechanisms for appointment and removal of its members) then even though the Report of the WB-led team had not specifically stipulated a mechanism for appointment, the First Ordinance 2007 would have implemented its recommendations in spirit and would have taken measures to ensure that the appointment process was independent and transparent.<sup>251</sup> It may further be argued that if *emulation* had been the relevant mechanism in this regard then the First Ordinance 2007 may have reflected clear international influences on the provisions prescribing CCP's composition.

It may further be possible to argue that given that the Pakistani competition law was introduced after the Initial Enactment 2002 of the Indian competition law, Pakistan was motivated by *regulatory competition* to adopt composition provisions comparable to those of the Indian competition law. For instance, section 9 of the Initial Enactment 2002, stated that '[t]he Chairperson or other Member shall be selected in the manner as may be prescribed'. In terms of section 2(n), 'prescribed' meant prescribed by rules made under the law'. Under section 63 of the Indian competition law, the power to make rules, including rules for selection of chairperson and members of CCI was vested in the government. The provision for appointment of chairperson and members in the Pakistani Competition Law (both in the First Ordinance 2007 and in the Act of 2010) are nearly identical to those of the Initial Enactment 2002.

It may also be argued that the impact of *regulatory competition* in respect of appointment provisions was exacerbated by Pakistan's dominant mechanism of *coercion*. The WB-led team was more interested in introducing the law within a relatively short time frame rather than in harnessing local expertise in adapting the law more fully to the context. It, therefore, took little or no measures to ensure that

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<sup>251</sup> Section 3.3.3(c). Although the WB-led team did not prescribe an appointment procedure it emphasized the critical importance of independence of members of CCP. This may be understood as entailing a transparent appointment procedure.

in adapting the appointment provisions of the Pakistani competition law, the Pakistani government would allow CCP the kind of autonomy that had been envisaged in the Report of the WB-led team.<sup>252</sup>

Local practices in the country may be another possible source of the provisions related to composition of CCP and it is likely that rather than being transferred, the provisions related to appointment of members were simply adopted from those already implicit and prevalent in the Pakistani context. The mechanism of *coercion*, with its limited engagement with local knowledge allowed these implicit patterns to make their way into the First Ordinance 2007 without fully exploring their repercussions.<sup>253</sup> More damagingly, however, it failed to create sufficient

<sup>252</sup> Section 14(2) Pakistani Act of 2010, is identical to section 14(2) First Ordinance 2007 and the 2009 Rules (see n. 179) are in force to date.

<sup>253</sup> Rodolfo Sacco, 'Legal Formants: A Dynamic Approach to Comparative Law (Installment II of II)' (1991) 39 The American Journal of Comparative Law 343, 384, 385.

Sacco suggests that the meaning of the adopted law is likely to be influenced by all such factors as may be capable of influencing the convictions of an interpreter in the adopting country. In the list of these factors, he includes 'cryptotypes' by which he means linguistic and behavioral patterns, which though implicit, have outward effects.

In my view, Sacco's definition of 'cryptotypes' may easily be extended to include appointment patterns implicit in Pakistan and stipulated in a number of regulatory laws. Sacco's 'interpreter' in this case is the government functionary who engages with the recommendations of WB-led Team at the end of the deliberation stage and 'interprets' its vague suggestions for appointment & removal in accordance with his own preferences and what was readily available to him.

To demonstrate that the provisions for appointment and removal provided in the First Ordinance 2007 and Act of 2010 are a continuation of a recognized trend, the following table compares the appointment mechanism in five different Pakistani regulatory laws which were enacted before or contemporaneously with the First Ordinance 2007:

Law	Mechanism for Appointment		Mechanism for Removal	
<b>Pakistan Telecommunication Authority Act 1996</b>	Section 3(2)	Members to be appointed by the government	Section 3(5)	Removal on an inquiry by the Federal Public Service Commission on grounds of mental, physical disability or misconduct.
<b>Securities and Exchange Commission of Pakistan Act 1997</b>	Section 5	Commissioners to be appointed by the government	Section 19	Removal on the basis of an enquiry by impartial persons on grounds of mental, physical disability or incapacity or misconduct.
<b>Regulation of Generation, Transmission and Distribution of Electric Power Act 1997</b>	Section 3(1)	Appointment of members to be made by the government upon recommendations of the provincial governments.	Section 4(2)	Removal on an inquiry by the Federal Public Service Commission on grounds of mental, physical disability or misconduct.

local understanding of or interest in the importance of transparent appointment mechanisms for CCP’s autonomy, which may have provided an impetus and a basis for future correction of these implicit patterns.<sup>254</sup>

Indeed in 2013, the government had an opportunity to rectify the appointment mechanism when the Pakistani Supreme Court directed the government to establish an independent commission for selecting persons to be appointed to regulatory bodies.<sup>255</sup> The government first resisted this decision and later challenged it on the grounds that directions of the Supreme Court were tantamount to interference in the government’s constitutional duty to exercise the ‘executive authority’ of the state, and that the statutes under which a number of regulatory bodies had been established did not require appointment through a commission.

In deciding this second challenge, the Supreme Court clarified that its direction in the first case was discretionary rather than a mandatory and allowed the government to proceed with making appointments in accordance with the parent acts of these regulatory bodies ie at the government’s discretion. CCP was included in the list of authorities in which the government was allowed to retain its powers to make appointment as conferred upon it under the Act of 2010.<sup>256</sup>

<b>Pakistan Electronic Media Regulatory Authority Ordinance 2002</b>	Section 3(2)	Members to be appointed by the government	Section 3(5)	Removal on an inquiry by the Federal Public Service Commission on grounds of mental, physical disability or misconduct.
<b>Oil and Gas Regulatory Authority Ordinance 2002</b>	Section 3(8)	Members to be appointed by the government	Section 3(11)	Removal on an inquiry by the Federal Public Service Commission on grounds of mental, physical disability or misconduct.

<sup>254</sup> It is very likely that had Pakistan adopted a mechanism of *socialization* in adopting the First Ordinance 2007, it would have ‘learnt’ from the feedback of stakeholders and institutions. This is evident in the case of India where the appointment and removal procedure proposed the Raghavan Committee though ignored by the Parliament in the Initial Enactment 2002, was re-introduced in the First Amendment 2007 at the behest of the Indian Supreme Court. Such a result may have been possible had there been a parallel recommendation at the deliberation stage in Pakistan.

<sup>255</sup> *Khwaja Muhammad Asif v. The Federation of Pakistan and others* 2013 SCMR 1205.

<sup>256</sup> *Ghulam Rasool v. Government of Pakistan* PLD 2015 SC 6.

3.5.2. Adoption Process and Compatibility and Legitimacy of the Laws

In addition to shaping the content of the competition laws, the transfer mechanisms and institutions engaged by India and Pakistan also had considerable impact on the compatibility of these laws with the contexts of their respective countries as well as their legitimacy in these contexts.

*(a) Compatibility and Legitimacy in India*

India had engaged a wide range of bottom-up, participatory and inclusive institutions drawn from all three branches of the state in adopting its competition law. The nature of the institutions engaged in the adoption process in India suggests that the Indian competition law was likely to be more compatible with the Indian context, whilst the range of these institutions (particularly given that these were drawn from all three branches of the state) indicates that the law would also enjoy greater legitimacy in the country.

Engaging bottom-up, participatory and inclusive institutions, allowed India to aggregate local knowledge and to adapt foreign blueprints to suit India's unique needs. Indeed, this process of adaptation or 'Indian-ization' is evident at each stage of the deliberation, initial enactment and subsequent amendments of the competition law. Therefore, this process enhanced the compatibility of the law with the Indian context. Further, the combined effect of the range and nature of institutions engaged in the adoption process, allowed a significant segment of society to participate in the adoption process and to give their constructive consent to the law. This engagement combined with the legality and authority of the institutions further bolstered the legitimacy of the law.

*(b) Compatibility and Legitimacy of the Pakistani Competition Law*

In a sharp contrast to India, Pakistan transferred the competition law, with a minimum number of exclusive and top down institutions. The exclusive and top-down nature of the institutions engaged in the adoption process prevented Pakistan from aggregating local information and, therefore, adapting international blueprints for local needs. Indeed this is even evident in the language of the Pakistani competition law, which closely mirrors that of the models on which it is based. It is therefore, possible to conclude that the Pakistani competition law

would be less compatible with the Pakistani context than its Indian counterpart would be in India.<sup>257</sup>

It is further likely that the Pakistani competition law would enjoy less legitimacy in Pakistan than the Indian competition law in India. This is due to the fact that for the large part, the institutions engaged in the transfer were limited to only one branch of the state and any interaction with the public who were to be the ultimate users of this law was almost entirely controlled by these institutions. The larger segment of stakeholders, therefore, remained in the dark about why Pakistan needed the law or why having the law may be beneficial for them. The question of consent, whether actual or constructive, simply did not arise. However, the law still had legality and authority in Pakistan because legislating through ordinance was recognised and accepted as a valid law-making process.

The compatibility and legitimacy of the Pakistani competition law is likely to have improved after the enactment of the Act of 2010, which engaged a wider range of bottom-up, participatory and inclusive institutions. However, any improvement is likely to have been slight because not only was the parliament in relative institutional infancy and, therefore, not equipped to aggregate and utilize local knowledge, but also it was constrained by the parameters of the First Ordinance 2007 as well as the considerations and forces that had shaped it.

### **3.6. Concluding Remarks**

India and Pakistan employed distinct mechanisms in adopting their respective competition law. Although it is not possible to fit these mechanisms into a single category identified in the typology of mechanisms, it is possible to identify dominant mechanisms whose impact has been more discernible and significant than that of others: *socialization* in the case of India and *coercion* in the case of Pakistan. Further, whilst India engaged a wide range of bottom-up, participatory

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<sup>257</sup> It may be argued Pakistan's adoption of patterns implicit in the Pakistani context would have enhanced the compatibility of the competition law with the context of the country.

However, such an argument is inherently weak because these implicit patterns do not offer any guarantee of harmonious or productive co-existence between the adopted law and the context of the country and indeed may only succeed in replicating non-productive and out-dated patterns from the context. These in turn reduce compatibility by reducing its ability of the new Law to co-exist harmoniously with the pre-existing legal system.

and inclusive institutions to implement its preferred mechanism, Pakistan relied almost entirely on limited, exclusive and top-down institutions.

These political choices of the countries had significant legal consequences. They shaped the content of the competition laws as well as the extent of their compatibility and legitimacy in the countries. In the case of India, *socialization* ensured that the content of the Law was gradually Indian-ized whilst *coercion* in Pakistan held the law aloof from the Pakistani context. Further, the utilization of wide-ranging, bottom-up, participatory and inclusive institutions in the adoption process in India suggests that the Indian competition law is likely to have greater compatibility and legitimacy than the Pakistani competition law which was adopted through limited, top-down, exclusive institutions. In both countries, the adoption processes laid the foundations for implementation of the laws in the countries.

#### **4. IMPLEMENTING COMPETITION LAWS IN INDIA AND PAKISTAN: AN OVERVIEW**

The mechanisms of *socialization* in India and *coercion* in Pakistan shaped the content of the Indian and Pakistani laws including the provisions setting out the structure, mandate and composition of the NCAs. Further, the interplay of mechanisms and institutions in the two countries also had an impact on the compatibility of these laws with their new contexts and their legitimacy in these contexts. In this Chapter, I analyse the final orders of CCI and CCP ('the orders') in respect of anti-competitive agreements and abuse of dominant position<sup>1</sup> in order to understand the impact of the transfer mechanisms and institutions engaged by India and Pakistan in their respective adoption processes on the subsequent implementation of competition laws in the two countries.<sup>2</sup>

This Chapter is organized as follows: In section 1, I describe the implementation stage of the competition laws and outline reasons for which orders of the CCI and CCP are comparable and appropriate proxies for the individual performance of the competition laws and their interaction with their respective pre-existing legal systems. In section 2, I identify features of orders of CCI and CCP that are relevant for this analysis ('the indicators'). I also indicate reasons for which these features are relevant and what aspects of performance and interaction they indicate. In section 3, I examine and compare the occurrence of each of the indicators in the orders of CCI and CCP. In section 4, I explore the links between these indicators and the transfer mechanisms and institutions and employed by India and Pakistan in the adoption processes. I also correlate the assessments made about the compatibility and legitimacy of the Indian and Pakistani competition laws in chapter 3<sup>3</sup> with their performance and interactions. In the final section, I conclude.

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<sup>1</sup> In this research, I do not include CCI and CCP's orders in respect of mergers because India's merger control regime came into force only in 2011 and at the time of this research there was no sufficient Indian data for a comparative analysis.

Also, I focus only on final orders of the CCI and CCP rather than of the tribunals for the reason that the Pakistani tribunal has been in force only since 2011 and that too intermittently and has not generated sufficient data. However, I address the operation and orders of tribunals in chapter 6.

<sup>2</sup> In case of India, final orders mean orders passed by CCI under sections 26(6) and 27 of the Indian competition law (ie orders that close a case or impose sanctions). In case of Pakistan, final orders mean any orders passed by the CCP under section 30 of the Pakistani competition law.

<sup>3</sup> Chapter 3, Section 3.5.2.

## **4.1. The Implementation Stage and Orders as Proxies for Implementation**

### **4.1.1. The Implementation Stage**

The implementation of competition laws in India and Pakistan comprises the enforcement and interpretation of the competition law by the NCAs and the Supreme Court in exercise of the powers conferred upon them by the Competition Laws (I refer to this as ‘performance’) and the interaction between the NCAs and the courts in their respective countries (I refer to this as ‘interactions’). The combination of performance and interactions determines the extent to and pace at which the competition laws integrate with the pre-existing legal systems of the countries.

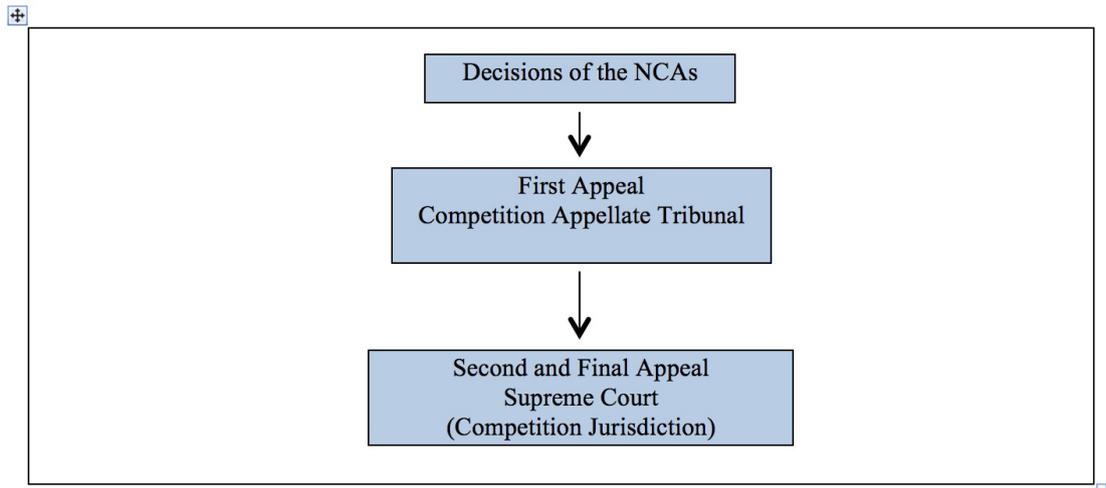
#### *(a) Performance of the Competition Laws*

In both India and Pakistan, the implementation of competition laws begins with the first tier NCAs—CCI and CCP. CCI and CCP are created by the competition laws for interpreting and enforcing the competition law in the first instance. Appeals from decisions of CCI and CCP (as the case may be) lie to the tribunals<sup>4</sup> and from decisions of the Tribunals to the Supreme Courts in the countries, which decide these matters in exercise of the competition appellate jurisdiction conferred upon them by the competition laws. Once the Supreme Court pronounces its decision, the matter attains finality and may no longer be challenged before any court or forum in the country. Through this process, therefore, the specialist competition principles gradually integrate into the pre-existing legal system of their country. The theoretical framework suggests that a law that is more compatible with the context of the country and enjoys greater legitimacy in the country, is more likely to progress with greater facility through the implementation stage and become part of its pre-existing legal system. Interestingly, the greater the facility with which the law progresses through the implementation stage and attains finality in the country’s pre-existing legal system, the more likely is it to become even more compatible with the context of the country and to enjoy greater legitimacy in it.<sup>5</sup>

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<sup>4</sup> Chapter 3, Table 3.3 for references to the relevant sections of the laws.

<sup>5</sup> The compatibility of principles embodied in the competition laws is enhanced as they



**Figure 4.1 Implementation Process Envisaged by Competition Laws in India and Pakistan**

*(b) Interaction with the Courts*

In both India and Pakistan, competition matters do not always proceed along the linear implementation path prescribed in the competition laws. This is largely due to the fact that persons aggrieved by actions or orders of the first tier NCAs have the right to invoke the inherent (and inalienable)<sup>6</sup> original jurisdiction of the courts in their countries by filing constitutional writ petitions. These petitions may be filed to challenge the actions or orders of the NCAs even whilst proceedings are still pending before them.<sup>7</sup>

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interact with the pre-existing legal system. Similarly, their legitimacy is increased by endorsement from the Supreme Court and the ‘consent’ given to this endorsement by the parties to proceedings before the Supreme Court.

<sup>6</sup> In India and Pakistan the high courts have jurisdiction to hear petitions on constitutional grounds, which cannot be ousted by any law in the country. Therefore, this inherent jurisdiction survives even though high courts are excluded from the implementation schemes provided in the Indian and Pakistani competition laws.

<sup>7</sup> In terms of Article 226 of the Indian constitution and Article 199 of the Pakistani constitution, the constitutional jurisdiction of the Indian and Pakistani high courts extends to:

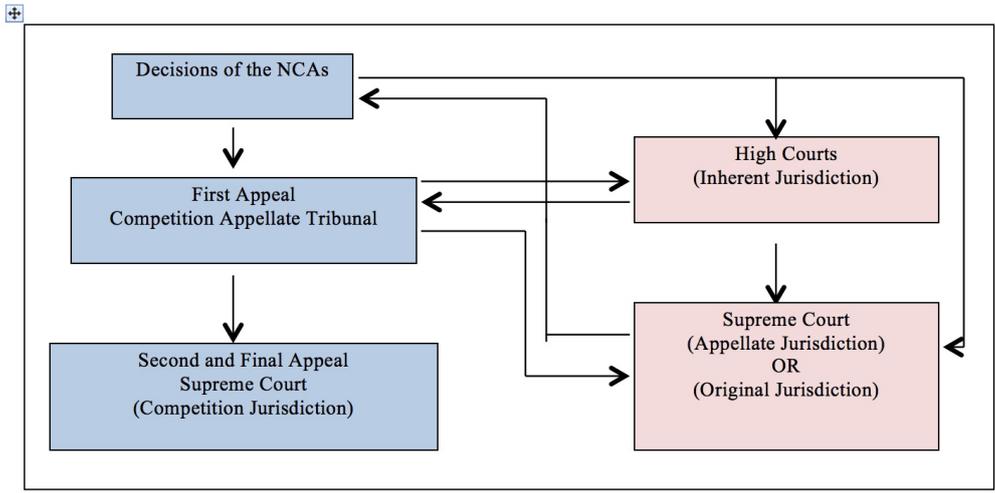
(a) directing a person carrying out a function in connection with the affairs of the state to refrain from doing anything he is not permitted to do or to do anything he is required to do (writ of mandamus and prohibition);

(b) declaring that any given act or proceeding performed by a person in connection with the affairs of the federation, has been done without lawful authority and is without legal effect (writ of certiorari);

(c) directing that a person held in custody within the jurisdiction of the court may be presented in court (writ of habeas corpus); and

(d) requiring a person holding public office to show the authority of law under which he claims to hold that office (writ of quo warranto).

The Indian and Pakistani courts have the power to issue any of these orders in order to enforce fundamental rights guaranteed under their respective constitutions (Articles 226 and 32 of



**Figure 4.2 Interactions between Competition Laws and Pre-existing Legal Systems**

Constitutional petitions filed before the courts whilst competition proceedings are pending before CCI or CCP, may potentially veer the competition laws off their linear implementation paths. However, the impact of these petitions on the progress of competition matters, and therefore, on the development of the competition laws depends, in large part, on the response of the courts. This response may be supportive in that it may clarify due process norms as well as rules of natural justice relevant to the matter. In such a situation, petitions filed before courts, even if they temporarily stall the progress of the competition laws, ultimately facilitate their development and integration with the pre-existing legal system. However, the response of the courts may be obstructive when the courts delay their decisions and/or restrain the NCAs from proceeding. In such a scenario the petitions not only choke the courts but also hinder the development of the competition laws and their ability to integrate with the pre-existing legal system of the countries.

Arguably, the response of the courts is likely to be more supportive if the competition law is compatible with the context of the country and enjoys legitimacy in it. Supportive decisions further enhance the compatibility of the

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the Indian constitution and Articles 199 read and 184(3) of the Pakistani constitution). The courts also have powers or issue interim orders until such time as the matters are finally decided. The Supreme Courts may also hear appeals against any orders passed by the high courts in exercise of their constitutional jurisdictions.

For an overview of the Indian and Pakistani Legal Systems, *see* Annexes D and E.

Laws by increasingly bringing them into conformity with the rules and norms pre-existing in the country and bolster their legitimacy by endorsing the NCAs and thereby, indirectly the competition laws.

#### 4.1.2. Reasons for which Orders of the NCAs are Appropriate Proxies

Orders issued by CCI and CCP, are appropriate proxies for the performance and interactions of the competition laws in India and Pakistan for at least three reasons:

##### *(a) Orders Represent the Competition Laws in Action*

Orders of CCI and CCP are evidence of the first footprints of competition laws as living laws. On the one hand they represent the Indian and Pakistani executive's interpretation of the provisions of the competition laws setting out the structure, mandate and composition of CCI and CCP respectively, whilst on the other, they depict the dynamic and symbiotic interaction of the structure, mandate and composition of CCI and CCP in arriving at their orders. These orders also represent the manner in which CCI and CCP interpret provisions of the competition laws.

##### *(b) Orders are arrived at through Comparable Processes*

Orders of the CCI and the CCP are particularly suited for a comparative analysis of implementation of competition laws in India and Pakistan because they are arrived at through comparable processes.

The Indian and Pakistani competition laws confer upon CCI and CCP respectively, the power to take cognizance of possible anti-competitive agreements and abuse of dominant position cases by (a) taking *suo motu* notice of a suspected violation;<sup>8</sup> (b) acting upon a complaint from a person/undertaking,<sup>9</sup> a consumer or a trade

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<sup>8</sup> Section 19(1), Indian competition law; Section 30, Pakistani competition law read with Regulation 16 of the 'Competition Commission (General Enforcement) Regulations 2007' ('the Pakistani Regulations').

<sup>9</sup> The term 'person' is defined in section 2(l) of the Indian competition law to include (i) an individual; (ii) a Hindu undivided family; (iii) a company; (iv) a firm; (v) an association of persons or body of individuals, whether incorporated or not, in India or outside India; (vi) any corporation established by or under any Central, State or Provincial Act or Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956); (vii) any body corporate by or under the laws of a country outside India; (viii) a co-operative society registered under any law relating to

association;<sup>10</sup> or (c) responding to a government reference.<sup>11</sup> From this point onwards, except for minor distinctions, CCI and CCP's decision-making processes are at entirely at par with each other as described below:

(i) *Decision making at CCI.*<sup>12</sup> Irrespective of the manner in which a matter arrives before CCI, CCI's first responsibility is to form a *prima facie* view as to whether or not there is a case to be investigated.<sup>13</sup> If, after the examining the information before it, CCI decides that there is no *prima facie* case, it closes the matter.<sup>14</sup> If, however, it forms the view that there is a *prima facie* case, it refers the matter to the Director General Investigations (DG) directing him to submit his report within a specified time.<sup>15</sup>

If the DG reports that there has been a contravention of the law, CCI may share the report with the parties and, if necessary, may order further enquiry.<sup>16</sup> If, however, the DG reports that there is no contravention, CCI has the discretion to still share the report with the parties and invite their comments and objections before finally deciding the matter.<sup>17</sup> However, in cases where the matter has been referred to CCI by the government or a statutory body it is mandatory for CCI to

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cooperative societies; (ix) a local authority; (x) every artificial juridical person, not falling within any of the preceding sub-clauses'.

The definition of 'undertaking' in section 2(1)(q) as any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services as well as an association of undertakings, is comparable.

Given the considerable overlap in the two concepts, I hereinafter refer to 'persons' and/or 'undertakings' as 'entities/entity'.

<sup>10</sup> Section 19(1)(a), Indian competition law; Section 30, Pakistani competition law read with Regulation 17, Pakistani Regulations.

<sup>11</sup> Section 19(1)(b), Indian competition law; Section 30, Pakistani competition law read with Regulation 17, Pakistani Regulations. In the Indian competition law, 'government' means either the central or provincial government. Section 19(1)(b) also allows CCI to entertain references initiated by a statutory authority. However, under Pakistani competition law, 'government' means only the federal government. Statutory authorities are included in the definition of 'undertaking' (See n. 9).

<sup>12</sup> For a Flow Chart of CCI's Decision-making Process, see Annexe I.

<sup>13</sup> Section 26(1) Indian competition law.

<sup>14</sup> Section 26(2) Indian competition law.

<sup>15</sup> Section 2(g) Indian competition law.

<sup>16</sup> Sections 26(3) and 26(8) Indian competition law.

<sup>17</sup> Section 26(3) Indian competition law.

share the report with the referring entity and to invite its comments before deciding the matter.<sup>18</sup>

CCI finally decides the matter after hearing comments and objections of parties and after examining the report of a further enquiry, if any.<sup>19</sup> It is not incumbent upon CCI to agree with the DG's conclusions and it may close the matter,<sup>20</sup> issue directions or impose a penalty on the entity found to be in contravention of the law, as it deems fit.<sup>21</sup>

(ii) *CCP's Decision-making Process.*<sup>22</sup> Like CCI, CCP may upon receipt of a complaint, make an initial assessment as to whether or not the facts stated in the complaint constitute a contravention of the competition law.<sup>23</sup> If CCP finds that the complaint is 'false and vexatious', it may close the matter.<sup>24</sup> If, however, it forms the view that there is sufficient evidence of a violation, it may either issue a show cause notice to the entity or initiate further investigation,<sup>25</sup> and then issue a show cause notice.

In the show cause notice, it is incumbent upon CCP to inform the entity of the case against it and to invite it to state its case in writing and to present it before CCP either in person or through an authorized representative. CCP may pass a final order after examining the submissions made by the entity and/or after hearing it in person or through a representative. In the event that the entity chooses not to submit to CCP's jurisdiction, CCP may pass an *ex parte* order.<sup>26</sup>

(c) *Orders as Records of Interactions*

Entities aggrieved by proceedings before CCI or CCP have the option of challenging these by filing petitions before courts in India or Pakistan, as appropriate. Unfortunately, however, these petitions and their orders are not

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<sup>18</sup> Section 26(5) Indian competition law.

<sup>19</sup> Sections 26(6) and 27 Indian competition law.

<sup>20</sup> Section 26(6) Indian competition law.

<sup>21</sup> Section 27 Indian competition law.

<sup>22</sup> For a Flow Chart of CCP's Decision-making Process, see Annexe J.

<sup>23</sup> Regulation 17(2), Pakistani Regulations.

<sup>24</sup> *ibid.*

<sup>25</sup> 17(2) and 22, Pakistani Regulations. The Pakistani competition law does not provide for a Director General investigations and the matter is simply passed on to CCP's investigation wing.

<sup>26</sup> *ibid.*

available on either CCI or CCP's official websites and the courts before which these are filed do not always maintain easily accessible electronic databases. However, in many instances, orders of both CCI and CCP passed in proceedings that had been challenged before the courts record the grounds on which these petitions were brought as well as the response of the courts to these petitions and are, therefore, authoritative and reliable records of the Interactions.

Given that these orders provide evidence only of petitions filed in proceedings that have been finally concluded by CCI and CCP it is entirely possible that petitions filed before the courts, in matters which are not finally concluded have been inadvertently omitted from this discussion. Nevertheless, even with this limited room for error, these orders provide an important insight into the nature and extent of interactions in India and Pakistan.<sup>27</sup>

#### **4.2. Analytical Framework for Examining Orders of CCI and CCP**

For the purposes of this research, I examine orders issued by CCI and CCP from the time they commenced their operations up until December 2016.<sup>28</sup> The indicators on the basis of which I evaluate and compare these final orders relate either to individual orders or to orders as a collective body of CCI or CCP's work. A list of these indicators and their significance for evaluating the performance and interactions of the Indian and Pakistani competition laws is detailed in Table 4.1 below.

**Table 4.1 Indicators & their Significance for Implementation of Competition Laws**

<b>Indicator</b>	<b>Significance</b>
Indicator 1: Total number of orders	<ul style="list-style-type: none"><li>• The total numbers of orders of CCI and CCP relate to the enforcement of competition laws.</li><li>• They indicate the extent to which CCI and CCP have utilized and applied the competition laws in exercise of their mandate.</li></ul>
Indicator 2: Sectors of Enforcement	<ul style="list-style-type: none"><li>• The number and range of sectors in which CCI and CCP pass final orders also relates to the enforcement of competition laws.</li><li>• It indicates the extent to which CCI and CCP have utilized and applied the competition laws in exercise of their mandate.</li><li>• The extent to which CCI and CCP pass orders against the</li></ul>

<sup>27</sup> I discuss these interactions more fully in Chapter 6.

<sup>28</sup> All data regarding final orders of CCI are taken from its official website <http://www.cci.gov.in>. All data for the decisions regarding CCP are taken from its official website <http://www.cc.gov.pk>.

## *Implementing the Laws*

	government or statutory bodies, reflects their independence from the government.
<u>Indicator 3:</u> Number of orders passed in proceedings initiated upon government references.	<ul style="list-style-type: none"> <li>• The number of orders passed in proceedings initiated upon references received by CCI and CCP from the government also relates to the enforcement of the competition laws.</li> <li>• This indicates the extent to which the governments understand and are willing to exercise their rights under the law.</li> </ul>
<u>Indicator 4:</u> Number of orders passed in proceedings initiated upon complaints <sup>29</sup>	<ul style="list-style-type: none"> <li>• The number of orders passed in proceedings initiated upon complaints received by CCI and CCP relates to the enforcement of the competition laws.</li> <li>• It indicates the extent to which the laws are understood, utilized and applied by the general public and therefore the extent of their compatibility with and legitimacy in the context of the country.</li> </ul>
<u>Indicator 5:</u> Number of orders initiated by taking <i>suo motu</i> notice.	<ul style="list-style-type: none"> <li>• The number of orders passed in proceedings initiated by CCI and CCP of their own volition also relates to the enforcement of the competition laws.</li> <li>• Whilst this indicator has a ‘positive’ correlation with the extent to which CCI and CCP are utilizing and applying the laws, it has a ‘negative’ correlation with the extent to which the competition law is understood, applied and utilized by other stakeholders in the country.</li> </ul>
<u>Indicator 6:</u> Number of orders in which direction or penalties are imposed.	<ul style="list-style-type: none"> <li>• The number of orders in which CCI and CCP impose sanctions also relates to the enforcement of the competition laws.</li> <li>• It indicates the extent to which CCI and CCP have utilized and applied the competition laws to exercise their mandate.</li> </ul>
<u>Indicator 7:</u> Number of orders in which case law, legal instruments or authoritative texts, whether foreign, domestic or CCI and CCP own earlier decisions are cited.	<ul style="list-style-type: none"> <li>• The number of orders in which CCI and CCP cite any type of case law (whether or not related to competition) or materials relates to the interpretation of the competition laws.</li> <li>• It is an indicator of the extent to which CCI and CCP identify with their adjudicatory (rather than regulatory) function.</li> <li>• The number of orders in which CCI and CCP cite domestic or foreign or their own decisions indicates their epistemological orientation.<sup>30</sup></li> <li>• Both aspects of this indicator relate to the composition of CCI and CCP and indicate their need for legitimacy.</li> </ul>
<u>Indicator 8:</u> Number of orders passed in full statutory strength.	<ul style="list-style-type: none"> <li>• The number of orders passed by CCI and CCP sitting in its full strength relates to the enforcement as well as interpretation of the competition laws.</li> <li>• It is an indicator of CCI and CCP acting as collegial bodies and pooling their epistemological resources in arriving at their orders.</li> <li>• This relates to the structure and composition of CCI and CCP.</li> </ul>
<u>Indicator 9:</u> Number of orders in respect of which	<ul style="list-style-type: none"> <li>• The number of orders in respect of which dissenting orders have been recorded relates to the enforcement and interpretation of the competition laws.</li> </ul>

<sup>29</sup> Section 19, Indian competition law uses the term ‘information’ to refer to notices of potential violations received from the public, whereas the Pakistani competition law (section 30 read with Regulation 17) uses the term ‘complaints’. From hereon, I refer to both informations and complaints as ‘complaints’.

<sup>30</sup> Where the CCI or the CCP cite different types of case law in a single final order, I count the final order once in each category.

dissenting opinions have been recorded.

- It is an indicator of CCI and CCP acting as collegial bodies in which members of different epistemological orientations have expressed their opinion.

**Indicator 10:**  
Number of orders which record petitions filed before courts

- The number of orders which record petitions filed before courts whilst proceedings before CCI and CCP are still pending, relate to the interaction of the competition laws with the courts.
- The number of petitions recorded, indicate the extent to which aggrieved entities have invoked the jurisdiction of the courts.
- The response of the courts in respect of these petitions indicates the nature of the relationship between the competition laws and the courts.

### 4.3. Examining and Comparing the Indicators

(i) *Indicator 1: Total number of Orders.* The provisions relating to anti-competitive agreements and abuse of dominant position in the Indian competition law (sections 3 and 4 respectively) were only brought into force in 2009.<sup>31</sup> A year-wise breakdown of CCI's orders from 2009 until December 2016 is as follows:

**Table 4.2 CCI's Orders re Anti-competitive Agreements and Abuse of Dominance**

Year	Total number of Orders	Orders in which CCI considered Anti-competitive Agreements	Orders in which CCI considered Abuse of Dominant Position
2009	0	0	0
2010	5	3	3
2011	33	25	25
2012	31	27	13
2013	21	15	10
2014	22	14	11
2015	28	21	12
2016	8	6	2
	<b>148</b>	<b>111<sup>32</sup></b>	<b>76</b>

Unlike CCI, CCP commenced operation very soon after the First Ordinance 2007 came into force.<sup>33</sup> A year-wise breakdown of orders in respect of anti-competitive agreements and abuse of dominant position (sections 4 and 3 of the Pakistani competition law) is as follows:

<sup>31</sup> For dates of notification of different provisions of the Indian competition law see Annexe G.

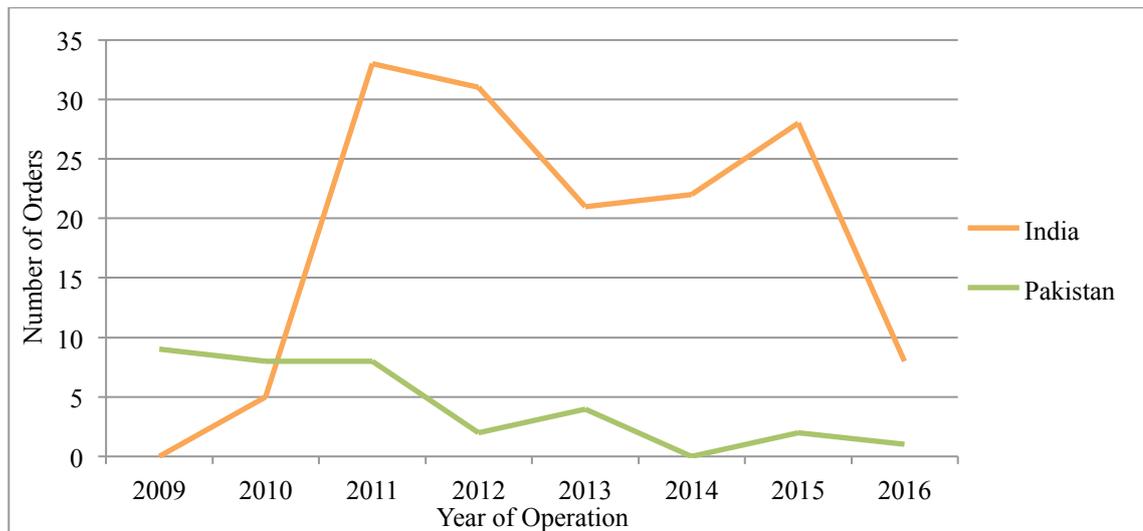
<sup>32</sup> In several of its orders, CCI considered violations of both sections 3 and 4, therefore, the total number of orders in which CCI considered violations of sections 3 and 4 respectively, is greater than the total number of orders passed.

<sup>33</sup> CCP was established and become operational on 12.11.2007. See Annexe A.

**Table 4.3 CCP's Orders re Anti-competitive Agreements and Abuse of Dominance**

Year	Total number of Orders	Orders in which CCP considered Anti-competitive Agreements	Orders in which CCP considered Abuse of Dominant Position
2007	0	0	0
2008	3	2	1
2009	9	7	6
2010	8	4	4
2011	8	6	2
2012	2	2	0
2013	4	2	2
2014	0	0	0
2015	2	2	0
2016	1	1	0
	<b>37</b>	<b>26<sup>34</sup></b>	<b>15</b>

Figure 4.3 compares the total number of Orders of CCI and CCP:



**Figure 4.3 Comparison of Total Number of Orders of CCI and CCP 2007-2016**

It is evident from this figure that after an initial burst of activity, CCP's operations followed an almost consistently downward trend, before coming to a grinding halt in 2014 when CCP passed no orders in respect of anti-competitive agreements or abuse of dominant position. Although CCP started issuing final orders again in 2015, its recovery has been modest.<sup>35</sup> On the other hand, after a slow initial period, CCI demonstrated a dramatic increase in the number of orders passed. Whilst the

<sup>34</sup> The total number of orders in which CCP considered violations of sections 3 and 4 of the Pakistani competition law is greater than the total number of orders passed due to the fact that in several of its orders CCP considered violations of both sections 3 and 4.

<sup>35</sup> These figures are not a comment on the overall performance of CCI or CCP, which is more multi-faceted and includes other enforcement areas as well as advocacy.

total number of orders passed by CCI in each year has been erratic, CCI has not halted its activities at any stage.

(ii) *Indicator 2: Sectors of Enforcement.* CCI issued orders in respect of anti-competitive agreements and abuse of dominant position in a wide range of economic sectors.

**Table 4.4 Sector-wise Distribution of CCI's Orders (2009-2016)<sup>36</sup>**

No.	Sector	Number of cases
1.	Real Estate	12
2.	Financial Sector/Capital Markets	10
3.	Film/TV/Entertainment/Print Media	24
4.	Health/ Pharmaceuticals	20
5.	Automobiles	3
6.	Information Technology/Telecom	5
7.	Petroleum/Gas	5
8.	Railways/Shipping	13
9.	Civil Aviation	9
10.	Power/Electricity	5
11.	Chemicals & Fertilizers	3
12.	Iron & Steel	4
13.	Coal	9
14.	Food and Beverage	4
15.	Services (including Insurance, Chartered Accountants)	2
16.	Education	0
17.	Cement	4
18.	Miscellaneous (Textiles, Heavy Machinery, Paper Products, Glass, Transport)	16
		<b>148</b>

At least 23 of CCI's orders (approximately 15%) were issued in respect of governmental ministries, governmental authorities or statutory corporations. Although these orders are spread across different economic sectors, the majority related to the coal sector.<sup>37</sup>

<sup>36</sup> These sectors are broadly based on the sectors identified in CCI's Annual Report for 2014-2015 for tabulating complaints received. Where necessary, the sectors have been re-named for comparability with sectors identified for CCP.

<sup>37</sup> CCI's orders relating to the government or to statutory bodies include orders dated:

- (1) 12.05.2011, Case 15/2010 (Government of Goa);
- (2) 31.05.2011, Case 45/2005 (North Delhi Power Limited);
- (3) 31.05.2011, Case 19/2008 (North Delhi Power Limited);
- (4) 26.07.2011, Case 04/2010 (Coal India Limited);
- (5) 07.10.2011, Case 3/2010 (Delhi Metro Rail Corporation Limited);
- (6) 11.05.2011, Case 6/2009 (North Delhi Power Limited);
- (7) 20.12.2011, Case 11/2009 (Steel Authority of India);
- (8) 11.01.2012, Case 06/2010 (BEST Undertaking Mumbai);
- (9) 14.08.2010, Case 64/2010, 12/2011, 2/2011 (Ministry of Railways);
- (10) 08.02.2013, Case 61/2010 (Board of Control of Cricket in India);

CCP's orders were similarly distributed across different economic sectors.

**Table 4.5 Sector-wise distribution of Orders of CCP (2007-2016)**

No.	Sector	Number of cases
1.	Real Estate	1
2.	Financial Sector/Capital Markets	4
3.	Film/TV/Entertainment/Print Media	2
4.	Health/ Pharmaceuticals	1
5.	Automobiles	2
6.	Information Technology/Telecom	2
7.	Petroleum/Gas	1
8.	Railways/Shipping	4
9.	Civil Aviation	3
10.	Power/Electricity	1
11.	Chemicals & Fertilizers	2
12.	Iron & Steel	1
13.	Coal	0
14.	Food and Beverage	5
15.	Services (including Insurance, Chartered Accountants)	4
16.	Education	1
17.	Cement	1
18.	Miscellaneous (Textiles, Heavy Machinery etc.)	3
		<b>38<sup>38</sup></b>

At least six of CCP's orders (or approximately 15%) were issued in respect of statutory or semi-governmental bodies.<sup>39</sup>

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- (11) 31.05.2013 Case 73/2011 (Hockey India);
  - (12) 09.12.2013 Cases 3/2012, 11/2012 & 59/2012 (Subsidiaries of Coal India Limited);
  - (13) 03.04.2012, Case 74/2012 (Ministry of Commerce and Industry);
  - (14) 15.04.2014, Case 05/2013 & 07/2013 (Subsidiaries of Coal India Limited);
  - (15) 15.04.2014, Case 37/2013 (Coal India Limited);
  - (16) 15.04.2013, Case 44/2013 (Coal India Limited);
  - (17) 27.10.2014, Case 59/2013 (Coal India Limited);
  - (18) 27.10.2014, Case 88/2013 (Subsidiaries of Coal India Limited);
  - (19) 12.05.2015, Case 42/2013 (State of Kerala & Others);
  - (20) 04.06.2015, Case 26/2015 (Ministry of Health);
  - (21) 16.02.2015, Case 8/2014 (Coal India Limited);
  - (22) 10.08.2015, Cases 100/2013 etc. (Ministry of Railways); and
  - (23) 05.05.2016, Case 33/2014 (REC Power Distribution Company Limited).

<sup>38</sup> The total number of Orders exceeds the total number of orders listed in Indicator 1 above as one Real Estate Order is cross-listed under Telecom.

<sup>39</sup> CCP's orders relating to governmental authorities or to statutory bodies, include orders dated:

- (1) 12.02.2010 Trading Corporation of Pakistan Case;
- (2) 20.11.2009 Pakistan International Airlines Case;
- (3) 08.12.2009 Pakistan International Airlines Case;
- (4) 04.12.2008 Institute of Chartered Accountants of Pakistan Case;
- (5) 10.01.2013 Institute of Chartered Accountants of Pakistan Case; and
- (6) 29.06.2011 Engro Vopak Pakistan Limited Case (Port Qasim Authority).

Regardless of the disparity between the total number of orders passed by CCI and CCP in the years that they have been in operation, the range of sectors in which they have made inroads is comparable, with both CCI and CCP passing orders in at least 18 different sectors in their respective countries. Figure 4.4 compares the sector-wise distribution of CCI and CCP's orders:

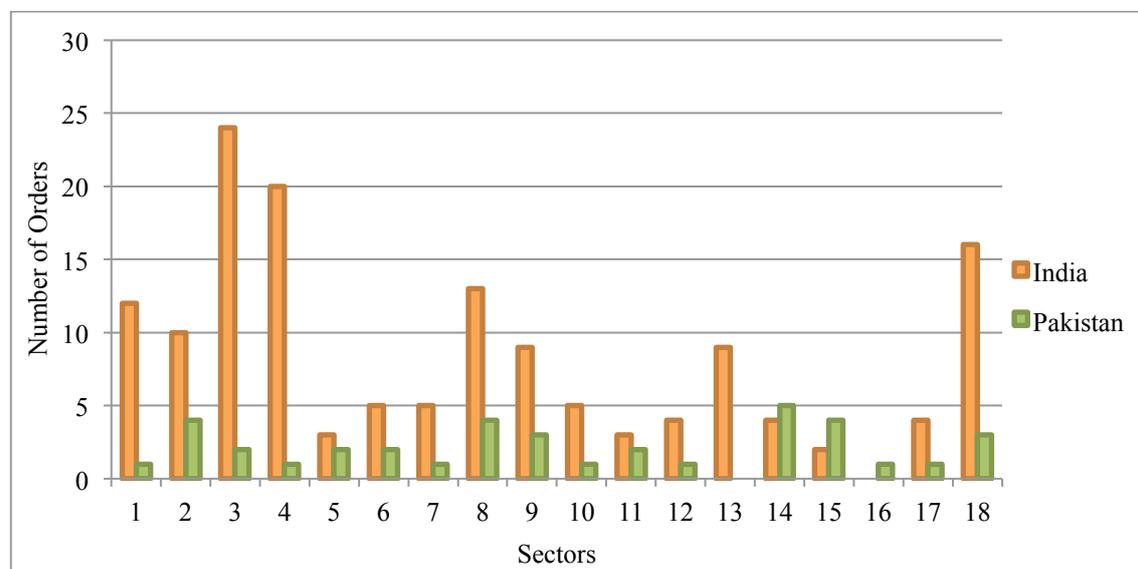


Figure 4.4 Sector-wise Distribution of Orders of CCI and CCP

This figure further suggests that whilst the orders of CCI are concentrated in the Film/TV/Entertainment/Print media sector those of CCP are distributed more evenly throughout the sectors.

(iii) Indicators 3, 4, 5: Government References, Complaints & Suo Motu Notices.

Table 4.6 provides a year-wise distribution of CCI's orders according to source.

Table 4.6 Year-wise Breakdown of CCI's Orders by Source

Year	Total Orders	Transferred Cases <sup>40</sup>	Suo Motu Notices	Complaints	Government References
2009	0	0	0	0	0
2010	5	2	0	3	0
2011	33	9	1	24	0
2012	31	4	3	21	2
2013	21	1	0	17	3
2014	22	1	4	14	3
2015	26	0	2	23	2
2016	8	1	0	7	0
	<b>148</b>	<b>18</b>	<b>10</b>	<b>109</b>	<b>10</b>
	100%	12.16%	6.75%	73.64%	6.75%

<sup>40</sup> These are cases referred to CCI from its predecessor Anti-monopoly Authority.

Table 4.7 categorises CCP’s orders by source in the same manner as CCI’s orders, with the caveat that it does not include cases transferred to CCP by its predecessor anti-monopoly authority, because although CCP has decided at least three such cases, these do not strictly qualify as orders in respect of anti-competitive agreements or abuse of dominant position.<sup>41</sup> Further, at times CCP initiated cases on the basis of informal complaints (ie complaints which had not been filed in accordance with the procedure provided in the law). For the purposes of this table, I only include those orders in orders that have been issued in proceedings initiated on the basis of formal complaints and count them under the head of ‘complaints’.

**Table 4.7 Year-wise Breakdown of CCP’s Orders by Source**

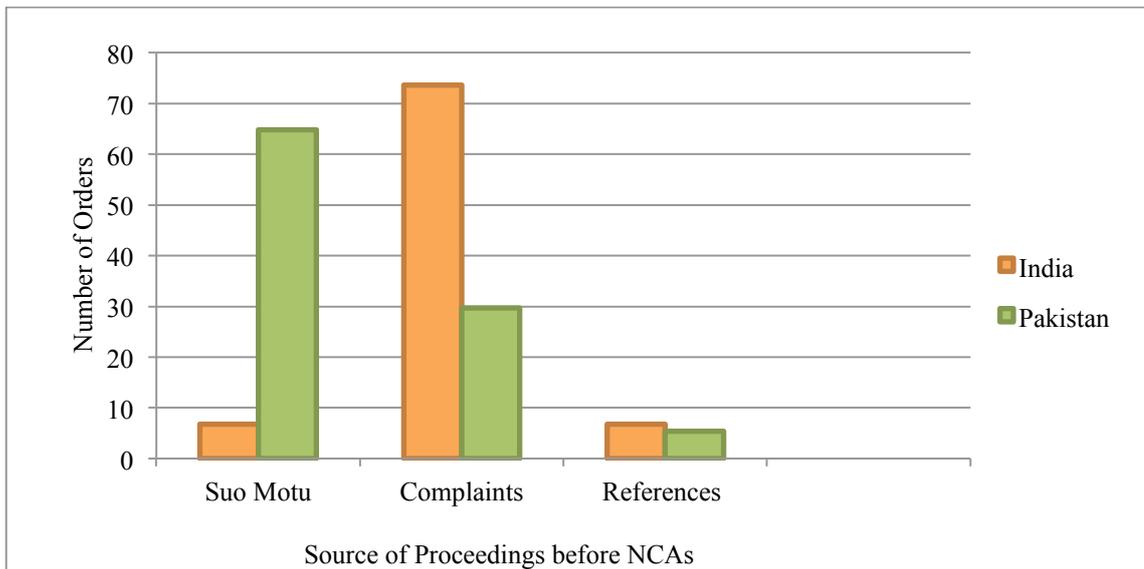
Year	Total Orders	Suo Motu Notices	Complaints	Government References
2007	0	0	0	0
2008	3	3	0	0
2009	9	5	4	0
2010	8	5	2	1
2011	8	5	3	0
2012	2	1	1	0
2013	4	3	0	1
2014	0	0	0	0
2015	2	1	1	0
2016	1	1	0	0
	<b>37</b>	<b>24</b>	<b>11</b>	<b>2</b>
	100%	64.8%	29.7%	5.4%

A comparison of orders of CCI and CCP that have been issued in matters initiated on the basis of complaints, references or on a *suo motu* basis (expressed as percentages of the total number of orders passed by the CCI or CCP as the case may be) indicates that whilst CCI has passed orders primarily in response to complaints filed before it, CCP’s orders are concentrated in cases initiated on a *suo motu* basis.<sup>42</sup> However, both CCI and CCP have issued approximately the same number of orders in respect of matters initiated on the basis of government references. This comparison is depicted in Figure 4.5.

<sup>41</sup> CCP’s orders in matters transferred to it from the Anti-monopoly Authority are:

- (1) Fauji Fertilizer decided 29.04.2008;
- (2) Dewan Salman Fibre Limited & others decided 10.06.2008, and
- (3) Pakistan Mobile Communications Limited decided 25.07.2008.

<sup>42</sup> These complaints are those that were not dismissed at the level of *prima facie* assessment.



**Figure 4.5 Year-wise Comparison of CCI and CCP Orders by Source**

The relatively higher *suo motu* notices in Pakistan may be explained by arguing that it was necessary for a young NCA to take *suo motu* notices in order to make its mark in an unwelcoming landscape, whereas CCP’s relatively lower number of complaints may be attributed to people not understanding and accepting the law because the law was not widely deliberated at the time of adoption and because the courts had failed to pass orders in petitions filed before them.<sup>43</sup> The lower level of *suo motu* notices in India may be attributed to CCI’s reluctance to interfere with the economy in any way that may be considered aggressive. The higher number of complaints may be attributed to more people understanding the law and being willing to utilise it as the law became clearer over time even in light of the decisions of the courts.

This is borne out by Figure 4.6 and Figure 4.7 which compare CCP’s and CCI’s orders in matters initiated by *suo motu* notices with those passed in matters initiated on the basis of complaints.

<sup>43</sup> See (viii) below.

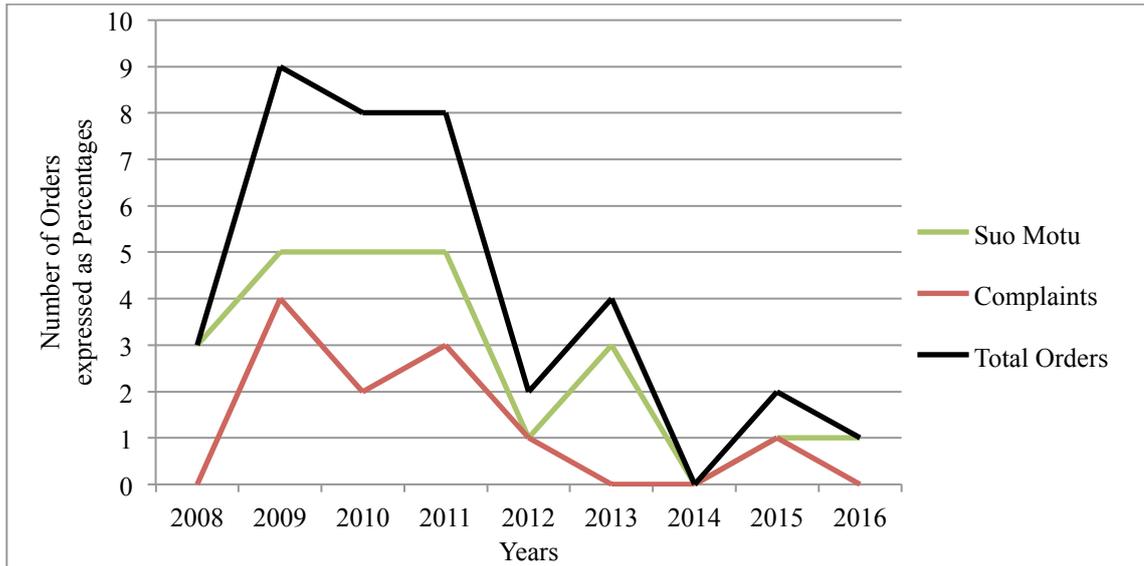


Figure 4.6 Year-wise Comparison of Sua Motu Notices versus Complaints decided by CCP

It is evident from the preceding that CCP’s orders in matters initiated by *suo motu* notices is consistently higher than in matters initiated by complaints. However, CCP’s *suo motu* notices have declined in recent years due to lack of resources because the government has not released funds and absence of quorum because the government has delayed the appointment of members.<sup>44</sup>

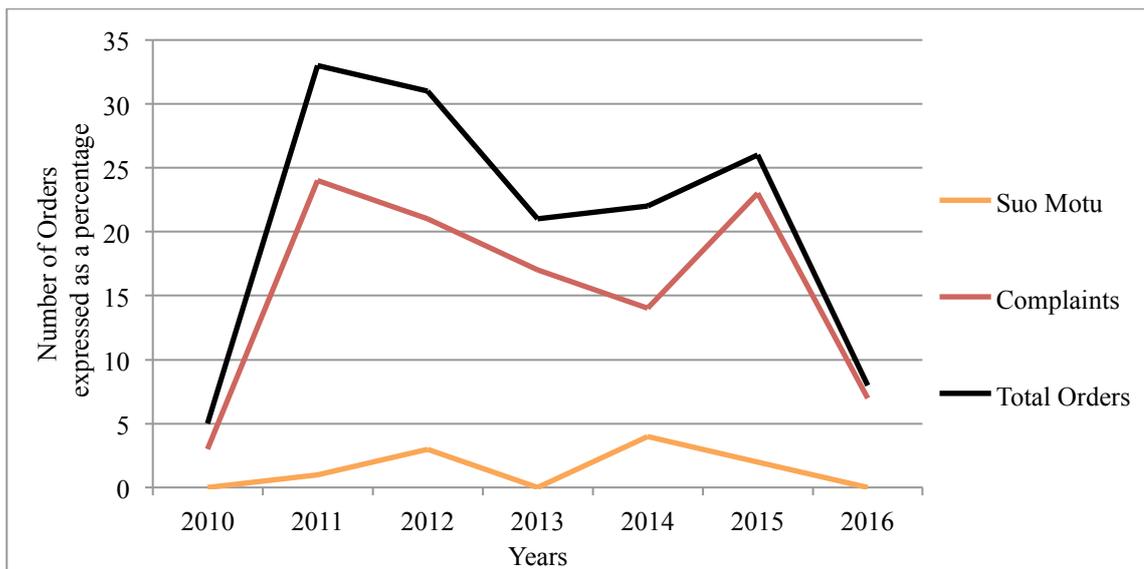


Figure 4.7 Year-wise Comparison of Sua Motu Notices versus Complaints decided by CCI

<sup>44</sup> I discuss these issues more fully in Chapter 6.

These underlying factors are also evident in the case of CCI, which has consistently passed more orders in matters initiated on the basis of complaints than on the basis of *suo motu* notices. Whilst fewer *suo motu* notices appear to be a matter of CCI strategy, the relatively higher number of complaints may be attributed to the greater understanding of the law in India and the supportive response of the courts to challenges filed before them which have indirectly improved CCI's effectiveness also.<sup>45</sup>

(iv) *Indicator 6: Penalties and Directions.* CCI has the power under law to either impose a penalty on an entity found in contravention of the law, or issue it such directions as it may deem fit, or to prescribe a combination of penalties and directions. Table 4.8 demonstrates the manner in which CCI has exercised these powers:

**Table 4.8 Orders in which CCI imposed Penalties and/or Directions**

Year	Total number of Orders	Penalties	Directions	Penalties + Directions
2010	5	0	0	0
2011	33	5	5	4
2012	31	12	12	10
2013	21	7	10	6
2014	22	13	12	9
2015	28	15	11	9
2016	8	3	1	1
	<b>148</b>	<b>55</b>	<b>51</b>	<b>39</b>
	100%	37.1%	34.4%	26.3%

In exercise of these powers CCI in approximately 75% of orders in which CCI imposed penalties, it also gave directions to the violating entities. These directions ranged from general cease and desist directions to case-specific behavioural and remedial orders. In nearly all cases CCI calculated penalties as percentages of turnover or income.<sup>46</sup>

CCP also has the power to impose penalties on entities found to be in contravention of the law and to issue them directions. The manner in which CCP has exercised these powers is detailed in Table 4.9.

<sup>45</sup> See (viii) below.

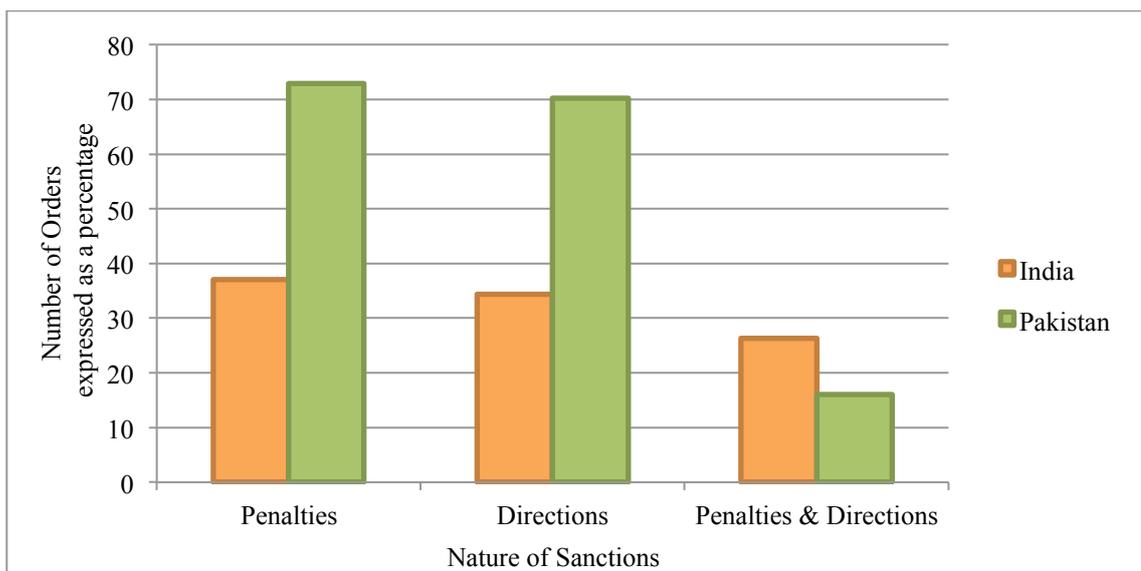
<sup>46</sup> *ibid.* I discuss the quantum of penalties in chapter 6.

**Table 4.9 Orders in which CCP imposed Penalties and/or Directions**

Year	Total number of Final Orders	Penalties imposed	Directions issued	Penalties + Directions
2008	3	1	3	1
2009	9	4	5	2
2010	8	4	6	4
2011	8	6	5	3
2012	2	2	2	2
2013	4	3	3	2
2014	0	0	0	0
2015	2	2	1	1
2016	1	1	1	1
	<b>37</b>	<b>27</b>	<b>26</b>	<b>16</b>
	100%	72.9%	70.2%	43.24%

CCP combined penalties and directions in approximately 61% of its orders. In a majority of orders, CCP imposed lump sum penalties.<sup>47</sup> In at least six cases CCP ‘accepted’ specific or general ‘undertakings’ from entities to refrain from the offending behaviour in the future. I have included these undertakings under ‘directions’ on the assumption that the content of the undertakings is likely to have been suggested by if not decided in consultation with CCP. CCP’s directions also included general cease and desist as well as case-specific remedial directions.

Figure 4.8 compares the different types of sanctions imposed by CCI and CCP.



**Figure 4.8 Comparison of Orders of the CCI and CCP by Nature of Sanctions Imposed**

<sup>47</sup> *ibid.* Under section 38, Pakistani competition law (*see* Annexe J) CCP had the option to impose lump sum or pro-rated penalties whilst in terms of section 27 (*see* Annexe I) CCI only had the power to impose proportional penalties.

Whilst CCP has imposed sanctions in a greater percentage of its orders than CCI, the number of cases in which CCP has imposed both penalties and directions simultaneously is fewer than those in which CCI has imposed both sanctions. Figure 4.9 and Figure 4.10 compare types sanctions imposed by CCI & CCP.

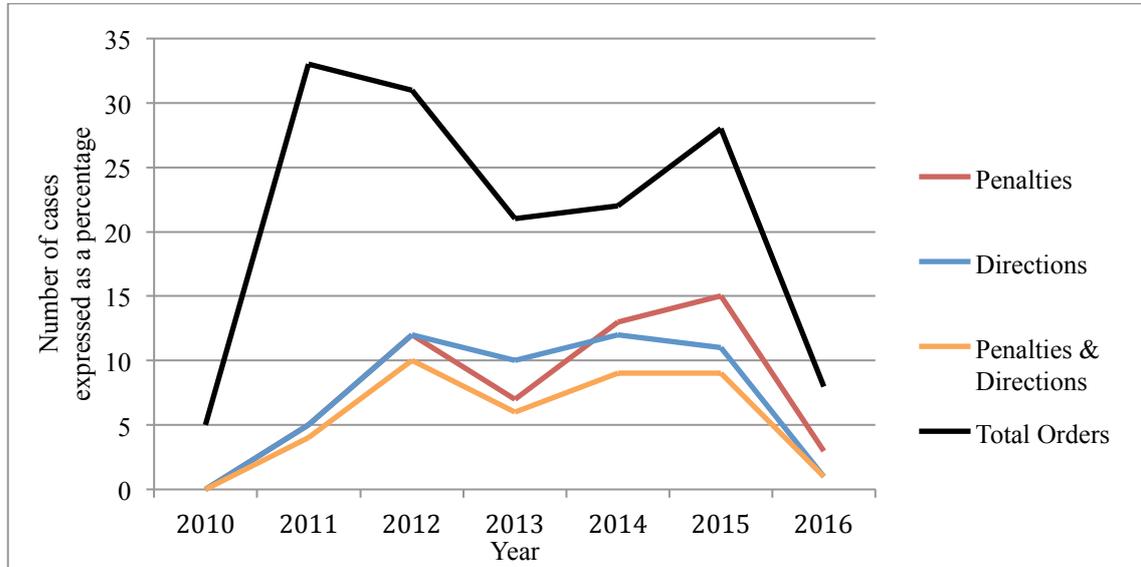


Figure 4.9 Year-wise Trend of Sanctions imposed by CCI

Figure 4.9 suggests that the number of orders in which CCI imposed penalties and directions is correlated with the total orders passed and has remained consistent over the years. The preference for penalties rather than directions reflects CCI’s growing confidence over time.

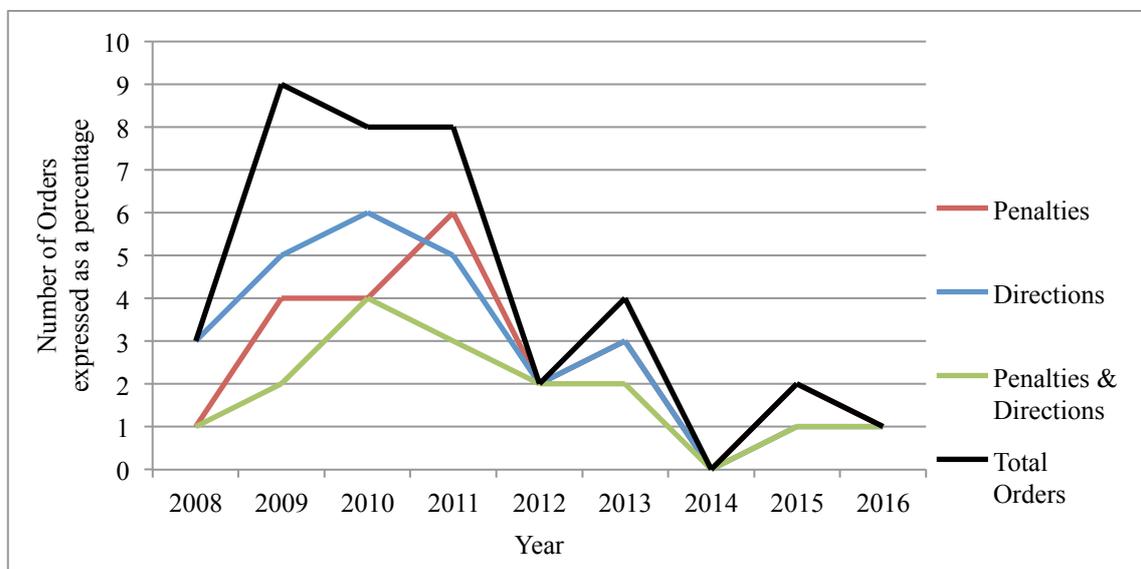


Figure 4.10 Year-wise Trend of Sanctions Imposed by CCP

Figure 4.10 suggests that with the exception of 2012 in which the number of orders in which CCP imposed penalties exceeded the number of orders in which it issued directions, the number of orders in which CCP has issued directions exceeds those in which it imposed penalties. It appears, however, that over time, CCP's preferred strategy has been to impose both penalties and directions simultaneously. This suggests that over time, CCP has abandoned its aggressive penal strategy for a strategy that may be more palatable in the context in which it was operating.

(v) *Indicator 7: Reliance on Case Law & Materials.* In arriving at its orders, CCI relied on the analytical skills of its members, drew support from orders of the Indian courts, orders and materials of competition authorities throughout the world and its own earlier orders. CCI's reliance on these sources is detailed in *Table 4.10*.<sup>48</sup>

**Table 4.10 Reliance on Case Law and Materials in CCI's Orders**

Year	Total Orders	Case Law or Materials considered	Domestic	Foreign	CCI's Own
2010	5	1	1	1	0
2011	33	5	3	2	2
2012	31	4	3	3	1
2013	21	13	4	3	9
2014	22	11	4	3	7
2015	28	8	2	0	7
2016	8	3	2	2	2
	<b>148</b>	<b>45</b>	<b>19</b>	<b>14</b>	<b>28</b>
	100%	30.41%	12.83%	9.46%	18.91%

In the domestic category, CCI has relied upon orders of the Indian Supreme Court as well as high courts,<sup>49</sup> whilst in the foreign category it has relied on EU (including CJEU) and US decisions and materials, as well as those of OECD, Brazil, UK, Canada, Greece, Australia and South Africa.<sup>50</sup>

<sup>48</sup> Case law and materials counted for the purposes of this section are those relied upon by CCI in its own deliberations and does not include case law and materials cited by entities appearing before CCI or by the DG in his Investigation Report.

<sup>49</sup> CCI cited decisions of the Indian Supreme Court in approximately 11 orders and of the high courts in approximately 10 orders.

<sup>50</sup> CCI referred to EU and CJEU decisions and EU materials in approximately 16 orders; to US cases and materials in approximately nine orders; to OECD Guidelines in at least three orders; to Brazilian authorities in three orders; to Canadian and British authorities in at least two orders each, and to Greek, Australian and South African authorities in one order each.

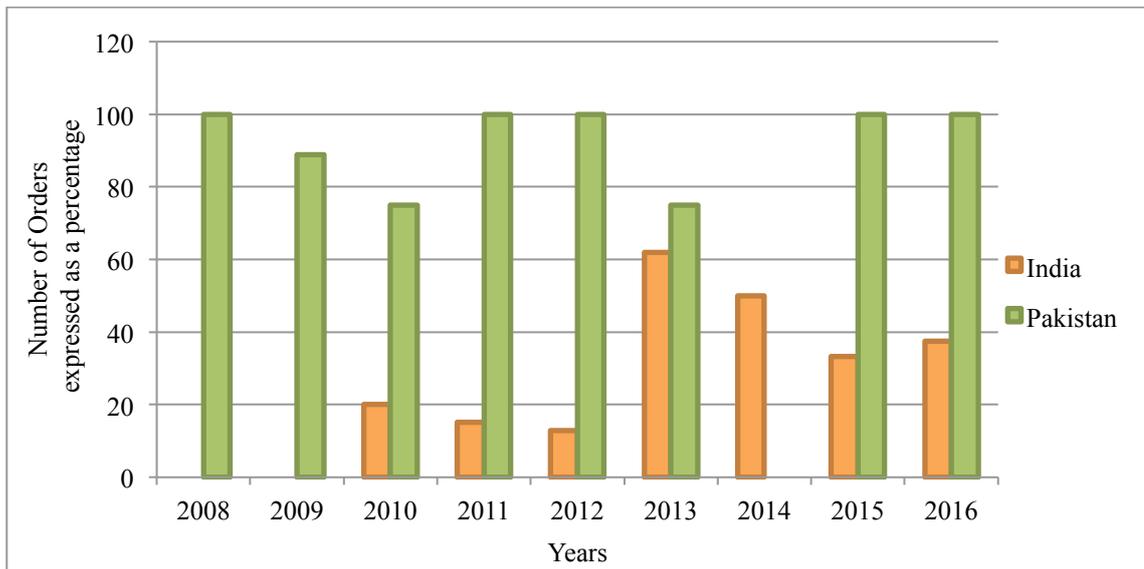
CCP's pattern of relying upon resources in arriving at its orders has been markedly different from the CCI, as is evident from Table 4.11.

**Table 4.11 Reliance on Case Law and Materials in CCP's Orders**

Year	Total Orders	Case Law or Materials considered	Domestic	Foreign	CCP's own
2008	3	3	1	3	1
2009	9	8	4	8	5
2010	8	6	3	6	3
2011	8	8	2	6	8
2012	2	2	1	2	1
2013	4	3	2	3	3
2014	0	0	0	0	0
2015	2	2	0	2	2
2016	1	1	0	1	1
	<b>37</b>	<b>33</b>	<b>13</b>	<b>31</b>	<b>24</b>
	100%	89%	35%	83.7%	64.8%

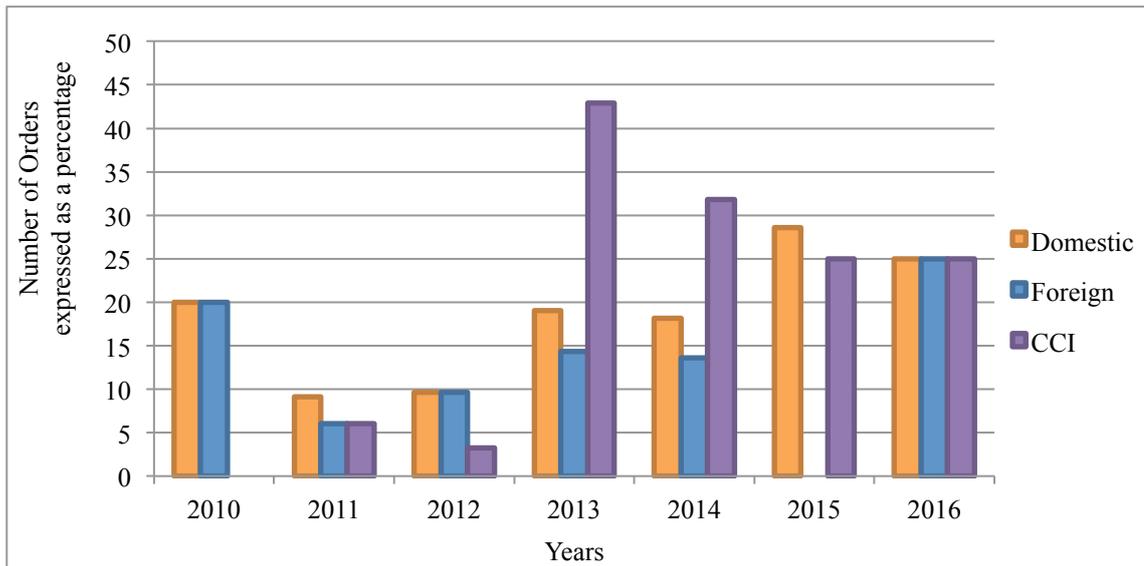
CCP has cited foreign case law and materials in approximately 83.7% of its orders. In addition to EU and US case law and materials, which CCP has cited in nearly every order in which it has relied upon foreign case law and materials, it has also referred to decisions and materials of the OECD, UK, Singapore, Nordic countries, South Africa, Italy, Albania, Brazil, Hungary, Korea and Turkey. Interestingly, whilst CCP has made no reference whatsoever to any of CCI's orders, it has relied upon decisions of the Indian courts in a number of orders.

A comparison of CCI and CCP's overall reliance on case law is shown in Figure 4.11 and suggests that CCP has relied more heavily on case law than CCI. However, it also shows that CCI's reliance on case law has increased in recent years.



**Figure 4.11 Comparing Reliance on Case Law and Materials in CCI and CCP's Orders**

In order to understand the extent to which CCI and CCP have relied on foreign case law as compared to domestic case law or their own orders, Figure 4.12 and Figure 4.13 provide a breakdown of case law and materials relied upon by CCI and CCP respectively, by source.



**Figure 4.12 CCI's Reliance on Case Law and Materials Refined by Source**

This figure suggests that from 2013 onwards, CCI has increasingly relied upon its own orders rather than on domestic or foreign resources. Further, with the exception of 2015, in which it did not cite any foreign case law in its orders, CCI's reliance on domestic and foreign case law has remained consistent. However, the

data for CCP suggests that CCP’s reliance on foreign case law far exceeds its reliance on domestic case law at all times to the extent that in its orders in 2015 and 2016 CCP did not cite any domestic case law at all. CCP’s increasing reliance on its own orders is also evident.

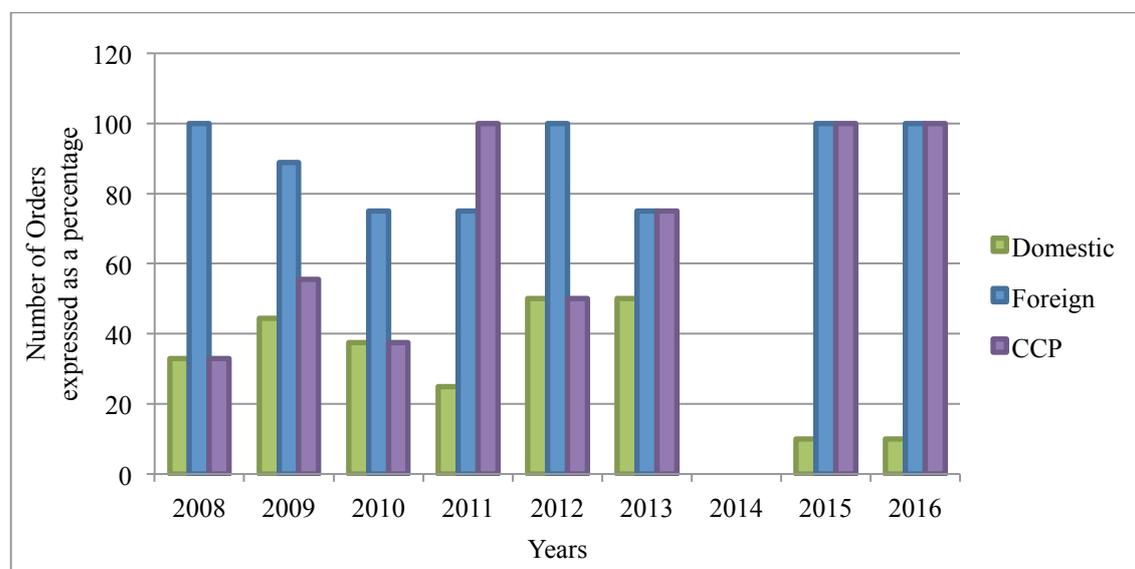


Figure 4.13 CCP’s Reliance on Case Law and Materials Refined by Source

(vi) *Indicator 8: Strength of CCI and CCP.* Under Law, CCI comprises a Chairperson and a maximum of six or a minimum of two members. Since becoming operational in 2009, CCI has, at all times, operated at its maximum strength of chairperson plus six members except for 2014, when it operated with chairperson plus five members.<sup>51</sup> Table 4.12 organizes CCI’s orders according to its strength of at the time of issuing these orders.

Table 4.12 Year-wise breakdown of Orders of CCI according to strength

Year	Total Strength	Total Orders	Orders at full strength	Orders at partial strength	Orders by Single Member	Strength not known
2010	7	5	2	2	0	1
2011	7	33	11	16	0	6
2012	7	31	22	9	0	0
2013	7/6	21	7	12*	0	0
2014	6/7	22	0	22*	0	0
2015	7	28	1	27	0	0
2016	7	8	0	8	0	0
		<b>148</b>	<b>43</b>	<b>96*</b>	<b>0</b>	<b>7</b>
		100%	29.0%	64.8%	0%	4.72%

<sup>51</sup> For CCI’s strength year-wise and membership since its inception, see Annexe K.

The above table indicates that CCI has passed the majority of its orders with at least five or six present. A small fraction of its orders (4.72%) as published on its website, do not indicate the number of members signing the order. I have placed these under ‘Strength not Known’.

Under law, CCP may comprise a minimum of five or a maximum of seven members including the chairperson. However, since commencing its operations in 2007, CCP has had four, five and six members from time to time, and has not at any time operated at its legal full strength.<sup>52</sup> The participation of CCP members in passing orders is presented in

Table 4.13.

**Table 4.13 Year-wise breakdown of CCP Orders according to strength**

Year	Total Strength	Total Orders	Orders at full strength	Orders at partial strength	Orders by Single Member	Strength not known
2008	5	3	0	0	0	0
2009	5	9	0	4	5	0
2010	4	8	0	6	2	0
2011	6	8	0	8	0	0
2012	6	2	0	2	0	0
2013	?	4	0	4	0	0
2014	?	0	0	0	0	0
2015	4	2	0	2	0	0
2016	4	1	0	1	0	0
		<b>37</b>	<b>0</b>	<b>27</b>	<b>7</b>	<b>0</b>
		100%	0%	72.9%	18.9%	0%

CCI and CCP have the discretion to determine the number of members that may be assigned to hear a particular matter depending upon their respective strength at any given time. Even allowing for fluctuations in the total number of members, Figure 4.14 suggests that CCI and CCP have exercised this discretion very differently.

<sup>52</sup> For CCP’s strength year-wise and membership since its inception, *see* Annexe K.

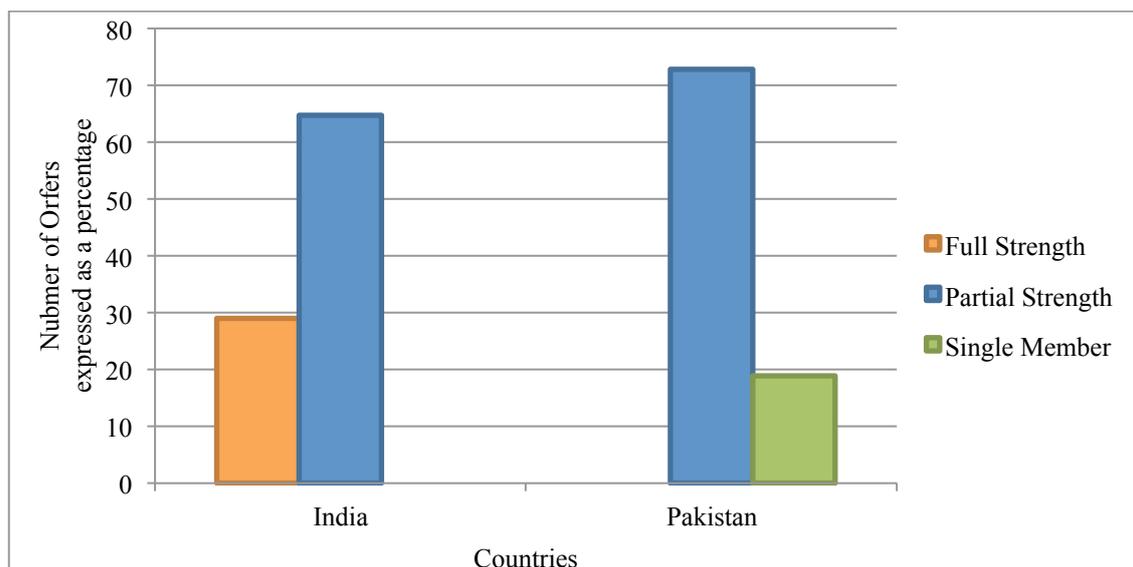


Figure 4.14 Comparing the Strength of CCI and CCP in passing Orders

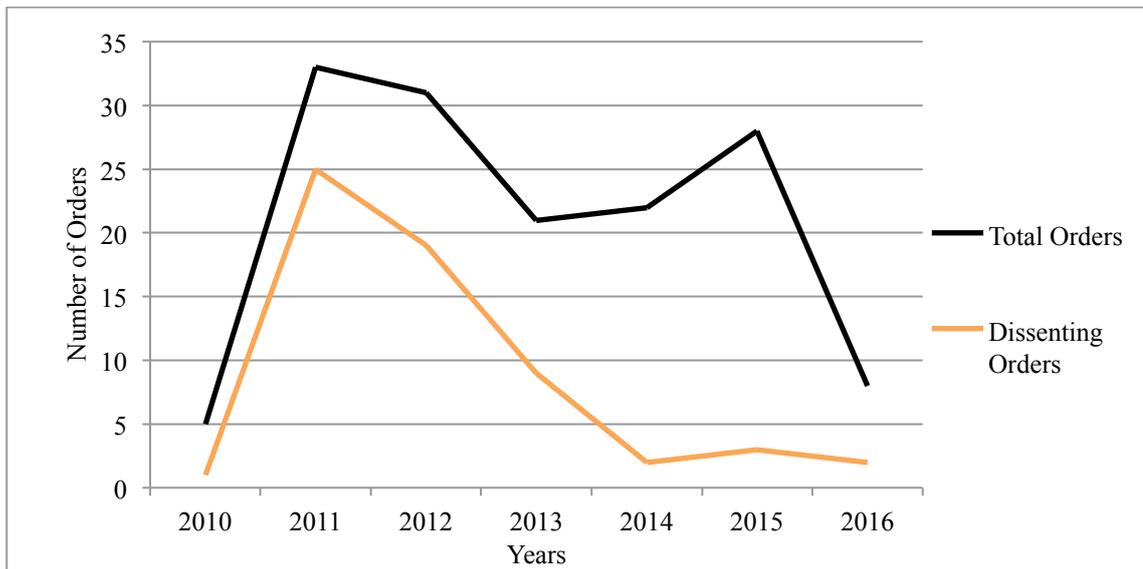
The most striking feature of this data is its polarity. Whilst CCI has passed no orders whatsoever with only a single member in attendance, CCP has not passed any order at its full strength.

(vii) *Indicator 9: Dissenting Orders.* The Indian and Pakistani competition laws neither expressly allow nor prohibit dissent at CCI or CCP. However, whilst CCI appears to have established a tradition of dissenting orders or separate notes (I count these under the same head), CCP has eschewed dissent altogether.

Table 4.14 Number of CCI's Orders in respect of which Dissent is Recorded

Year	Total Orders	Dissenting Orders s.26(6)	Dissenting Orders s.27	Total Dissenting Orders
2010	5	1	0	1
2011	33	20	5	25
2012	31	10	9	19
2013	21	4	5	9
2014	22	0	2	2
2015	28	3	0	3
2016	8	2	0	2
	<b>148</b>	<b>40</b>	<b>21</b>	<b>61</b>
	100%			41.2%

The robustness of the dissenting tradition at CCI is further evident from the fact that in at least 22 cases in which CCI recorded dissenting orders, it recorded two and sometimes recorded three such orders.



**Figure 4.15 Year-wise trend of CCI's Dissenting Orders**

The above figure suggests that whilst CCI continues with the tradition of dissenting orders, the total number of orders in which dissent is recorded has steadily declined over the years. A possible explanation for this decline may be that the jurisprudence in certain areas has become more settled and, therefore, there is less need for CCI to record dissent. It is equally plausible, however, that CCI has become more efficient in achieving consensus amongst its members, or, more ominously that it has become more complacent in its efforts to develop competition jurisprudence in the country.<sup>53</sup>

(ix) *Indicator 10: Interaction with the Courts.* Proceedings initiated by CCI or CCP, or interim orders passed by them in the course of these proceedings, may be challenged before Indian or Pakistani courts on constitutional grounds. The courts have the option to either decide these matters or to issue interim injunctions restraining CCI or CCP, as the case may be from continuing the proceedings.

Details of the number of challenges filed against proceedings pending before CCI or CCP, or interim orders by them, and the decisions of the courts in respect of these challenges are provided in Table 4.15 and Table 4.16 below.

<sup>53</sup> Dr. Gauri and Mr. Kumar suggested that a large number of dissenting orders were issued by Member Prasad for personal reasons. However, both agreed that CCI had welcomed and appreciated dissent.

**Table 4.15 CCI Proceedings challenged before Courts and Response thereto**

Year	Total Number of Orders	Number of Proceedings Challenged	Total Number of Challenges <sup>54</sup>	Total Number of decisions of Courts	Number of interim orders of Courts	Number of final orders of Courts
2009	0	1	1	0	0	0
2010	5	5	5	6	0	6
2011	33	3	3	2	0	2
2012	31	2	2	3	1**	2
2013	21	4	5	4	1**	3
2014	22	2	3	3	1	2
2015	28	0	0	3	0	3
2016	8	0	0	0	0	0
	<b>148</b>	<b>17</b>	<b>19*</b>	<b>21</b>	<b>3</b>	<b>18</b>
	100%	11.48%		100%	14.3%	85.7%

\*In two proceedings pending before CCI, the order of the courts in petitions filed before them was challenged in appeal before the same courts.

\*\*These interim orders were replaced by final orders of the courts during the course of the proceedings before CCI.

The data in Table 4.15 suggests that only 11.48% proceedings pending before CCI were challenged before the courts. More importantly, however, the data suggests that the courts issued orders restraining CCI in only three challenges of which two restraining orders were vacated even whilst the proceedings were still pending before CCI. The courts disposed of more than 85% of all challenges filed before them against proceedings pending before CCI even whilst the proceedings were pending before CCI.

**Table 4.16 CCP Proceedings challenged before Courts and Response thereto**

Year	Total Number of Orders	Number of Matters Challenged	Number of Challenges	Total Number of decisions of Courts	Number of interim orders of Courts	Number of final orders of Courts
2008	3	2	3*	6	4	2
2009	9	3	5	7	5	2
2010	8	0	0	0	0	0
2011	8	0	0	0	0	0
2012	2	0	0	0	0	0
2013	4	1	1	1	0	1
2014	0	0	0	0	0	0
2015	2	0	0	0	0	0
2016	1	0	0	0	0	0
	<b>37</b>	<b>6</b>	<b>9</b>	<b>14</b>	<b>9</b>	<b>5</b>
	100%	16.2%		100%	64.3%	35.7%

\*There were 20 parties to the Cement Manufacturers Case pending before CCP. Each of these filed separate petitions before the courts. However, the Courts disposed of these petitions by a single order. Therefore, for the purposes of this table, I treat these as one petition.

<sup>54</sup> Where there was more than one challenge in respect of any given matter pending before CCI, I count each challenge.

Whilst only 16.2% proceedings pending before CCP were challenged before the courts, certain proceedings gave rise to multiple challenges. However, Pakistani courts issued restraining orders in nearly 65% of all challenges filed before them and followed these up with final decisions only in approximately 35% of the challenges. Figure 4.16 compares the challenges before the courts from proceedings pending before CCI and CCP, as the case may be.

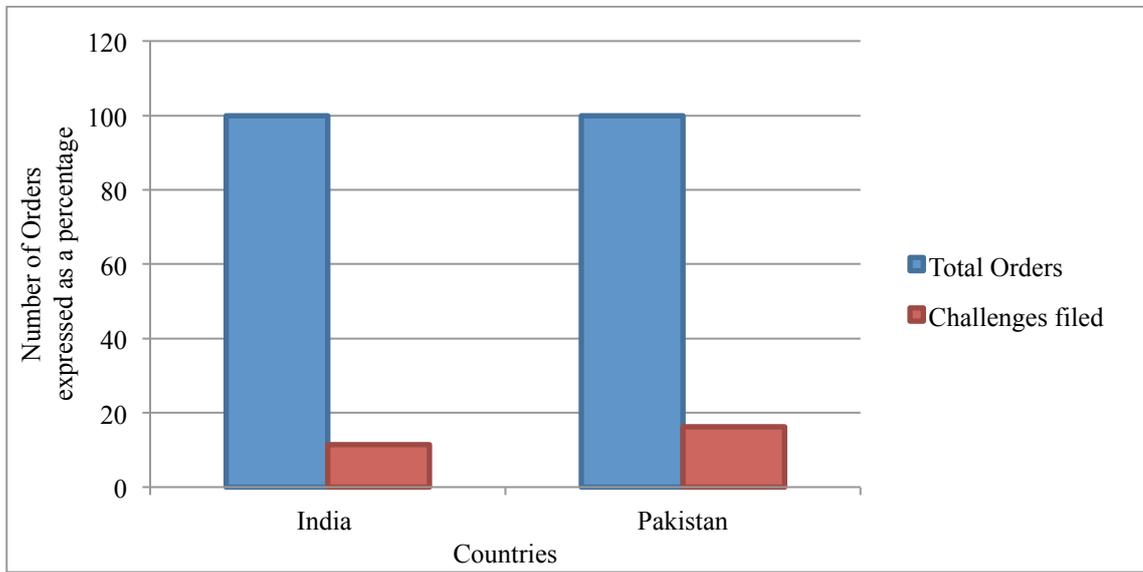


Figure 4.16 Comparing Interaction between CCI, CCP and the Courts

Figure 4.17 compares the responses of the courts to these challenges in respect of these challenges in both countries.

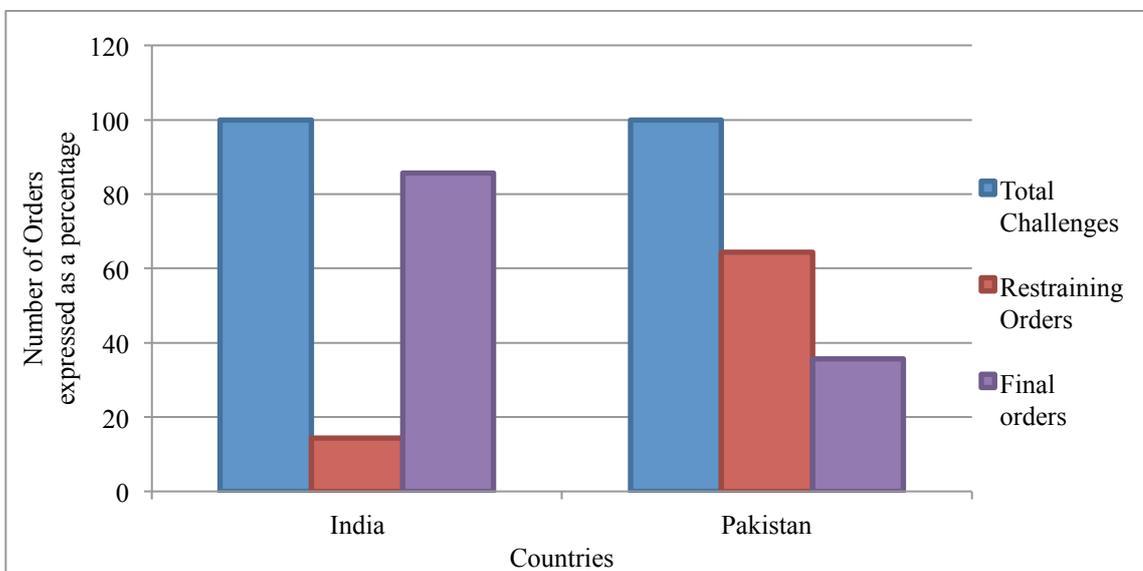


Figure 4.17 Response of Courts to Challenges Filed Against CCI and CCP

It is evident from this figure that whilst Indian courts have finally decided and disposed of the majority of the challenges filed before them in respect of proceedings pending before CCI, Pakistani courts have preferred to the proceedings pending before CCP and have rather than finally deciding the of the challenges filed before them.

#### **4.4. Links between the Implementation Stage and Adoption Processes**

The Indian and Pakistani Indicators not only help evaluate the implementation of competition laws in India and Pakistan but also highlight the links between the implementation of the competition laws and the adoption processes of the two countries.

##### 4.4.1. The Implementation of Competition Laws in India and Pakistan

As discussed in section 4.1 above, in order to understand the implementation of competition laws in India and Pakistan, it is necessary to understand their performance (as reflected in the operations of the NCAs) and interactions (as represented by the dynamic between the NCAs and the courts).

The performance of the Indian and Pakistani Competition Laws may be assessed on the basis of the extent to which the competition laws have been activated, and are understood, utilized and applied by persons in the two countries. Their interactions may be assessed on the ability of the competition law to interact productively with the pre-existing legal system. Both these aspects of implementation impact the pace at and extent to which the laws integrate with the pre-existing legal systems of the countries and are informed by the extent of compatibility and legitimacy of the laws in their countries.<sup>55</sup>

##### *(a) Performance of the Competition Laws*

*(i) Enforcement.* It is evident from the data that both CCI and CCP place a strong emphasis on the enforcement of their respective competition laws.<sup>56</sup> However, whilst both CCI and CCP cast a reasonably wide net of enforcement in terms of the sectors they penetrate, the total number of orders passed by them in

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<sup>55</sup> Chapter 2, Section 2.4.2.

<sup>56</sup> Ms. Kaunain-Hassan also corroborated this view.

respect of anti-competitive agreements and abuse of dominant position is somewhat more erratic. CCP made a robust start in 2007, peaked in 2009, then experienced a gradual decline, came to a complete halt in 2014 and only restarted activity in 2015, albeit hesitantly. CCI, on the other hand, had a slow start but gradually picked up pace. Although the number of matters decided by CCI has also declined in the last two years, its operations have not come to a halt at any time.<sup>57</sup>

One factor in CCI and CCP's erratic performance may be that whilst CCI commenced the greater majority of its proceedings on the basis of complaints,<sup>58</sup> CCP relied on *suo motu* notices.<sup>59</sup> It is likely that CCI's overall enforcement declined when complaints lodged before CCI declined as the public gained a greater understanding of CCI's mandate.<sup>60</sup> In the case of CCP, however, the decline in enforcement may be due to the fact that over time, it did not have sufficient financial or human resources to initiate *suo motu* action and because the courts had not decided petitions pending before them which would have allowed CCP to gain firmer foothold and recognition in the country.<sup>61</sup>

However, the numbers of proceedings before CCI and CCP initiated by complaints or *suo motu* notices also indicate the extent to which the competition laws are understood, utilized and applied in the countries. Arguably, the high number of complaints in India is an indication of the extent to which the public recognises and accepts the competition law as a legitimate legal instrument, whilst the higher number of matters initiated on the basis of *suo motu notices* by the CCP, is an indication that whilst CCP itself understands and is ready to utilize and apply the

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<sup>57</sup> Dr. Gauri, Mr. Kumar and Mr. Sahoo were of the view that the phased enforcement of Competition Law in India was positive. However, Dr. Bhattacharjea believed that CCI was taken seriously only after it started imposing fines.

<sup>58</sup> Dr. Gauri, Mr. Kumar and Mr. Sahoo confirmed that CCI has been more focused on complaints or complaints than on taking *suo motu* notices. However, Dr. Gauri, explained that this was because CCI wished to gradually reform the market rather than by way of shock.

<sup>59</sup> Ms. Kaunain-Hassan suggested that CCP was not interested in simply relying on complaints and took *suo motu* notice if there was sufficient evidence to do so.

<sup>60</sup> Drs. Bhattacharjea and Gauri indicted that a large number of complaints were filed before CCI because the public mistook it as a forum for resolving personal disputes.

<sup>61</sup> Ms. Kaunain-Hassan and Dr. Wilson bemoaned the lack of financial resources, which prevented them from building capacity or carrying out their activities and the lack of cooperation from the courts for the drop in their enforcement.

competition law, the law has not gained currency in the wider society, primarily due to lack of support from the government and the courts.<sup>62</sup>

Sanctions are an important and perhaps the most visible aspect of enforcement of competition laws in both India and Pakistan. The data suggests that CCI and CCP have comparably utilized the sanctioning powers conferred upon them by their respective competition laws and have imposed sanctions on offending entities in a similar number of orders. However, the present data does not specify the strategies CCI and CCP have followed in arriving at sanctions imposed, the quantum of penalties imposed and the quantum realised.<sup>63</sup>

(ii) *Interpretation.* The extent to which CCI and CCP rely on case law and materials, and the extent to which they rely on domestic, foreign or their own case law and materials, not only demonstrates whether they view themselves as regulatory or adjudicatory bodies but also whether or not they seek to align themselves with the models from which their respective competition law are derived (which hints at their need for legitimacy).

A review of the data in this regard suggests that CCI has relied far less on case law and materials than CCP. Further, even in orders in which CCI has relied on case law, it has preferred domestic case law to foreign case law and increasingly its own orders.<sup>64</sup> CCP, on other hand, has not only relied more on case law and materials in interpreting its competition law but also more on foreign rather than on domestic case law and materials. However, like CCI, it has increasingly relied simply on its own earlier orders.<sup>65</sup>

Given that CCI relies less on case law and materials on interpreting the competition laws suggests that it sees itself primarily as a regulatory rather than an adjudicatory body and understands that it shares the enforcement function with the second tier NCA, the tribunal. However, CCP with its extensive reliance on case law, appears to see itself as a regulatory *as well as* adjudicatory body and in doing

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<sup>62</sup> Mr. Raja and Mr. Asif Saad, Former CEO Lotte Pakistan Limited (Karachi, Pakistan 23 September 2014) were of the view that CCP had failed to get widespread acceptance.

<sup>63</sup> I address some of these issues more fully in Chapter 6.

<sup>64</sup> Dr. Gauri and Mr. Sahoo were quite adamant that CCI should not act as a court.

<sup>65</sup> Ms. Kaunain-Hassan considers reliance on foreign materials important. However, she insists that CCP does not do so mindlessly.

so occupies its own space in the legal system as well as that allocated to the tribunal under law. Further, the fact that CCI relies more on domestic precedent than CCP, suggests that CCI's orders are more likely to be compatible with and enjoy greater legitimacy in India's pre-existing legal system than orders of CCP are likely to be with and in the Pakistan's pre-existing legal system. Both these factors are likely to render the Indian competition law more accessible and enforceable in India than the Pakistani competition law is likely to be in Pakistan.<sup>66</sup>

(iii) *Factors Common to Enforcement and Interpretation.* The extent to which CCI and CCP operate as collegial bodies brings greater depth to their decision-making and reflects the extent to which their respective members understand the competition laws and are able to pool their intellectual resources in interpreting the Laws. Given that CCI has passed a number of its orders with all members in attendance and none with a single member, it may be argued that it has pooled its resources to a higher degree than CCP, which has operated with considerably fewer members and has even passed a number of orders through single members.<sup>67</sup>

The extent to which CCI and CCP issue dissenting orders is correlated to their operation as collegial bodies and indicates the pace at which the competition law is developing in the country. This correlation derives from the fact that only when CCI or CCP are able to pool the intellectual resources available to them, are they in a position to elicit dissenting opinion. The data also confirms this correlation: CCP decides matters through single members and generally through two or three members and records absolutely no dissent whatsoever,<sup>68</sup> whilst CCI operates either at full strength or with benches comprising six or seven members and records a reasonable number of dissenting orders. Dissenting orders deepen and enhance the understanding of the laws and facilitate their development by allowing different points of view to come forward.<sup>69</sup>

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<sup>66</sup> I address these issues more fully in chapters 5.

<sup>67</sup> Ms. Kaunain-Hassan corroborated this view.

<sup>68</sup> According to Ms. Kaunain-Hassan, it was the policy of the CCP to issue unanimous decisions.

<sup>69</sup> Mr. Kumar, Dr. Gauri and Mr. Sahoo viewed dissenting opinions in a very positive light and credited them with developing competition law in India.

*(b) Interaction with the Courts*

A comparison of the interaction between CCI, CCP and the courts suggests that whilst the Indian courts have decided and disposed of the majority of challenges filed before them in respect of proceedings pending before CCI,<sup>70</sup> Pakistani courts have opted for issuing interim restraining orders and keeping the petitions pending.<sup>71</sup> The supportive response of Indian courts has allowed CCI to adapt its decision-making process to India's pre-existing legal system and, thereby, to enhance the compatibility and legitimacy of the Indian competition law in the country. On the other hand, the preference of Pakistani courts for issuing interim restraining orders has not only impeded the performance of the Pakistani competition law but has also deprived its operation of much-needed clarity and certainty.<sup>72</sup> More worryingly, perhaps the attitude of the Pakistani courts has failed to enhance the already weak compatibility and legitimacy of the Pakistani competition law in the country.

4.4.2. Impact of Adoption Processes on Implementation of the Competition Laws

The transfer mechanisms and institutions employed by India and Pakistan in their respective adoption processes, impact the content, compatibility and legitimacy of the competition laws.<sup>73</sup> In this section I examine the connections between the adoption processes, their outcomes and the implementation of the laws in India and Pakistan.

*(a) Links between Adoption Process and Implementation Stage in India*

In adopting its competition law, India had primarily employed the mechanism of *socialization* (with elements of *emulation*, *regulatory competition* and *implied coercion*) and delivered it through a wide range of bottom-up, participatory and inclusive institutions. The impact of the interplay of mechanisms and institutions is

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<sup>70</sup> Dr. Gauri and Mr. Kumar have particularly acknowledged the supportive attitude of Indian courts.

<sup>71</sup> My Pakistani interviewees admitted the complicated relationship between CCP and the courts and its adverse impact on the operations of CCP in Pakistan. However, they attributed this solely to the endemic delay in the courts.

<sup>72</sup> I discuss this more fully in chapter 6.

<sup>73</sup> Chapter 3, section 3.5.2.

evident in the performance and interactions of the Indian competition law. I discuss this impact with reference to the different mechanisms.

(i) *Impact of Socialization.* Interestingly, the earliest impact of *socialization* is evident in the Indian competition law not being made operational for nearly seven years after the Initial Enactment 2002. *Socialization* combined with the pre-conditions of transfer in the country meant that the law had to be adapted in light of feedback from a range of institutions before it could be made operational. This delay in operationalizing led to further *socialization* by providing CCI an opportunity to engage in competition advocacy throughout the country and to propose recommendations for the amendment of the law in light of the feedback received from stakeholders in the course of this advocacy. The awareness generated through advocacy impacted the extent to which the competition law was later utilised whilst adapting the law in light of the feedback helped the law become more compatible with the context of the country.<sup>74</sup>

The legitimacy generated through *socialization* and by the engagement of parliamentary institutions in the enactment and amendment of the competition law allowed stability to CCI's operations and also made CCI immune from politics and post-electoral changes in the government. Although the Indian competition law had not fully complied with the Raghavan Committee's recommendation regarding CCI's independence, CCI continued to receive from the government the financial resources required by it for carrying out its operations and continued to operate under parliamentary oversight and without government interference.<sup>75</sup> Whilst there was some fluctuation in the number of orders issued by CCI from year to year, in the absence of other factors suggesting a decline in CCI's operations due to government changes, these changes possibly reflect CCI's evolving enforcement priorities.

The independence and immunity enjoyed by CCI may also be attributed to the fact that the responsibility of appointing its members had been entrusted to an impartial

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<sup>74</sup> Dr Bhattacharjea and Mr. Kumar corroborate this view however, they also state that this advocacy as ineffectual because it could not be followed up with enforcement.

<sup>75</sup> The government continued to control CCI's budget, however, Mr. Kumar, Dr. Gauri and Mr. Sahoo all attest to the support of the government and immunity of the CCI from political changes and influence.

body, presided by the Chief Justice of the Indian Supreme Court. This body thoroughly vetted individuals before recommending them for appointment to CCI, and, thereby, ensured that only qualified and suitable persons who understood CCI's agenda were appointed. This also demonstrates the impact of *socialisation*, which had considerably shaped the appointment mechanism in the first place.

The majority of CCI's orders have been issued in response to public complaints, which suggests that the public was sufficiently aware of the Law to lodge complaints under it. This public awareness is also a by-product of *socialization* especially when implemented through bottom-up, participatory and inclusive institutions as in India. Direct public interaction in the adoption process created knowledgeable future users of the law and, thereby, facilitated the extent to which the law has been understood, utilised and applied in the country, whilst indirect public interaction through bottom-up, participatory institutions generated legitimacy for the law which in turn, bolstered its credibility and acceptance in the country.

The impact of *socialization* and the legitimacy it generated by engaging a range of institutions is also evident in CCI's limited overt reliance on case law, especially foreign case law and materials, in interpreting the law.<sup>76</sup> The institutions engaged in the adoption process in India held considerable discussions and debates which allowed the law to be adapted to the Indian context; generated a deeper understanding of the competition law amongst future users, and created a sense of national ownership for it. This extensive 'Indian-ization'<sup>77</sup> has continued regardless of CCI's membership and may be attributed to CCI's appointment mechanism which is likely to ensure that only such persons be appointed to CCI as understand and are committed to its implementation priorities.

CCI's relatively conservative approach in imposing sanctions may also be partially traced to *socialization*, which impressed upon CCI the need to take local conditions into account in enforcing the law and be cautious in imposing

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<sup>76</sup> Also *see* (ii) and (iii) below.

<sup>77</sup> Dr. Gauri, Mr. Kumar and Mr. Sahoo referred to the 'Indian-ization' of the law with pride.

penalties.<sup>78</sup> At the deliberation stage, the Raghavan Committee had urged that the NCA established to enforce the law recognize that the Indian economy was transitioning from a controlled to a liberal economy and, therefore, not be harsh in sanctioning violations as this would be detrimental to economic growth in the country. This principle appears to guide CCI's sanctioning strategy in subsequent years even today.<sup>79</sup>

Finally, the impact of *socialization* and the compatibility and legitimacy it has generated in India is evident in the response of the Indian courts to the challenges filed before them against proceedings pending before CCI. It may be argued that the clarity and alacrity with which the courts have decided competition related petitions filed before them is due to fact that the judiciary was allowed to be included in the process of *socialization* and had become acquainted with and endorsed the Indian competition law in hearing the *Brahm Dutt case*.<sup>80</sup> However, the clarity of the response of the courts is also partly due to the fact that the government established the appellate system envisaged in the law, which directed a number of challenges to be towards the tribunal rather than allowing these to choke the courts.<sup>81</sup> However, even the attitude of the government is attributable to *socialization*, which had ensured that the executive as well as the parliament took ownership of and were committed to meaningfully activating the competition law in the country.

(ii) *Element of Emulation and its effect.* The range of sectors in which CCI has exercised its powers relates to the mandate conferred upon it by the competition law. Given that the provisions relating to CCI's mandate were derived through *emulation* of foreign models and international best practices,<sup>82</sup> CCI's ability to enforce the provisions of the law so widely may also be attributed to *emulation*. However, the fact that CCI actually *exercises* the powers conferred upon it under the law is more likely due to *socialization* and the support of the institutions that it has garnered in the adoption process. The same argument holds true for CCI's

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<sup>78</sup> See (ii) (*Emulation*).

<sup>79</sup> Dr. Gauri and Mr. Sahoo were particularly reluctant to introduce any disruptive legal element into the economy.

<sup>80</sup> Chapter 3, Section 3.2.2 (b)(ii). I address this more fully in chapter 6.

<sup>81</sup> I discuss this more fully in chapter 6.

<sup>82</sup> Chapter 3, section 3.5.1.

power to impose sanctions. Whilst the powers themselves may be attributed to *emulation* of international best practices, the manner in which CCI has cautiously exercised these powers reveals the stronger impact of *socialization*. The extent to which CCI relies upon foreign case law and materials in interpreting the competition law may also be linked to *emulation*. Here too, however the impact of *socialization* and CCI's need to 'Indian-ize' principles by adapting them to local exigencies appears to be stronger than its inclination to *emulate*.<sup>83</sup>

(iii) *Evidence of Regulatory Competition.* CCI's reliance on foreign case law and materials in interpreting the competition law, albeit limited, may also be attributed to *regulatory competition*. Arguably, the need for international legitimacy that had motivated India to adopt a modern competition law may have continued to be relevant in the implementation stage. However, CCI's preference for 'Indian-ization' rather than simply gaining international legitimacy suggests, once again, that the impact of *socialization* outweighs that of *regulatory competition*.<sup>84</sup>

(b) *Understanding Links between Adoption and Implementation in Pakistan*

Pakistan had relied upon *coercion* for adopting its competition law, with some elements of *emulation*, *regulatory competition* and, latterly, of *socialization*. In adopting the 2007, 2009 and 2010 ordinances, Pakistan had only engaged limited, exclusive and top down institutions, which did not generate a high degree of compatibility or legitimacy for the law. By the time Pakistan enacted the Act of 2010 it had engaged more inclusive, bottom-up institutions. However, these latter institutions were not able to satisfactorily recast the competition law as more compatible with and legitimate in the Pakistani context. Whilst this was partly due to the overall weakness of democratic institutions in the country, it was at least in part due to the powerful and lingering impact of the *coercion* through which Pakistan had acquired the law in the first place.

(i) *The Lingering Effect of Coercion.* The first impact of *coercion* and its engagement of limited, exclusive and top-down institutions is manifest in

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<sup>83</sup> I examine this more fully in chapter 5.

<sup>84</sup> I address this issue in chapter 5.

Pakistan's ability to operationalize its competition law within days of promulgating the First Ordinance 2007. The pre-conditions of transfer in Pakistan in which *coercion* was activated, allowed the Pakistani government to take decisive and prompt action for establishing and operationalizing CCP without the necessity of inviting, let alone entertaining, any objections from other state institutions or from the public. However, the fact that the Pakistani competition law faced obstacles from the judiciary (as manifest in its response to the challenges filed before the courts) and the legislature (in moving from the ordinances to the Act of 2010) in its earliest years may also be traced to *coercion* and the attendant absence of a widespread engagement of participatory institutions.<sup>85</sup>

In addition to these early obstacles, the Pakistani competition law (and by extension the CCP) faced a further obstacle in 2013, when in the wake of post election transfer of power from one government to the next, CCP was deprived of support from the executive that had first breathed life into it. The commencement of the term of the new government coincided with the end of the term of the then CCP chairperson.<sup>86</sup> However, the new government had its own domestic constituency, political priorities and relationship with the World Bank and was, therefore, unwilling or simply disinterested in allocating the necessary financial resources for CCP or appointing of new chairperson to manage its operations.

Consequently, instead of appointing a full time chairperson, the government entrusted CCP's operations to an acting chairperson who, by definition, lacked security of tenure.<sup>87</sup> This situation lasted for more than a year whilst the issue of appointing heads of regulatory authorities remained pending before the Pakistani Supreme Court.<sup>88</sup> The resulting uncertainty at CCP is likely to have been a factor in bringing CCP's enforcement (in respect of abuse of dominant position and anti-competitive agreements) to a halt in 2014.<sup>89</sup> However, CCP itself cites lack of

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<sup>85</sup> Chapter 3, section 3.3.2.

<sup>86</sup> Ms. Kaunain-Hassan completed her tenure in November 2013.

<sup>87</sup> Dr. Wilson who had been a member of CCP from its inception was appointed acting chairman in pursuance of section 16 of the Act of 2010.

<sup>88</sup> Chapter 3, section 3.5.1.

<sup>89</sup> The new chairperson Ms. Khalil was appointed only in December 2014, 13 months after the retirement of Ms. Kaunain-Hassan.

funds, limited capacity and a preference for competition advocacy as its reasons for not passing any orders in this period.<sup>90</sup>

The government's powers with respect to the appointment of CCP members itself reveals the impact of *coercion* delivered through limited, exclusive institutions, which allowed procedures for appointment and removal of members prevalent in the Pakistani context to be incorporated into the competition law without debate. These procedures vested all powers of appointment and removal of CCP members exclusively in the government and thereby, made the members vulnerable to the possibility of removal, and therefore to government pressure. Whilst there is no evidence that the government interfered in CCP's decision-making, governmental pressure may have played a role in CCP's decision whether or not to take *suo motu* notice, the choice of sectors for such notices, or the near abandonment of enforcement actions after a change of government. The need to take government preferences into account and to adopt a cautious attitude may have been amplified in the tenure of the acting chairperson who lacked even the basic security of tenure allowed to permanent members.

The fact that CCP initiated most of its matters by taking *suo motu* notice of potential violations of the Pakistani competition law also points to the impact of *coercion* and its execution through a limited number of top-down, exclusive institutions which had adversely affected the legitimacy and awareness of the Law in the country. The fact that fewer stakeholders had participated in the adoption process in Pakistan not only made them less aware of the content of the law but also rendered them suspicious of its aims. At the implementation stage, this translated not only into fewer complaints being filed before CCP but was also reflected in the highly guarded response of the courts towards competition matters.<sup>91</sup>

CCP's preference for imposing lump sum rather than proportional penalties may also partly be attributable to *coercion*, in particular to the World Bank's insistence at the deliberation stage on imposition of penalties as the most appropriate

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<sup>90</sup> This was the view expressed by Dr. Wilson who was the acting chairperson concerned.

<sup>91</sup> I discuss this more fully in chapter 6.

sanctioning strategy.<sup>92</sup> However, this may also in part be due to the difficulty CCP is likely to have faced in obtaining and computing turnovers.<sup>93</sup> CCP's use of behavioural directions (and accepting 'voluntary' undertakings from the contravening entities) is perhaps more nuanced. It may be argued, on the one hand, that CCP's sanctioning strategy demonstrates its understanding of the peculiarities of the context it was operating in and, therefore, suggests the impact of *socialisation*.<sup>94</sup> However, it is equally plausible that it reflects the nexus between CCP and the government created through CCP's appointment and removal mechanisms. Given that the government has exclusive authority to appoint CCP members, these members are likely to feel beholden to it and, therefore, reluctant to impose penalties in sensitive cases. However, there is no evidence of any overt interference on the part of the government.

The extent to which CCP relies on case law generally and foreign case law and materials particularly, once again suggests the influence of *coercion*, which had introduced the law in the country with only limited engagement with domestic institutions and within a very short span of time. This is likely to have affected not only the compatibility and legitimacy of the law with the Pakistani context but also the understanding of the competition principles included in law even amongst CCP members and those responsible for appointing them. CCP's extensive reliance on case law and particularly foreign case law appears to be an attempt at bridging this gap in understanding as well as an attempt to create greater domestic legitimacy for the law by creating and asserting its international legitimacy. Interestingly, CCP itself relates its reliance on case law and materials on the need

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<sup>92</sup> In the majority of cases, CCP opted for lump sum penalties without offering any justification for quantum and very rarely expressed penalties as a percentage of the turnover of the contravening entity (e.g. Cement and LPG cases).

<sup>93</sup> There is no evidence that CCP had difficulty obtaining turnover figures. CCP was mostly addressing violations by companies, which are required by law to file and publish their financial reports, therefore, imposing lump sum penalties may be attributed to preference rather than informed strategy.

<sup>94</sup> CCP's need to be fully in command over its penal strategy is evident from the fact that in 2008 it had formulated non-binding guidelines to help achieve transparency and clarity in its penalties. However, given that these guidelines are not referred to in the orders, it is impossible to ascertain the extent to which these influenced the quantum of penalties imposed by CCP.

to apply the best available legal precedents and views it as an outcome of *socialization*.<sup>95</sup>

The complete absence of dissent in CCP's orders is another interesting outcome of *coercion* and may be attributed to the manner in which *coercion* has shaped CCP's composition. According to the Pakistani competition law (and rules made thereunder) the government appoints CCP members in consultation with its chairperson. Inclusion of the chairperson in the appointment process is likely to create an imbalance in CCP's collegial structure by making the chairperson more powerful and the members more reluctant to express dissent. However, absence of dissenting orders, may also be due to the fact that a number of CCP's earliest orders were passed by single members. Whilst the reason for which CCP appointed single members to decide cases is not clear, it is likely that CCP took this decision to allow for the possibility of appeals to CCP's appellate bench. The appellate bench is yet another example of a domestic Pakistani feature finding its way into the law indirectly through *coercion* which did not allow this feature or its utility and legality to be openly debated.<sup>96</sup>

The impact of *coercion* is also evident in the response of the Pakistani courts to the challenges filed before them in proceedings pending before CCP. It may be argued that *coercion* prevented the judiciary from being included in the adoption process and, therefore, from responding with clarity to the challenges filed before it. However, it is important to note that even in India, the judiciary was not *invited* by the government to participate in the adoption process, but was simply strong enough to be independently invoked by a private litigant. The fact that the Pakistani judiciary was not robust or pro-active with respect to the Pakistani competition law is more likely due to a combination of its historic weakness and the on-going tussle between the judiciary and the executive.<sup>97</sup> However, the impact of *coercion* is evident indirectly in the failure of successive governments

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<sup>95</sup> Ms. Kaunain-Hassan asserted this view rather vehemently. I discuss these arguments in chapter 5.

<sup>96</sup> Mr. Raja confirms that the appellate bench was included in the competition law simply because it already existed in the Securities and Exchange Commission of Pakistan Act and without regard to a subsequent judgment of the Supreme Court which had called such Benches into question for being contrary to the principle of separation of powers. *Mehram Ali and others v. Federation of Pakistan & others* PLD 1998 SC 1445.

<sup>97</sup> Chapter 3, section 3.1.1; 3.1.2(b) and 3.1.3(b).

and the parliament to take ownership of the law and to establish the tribunal, which would have significantly eased the pressure of the courts and perhaps facilitated their response.<sup>98</sup>

(ii) *Links with Emulation.* The effect of *emulation* in the implementation of the Pakistani competition law is most evident in the manner in which CCP has exercised its mandate. The fact that CCP investigated and addressed violations in a reasonably large number of sectors and imposed considerable penalties in respect of these violations suggests not only that it has the power to enter these sectors (which is a function of *emulation* in the adoption process) but also that, in its operations, it seeks to *emulate* effective NCAs anywhere in the world. However, it may equally be argued that CCP's sanctioning strategy reveals the impact of *coercion* because it was prescribed by the WB-led team and it was necessary for CCP to follow it in the earliest years in order to continue meeting World Bank expectations.<sup>99</sup>

Further evidence of *emulation* is manifest in the extent to which CCP relies upon foreign case law and materials in interpreting the Pakistani competition law. The argument that may be made in this regard is that given that the competition principles included in the mandate of the competition law had been adopted through *emulation*, it is only understandable that CCP *emulate* more principles in interpreting these principles. However, it may also be argued that *coercion*, especially when executed through limited, top-down and exclusive institutions enhances the need for *emulation* in interpreting the law because it does not allow the competition law to acquire domestic legitimacy. The absence of domestic legitimacy of the competition law, makes it important for CCP to seek international legitimacy and to leverage it domestically. Interestingly, however, CCP itself considers its reliance on foreign case law to be a process of *socialization*, it takes considerable pride in its international antecedents which, in its view, allow it to take advantage of international competition jurisprudence.<sup>100</sup>

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<sup>98</sup> I discuss these issues more fully in chapter 6.

<sup>99</sup> This argument cannot be substantiated without exploring Pakistan's relationship with the World Bank in greater depth, which is beyond the remit of this research.

<sup>100</sup> Although Ms. Kaunain-Hassan was particularly vocal on this issue, others such as Mr.

(iii) *Effect of Regulatory Competition.* In addition to *emulation*, it may be possible to attribute Pakistan's continued and extensive reliance on foreign case law and materials in interpreting its competition law to the mechanism of *regulatory competition*. *Regulatory competition* was a factor in Pakistan acquiring a modern competition law. It is likely that this need for international recognition and legitimacy continued to be relevant even in the implementation stage.

(iv) *Traces of Socialization.* Not only did Pakistan employ *socialization* very late in adopting its competition law and then too, through weak institutions but also the initial impact of *coercion* was too strong to allow *socialization* to make an obvious dent in the competition law. Nevertheless, the effects of *socialization* are visible at the implementation stage in the manner in which CCP tailors and adapts its sanctioning powers to suit the domestic scenario; interprets and adapts foreign case law and materials in deciding the issues before it.

However, in the case of penalties and directions, the impact of *socialization* is superficial if not counterproductive. The superficiality is evident from the fact that whilst CCP acknowledges the need for adapting sanctioning powers to the specific violation being addressed, it does not identify the methodology it has followed in determining the nature of these sanctions or, in the cases of penalties, calculating their quantum. Consequently, sanctions imposed by CCP appear to be a reflection of its inclination at a given time rather than of an objective application of mind.<sup>101</sup> The counterproductive effect may be inferred from CCP's need to tailor sanctions to suit an already weak enforcement culture which has the effect of diluting the authority of the Pakistani competition law rather than bolstering its legitimacy in the country.<sup>102</sup>

The extent to which CCP adapts foreign case law and materials in interpreting the provisions of the Competition Law rather than citing it out of a lingering sense of *coercion* or the need for *emulation* requires greater scrutiny. However, given that CCP does not expressly state its motivation in citing international precedents in

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Raja and Mr. Ijaz Ahmed, Advocate Supreme Court of Pakistan (Karachi, Pakistan 22 September 2014) also viewed reliance on foreign materials in a positive light.

<sup>101</sup> See n. 94.

<sup>102</sup> Although I touch upon penalties more fully in chapter 6, this area is too broad and too important to give a cursory treatment in this research and merits a detailed study of its own.

arriving at its decisions, any answer derived in this regard, without a deeper analysis of CCP's orders than this research allows, is likely to be more speculative than scientific.<sup>103</sup>

#### **4.5. Concluding Remarks**

The examination of the orders of CCI and CCP on the basis of the indicators and the analysis of the data suggests significant, discernible and direct as well as indirect links between the mechanisms and institutions engaged by India and Pakistan in the adoption process of the competition laws, and the implementation of these laws in the respective countries.

More specifically, the analysis suggests that, on balance, a competition law, such as the Indian competition law, which has been transferred primarily through *socialization* and by engaging a wide range of bottom-up, participatory and inclusive institutions, is likely to be better understood, applied and utilised, and therefore, more meaningfully implemented in the adopting country than a law such as the Pakistani law which has been introduced through *coercion* and limited top-down and exclusive institutions. Further, the socialised law is also likely to interact more productively with the pre-existing legal system of the country and to integrate into it more quickly and with greater facility than its coerced counterpart.

However, this analysis is complicated by the fact that it is not always possible to isolate the links between the adoption process and the implementation stage to a single transfer mechanism, the nature or range of institutions they engage, or to the compatibility and legitimacy they generate. One reason for this complication is that the indicators themselves are interconnected and symbiotic. In chapters 5 and 6, I further explore the implementation of these laws by focusing on the interpretive strategies adopted by CCI and CCP and their interaction with the courts.

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<sup>103</sup> I address some of these issues more fully in chapter 5.

## **5. INDIAN AND PAKISTANI STRATEGIES FOR INTERPRETING COMPETITION LAWS**

The discussion in chapter 4 indicates that the strategy adopted by CCI and CCP in interpreting the Indian and Pakistani competition laws not only influences the implementation of these laws but also reflects the continuing impact of the transfer mechanisms and institutions engaged by the countries in their respective adoption processes. However, the discussion also hints at the underlying complexity of CCI or CCP's respective interpretive strategies. It is not only difficult to trace a particular interpretive strategy to a specific transfer mechanism but also it is nearly impossible to establish whether the strategy stems from the content of the laws or their compatibility or legitimacy in their respective countries. The discussion also suggests that although the interpretive strategy is listed as *one* of the indicators on the basis of which CCI and CCP orders may be examined, it is in fact an *amalgam* of a number of other indicators and is, therefore, linked to the adoption processes in multiple ways. An evaluation of the interpretive strategies and the factors that motivate these strategies is likely to provide greater insight into the implementation of the law as a whole and the links between the adoption process and implementation.

In this chapter, I examine the interpretive strategies adopted by CCI and CCP with the aim of understanding reasons for the considerable variance between the two. Whilst CCI has cited case law more sparingly than its Pakistani counterpart, when it *has* cited case law, it has preferred to rely on domestic rather than foreign precedents and materials. CCP, on the other hand, has demonstrated a marked preference for foreign case law and material. I also examine CCI and CCP's increasing references to their own decisions and its implications for the implementation of the law. I focus exclusively on the strategy adopted by CCI and CCP for interpreting the analytical tests provided in the Indian and Pakistani competition law for establishing anti-competitive agreements. My reason for doing so is threefold: the tests, as stated in the Indian and Pakistani competition laws, have been shaped by the same transfer mechanisms and institutions through which the Laws themselves were adopted;<sup>1</sup> the strategy adopted by CCI and CCP in interpreting the analytical tests, showcases their

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<sup>1</sup> Chapter 3, section 3.5.1.

respective overall interpretive strategy;<sup>2</sup> and the interpretation of the tests has considerable bearing on the enforcement of provisions related to anti-competitive agreements provided in the competition laws.<sup>3</sup>

To this end, in section 1, I outline the essentials of the analytical tests for anti-competitive agreements as stipulated in the EU and US competition and anti-trust systems. I do this by way of background for placing CCI and CCP's interpretation of the analytical tests in the context of the models from which they are primarily derived later in the chapter. In section 2, I set out the analytical test for anti-competitive agreements as provided in the Indian and Pakistani competition laws and examine the extent to which their respective formulation may be attributed either to the EU or the US systems. Also in this section, I note the impact of India and Pakistan's adoption processes in shaping these analytical tests. In section 3, I examine selected decisions of CCI and CCP in respect of anti-competitive agreements to understand the manner in which CCI and CCP have applied these tests for different categories of agreements. In section 4, I explore the links, if any, between CCI and CCP's interpretive strategies for the analytical tests and the transfer mechanisms and institutions engaged by the countries in the adoption process. In section 5, I conclude.

### **5.1. Understanding 'Rule of Reason/Per se Rule' and 'Object/Effect' Analysis**

Anti-competitive agreements<sup>4</sup> have been at the heart of US Antitrust Law from the time of its codification in the Sherman Act 1890 and in the EU since the signing of the Treaty of Rome in 1957. However, the US and the EU have not always been in agreement as to the analytical tests that may be applied to establish anti-competitive agreements. Whilst the US has opted for a rule of reason/per se analysis, the EU has preferred an object/effects approach.

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<sup>2</sup> Chapter 4, section 4.3 Part (v).

<sup>3</sup> In an earlier version of this chapter, I had also examined the impact of India and Pakistan's choice of transfer mechanisms and institutions, on the interpretation of the concept of 'agreement' and 'relevant market' as provided in the Indian and Pakistani competition laws. However, due to word limit constraints, I have omitted the discussion from the thesis and have reproduced it in Annexe L.

<sup>4</sup> Section 1 of the Sherman Act and Article 101 TFEU do not define an 'agreement', however, a classical definition of agreement is provided in the case of *Bayer AG v. Commission (2000)* which I rely on for the purposes of this chapter: 'Proof of an agreement must be founded upon the existence of the subjective element that characterizes the very concept of the agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective or the adoption of a given line of conduct on the market'.

### 5.1.1. Rule of Reason/Per se Rule

The foundations of the ‘rule of reason’ test were laid down in the *Standard Oil Case (1911)*.<sup>5</sup> In this case the US Supreme Court circumscribed the somewhat vague and all-encompassing language of Section 1 of the Sherman Act 1890 by declaring that only ‘unreasonable agreements’ in restraint of trade were void. The US Supreme Court clarified ‘reasonableness’ in its decision in the *Chicago Board of Trade Case (1918)*,<sup>6</sup> in which it stated that the true test of legality of an agreement is whether the restraint imposed by it merely regulates competition or suppresses or destroys it.<sup>7</sup> However, the decision in the *Chicago Board of Trade Case* was, criticized for not being sufficiently focused, and for failing to specify the minimum factors that needed to be proven before the court could initiate a rule of reason inquiry.<sup>8</sup>

Beginning with its decision in the *Trenton Potteries Case*,<sup>9</sup> the US Supreme Court identified two types of antitrust analysis: the rule of reason and the per se rule.<sup>10</sup> Whilst the more commonly applied “rule of reason,” approach requires the plaintiff to plead and prove that defendants with market power have engaged in anti-competitive conduct, in the application of the “per se” rule, market power generally need not be proven and anti-competitive effects are largely inferred from the conduct itself.<sup>11</sup>

Although it is the plaintiff who decides whether to plead under the rule of reason or the per se rule, the category in which the case falls is a matter of law to be determined by the court.<sup>12</sup> In its purest application, the per se rule allowed US courts to condemn conduct without requiring proof of market power, effect or purpose and without hearing claims as to the legitimate objectives of the defendant’s behaviour.

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<sup>5</sup> *Standard Oil Co. of N. J. v. United States*, 221 U.S. 1 (1911) <https://supreme.justia.com/cases/federal/us/221/1/case.html> (accessed 12 September 2017).

<sup>6</sup> *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918) <https://supreme.justia.com/cases/federal/us/246/231/case.html> (accessed 12 September 2017)

<sup>7</sup> Phillip Areeda and Herbert Hovenkamp, *Fundamentals of Antitrust Law* (Aspen 2004).

<sup>8</sup> Herbert Hovenkamp and Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* (West Pub Co 1994). S.5.6b.

<sup>9</sup> *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) <https://supreme.justia.com/cases/federal/us/273/392/case.html>. (accessed 12 September 2017)

<sup>10</sup> The per se category was fully recognized in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (“Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.”).

<sup>11</sup> Herbert J Hovenkamp, ‘The Rule of Reason’ [2016] SSRN Electronic Journal <<http://www.ssrn.com/abstract=2885916>> accessed 2 July 2017, 2.

<sup>12</sup> *ibid.*

Historically, US courts have considered per se condemnation most appropriate for naked restraints i.e. those that did not have any redeeming power (such as price-fixing, boycotts/refusals to deal and market sharing).<sup>13</sup>

US courts have applied the per se rule on the assumption that there is sufficient 'judicial experience' of certain practices which allows these to be categorized as anti-competitive without empirical evaluation.<sup>14</sup> In a case decided under the per se rule, the question is typically whether an anti-competitive agreement (such as an agreement for price-fixing) exists as compared to a case decided under the rule of reason, where the existence of the agreement is not in dispute, and the only issue is whether or not it is anti-competitive under the circumstances.<sup>15</sup>

Despite lending a degree of certainty to antitrust litigation in the US, the per se rule came under severe criticism for being removed from economic realities and for reducing antitrust litigation to an exercise in determining categories, i.e. focusing the attention of the courts on determining whether a restraint required a full-fledged rule of reason inquiry which requires an understanding of the actual, economic impact of the alleged restraint on competition, or if it could be dealt with summarily under the per se rule.<sup>16</sup>

The high point of per se antitrust illegality occurred in the 1950s and 1960s, when the US courts decided that some joint ventures were unlawful per se, because they divided markets<sup>17</sup> or constituted concerted refusals to deal.<sup>18</sup> Among vertical practices,

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<sup>13</sup> Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (Oxford University Press 2014), 197-198 .

<sup>14</sup> Hovenkamp and Hovenkamp (n 8) s. 5.6b. It is a corollary of per se being a product of judicial experience that, as their experience grows, judges change their mind about whether a case may be dealt with under rule of reason or the per se rule. When the Court deviates from earlier decisions and applies the per rule, stare decisis is not a factor. For example in the *White Motor Case* the Supreme Court found a manufacturer's non-price vertical restrictions to be reasonable. That decision was overruled only four years later by *Schwinn*, which applied the per se rule with no discussion of stare decisis. A decade later the Court reversed itself again, applying a rule of reason in *GTE Sylvania*. Now, however, the Court felt compelled to discuss *stare decisis* concerns. Also, Hovenkamp (n 11) 11.

<sup>15</sup> Hovenkamp (n 11) 7.

<sup>16</sup> A.I Gavil, 'Moving beyond Caricature and Characterization: The Modern Rule of Reason in Practice' (2013) 85 South. Calif. Law Rev. Southern California Law Review 733.

<sup>17</sup> *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

<sup>18</sup> *Radiant Burners, Inc. v. People's Gas Light & Coke Co.*, 364 U.S. 656 (1961) (agreement involving insurers to refuse to approve plaintiff's dangerous heater for insurance purposes).

the courts declared minimum<sup>19</sup> and maximum<sup>20</sup> resale price maintenance as well as most tying arrangements to be unlawful per se.<sup>21</sup> For a decade, vertical non-price restraints were also thought to be unlawful per se.<sup>22</sup> Further, under the test developed in the *Philadelphia Bank Case*, even mergers were made subject to a quasi-per se rule if the market shares of the merging parties exceeded a certain threshold.<sup>23</sup> Nearly all of this jurisprudence, though not expressly overruled, is dubious today.<sup>24</sup> More importantly, after years of ambiguity, the US Supreme Court has finally stated that purely vertical agreements should be assessed under the rule of reason.<sup>25</sup>

In a case in which rule of reason is applied, the question whether a restraint is “reasonable” is ordinarily one of fact.<sup>26</sup> It is up to the court to determine whether, under all the circumstances of the case, the anti-competitive agreement imposes an unreasonable restraint on competition.<sup>27</sup> In such cases, the initial burden of proof to allege and prove the violation is on the plaintiff. Ordinarily, the plaintiff has to establish at the outset that the defendant has sufficient market power to make the anti-competitive restraint plausible.<sup>28</sup> If the plaintiff succeeds in establishing a *prima facie* case of competitive harm, then the burden shifts to the defendant to show a pro-competitive justification for the practice.<sup>29</sup> If the defendant is unable to show such a

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<sup>19</sup> *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), overruled by *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). (Also see n. 25).

<sup>20</sup> *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), overruled by *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

<sup>21</sup> *Times-Picayune Pub. Co.*, 345 U.S. 594 (1953); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958); *Fortner Enter., Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969) (*Fortner I*)

<sup>22</sup> *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), overruled by *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

<sup>23</sup> *United States v. Philadelphia Nat'l. Bank*, 374 U.S. 321, 362 (1963).

<sup>24</sup> Hovenkamp (n 11) 41.

<sup>25</sup> *ibid*, 41. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998). Also *Leegin Creative Leather Products, Inc. v. PSKS* in which the US Supreme Court overruled *Dr. Miles Med. Co. v. John D. Park & Sons* (n. 19) which had ruled that vertical price restraints were illegal per se. *Leegin* established that that legality of such restraints are to be judged based on the rule of reason.

<sup>26</sup> *ibid*, 8. *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 343 (1982).

<sup>27</sup> *ibid*.

<sup>28</sup> Hovenkamp (n 11), 18. The less plausible the case the greater the need for evidence.

<sup>29</sup> *ibid*, 22. See, e.g., *American Express*, 838 F.3d F.3d at 195 (“the burden shifts to the defendant to offer evidence of any pro-competitive effects of the restraint at issue.”); *United States v. Visa USA, Inc.*, 163 F. Supp. 2d 322, 400–01 (S.D.N.Y. 2001), *modified*, 183 F. Supp. 2d 613 (S.D.N.Y. 2001), *aff'd*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 543 U.S. 811 (2004) (similar). This burden should be stricter than the one applied to the plaintiff’s *prima facie* case. Restraints are adopted self-consciously, and we must assume that the defendants are rational and knew what they were doing when the challenged restraints were created. To the extent that the defendants’ expectation of profit came from something other than a restriction of competition, they should have evidence and are in the best position to provide it.

justification, then the plaintiff is entitled to prevail. However, if the defendant does provide a justification, the burden shifts once again to the plaintiff to show that the same object could have been achieved by a less restrictive alternative that has approximately the same benefits but not the harm.<sup>30</sup> If a less restrictive alternative is not available, the court may need to “balance” both the restraint and the justification in order to assess their net anti-competitive effects.<sup>31</sup>

An alternative to the hidebound distinction between the rule of reason and per se rule, initially developed in the *Antitrust Law* treatise, is that these two modes of antitrust analysis represent a continuum, or a “sliding scale,” with different fact-finding requirements for different situations.<sup>32</sup> The focus of this effort is on core economic concepts embraced by the court in its formative modern rule of reason cases, especially with regard to anti-competitive effects and efficiencies.<sup>33</sup>

This new relationship between the per se rule and rule of reason is clarified by the Federal Trade Commission (FTC) in the *Polygram Holdings Inc. case*.<sup>34</sup> According to the FTC, although each case starts out as a full-scale rule of reason enquiry, the plaintiff may avoid it if it demonstrates that the conduct at issue is inherently suspect owing to its tendency to suppress competition.<sup>35</sup> If the plaintiff succeeds in making a case to this effect, then to avoid summary condemnation it is incumbent upon the defendant to advance a legitimate justification for the allegedly anticompetitive

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<sup>30</sup> *American Express*, 838 F.3d at 195. An alternative should be considered less restrictive if it accomplishes most of the defendants’ legitimate goals while also providing lower prices or higher quality. *ibid.* p. 25. Also, Scott C. Hemphill, ‘Less Restrictive Alternatives in Antitrust Law’ (November 1, 2015). 116 *Columbia Law Review* 927 (2016).

<sup>31</sup> According to Hovenkamp (n. 11) 40-41 a better way to view balancing is as a last resort when the defendant has offered a pro-competitive explanation for a *prima facie* anticompetitive restraint, but no less restrictive alternative has been shown. The court must then determine whether the anticompetitive effects made out in the *prima facie* case are sufficiently offset by the proffered defense. Even here, a hard look at the quality of the evidence is important. The court needs to make sure that the market is well defined, with convincing evidence of power, and that the threat of higher prices or anticompetitive exclusion is clear.

<sup>32</sup> Areeda and Hovenkamp (n 7) 1507.

<sup>33</sup> Gavil (n 16) 759-760.

<sup>34</sup> See <<https://www.ftc.gov/enforcement/cases-proceedings/0010231/polygram-holding-inc-decca-music-group-limited-umg-recordings>> (accessed 12 September 2017) Also see *ibid.* 760-761. The FTC’s approach was affirmed by the court in its 2005 decision in *Polygram Holdings Inc. v. FTC* [https://www.cadc.uscourts.gov/internet/opinions.nsf/5680088A77E34BE88525742B00559024/\\$file/03-1293a.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/5680088A77E34BE88525742B00559024/$file/03-1293a.pdf) (accessed 12 September 2017).

<sup>35</sup> *ibid.* p. 762. The plaintiff can do this by raising one of the three following presumptions: (a) through irrebuttable, conclusive presumption that is per se condemnation; (b) through rebuttable presumption triggered by an obvious anti-competitive effect; and (c) through rebuttable presumption triggered by a showing of market power.

practices (i.e. a justification which demonstrates how the restraint plausibly creates or improves competition) and to articulate the link between the challenged restraint and its purported justification. If the defendant succeeds in reaching this point, the court conducts a full-scale rule of reason inquiry otherwise it decides the case under the per se rule.

In the event that the case proceeds in accordance with the rule of reason, the plaintiff shows the magnitude of the type of restraint by reference to actual detrimental effects or market power, whilst the defendant argues that the justifications are legitimate and supported by the restraint. It is then up to the plaintiff to argue that the ends for which the restraint is allegedly imposed can be met otherwise also.<sup>36</sup> Finally, the court may engage in a balancing exercise wherein it weighs the anti-competitive and pro-competitive effects of the restraint.<sup>37</sup>

The US Supreme Court majority embraced the idea of a sliding scale in Justice Breyer's opinion for the Court in *Actavis*,<sup>38</sup> as well as in Justice Souter's opinion in *California Dental*,<sup>39</sup> from which Justice Breyer dissented.<sup>40</sup> The more elaborate discussion of the issue in *California Dental* clarifies that the Supreme Court did not intend some form of new third category of analysis but merely a mechanism for rationalising the existing two approaches.<sup>41</sup>

#### 5.1.2. The Objects/Effects Analysis

Although the EU watches the shifting boundaries of the per se rule and rule of reason in the US with interest, it has developed and applies its own standards and tests for identifying and voiding anti-competitive agreements which are not only appropriate for its specific context but also for its market integration aims.

In terms of Article 101 TFEU—<sup>42</sup> an agreement whether horizontal or vertical, may be deemed to be anti-competitive, and, therefore, automatically void, if it is (a)

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<sup>36</sup> Areeda and Hovenkamp (n 7).

<sup>37</sup> *ibid.*

<sup>38</sup> *FTC v. Actavis Inc. et al* 570 U.S. \_\_\_, 133 S. Ct. 2223 (2013), 2237–38. [https://www.supremecourt.gov/opinions/12pdf/12-416\\_m5n0.pdf](https://www.supremecourt.gov/opinions/12pdf/12-416_m5n0.pdf) (accessed 12 September 2017)

<sup>39</sup> *California Dental Association v. FTC*, 526 U.S. 756 (1999) 780–81.

<sup>40</sup> *ibid* 780–794.

<sup>41</sup> Hovenkamp (n 11) 32.

<sup>42</sup> Given that Article 101 is a reiteration of Article 85 of the Treaty of Rome (or the Treaty

entered into between undertakings or associations of undertakings; (b) appreciably affects trade between EU member states; (c) has either the *object* or *effect* of preventing, restricting or distorting competition between member states and (d) does not meet the criteria for exemption specified in Article 101(3) of the TFEU.<sup>43</sup> Subsections (a-e) of Article 101(1) identify price fixing; output controls; market allocation; applying dissimilar conditions to similar transactions, and tying as practices falling within the scope of the Article.<sup>44</sup> Agreements that violate Article 101(1) and do not meet the cumulative criteria of 101(3) are automatically void.<sup>45</sup>

Until 1<sup>st</sup> May 2004, when the Council of the European Union, issued Regulation 1/2003, EU national courts could apply Article 101(1) TFEU to anti-competitive agreements whilst the power to apply Article 101(3) remained within the sole purview of the EU Commission.<sup>46</sup> However, Regulation 1/2003 abolished the monopoly of the Commission over exemptions under Article 101(3) and made it open to national authorities and courts to apply Article 101 in its entirety and thereby to share in its enforcement.<sup>47</sup> The Regulation also accepted the need for a more economic and less formalistic and rigid analysis of allegedly anti-competitive agreements under both Articles 101(1) and 101(3),<sup>48</sup> and, thereby, advanced the approach which had already been articulated in a number of cases (such as the *STM-*

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Establishing the European Economic Community) and Article 81 of the Treaty Establishing the European Union), I have read as references to Article 101 any references to Articles 85 and 81 in the literature examined for the purposes of this chapter.

<sup>43</sup> René Joliet and James A Rahl, *The rule of reason in antitrust law: American, German and Common Market laws in comparative perspective* (Faculté de Droit La Haye: Martinus Nijhoff 1967). In its early application of Article 101, the Commission adopted a formalistic approach whereby it took the view that a large number of agreements violated Article 101(1) and were, therefore, void unless ‘exempted’ under Article 101(3). Although this approach was at times deemed akin to the US *per se* rule, it could not be fully equated with it.

Richard Whish and Brenda Sufrin, ‘Article 85 and the Rule of Reason’ (1988) 1987 Yearbook of European Law 1, 85. Towards the 1990s, the EU Commission and the CJEU recognized the need to move away from a formulaic analysis to an effects based analysis. However, the extent of this shift remained unclear. Some argued that the Commission must undertake greater economic analysis, similar to the US ‘rule of reason’ analysis whilst others were of the view that a rule of reason type analysis would run contrary to EU’s market integration goal.

<sup>44</sup> Caleb Vasey ‘Per se Rules in U.S. and EU Antitrust/Competition Law’ <<file:///Users/macbookpro/Desktop/Per%20se%20Rules%3F%20-%20European%20Union%20Competition%20LawEuropean%20Union%20Competition%20Law.html>> (accessed 3 July 2017).

<sup>45</sup> Jones and Sufrin (n 13), 125.

<sup>46</sup> Ioannis Lianos, *Competition Law: Analysis, Cases and Materials* (forth. Oxford University Press 2018), ch 6, p.3

<sup>47</sup> Jones and Sufrin (n 13), 125.

<sup>48</sup> *ibid*, 125.

*MBU Case*),<sup>49</sup> that advocated the drawing up of a competition balance sheet and weighing anti-and pro-competitive effects before arriving at a conclusion about the overall effects of any agreement.

Presently, agreements are presumed to be restrictive by object if they contain restrictions that, in the context in which they are to operate,<sup>50</sup> are very likely to harm competition.<sup>51</sup> Whilst the category of object restraints is not as simple as constituting a list,<sup>52</sup> horizontal agreements containing price fixing and/or output limiting restraints;<sup>53</sup> agreements between competitors for reducing capacity,<sup>54</sup> and information exchanges between competitors directly or indirectly to fix purchase or selling prices,<sup>55</sup> have been deemed to be highly likely to be restrictive by object.<sup>56</sup> Certain vertical restraints especially for resale price maintenance and for conferring absolute

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<sup>49</sup> Particularly, see Case-56/65 *Société Technique Minière (STM) v. Maschinenbau Ulm (MBU)*, [1966] ECR 235, which sets out a comprehensive test in which to determine the object of an agreement. (“...interference with competition must result from all or some of the clauses of the agreement itself. Where an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered”).

<sup>50</sup> Case T-168/01 *Glaxo-SmithKline Services Unlimited v. Commission*, [2006] ECR II-2629 Case C-439/09, *Pierre Fabre Dermo-Cosmetique SAS v Président de l’Autorité de la Concurrence, Ministre de l’Économie, de l’Industrie et de l’Emploi*, [2011] ECR I-9419.

<sup>51</sup> Jones and Sufrin (n 13), 205.

<sup>52</sup> It is important to point out that this statement does not detract from the concept of ‘hardcore restriction’ which was introduced by the European Commission in the Follow-up to the Green Paper on Vertical Restraints, published in 1998, and reiterated in the Commission’s *De Minimis* Notice and in the Horizontal Cooperation Agreements and the Vertical Agreements Block Exemption Regulations which indicates practices that are so injurious to competition that they will almost never be justified. However, given the scheme of Article 101, it remains theoretically possible to individually assess hardcore restrictions under Article 101(3).

Professor Richard Whish has also introduced the concept of an ‘object box’ which comprises particularly pernicious types of agreements that are overwhelmingly likely to harm consumer welfare. He explains however, that even these agreements can still be permitted if they can be shown to satisfy the requirements of Article 101(3). Richard Whish and David Bailey, *Competition Law* (Oxford University Press 2012), 120.

<sup>53</sup> For instance see decision of the General Court in T-374-375/94, 384/94 *European Night Services v Commission* [1998] ECR II-3141.

<sup>54</sup> CJEU’s preliminary ruling in Case C-209/07, *Competition Authority v Beef Industry Development Society Ltd and Barry Brothers (Carrigmore) Meats Ltd*. [2008] ECR I-8637.

<sup>55</sup> CJEU decision in Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529.

<sup>56</sup> It is possible that the CJEU, like the US Supreme Court could rethink the boundaries of the ‘object’ category of restraints where necessary to reflect economic and other developments. However, EU objectives have not evolved as dramatically as those in the US and despite having no formal system of precedents, the CJEU consistently reiterates and reaffirms statements set out in previous judgments. (See Case 4/73, *Nold v. Commission* [1974] ECR 491). Jones and Sufrin (n 13), 231.

territorial protection to distributors are also highly likely to be considered restrictive by object.<sup>57</sup>

If it is found that an agreement does not have the object of restricting competition then its effect on competition may be examined in light of its actual circumstances. These include, the provisions of the agreement; objectives it seeks to attain; the economic and legal context of which it forms a part; the nature of goods and services affected by the agreement and the real condition and structure of the markets in which it is likely to operate. EU courts may consider the manner in which the specific agreement may affect potential rather than merely actual competition, as long as this is not purely speculative and is based on the evidence at hand and ‘represents a real, concrete possibility’. Effects may be demonstrated through a combination of empirical evidence and theories of harm based on economic models.<sup>58</sup>

Before deciding whether or not an agreement is anti-competitive, the competition authorities and courts apply the counterfactual test. This test compares the competitive situation resulting from the agreement with the situation that would have existed had the agreement not been in place. The counterfactual test forms part of the economic and legal context of the agreement.<sup>59</sup> The importance of this test has been particularly noted in the *GSK Case* and the *O2 Case*.<sup>60</sup>

Importantly, Article 101 TFEU does not prohibit all agreements that restrict competition either by object or effect and that are likely to affect inter-state trade. The TFEU recognizes that some forms of collaboration that are restrictive of competition may still have beneficial effects. Therefore, the prohibition in Article 101(1) may be declared inapplicable to any agreement by virtue of Article 101(3) TFEU, on the basis that it (a) contributes to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, and (b) does not impose on the undertakings concerned, restrictions which are not indispensable to the attainment of these objectives, and (c) affords such undertakings the possibility of eliminating competition in respect of a

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<sup>57</sup> Case No. 58/64 *Consten and Grundig v Commission* [1966] ECR 429.

<sup>58</sup> Lianos (n 46), ch 6, 84.

<sup>59</sup> Lianos (n 46), ch 6, 85.

<sup>60</sup> Case T-168/01, *GlaxoSmithKline Services Unlimited v Commission* [2006] ECR II-2969 and Case T-328/03, *O2 (Germany) GmbH & Co. OHG v. Commission* [2006] ECR-II 1231.

substantial part of the products in question. Regardless of how difficult it may be to achieve this in reality, theoretically at least there is a possibility under TFEU that any agreement, which has an anti-competitive object or effect, even an agreement embodying a hardcore restriction, may still be allowed to operate if it meets all four conditions stipulated in Article 101(3) TFEU.<sup>61</sup>

### 5.1.3. Distinctions and Commonalities between the US and EU Approaches

The distinctions between the US and the EU approaches to anti-competitive agreements are rooted in the underlying philosophies of the two systems. Whilst the US system is built upon absolute faith in the values of competition, in the EU perspective competition is subordinate to EU's primary objective of market integration.<sup>62</sup> Over time, however, the distinctions between the two systems have become somewhat blurred with Advocate General Kokott actually using the term 'per se prohibition' in the *T-Mobile Case*<sup>63</sup> and the EU Commission moving towards more economic analysis which has sometimes been likened to a rule of reason style approach. The two most significant distinctions and one important commonality between the two systems are as follows:

#### *(a) Distinction 1: Restriction by object is not automatic like the per se rule*

It is possible to confuse the EU restriction by object with the US per se rule. Indeed, the two are similar given that in the EU when an agreement has an anti-competitive object, then, as under the per se rule, it is not necessary to examine its actual or potential anti-competitive effect in order to decide whether or not it is anti-competitive within the meaning of Article 101(1) TFEU.

However, unlike the US per se rule, the assessment of the EU anti-competitive 'object' is not automatic and requires the characterization or classification of the facts at issue within one of the categories/types of coordination/collusion between undertakings which have been recognised as having an anti-competitive object. This

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<sup>61</sup> Satisfaction of these conditions is 'both necessary and sufficient': Case 42/84 *Remia and Others v Commission* [1985] ECR 2545, para.38; Case T-17/93, *Matra Hachette SA v. Commission* [1994] ECR II-595, para. 104; Joined Cases C-501/06 P, 513/06 P, 515/06 P, 519/06 P, *GlaxoSmithKline Services Unlimited v Commission*, [2009] ECR I-9291.

<sup>62</sup> Whish and Sufrin (n. 43).

<sup>63</sup> Opinion of AG Kokott, Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529.

characterization step is performed with regard to the EU Commission's past experience with the type of coordination/collusion as well as with regard to the *economic and legal context* in which the *specific* agreement is to operate. It is possible, therefore, that an agreement that appears to belong within an anti-competitive object category may not qualify as a restriction of competition by object, because of the specific legal and economic context of which it forms part.

*(b) Distinction 2: the Absence of Article 101(3) in US Antitrust Law*

Another significant difference between restriction by object and the per se rule is that even though the characterization of an agreement as restrictive by object leads to a presumption of incompatibility with Article 101 TFEU, much like the per se rule immediately establishes anti-competitive effect, it is still theoretically possible for parties to the agreement to justify it under Article 101(3) TFEU.<sup>64</sup> However, the ultimate impact of this distinction is small given that the EU Commission rarely justifies such agreements under Article 101(3).

Further, in respect of practices and agreements that are anti-competitive by effect, the Commission has not accepted that a 'rule of reason' style analysis that would entail balancing anti- and pro-competitive effects under Article 101(1), provides the solution. Rather the Commission is of the view that Article 101(3) provides the appropriate forum for weighing the restrictive effects of the agreement against any economic benefits and efficiencies created by the agreement.<sup>65</sup>

*(c) Commonality: Move towards greater economic analysis*

An important commonality between the EU and US approach towards anti-competitive agreements is the increasing trend of both towards more economic analysis. In the US, the per se category is shrinking and the rule of reason is increasingly becoming the default mode of approaching anti-competitive agreements. Similarly, in the EU, the Commission is injecting some economic analysis in

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<sup>64</sup> Lianos (n 46), ch 6, 74.

<sup>65</sup> Jones and Sufrin (n 13), 198-199.

determining even the object category whilst stopping short of a full-fledged effects analysis.<sup>66</sup>

## **5.2. Analytical Tests in the Indian and Pakistani Competition Laws**

The analytical tests stipulated in the Indian and Pakistani competition laws for establishing anti-competitive agreements, trace their roots to the EU and US models. These tests form an important bridge between the adoption processes and the implementation of provisions related to anti-competitive agreements in the two countries in that they reflect the interplay of transfer mechanisms and institutions in the adoption process and form the basis of enforcement actions in respect of anti-competitive agreements at the implementation stage.

### 5.2.1. The Analytical Test in the Indian Competition Law

#### *(a) Provisions related to Anti-competitive Agreements<sup>67</sup>*

Section 3 of the Indian competition law sets out the prohibition against anti-competitive agreements. Section 3(1) prohibits ‘enterprises’, ‘associations of enterprises’, ‘persons’ or ‘associations of persons’ from entering into ‘any’ agreement, which is in respect of ‘production, supply, distribution, storage, acquisition or control of goods or provision of services’ in India and ‘causes or is likely to cause an appreciable adverse effect on competition within India.’ In terms of section 3(2), any such agreement, if entered into, is automatically void.

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<sup>66</sup> James E Hartley and American Bar Association (eds), *The Rule of Reason* (ABA Section of Antitrust Law 1999). (accessed 6 July 2017). In contrast, in the CJEU’s more recent decision in the *Expedia Case*, the AG reverted to the Beef Industry language regarding the justification to prohibit “certain forms of collusion.” However, it may be possible to carve out an exception given that this was in relation to a *de minimis* standard set out in Council Regulation (EC) No.1/2003. Nevertheless, the CJEU found once again here that “there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition.”

However, in its 2014 decision in Case C-67/13 P *Groupement des cartes bancaires (CB) v. Commission* (2014) CJEU set aside the judgment of the General Court that certain pricing measures adopted by CB Group in a two-sided market, constituted ‘by object’ restriction of competition. Specifically, CJEU rejected a broad interpretation of the ‘by object’ category and clarified that the essential legal criterion for ascertaining a restriction of competition by object is the finding that such coordination in itself reveals a sufficient degree of harm to competition.

See JR Calzado and A Scordamaglia-Tousi ‘Groupement des Cartes Bancaires v Commission: Shedding Light on What Is not a ‘by object’ Restriction of Competition’ *Journal of European Competition Law & Practice Advance Access published 18<sup>th</sup> March 2015* <<https://www.lw.com/thoughtLeadership/groupement-des-cartes-bancaires-commission>> (accessed 28 July 2017).

<sup>67</sup> For the full text of the sections referred to here, see Annexe M.

Sections 3(3) and 3(4) list two categories of potentially anti-competitive agreements. Section 3(3) lists types of agreements, practices and decisions that are *presumed* to have an appreciable adverse effect on competition (AAEC). In case an agreement is presumed to have AAEC under this section, the burden of proof shifts on to the defendant to prove that the agreement does not in fact have AAEC in India. However, the section is silent as to the factors the defendant may press in order to successfully rebut this presumption.<sup>68</sup> The proviso to the section exempts from the application of the section, ‘agreements entered into by way of joint ventures’ if these increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services’.

Section 3(4) enumerates agreements in respect of which there is no presumption of AAEC and it is incumbent upon CCI to *establish* their adverse effect on competition. Categories of agreements listed in this section include tie-in arrangements; exclusive supply agreements; exclusive distribution agreements; refusals to deal, and agreements for resale price maintenance. Section 3(5) lists categories of agreements that are exempted from the application of section 3 altogether provided that the restraints or conditions imposed by them are ‘reasonable’.

*(b) Relationship with EU and US Models*

It is evident from the preceding that section 3 of the Indian competition law is a hybrid of section 1 of the Sherman Act and Article 101(1) of the TFEU. Just as section 1 of the Sherman Act, section 3(1) of the Indian competition law encompasses all agreements solely on the touchstone of their effect on competition whilst section 3(2) mirrors both section 1 of the Sherman Act and Article 101(2) TFEU in implying that agreements falling within the ambit of section 3(1) are illegal and automatically void.

Section 3(3) identifies types of agreements that may be *presumed* to be anti-competitive by the nature of their activity and declares that their AAEC need not be established. It thereby, echoes the underlying philosophy of the US per se rule and the ‘object’ provision of Article 101(1) TFEU albeit recasting it in its own words.

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<sup>68</sup> Section 19(3) of the Law provides a list of factors that may be taken into account in assessing the effect. For text of the section *see* Annexe M.

However, the similarity between section 3(3) and the US per se rule appears to be superficial: whilst the two are comparable to the extent that anti-competitive effect is largely inferred from the conduct envisaged in the agreement, the Indian competition law envisages a possible rebuttal of this presumption unlike the per se rule in which once the government or private plaintiff have established that the conduct has occurred there is no possibility of rebuttal of this effect by the defendant.<sup>69</sup>

The similarity between section 3(3) and Article 101(1) is more pronounced as is evident from

Table 5.1 below.

**Table 5.1 Categories listed in Article 101(1) TFEU and section 3(3) of Indian Competition Law**

101(1) TFEU	Section 3(3) Indian Competition Law
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;	(a) directly or indirectly determines purchase or sale prices;
(b) limit or control production, markets, technical development, or investment;	(b) limits or controls production, supply, markets, technical development, investment or provision of services;
(c) share markets or sources of supply;	(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;	
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.	
	(d) directly or indirectly results in bid rigging or collusive bidding.

There appears to be no requirement in section 3(3) for evaluating the pro-competitive effects of agreements presumed to be anti-competitive as per Article 101(3) TFEU (other than in relation to joint ventures referred to in the proviso to the section, where

<sup>69</sup> James E Hartley and American Bar Association (eds), *The Rule of Reason* (ABA Section of Antitrust Law 1999), 3.

the relevant test is one of ‘reasonableness’). However, section 19(3) of the Indian competition law may be deemed to serve the same purpose because even though it does not expressly refer to ‘reasonableness’, it lists factors that CCI may take into account in determining AAEC under section 3 of the Indian competition law. Further, section 3(3) shifts the burden of proof for rebutting the presumption of anti-competitiveness on to the defendant. This appears to be in accordance with the option available to the defendant under TFEU, at least theoretically, to demonstrate that the agreement is not anti-competitive because it meets the requirements of Article 101(3).<sup>70</sup>

There is no presumption of anti-competitiveness in respect of section 3(4) agreements. Section 3(4) appears to be in line with the ‘effects’ analysis required under Article 101(1) TFEU to the extent that CCI is required to determine the actual or potential effect on competition of agreements listed at Section 3(4)(a) to (e), by taking into consideration factors listed in section 19(3) of the law. Further, by requiring that AAEC of the agreement be ‘appreciable’, section 3(4) appears to incorporate EU’s *De Minimis* rule<sup>71</sup> rather than the test of reasonableness implicit in section 1 of the Sherman Act.

Table 5.2 indicates the parallels between factors listed in section 19(3) and the considerations stated in Article 101(3) TFEU as well as with the Commission’s Guidelines on Enforcing Article 102.

**Table 5.2 Comparing Article 101(3) TFEU and Section 19(3) Indian Competition Law**

Article 101(3) TFEU	Section 19(3) Indian Competition Law
<i>Article 101 does not apply to agreements:</i>	<i>Factors to be considered in determining AAEC:</i>
1. which contribute to improving the production or distribution of goods	1. improvements in production or distribution of goods or provision of services [19(3)(e)]
2. which contribute to promoting technical or economic progress	2. promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services [19(3)(f)]
3. which allow consumers a fair share of the resulting benefit	3. Accrual of benefits to consumers [19(3)(d)]

<sup>70</sup> Article 2 Council Regulation No 1/2003 and Jones and Sufrin (n 13), 212, 222, 251.

<sup>71</sup> Jones and Sufrin (n 13), 240. Guidance 2001/C 368/07.

Article 101 does apply in case the agreements:

4. impose on the undertakings concerned, restrictions which are not indispensable to the attainment of these objectives	4. creation of barriers to new entrants in the market [19(3)(a)]
5. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.	5. driving existing competitors out of the market [19(3)(b)]
	6. foreclosure of competition by hindering entry into the market [19(3)(c)] <sup>72</sup>

However, a closer look at the scheme of section 3(4) read with section 19(3) reveals that unlike the requirements of 101(3) of the TFEU, which are cumulative, the requirements of section 19(3) are disjunctive. Under the Indian competition law therefore, the defendant has a lower burden to discharge in order to demonstrate the pro-competitive effects of the agreement.

Further, an evaluation of the categories of section 3(3) agreements (presumed to be anti-competitive) and section 3(4) agreements (for which AAEC must be established), reveals that whilst all section 3(3) agreements are horizontal agreements, those listed in section 3(4) are vertical agreements. In effect, this means that the Indian competition law *presumes* horizontal agreements to be anti-competitive but requires evidence of anti-competitive effect in case of vertical agreements. Joint ventures falling within the proviso to section 3(3), which are a type of horizontal agreements, are exempt from the presumptive effect of section 3(3) and, for all analytical purposes, are treated more like vertical agreements under section 3(4).<sup>73</sup> Such bifurcation of horizontal and vertical agreements or indeed singling out joint ventures for special treatment is unprecedented under both Article 101(1) TFEU, however it reflects the move in US antitrust jurisprudence to always treat purely vertical agreements under rule of reason.<sup>74</sup>

<sup>72</sup> Factors listed at serial numbers 4, 5 and 6 in this column, echo Guidance paragraphs 16 to 19 of Guidance on the Commission's Enforcement Priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02) even though the latter relate to defining market power for the purposes of establishing dominance rather than for establishing anti-competitive agreements.

<sup>73</sup> Although, the proviso to section 3(3) does not state the factors that may be taken into account to ascertain the 'reasonableness' or otherwise of the relevant joint venture agreements, whilst section 3(4) refers to section 19(3) to identify factors that may be relevant to assess anti-competitive effect.

<sup>74</sup> See n. 25 and text thereto.

Section 3(5), which allows entities to impose ‘reasonable conditions’ to protect rights conferred upon them under the laws listed in the section, appears to be an Indian innovation.<sup>75</sup> The motivation for this provision appears to be to protect certain intellectual property rights. There is no such exclusion category in Article 101(3) TFEU which allows for exemption from the operation of Article 101(1) only on the basis of an agreement’s pro-competitive effects that are identical for all types of agreements. The commonality with the Sherman Act is limited to the use of the term ‘reasonable’ although there is no indication that the use of this term entails a rule of reason analysis as carried out in the US antitrust system. Even otherwise, the US antitrust statutes do not advocate an exemption by category. In both the EU and the US systems, the line between the need to protect intellectual property rights and to promote competition is drawn and redrawn by enforcement authorities on a case-to-case basis rather than by statute.

(c) *Links with the Indian Adoption Process*

Section 3 of the Indian competition law reflects the effects of *socialization* as well as of *emulation*.<sup>76</sup> However, it is not easy to segregate the effects of the two mechanisms. The concept of anti-competitive agreements and the decision to void such agreements is an outcome of *emulation*, to the extent that section 3(2) reproduces Article 101(2) TFEU almost verbatim. However, sections 3(1), 3(3) and 3(4) appear to draw inspiration from both Article 101(1) TFEU and section 1 of the Sherman Act without *emulating* either. In fact the manner in which these sub-sections combine and recreate principles derived from the two jurisdictions suggests the greater effect of *socialization*. Section 19(3), which supports the interpretation of section 3 generally and section 3(4) particularly, at first appears to emulate Article 101(3) TFEU, however, a closer examination suggests that it is in fact an adaptation of the Article and the Commission’s Guidelines on Enforcing Article 102 TFEU. The requirement for AAEC to be ‘appreciable’ seems to emulate the *De Minimis* rule of EU competition law.

The impact of *socialization*—indeed of Indian-ization—is perhaps most pronounced in the bright line bifurcation of horizontal and vertical agreements into ‘presumed

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<sup>75</sup> See Annexe M for texts of these sections.

<sup>76</sup> Chapter 3, sections 3.4 & 3.5.

restrictive’ and ‘restrictive by effect’ and in section 3(5), which exempts entire categories of agreements from the operation of section 3 provided the restraints imposed by them are ‘reasonable’. This provision is akin to the block exemptions that may be granted under Article 101(3).<sup>77</sup> However, section 3(5) is distinct from Article 101(3) block exemptions in that its exemptions are statutory and, therefore, more ironclad. The term ‘reasonable’ as used in section 3(5) may be another effect of *socialization* in that the law provides no insight if it is inspired from the US style rule of reason or employed in its ordinary dictionary sense.

### 5.2.2. Anti-competitive Agreements under the Pakistani Competition Act

#### (a) *Provisions of the Pakistani Competition Law*<sup>78</sup>

The provisions relating to anti-competitive agreements in the Pakistani competition law are spread over four sections: section 4 stipulates the offence, and sections 5, 7 and 9 provide mechanisms for individual and block exemptions.

Section 4(1) identifies the types of agreements that may be found to be anti-competitive unless exempted in accordance with the relevant provisions of the law. Section 4(2) provides a non-exhaustive list of potentially anti-competitive agreements and section 4(3) declares that any agreement found to be anti-competitive in pursuance of section 4, shall be automatically void.

The possibility of exemption referred to in section 4(1) is detailed in section 5. Whilst the discretion to grant an exemption vests in the CCP, the onus of applying for such exemption and for demonstrating that it meets the criteria specified in section 9, lies on the entity seeking the exemption. In terms of section 7, CCP also has the power to grant block exemptions on such terms as it may deem fit.

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<sup>77</sup> Between 2004 and 2010 the EU Commission had issued Regulation Nos. 772/2004, 330/2010, 461/2010, 1218/2010, 1217/2010, 267/2010, 906/2009, 169/2010 granting block exemptions to technology transfer agreements, vertical agreements, vertical agreements and concerted practices in the motor vehicle sector, specialization agreements, R & D agreements, agreements in the insurance sector, liner shipping consortia and rail, road and inland waterway sectors respectively. These regulations were issued under Regulation 19/65 (as amended by Council Regulation 1215/99 and 1216/00), Regulation 2821/71, Council Regulation 1534/91 and Council Regulation 246/2009 (Jones and Sufrin n 13), 264).

<sup>78</sup> See Annexe N for text of all relevant sections.

(b) *International antecedents of these Provisions*

The provisions of the Pakistani competition law relating to anti-competitive agreements place it squarely in the tradition and terminology of Article 101 TFEU. Section 4(1) applies to agreements in respect of ‘the production, supply, distribution, acquisition of goods or control of goods or the provision or provision or services’ in the relevant market that, just as required in Article 101(1) TFEU, have the ‘object or effect of preventing, restricting or reducing competition within the relevant market’. Further, as Table 5.3 demonstrates, the categories of agreements listed in section 4(2) almost mirror those listed in Article 101(1) TFEU.

**Table 5.3 Comparing Article 101(1) TFEU and section 4(2) Pakistani Competition Law**

Article 101(1)	Section 4(2) of Pakistani Competition Law
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;	(a) fixing the purchase or selling price or imposing of any other restrictive trading conditions with regard to the sale or distribution of any goods of the provision of any service;
(b) limit or control production, markets, technical development, or investment;	(c)/(d) fixing or setting the quantity of production, distribution or sale with regard to any goods or the manner or means of providing any services; limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of any services; and
(c) share markets or sources of supply;	(b) dividing or sharing of markets for the goods or services, whether by territories, by volume of sales or purchases, by type of goods or services sold or by any other means;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;	(f) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.	(g) making the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
	(e) collusive tendering or bidding for sale, purchase or procurement of any goods or service.

Also in keeping with EU Competition Law, the Pakistani competition law does not distinguish between horizontal and vertical agreements and also does not raise a rebuttable presumption of AAEC in respect of any category or class of agreements. Further, section 4(3) reproduces Article 101(2) TFEU verbatim, in stating that any agreement entered into in violation of section 4 shall be void.

Sections 4(1) applies to all agreements that meet its criteria unless these are individually or block exempted under sections 5 and 7 of the Pakistani competition law. Section 9 which lists factors that CCI is required to consider in determining whether or not an agreement is eligible for either exemption, is comparable to Article 101(3) TFEU as detailed in Table 5.4 below:

**Table 5.4 Comparing Article 101(3) TFEU and Section 9 Pakistani Competition Law**

Article 101(3) TFEU	Section 9 Pakistani Competition Law
<i>Article 101 does not apply to agreements:</i>	<i>Factors to be considered in determining eligibility for exemption</i>
1. which contribute to improving the production or distribution of goods	1. improving production or distribution
2. which contribute to promoting technical or economic progress	2. promoting technical or economic progress, while allowing consumers fair share of the resulting benefit; or
3. which allow consumers a fair share of the resulting benefit	
<i>Article 101 does apply in case these agreements:</i>	
4. impose on the undertakings concerned, restrictions which are not indispensable to the attainment of these objectives	
5. afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.	3. the benefits of that clearly outweigh the adverse effect of absence or lessening of competition.

However, the scheme of exemptions in the Pakistani competition law departs from Article 101(3) TFEU in two material respects: first, in adding a balancing dimension to the factors to be considered (section 9(1)(c)) which is more reminiscent of the US rule of reason approach than of EU competition law.<sup>79</sup> And second, the manner in which the exempting factors are brought into play. Although in terms of Article 101 TFEU, the burden of proving Article 101(3) shifts to the defendant, it is not required

<sup>79</sup> See n. 37 and text thereto.

to initiate independent proceedings to claim relief under Article 101(3). However, under Pakistani competition law, it appears incumbent upon the defendant to file an independent application to seek an exemption. CCP's power and discretion to grant block exemptions under section 7 reflects the EU's present approach towards implementing Article 101(3).<sup>80</sup>

(c) *Effect of Pakistani Transfer Mechanisms*

The scheme of addressing anti-competitive agreements prescribed in sections 4, 5, 7 and 9 of the Pakistani competition law reflects the unmistakable stamp of Pakistan's transfer mechanisms of *emulation* and *coercion*.<sup>81</sup>

The impact of *emulation* is evident not only in that the principles stated in these sections mirror Article 101 TFEU but also in the language and style in which these are stated. However, the fact that this *emulation* had taken place through the agency of the WB-led team and the Brussels based law firm engaged by the WB-led Team to draft the law, indicates the absence of any independent application of mind or choice of systems to be adopted on the part of Pakistan, and, therefore, indicates the overriding impact of *coercion*.

The source of the only two significant departures from EU competition law (adding a balancing component to the consideration of cases of exemptions and making such consideration only if the defendant files an independent exemption application) in these sections is unclear. The first of these reflects principles of a rule of reason inquiry under US antitrust law and may also be attributed to the combined mechanisms of *coercion* and *emulation* under the WB-led team whilst the second may be ascribed to *socialization* introduced through the Pakistani element operating within the WB-led team.

5.2.3. Projections Regarding Interpretation of Analytical Tests

The interpretive strategies that CCI and CCP are likely to adopt in the implementation stage are likely to depend upon: (i) the international antecedents of the statutory provisions relating to anti-competitive agreements in the respective laws, and (ii) and

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<sup>80</sup> See n. 77.

<sup>81</sup> Chapter 3, sections 3.4 & 3.5.

the transfer mechanisms that the countries had adopted in the course of adopting the competition laws. I have discussed the antecedents at length in sections 5.2.1(b) and 5.2.2 (b) above and need not be reproduced here. Further, it may be assumed that in interpreting the analytical tests, CCI and CCP will continue to employ the transfer mechanisms engaged by them in transferring the original provisions ie CCI will continue with *socialization* and *emulation* whilst Pakistan will *emulate* under *coercion*.

Given these two factors, and further given the hybrid nature of the relevant provisions in the Indian competition law, CCI may be expected to draw support from both EU and US decisions and materials in interpreting the analytical tests. However, if *socialization* remains dominant even in interpreting these tests, then the international decisions and materials are likely to be adapted and Indian-ized to meet the exigencies of the Indian context. Conversely, if the mechanism of *emulation* gains greater momentum at the implementation stage then CCI is likely to refer to a wide range of foreign decisions and materials without necessarily adapting these for India's specific context.

Conversely, in view of the strong EU competition law roots of the provisions relating to anti-competitive agreements in the Pakistani competition law, CCP may be expected to continue to draw upon EU decisions and materials in interpreting the analytical tests. If CCP continues to employ *emulation* as the WB-led team had done in the adoption process then it is more likely to rely on EU decisions and materials without adapting these to domestic Pakistani conditions or needs. The residual impact of *coercion* is likely to be evident in CCP's continuance with the transfer strategies of the WB-led team.

### **5.3. CCI's Interpretation and Application of the Analytical Tests**

CCI's passes orders in respect of anti-competitive under: (i) section 26(2) (when it dismisses a matter because there is no *prima facie* case); (ii) section 26(6) (where the matter is dismissed after an investigation and hearing), and (iii) section 27 (where CCP finds a contravention after a hearing and imposes sanctions).<sup>82</sup> Amongst these,

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<sup>82</sup> See Annex I for the full texts of these Indian competition law sections.

section 26(6) and 27 orders contain an in-depth examination and analysis of issues and I focus only on these for the purpose of the following analysis.

### 5.3.1. A Historical Review of CCI's Orders

CCI's orders in respect of anti-competitive agreements relate either to section 3(3), where if CCI is able to prove the existence of a horizontal 'agreement',<sup>83</sup> it presumes its AAEC or to section 3(4), where it is incumbent upon CCI to establish the existence of a vertical agreement and to ascertain its AAEC with reference to factors listed in section 19(3). I examine CCI's orders in both these categories.<sup>84</sup>

#### (a) *Orders in Agreements for Price-fixing*

(i) *Neeraj Malhotra v. Deutsche Post Bank Home Finance Ltd. & Others.*<sup>85</sup> This was CCI's first anti-competitive agreement case. The issue before CCI was whether or not pre-payment penalty imposed by banks in respect of housing finance loans violated section 3 of the law. Although CCI was of the view that there was 'no agreement' amongst the parties to the case,<sup>86</sup> it nevertheless evaluated whether in imposing prepayment penalty, the banks had violated section 3(3) of the law.<sup>87</sup> However, even though the DG and the defendants repeatedly raised the possibility of the application of the per se rule or rule of reason, CCI focused on establishing the economic, policy and factual context in which the impugned banks had been operating before concluding that the parties had not violated section 3.<sup>88</sup>

CCI also seemed particularly interested in establishing the general state of competition in the banking and housing industry rather than in interpreting or applying the provisions of the law. Further, even though the subject of the alleged

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<sup>83</sup> See Annexes M and N for definitions of 'agreement' under the Indian and Pakistani competition laws.

<sup>84</sup> Where a case addresses more than one category of agreements listed in a section, I identify it according to the first category of agreement addressed in the order. For example a case of price fixing and restricting supplies falls into 3(3)(a) as well as 3(3)(b). However, in order to avoid repetition, I consider it under price fixing only especially given that CCI's analysis of AAEC for each category is essentially the same.

<sup>85</sup> Case 5/2009 decided 02.12.2010.

<sup>86</sup> See n. 85 Para 17. CCI was of the view that there was no agreement amongst the banks as all banks had not attended the meeting of the Indian Banking Association in which the matter had been discussed.

<sup>87</sup> See n 85 Para 18.1

<sup>88</sup> See n.85 Para 15.1. 'In identifying the key issues for determination in this case, it is important to be fully conscious of the fact that its various dimensions include significant macro-economic factors and financial stability implications on the one hand and consumer interest on the other.'

agreement was among those *presumed* to be anti-competitive, CCI considered its AAEC with reference to factors listed in section 19(3). Throughout this analysis, CCI did not refer to the per se rule or rule of reason or to any judicial precedents whether domestic or international.<sup>89</sup>

Member Parashar issued a dissenting order in which after a more rigorous legal analysis<sup>90</sup> he concluded that in imposing prepayment penalty, the banks had entered into a price fixing agreement within the meaning of section 3(3)(a) and an agreement for restricting supply of banking services under section 3(3)(b). He expressly referred to EU and US precedents and employed per se rule /rule of reason terminology. He referred to factors listed in section 19(3) to conclude that the agreement had AAEC and discussed the law relating to rebuttable presumptions as detailed in Indian judicial precedents.

(ii) *FICCI v. United Producers/Distributors Forum & others.*<sup>91</sup> In the following year, CCI found United Producers/Distributors Forum and others (UPDF) guilty of fixing the price and restricting supply of films to FICCI, an association of multiplex owners in violation of sections 3(3)(a) and 3(3)(b) of the Law. However, unlike the *Indian Banking Association Case*,<sup>92</sup> CCI limited its analysis to *finding* an agreement.<sup>93</sup> Once it had established that an agreement existed, CCI *presumed* AAEC and shifted the onus on to the defendants to provide evidence to rebut the presumption.<sup>94</sup> CCI also clarified that once an agreement was covered within the presumption of section 3(3), the factors listed in section 19(3) 'need not be gone into'.<sup>95</sup> It nevertheless examined these factors (for the reason that the DG had already considered these at great length) and found the defendants in violation of section 3.<sup>96</sup> However, throughout this

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<sup>89</sup> In his dissenting order, Member Prasad followed a similar approach of evaluating the agreement in the context in which it operated and the overriding importance of consumer interest rather than on the touchstone of the provisions of the Law, concluded that the parties had violated section 3 of the Law.

<sup>90</sup> See n. 85. Dissenting Order by Member PN Parashar.

<sup>91</sup> Case 1/2009 decided 25.5.2011.

<sup>92</sup> See n. 85.

<sup>93</sup> See n. 91 (para 23). CCI formed the view that UPDF's joint stand towards FICCI members, as reflected in its letter to them, was an agreement for limiting or controlling production and price-fixing and, therefore, fell within the purview of section 3.

<sup>94</sup> See n. 91 (para 23.51).

<sup>95</sup> See n. 91 (para 23.53).

<sup>96</sup> See n. 91 (para 24).

analysis, CCI did not refer to EU or US competition laws or jurisprudence and did not employ their terminology.

(iii) *Varca Druggist & Chemist and others v. Chemists & Druggists Association Goa and others.*<sup>97</sup> In this case, CCI reiterated its approach in the *UPDF Case*<sup>98</sup> and found the defendant associations in violation of sections 3(3)(a) and 3(3)(b) of the Law. CCI clearly stated that, ‘once existence of prohibited agreement...is established there is no further need to show an effect on competition because then a rebuttable presumption is raised that such conduct has an appreciable adverse effect on competition’.<sup>99</sup> CCI further stated that in such circumstances, the burden of proof shifts on to the defendants ‘to rebut that presumption referring to factors enumerated in section 19(3) of the Act,’<sup>100</sup> and that it is not incumbent upon CCI ‘to launch into an enquiry...to find out existence of appreciable adverse effect on competition.’ Interestingly, however, CCI did consider factors listed in section 19(3),<sup>101</sup> and concluded that ‘it can be seen that all pro-competitive factors are absent and at the same time all factors indicating anti-competitive effect are present.’<sup>102</sup>

(iv) *Builders Association of India v. Cement Manufacturers Association & Others.*<sup>103</sup> CCI’s decision in this case was a departure from its position in earlier cases. Rather than *presuming* AAEC and leaving it to the defendants to rebut the presumption, CCI

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<sup>97</sup> MRTP Case No. C-127/2009/DGIR (4/28), decided 11.06.2012.

<sup>98</sup> See n. 91.

<sup>99</sup> *ibid* (para 27.6).

<sup>100</sup> *ibid* (para 27.29).

<sup>101</sup> *ibid* (para 27.30).

<sup>102</sup> *ibid* (para 27.31). CCI followed this decision in several cases without actually citing it, including:

(1) Case C-87/2009/DGIR, *Vedant Bio Sciences v. Chemists & Druggists Association of Baroda*, decided 05.09.2012;

(2) Case 60/2012, *Arora Medical Hall, Ferozepur v. Chemists & Druggists Association, Ferozepur & Ors*, decided 05.02.2014;

(3) Case 02/2012 and Ref. Case 01/2013 *Bengal Chemist & Druggist Association* decided 11.03.2014;

(4) *Suo Motu Case 5/2013 Collective boycott/refusal to deal by the Chemists & Druggists Association, Goa (CDAG), M/s Glenmark Company and, M/s Wockhardt Ltd.* decided 27.10.2014;

(5) Case 20/2011 *Santuka Associates Pvt. Ltd. v. All India Organization of Chemists and Druggists & Others* decided 19.02.2013;

(6) Case 41/2011 *Sandhya Drug Agency v. Assam Drug Dealers Association and Others* decided 09.12.2013; and

(7) Case 30/2011 *Peeveear Medical Agencies, Kerala vs All India Organization of Chemists and Druggists and Other* decided 20.06.2010.

<sup>103</sup> Case 29/2010 decided 20.06.2010.

sought to establish the *effect* of increase in the price of cement, which had resulted from the defendants' actions.<sup>104</sup>

(v) *Indian Sugar Mills Association & Others v. Indian Jute Mills Association & Others*.<sup>105</sup> In this case, CCI reverted to its earlier position regarding section 3(3) cases stating that '[a] bare reading of the statutory scheme ... indicates that under section 3(3) of the Act, the presumption of appreciable adverse effect on competition has to follow once an agreement falling under clauses (a) to (d) of section 3(3) of the Act is found to exist'. CCI further held that it was 'wholly untenable' that the defendants should try and shift the statutory scheme.<sup>106</sup> Interestingly, however, CCI made this statement only after it had considered and affirmed the DG's discussion in respect of factors listed in section 19(3).

(b) *Orders in Limiting Supply cases*<sup>107</sup>

(i) *Vijay Gupta v. Paper Merchants Association Delhi & Others*.<sup>108</sup> In this case CCI held that the Paper Merchants Association Delhi (PMAD) had violated section 3(3)(b) of the law by including in its rules and regulations a clause restricting members from having dealings with persons who failed to comply with the directions of PMAD's executive committee. In arriving at this conclusion, CCI examined factors listed in section 19(3) and explained that the mere absence of pro-competitive factors does not establish an offence unless anti-competitive factors are also present. CCI also noted that PMAD had failed to rebut the presumption of AAEC and had failed to establish any of the pro-competitive factors listed in section 19(3).

(ii) *Uniglobe Mod Travels Pvt. Limited v. Travel Agents Federation of India & Others*.<sup>109</sup> In this case, CCI found that a boycott call given by the defendants fell within the ambit of section 3(3)(b). CCI clarified that 'once existence of a prohibited agreement, practice or decision enumerated in section 3(3) is established it may not be

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<sup>104</sup> *ibid.* Particularly see paras 6.8 & 6.9. CCI also adopted this approach in RTPE 52/2006 *Re: Alleged Cartelization by Cement Manufacturers* decided 30.07.2012.

<sup>105</sup> Case 38/2011 decided 03.04.2014.

<sup>106</sup> *ibid* (para 173).

<sup>107</sup> See cases listed at n 85, n. 91 & n. 97 which are also included under this heading but not repeated for sake of brevity.

<sup>108</sup> Case 7/2010 decided 24.03.2011.

<sup>109</sup> Case 3/2009 decided 04.10.2011. CCI also followed this decision in Case RTPE 09/2008 (C-31/2009/DGIR) *FCM Travel Solutions (India) Ltd., New Delhi v. Travel Agents Federation of India & Others* decided 17.11.2011.

necessary to show an effect on competition’ and that ‘the burden of proof [shifted] upon the opposite parties to show that impugned conduct does not cause appreciable adverse effect on competition.’<sup>110</sup> Although CCI evaluated factors listed in section 19(3) it did so in response to arguments made by the defendants rather than of its own accord. In any event, CCI found that the defendants were not able to rebut the presumption of AAEC or to establish its pro-competitive effect.

Unusually, CCI cited a number of US and EU decisions as well as decisions of the anti-monopoly authority in the course of this analysis. However, it did not expressly refer to or engage in any discussion about the applicability of per se rule/rule of reason or object/effect tests.<sup>111</sup>

(iii) *Reliance Big Entertainment Limited v. Karnataka Film Chamber of Commerce & Others*.<sup>112</sup> In this case, CCI found that certain associations of film distributors were in violation of section 3(3). It began its analysis by examining whether the alleged anti-competitive practices fell within the ambit of section 3(3) or 3(4). Having established that the practices violated section 3(3)(b),<sup>113</sup> CCI invoked the rebuttable presumption of AAEC, and contrary to its earlier decisions, stated that ‘in order to find out whether the agreement...has caused appreciable adverse effect on competition factors listed in section 19(3) are to be considered.’<sup>114</sup> However, instead of embarking on a detailed consideration of the defendants’ arguments, CCI merely accepted the arguments presented by the DG in this regard that declared that the defendant ‘associations had not been able to refute this’.<sup>115</sup>

CCI also discussed the manner in which actions of associations could adversely impact not only competition but also consumers, and cited the decision of the anti-monopoly authority in the Motor Merchants Association Case in its support, in which

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<sup>110</sup> *ibid* (para 68.2.1).

<sup>111</sup> *See* n.109 (paras 29.7 and 29.8), dissenting note. In their dissenting notes, Members R. Prasad and M.L Tayal arrived at the same conclusion as CCI, via a different route. Also, although they expressly referred to the object/effect analysis in EU competition law, they stated that it was not incumbent upon CCI to interpret the Indian competition law in accordance with EU precedents alone and it could draw upon diverse sources in arriving at its decisions.

<sup>112</sup> Case 25/2010 decided 16.02.2012.

<sup>113</sup> *ibid* (paras 6.32, 6.41, 6.54, 6.65, 6.89).

<sup>114</sup> *ibid* (paras 6.90 and 6.91).

<sup>115</sup> *ibid*.

the authority had held that a restriction on dealing with non-members was a restrictive trade practice.<sup>116</sup> CCI penalized the defendants on the basis of this reasoning.<sup>117</sup>

(c) *Orders regarding Bid rigging Agreements*

(i) *A Foundation for Common Cause & People Awareness v. PES Installations Pvt. Limited.*<sup>118</sup> In its first case of bid rigging and CCI began its analysis by identifying and categorizing the agreement.<sup>119</sup> However, once it had decided that the acts and conduct of the defendants constituted a violation of section 3(3)(d),<sup>120</sup> it simply declared its decision on the basis of the DGs report<sup>121</sup> rather than raising a presumption of AAEC or examining the response of the defendants to identify possible rebuttals, let alone by voluntarily evaluating and balancing the anti-competitive and pro-competitive factors listed in section 19(3).<sup>122</sup>

(ii) *Re Aluminum Phosphide Tablets Manufacturers.*<sup>123</sup> CCI decided this case soon after (i) above, and replicated the strategy it had followed in the price fixing and limiting supply cases, in two important respects: first, by declaring that once CCI had determined that an agreement fell within the ambit of section 3(3), ‘the appreciable

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<sup>116</sup> *ibid* (para 6.100).

<sup>117</sup> CCI followed this reasoning and arrived at the same conclusion in several other cases including:

(1) Cases 52 & 56/2010 *Sunshine Pictures Private Limited & Eros International Media Limited v. Central Circuit Cine Association, Indore & Others* decided 16.02.2012;

(2) Case 9/2011 *UTV Software Communications Limited, Mumbai v. Motion Pictures Association, Delhi* decided 08.05.2012;

(3) Case 16/2011 *Mr. Sajjan Khaitan vs Eastern India Motion Picture Association & Others* decided 09.08.2012;

(4) Case 56/2011 *Cinergy Independent Film Services Pvt. Ltd v. Telangana Telugu Film Distribution Association & Others* decided 10.01.2013;

(5) Case 71/2011 *Shri Ashtavinayak Cine Vision Limited v. PVR Picture Limited, New Delhi & Others* decided 08.05.2013;

(6) Case 62/2012 *M/s Cinemax India Limited (now known as M/s PVR Ltd.) v. M/s Film Distributors Association (Kerala)* decided 23.12.2014;

(7) Case 32/2013 *Shri P.V. Basheer Ahamed vs M/s Film Distributors Association, Kerala* decided 23.12.2014.

<sup>118</sup> Case 43/2010 decided 16.4.2012. CCI also followed this decision in Case 40/2010 *Shri Gulshan Verma v. Union of India, through Secretary, Ministry of Health and Family Welfare & Others* decided 25.4.2012

<sup>119</sup> *ibid* (paras 6.45 to 6.56).

<sup>120</sup> *ibid* (para 6.56).

<sup>121</sup> *ibid* (para 6.60). In this case the complainant had made an additional allegation that the parties had entered into an exclusive supply agreement in violation of section 3(4). However, CCI found that no such agreement existed.

<sup>122</sup> CCI adopted a similar approach in Case 6/2011 *Coal India Limited v. Gulf Oil Corporation & Others* decided 16.4.2012 (Paras 8.3 to 8.34 and 9).

<sup>123</sup> *Suo motu* Case 2/2011 decided 23.04.2012.

adverse effect on competition is presumed to be per se<sup>124</sup> and second, by examining the rebuttal evidence led by the defendants on the touchstone of the anti-competitive and pro-competitive factors listed in section 19(3).<sup>125</sup>

(iii) *Shri B.P Khare v. Orissa Concrete and Allied Industries & Others*.<sup>126</sup> In this case CCI followed the strategy it had adopted in the *Aluminum Phosphide Case*<sup>127</sup>, stating that ‘in case of horizontal agreements [such as in case of collusion in bidding as in the present case], once it is established that an agreement exists, it will be presumed that the agreement has an appreciable adverse effect on competition and the onus to rebut the presumption would lie upon the opposite parties.’<sup>128</sup>

CCI nevertheless, lauded the efforts of the DG who ‘despite availability of presumption of appreciable adverse effect on competition as incorporated in section 3(3) went on to independently examine the appreciable adverse effect on competition arising out of anti- competitive agreements in the light of the factors given in section 19(3) of the Act.’<sup>129</sup> In this case, CCI held that the defendants had not only failed to rebut the presumption of AAEC but had actually strengthened it and were, therefore, in violation of section 3.<sup>130</sup>

(d) *Orders in case of other Section 3 Agreements*

(i) *Automobile Dealers Association v. Global Automobiles & others*.<sup>131</sup> Unlike the majority of cases taken up by CCI, this case dealt with a vertical anti-competitive agreement under section 3(4) and CCI entered into a detailed discussion about the strategy for enforcing section 3(4) even though it was of the view that in this case there had been no violation.

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<sup>124</sup> *ibid* (para 7.42).

<sup>125</sup> *ibid* (paras 7.43-7.45).

<sup>126</sup> Ref Case 5/2011, decided 21.02.2013.

<sup>127</sup> *See n.* 123.

<sup>128</sup> *ibid* (para 36).

<sup>129</sup> *ibid* (para 38).

<sup>130</sup> *ibid*. CCI adopted an almost similar line of reasoning in several other cases, including:

(1) Ref Case 1/2012 *DGS&D, Ministry of Commerce, Government of India v. Puja Enterprises & Others* decided 06.08.2013;

(2) Case 3/2012 *Alleged Cartelization in the matter of Supply of Spares to Diesel Loco Modernization Works, Indian Railways, Patiala, Punjab v. Stone India Limited & Others* decided 05.02.2014;

(3) *Suo-Moto Case 03/2011 LPG cylinder manufacturers* decided 06.08.2014.

<sup>131</sup> Case 33/2011 decided 03.07.2012.

The primary allegation against the defendants in this case was that they had imposed unduly restrictive conditions in agreements entered into between them and their distributors. CCI identified five ingredients that must be satisfied in order to determine whether an agreement contravenes section 3(4): (a) there must be an agreement; (b) the parties to such agreement must be at different stages or levels of the production chain; (c) the parties must be in different markets; (d) the agreement should fall within any of clauses (a) to (e) of section 3(4), and (e) the agreement should cause or be likely to cause AAEC.<sup>132</sup>

CCI further stated that in ascertaining AAEC of any agreement that falls within section 3(4): ‘The existence of the first three factors listed in section 19(3) would normally indicate no AAEC as they are in the nature of efficiency justifications. The absence of the last three factors alone can neither determine AAEC nor establish efficiency guidelines. In most cases, therefore, it is more prudent to examine all the above factors together to arrive at a net impact on competition.’ In making this observation CCI moved closer to the conjunctive approach of Article 101(3) TFEU.<sup>133</sup>

CCI held that although the facts proved the first four ingredients,<sup>134</sup> the parties to the agreement had only an ‘insignificant presence in the market’ and, therefore, were not capable of causing AAEC. In a rare move, CCI explicitly drew support for its view from EU competition law stating that ‘this is probably the reason that in EU vertical agreements are not given much of a thought unless both parties possess at least 30% market share in respective markets.’<sup>135</sup>

(ii) *Shri Sonam Sharma v. Apple Inc. USA & Others*.<sup>136</sup> CCI’s approach in this case was similar to its approach in the *Automobiles Case*.<sup>137</sup> It held that although a tying-in agreement between Apple and Vodafone met most of the requirements of section 3(4), it did not cause AAEC for the reason that ‘for a vertical agreement to be anti-competitive requires the monopolization claim to hold, and given the minuscule

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<sup>132</sup> *ibid* (para 12.4).

<sup>133</sup> *ibid* (paras 12.7 and 12.9).

<sup>134</sup> *ibid* (para 12.5).

<sup>135</sup> *ibid* (para 12.10).

<sup>136</sup> Case 24/2011 decided 19.03.2013.

<sup>137</sup> *See n.* 131.

market share of the tying party the monopolization claim will be contrived.’<sup>138</sup> CCI nevertheless evaluated factors listed in section 19(3) before concluding that the defendants had not violated section 3(4).<sup>139</sup>

(iii) *Shri Dhanraj Pillay & others v. Hockey India*.<sup>140</sup> Citing its decision in the *Apple Case*,<sup>141</sup> CCI held that ‘[t]he standards applied to test the effect of vertical restraints on competition have already been spelt out in ... *Sonam Sharma vs. Apple Inc. and Others*...[where] the Commission held that for concluding that a vertical agreement has caused an appreciable adverse effect on competition, the person imposing the vertical restriction should be in a dominant position and the intent behind the restriction should be foreclosure, without any obvious efficiency justifications.’<sup>142</sup>

On the specific allegations raised in the case, CCI held ‘that these restrictive conditions [imposed by the defendant] are inherent and proportionate to the objectives of HI [Hockey India] and cannot be fouled on *per se* basis till there is any instance where these are applied in a disproportionate manner, for which there is no evidence at present.’<sup>143</sup>

(iv) *Mr. Ramakant Kini v. Dr. L.H. Hiranandani Hospital, Powai, Mumbai*.<sup>144</sup> In this case, CCI significantly expanded its interpretation of section 3 of the Indian competition law. The defendant had been charged with having entered into an anti-competitive agreement with a stem cell clinic. Although CCI acknowledged that the agreement did not expressly fall within the ambit of section 3(4) as it was not between parties at different stages of production etc. it held that ‘[a]ll agreements as described in section 3(3) and 3(4) of the Act alone cannot be the only agreements covered under section 3(1) of the Act...The Commission can consider the impact of any agreement

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<sup>138</sup> *ibid* (para 70).

<sup>139</sup> *ibid* (para 80).

<sup>140</sup> Case 73/2011 decided 31.05.2013.

<sup>141</sup> *See n.* 136.

<sup>142</sup> *ibid* (paras 10.13.2, 10.13.3).

<sup>143</sup> *ibid* (para 10.13.6).

<sup>144</sup> Case 39/2012 decided 05.02.2014. CCI followed this reasoning in:

(1) Case 28/2014 *P.K Krishnan v. Paul Madavana Alkem Laboratories & others* decided 01.12.2015, and

(2) Case 71/2013 *Maruti & Company v. Karnataka Chemists & Druggists Association & others* decided 28.07.2016.

which falls within the four walls of section 3(1) and assess if the agreement has an appreciable adverse effect on competition...[In doing so] the Commission has to keep in mind the purpose for which the Act was enacted i.e. inter alia freedom of trade and consumers' interest must be protected.”<sup>145</sup>

Further, whilst CCI examined factors listed in section 19(3), it stopped short of an economic analysis and concluded that the agreement is ‘bound to’ hinder the development and competition in stem cell service industry to the detriment of consumers.<sup>146</sup>

In her dissenting note, Member Gauri interpreted the facts of the case squarely within the black letter law and in light of CCI’s earlier decisions (specifically in the *Apple Case*).<sup>147</sup> She also highlighted the necessity of CCI adopting either the rule of reason or per se rule in analysing anti-competitive agreements and concluded that the impugned agreement was not anti-competitive.<sup>148</sup> Along similar lines, Member Tayal, in his dissenting note, held that ‘section 3(1) cannot be interpreted de-hors of section 3(3) and section 3(4) of the Act.’<sup>149</sup>

(v) *Shri Shamsher Kataria v. Honda Siel Cars India Limited & Others*.<sup>150</sup> In this case CCI returned to its structured, law bound approach towards section 3(4) and supplemented its interpretation of section 3(4) by reference to foreign competition laws and decisions.<sup>151</sup>

In examining whether the three types of agreements entered into between Original Equipment Manufacturers (OEMs) and Original Equipment Suppliers (OESs) fell within the ambit of section 3(4), CCI held that: (a) agreements between OEMs and

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<sup>145</sup> *ibid* (para 15).

<sup>146</sup> *ibid* (para 20).

<sup>147</sup> *See n.* 136.

<sup>148</sup> *See n.* 144, dissenting order Member Gauri (para 74).

<sup>149</sup> *See n.* 144, dissenting order Member Tayal (para 14).

<sup>150</sup> Case 3/2011 decided 25.08.2014.

<sup>151</sup> CCI’s return to a structured, law-bound approach was also evident in:

(1) Case 48/2011 *ESYS Information Technologies Pvt. Ltd. V. Intel Corporation (Intel Inc.) & Others* decided 16.01.2014 in which it declared that the impugned agreements did not contravene section 3 of the Law on the basis that these did not fall squarely within the ambit of section 3(4) of the Act;

(2) Case 65/2013 *Magnus Graphics v. Nilpeter India Pvt. Ltd. & Others* decided 02.12.2014 (para 9.3.2) in which it held that the impugned agreements did not form part of a ‘production chain’ and, therefore, were not in contravention of section 3(4) of the Act, and

(3) Case 52/2013 *Financial Software and Systems Pvt. Limited v. ACI Worldwide Solutions Private Limited and others* decided 13.01.2015 (paras 10.65 and 10.67).

their *overseas suppliers* did not fall within section 3(4) as these were internal agreements of a single economic entity;<sup>152</sup> (b) agreements between OEMs and *local OESs* were instances of refusal to deal and exclusive distribution agreements, and fell within the mischief of section 3. CCI analysed the AAEC of these agreements in light of factors listed in section 19(3). It also considered whether the defendant was entitled to an exemption under section 3(5)(i);<sup>153</sup> (c) agreements between OEMs and their *authorized dealers* were also anti-competitive on the basis of an analysis similar to that in case of OEMs and local OESs (see (b) above).

In the course of its analysis CCI also drew an analogy between section 19(3) and Article 101(3) TFEU and referred to the Guidelines on the Application of Article 81(3) of the EC Treaty [now Article 101(3) TFEU]; EU Guidelines on Vertical Restraints; EU Motor Vehicle Block Exemption Regulation 2010 (with specific reference to hardcore restraints); the practice of competition authorities of Brazil and South Africa; the French competition authority's sectoral inquiry of the motor vehicle maintenance as well as to a number of EU precedents and at least one US precedent.<sup>154</sup>

### 5.3.2. India's Present Approach towards Anti-competitive Agreements

From 2015 onwards, CCI has demonstrated increasing clarity and uniformity in interpreting and applying the analytical test. Whilst in a number of its orders, CCI has interpreted and explained the analytical test as stated in section 3,<sup>155</sup> in an almost

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<sup>152</sup> *ibid* (para 20.6.3).

<sup>153</sup> *ibid* (para 20.6.7). CCI also referred to this reasoning in:

(1) Case 3/2011 *Shri Shamsher Kataria v. Honda Siel Cars Limited India & others*, decided 27.07.2015 and

(2) In considering section 3(5) exemption in Case 107/2013 *Association of Third Party Administrators v. General Insurers (Public Sector) Association of India & others* decided 04.01.2016 CCI clarified that joint ventures that enhanced efficiency even though horizontal, were not presumed to have an AAEC and their anti-competitive effects needed to be established. 'The question of them being per se anti-competitive does not arise...' (para 67).

<sup>154</sup> *ibid* (paras 20.6.24 to 20.6.42).

<sup>155</sup> For example CCI has interpreted and explained the analytical test in:

(1) Case 61/2012 *Indian Foundation of Transport Research & Training v. Sh. Bal Malkait Singh & others* decided 16.02.2015;

(2) *Suo Motu* Case 4/2013 *Sheth & Co. & others* decided 10.06.2015;

(3) *Suo Motu* Case 2/2014 *Cartelization in Public Sector Insurance Companies* decided 10.07.2015;

(4) Case 68/2013 *Shri Ghanshyam Das Vij v. Bajaj Corporation Limited & others* decided 12.01.2015;

(5) Case 30/2013 *Express Industry Council of India v. Jet Airways (India) Limited & others* decided 17.11.2015;

(6) Case 29/2010 *Builders Association of India v. Cement Manufacturers Association and others*

equal number of other orders it has simply applied the test to the facts before it, without any reference to the statute.<sup>156</sup>

Regardless of the approach it has adopted, CCI has applied the test uniformly, without reference to its US or EU antecedents and without citing international case law in support of its approach. In case of horizontal agreements, CCI has presumed AAEC unless the defendants have rebutted the presumption with reference to factors listed in section 19(3). In case of vertical agreements CCI has established AAEC itself with reference to the factors listed in that section. However, it has still fallen short of fully embracing economic analysis and has continued to lean towards a formalistic interpretation of the test.

#### **5.4. CCP's Interpretation of the Analytical Tests**

CCP passed orders in respect of anti-competitive agreements under section 4 read with section 31 of the Pakistani competition law.<sup>157</sup> The Pakistani competition law does not prescribe a different analytical test for horizontal and vertical agreements and, therefore, all potentially anti-competitive agreements were considered under the same provisions.

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decided 31.08.2016; and

(7) RTPE 52/2006 *Re Alleged Cartelization by Cement Manufacturers v. Shree Cement Limited and others* decided 31.08.2016.

<sup>156</sup> For instance CCI has decided the following cases without express reference to the Law:

(1) Case 42/2012 *Swastik Stevedores Private Limited v. Dumper Owner's Association & others* decided 21.01.2015;

(2) Case 78/2012 *Rohit Medical Store v. Macleods Pharmaceutical Limited & others* decided 29.01.2015;

(3) Case 59/2011 *Shri Jyoti Swaroop Arora v. Tulip Infratech Limited & others* decided 03.02.2015;

(4) Case 26/2013 *Bio Med Private Limited v. Union of India & others* decided 04.06.2015;

(5) Case 45/2012 *Kerala Cine Exhibitors Association v. Kerala Film Exhibitors Federation & others* decided 23.06.2015;

(6) Case 58/2012 *Kannada Gratiakara Koota Shri Ganesh Chetan v. Karnataka Film Chamber of Commerce & others* decided 27.07.2015;

(7) Case 16/2014 *Crown Theatre v. Kerala Film Exhibitions Federation* decided 08.09.2015; and

(8) Case 43/2013 *Shivam Enterprises v. Kiratpur Sahib Truck Operators Transport Society Limited & others* decided 04.02.2015.

<sup>157</sup> For the text of section 31 see Annexe J and for text of section 4, see Annex N.

5.4.1. A Review of CCP's Early Orders

(a) *Orders in case of Agreements for Price-Fixing*

(i) *Pakistan Banking Association & Others.*<sup>158</sup> In this case the issue under consideration was whether or not an advertisement issued by the Pakistan Banking Association (PBA) was an agreement amongst the banks to collectively decide rates of profits and other terms and conditions regarding deposit accounts, in violation of section 4 of the Pakistan competition law.

In applying section 4 of the Pakistani competition law, CCP first traced its links with Article 81 of the EU Treaty [now Article 101 TFEU]. It then reproduced the analytical test as stated in Article 81, stating that an agreement may be anti-competitive by object or effect and that in case an agreement had an anti-competitive object there was no need to inquire into its effect.<sup>159</sup> However, CCP also drew support from US antitrust law, stating that both EU and US competition authorities had 'taken the view that certain types of agreements-direct or indirect price fixing...limiting or controlling production, markets or agreeing levels of output or dividing markets—by their very nature always restrict competition and so are prohibited per se regardless of effect, impact or the fact that very small undertakings are involved.'<sup>160</sup> CCP also cited EU and US case law to bolster its argument.<sup>161</sup>

However, CCP did not (a) take into account the objectives of the PBA agreement or the context in which it was executed thereby demonstrating its alignment with the orthodox interpretation of Article 101(1) TFEU;<sup>162</sup> (b) did not provide an opportunity to the defendants to argue for an exemption under section 5 (read with section 9) of the Pakistan competition law thereby excluding an analysis in the style of Article 101(3) TFEU,<sup>163</sup> and (c) rejected the possibility of application of a EU *de minimis* style rule thereby inclining towards the approach of the EU Commission in the *Expedia Case*.<sup>164</sup>

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<sup>158</sup> File 2/sec-4/CCP/07 decided 10.04.2008.

<sup>159</sup> *ibid* (para 48).

<sup>160</sup> *ibid*.

<sup>161</sup> *See* n. 158, (paras 49 & 50).

<sup>162</sup> *See* n. 159.

<sup>163</sup> *ibid*.

<sup>164</sup> *See* n.158 (para 48). Also see n 66. The Commission's Notice on Agreements of Minor

(ii) *Institute of Chartered Accountants of Pakistan Case*.<sup>165</sup> In this case, CCP continued to conflate EU competition law and US antitrust law in considering whether fixing of minimum hourly rates and a fee for audit engagements of the Institute of Chartered Accountants of Pakistan (ICAP) violated section 4 of the Pakistani competition law. CCP stated that not only is section 4 ‘similar to Article 81 of the Treaty of Rome’<sup>166</sup> [now Article 101 TFEU] but also ‘is in congruity with section 1 of the Sherman Antitrust Act of the United States.’<sup>167</sup> CCP maintained that the EU competition and US antitrust principles were entirely in consonance with each other<sup>168</sup> and relied almost exclusively on US decisions in the course of its analysis.<sup>169</sup>

(iii) *Karachi Stock Exchange Case*.<sup>170</sup> In this case CCP discussed the concept of ‘object’ (of an agreement) at length, combining the EU competition law definition of ‘object’<sup>171</sup> with the US antitrust concept of ‘naked restraints’.<sup>172</sup> It categorized the decision of the stock exchanges to fix a price floor, as a ‘per se violation’<sup>173</sup> and concluded that it had the object of restraining competition.<sup>174</sup> CCP replicated this reasoning and approach in a number of other cases.<sup>175</sup>

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Importance (2001) does not apply to all agreements containing hardcore constraints listed in the Notice. In *Expedia* (2012) the CJEU held that an agreement, which is restrictive of competition by object is so injurious to competition that it always constitutes an appreciable restriction of competition. This judgment, however, does not overrule the earlier judgment of the court in *Volk* (1969), which held that EU law is not concerned with agreements, even those containing object restraints, which have an insignificant effect on the market.

<sup>165</sup> File 3/Sec-4/CCP/08) decided 04.12.2008.

<sup>166</sup> *ibid* (para 11).

<sup>167</sup> *ibid*.

<sup>168</sup> For instance *see* n. 160, 162, 163 and 164.

<sup>169</sup> *See* n. 165 (paras 12, 13, 14).

<sup>170</sup> File 1/Dir(Inv.) KSE/CCP/08), order dated 18.03.2009.

<sup>171</sup> *ibid* (para 42).

<sup>172</sup> *ibid*.

<sup>173</sup> *See* n. 170 (paras 44, 45, 48, 49, 52, 53).

<sup>174</sup> Even though the order argues that object is to be determined by understanding the objective intent of the parties to the agreement, it makes little or no attempt to actually do so and relies instead on the per se rule to arrive at the conclusion that the agreement had the object of restraining competition.

In paragraph 51 of the order listed at n. 165, it makes a reference to subjective and actual intention, but this is purely academic, as it had already concluded that there had been a violation of section 4.

<sup>175</sup> For instance CCP replicated its reasoning in the *Karachi Stock Exchange Case* in:

(1) File 06/Sec 3/CCP/08 *All Pakistan Newspaper Society and Others* decided 23.04.2009, and

(2) File 4/2/Sec 4/CCP/2008 *All Pakistan Cement Manufacturers Association* decided 27.08.2009.

Over time CCP’s reasoning in this regard grew more cursory. For example:

(1) File 3/LPG/DIR(INV)/M&TA/CCP/2009 *Jamshoro Joint Venture Limited and LPG Association of Pakistan* decided 14.12.2009;

(2) File 9/M(A&R)/CAA-TAAP/CCP/2007 *Takaful Pakistan Ltd. And Travel Agents’ Association of Pakistan* decided 29.01.2010;

(iv) *Pakistan Vanaspati Manufacturers' Association Case*.<sup>176</sup> This was an exception to CCP's hitherto predictable pattern of interpreting the analytical test. In this case the defendant had urged in its defence that it had entered into the agreement under duress, and that CCP could find against it only after examining the legal and economic context in which the agreement had been executed and after allowing the defendant an opportunity to press section 9 factors to establish the pro-competitive nature of the agreement.

CCP dismissed both arguments. In respect of the first, it stated that the defendant could not argue duress and press legal and economic justifications at the same time. In respect of the second, it suggested that establishing the legal and economic context of the agreement was the responsibility of the defendant and not of CCP.<sup>177</sup> CCP also declined to consider the possibility of an exemption under section 5 (read with section 9) and advised the defendant to initiate separate proceedings for the purpose.<sup>178</sup>

(v) *1-Link Guarantee Limited & Member Banks Case*.<sup>179</sup> In this case CCP added a further dimension to its approach towards price-fixing. The issue before it was whether agreements amongst banks to fix charges for ATM cash withdrawals by customers, providing Utility Bills Payment Services (UBPS) and for executing Inter bank Fund Transfers (IBFT) were in violation of section 4.

CCP drew a distinction between prices fixed by a joint venture for the purposes of 'creating significant and beneficial efficiencies that could not otherwise be accomplished'<sup>180</sup> (i.e. agreements for UBPS and IBFT) and other 'horizontal price fixing agreements' (i.e. for ATM Cash withdrawal).<sup>181</sup> It held that whilst the former 'may be considered under a rule of reason' and also for an exemption under section 5

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(3) File CCP/Cartels/04/2010 *Pakistan Poultry Association* decided 16.08.2010;

(4) File CCP/Cartels/03/2010 *Pakistan Jute Mills Association and its member mills* decided 03.02.2011;

(5) File 08/APPMA/CMTA/CCP/10/1709 *Pakistan Ship's Agents' Association* decided 22.06.2011;

(6) File 5(114)/Reg/ADG-SCP/LHC/CCP/13 *LDI Operators Case* to the extent that it relates to price fixing (paragraphs 93-108) decided 30.04.2013.

<sup>176</sup> File 1(15)/PVMA-ISB decided 30.06.2011.

<sup>177</sup> *ibid* (para 53 (b)).

<sup>178</sup> *ibid* (para 53(c)).

<sup>179</sup> File 1/24/ATM Charges/C&TA/CCP/2011 decided 28.06.2012.

<sup>180</sup> *ibid* (para 62).

<sup>181</sup> *ibid* (para 91).

(read with section 9),<sup>182</sup> the latter were to be viewed ‘as having the object of preventing, restricting and reducing competition’ and, therefore, were not eligible to be considered for an exemption.<sup>183</sup> CCP’s basis for making this distinction was a single US precedent, which fit the facts of the case.<sup>184</sup>

CCP did not attempt to reconcile this decision with any of its earlier decisions on price fixing and even though CCP declared that the case required a rule of reason inquiry, it moved directly to the issue of exemption without engaging in such an analysis.<sup>185</sup>

*(b) Orders in Bid-rigging cases*

*(i) Dredging Companies Case.*<sup>186</sup> In addressing the issue of bid rigging for the first time, CCP first ascertained whether to treat bid rigging under the per se or rule of reason.<sup>187</sup> CCP examined the treatment of bidding agreements in various jurisdictions<sup>188</sup> and concluded that ‘bidding consortia are to be treated on case-to-case basis applying the rule of reason and should not be treated as per se illegal i.e. agreements that always have anti-competitive objects and effects.’<sup>189</sup> Despite this assertion, CCP did not engage in economic analysis and decided the case on the basis of the relevant market, specifications of the project for which the bid had been made and the legal status of the parties to the agreement.

*(ii) PESCO Tender Order/Amin Brothers Engineering et al Case*<sup>190</sup> In its only other bid-rigging case, CCP started the analysis by stating that the difference between EU competition law and US antitrust law was only of ‘semantics’ and that the EU competition law encompassed ‘the principles developed in the US jurisdiction within

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<sup>182</sup> See n. 180.

<sup>183</sup> See n. 181.

<sup>184</sup> See n.179 (para 63). CCP also relied on a sole US case to determine price fixing in:

**(1)** File 2(2)/JD(L)/POEPA/CCP/2011 *GCC Approved Medical Centres* (Paragraphs 92 to 94) decided 29.06.2012, and

**(2)** Case 1(52)/ICAP/C&TA/CCP/2012 *Institute of Chartered Accountants of Pakistan* decided 10.01.2013 (Para 56).

<sup>185</sup> See n. 179 (para 64).

<sup>186</sup> File 3(17)/L.O/CCP/2009 decided 23.07.2010.

<sup>187</sup> *ibid* (para 47).

<sup>188</sup> See n 186, (paras 48-52, 54, 56-57). CCP cited examples from Germany, South Africa, Singapore and Italy, quoted Article 81 of the EU Treaty [now Article 101 TFEU] and section 1 of the Sherman Act. It also referred to OECD documents.

<sup>189</sup> See n.186, (para 59).

<sup>190</sup> File 13/PESCO/CMTA/CCP/2010 decided 13.05.2011.

its statute.<sup>191</sup> CCP also stated that the ‘EU classification of ‘object’ and ‘effect’ clearly echoes the broad principles developed by the US courts in the ‘per se’ and ‘rule of reason’ doctrines<sup>192</sup> and the ‘various terms developed in the US and the EU, therefore, have the same underlying principles.’<sup>193</sup> However, CCP distanced itself from EU precedents stating that ‘(t)his similarity with the EU Law does not mean that Pakistan must only look at EU case law and principles...we have over time developed our own jurisprudence and are not bound by any particular international jurisprudence.’<sup>194</sup>

On the issue of whether bid rigging was a per se violation, CCP held that ‘collusive bidding remains in the restraint by object category before the Commission’ as the ‘anti-competitive effects of these actions have consistently been established over a hundred years of competition jurisprudence and no economic evidence has been established that shows pro-competitive benefits of these actions.’<sup>195</sup> CCP did not distinguish the *Dredging Companies Case*.<sup>196</sup> It also did not cite any other precedent in support of its arguments.

(c) *Other Section 4 Agreements*

(i) *Wateen Telecom (Pvt.) Limited and Defence Housing Authority Case*.<sup>197</sup> This case concerned an exclusive services agreement entered into between Wateen Telecom and Defence Housing Authority (DHA). However, instead of categorizing the agreement, CCP simply interpreted the clauses of the agreement to conclude that the agreement was anti-competitive.<sup>198</sup> In a hitherto unprecedented move, CCP acknowledged the possibility of an exemption application to be considered alongside the main case even though it did not actually grant an exemption to the parties.<sup>199</sup>

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<sup>191</sup> See n.190, (para 25).

<sup>192</sup> *ibid.*

<sup>193</sup> See n. 190, (para 27).

<sup>194</sup> See n. 190, (para 28).

<sup>195</sup> See n. 190, (para 30).

<sup>196</sup> See n. 186.

<sup>197</sup> Case 09/Reg/Comp/CAP/CCP/2010 decided 22.03.2011.

<sup>198</sup> *ibid* (para 29).

<sup>199</sup> See n. 197, (paras 10 and 46).

(ii) *Port Qasim Authority and Engro Vopak Terminal Limited Case*.<sup>200</sup> In this case, whilst considering an exclusivity agreement between Port Qasim and Engro Vopak, CCP adopted an approach similar to that it had followed in the *Wateen Telecom Case*<sup>201</sup> and relied only on the literal interpretation of clauses of the agreement to determine whether or not there was a violation of the law.<sup>202</sup>

(iii) *GCC Approved Medical Centres case*<sup>203</sup> & *LDI Operators case*.<sup>204</sup> These cases addressed the division of markets and quota allocation. In the *GCC Case*, after establishing that the entities had entered into a scheme for market allocation, CCP treated it as a per se violation on the basis of US precedents.<sup>205</sup> However, in the *LDI Case*, CCP declared quota/market allocation as ‘a per se’ violation of competition principles on the basis of EU competition law.<sup>206</sup> Although CCP acknowledged that it was not required to conduct economic analysis for a per se violation,<sup>207</sup> it carried out perhaps its first (if not only) economic analysis in this case.

#### 5.4.2. Pakistan’s Present Approach Towards Anti-competitive agreements

In its most recent orders, CCP appears to have moved away from detailed discussions regarding the analytical tests stipulated in the EU competition law and US antitrust law.<sup>208</sup> However, it still appears hesitant to set out a test that is fully anchored in the language of section 4 and prefers to link its findings either to a foreign decision that fits the particular facts of the case before it<sup>209</sup> or to its own earlier decisions.<sup>210</sup> Also, CCP still remains hesitant to undertake economic analysis and continues to adopt a formalistic strategy in interpreting the test.

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<sup>200</sup> Files 6/LP/CMTA/CCP/2010 & 2/(192)/AGR/Exm./Reg/CCP/2010 decided 29.06.2011.

<sup>201</sup> See n. 197.

<sup>202</sup> See n. 200 (para 57).

<sup>203</sup> See n 184 (paras 100-105).

<sup>204</sup> File 5(114)/Reg/ADG-SCP/LHC/CCP/13 decided 30.04.2013.

<sup>205</sup> See n. 184 (para 100).

<sup>206</sup> See n. 204 (para 119). Referring in particular to *Guidelines on Application of Article 81*.

<sup>207</sup> See n. 204 (paras 144-160).

<sup>208</sup> CCP makes no reference to the EU and US analytical tests in:

(1) File 1/101/PAMADA/C & TA/CCP/2013 *Pakistan Automobile Manufacturers Authorized Dealers Association & Member Undertakings* decided 10.04.2015;

(2) File 42/PPA/C & TA/CCP/2015 *Pakistan Poultry Association*, decided 29.02.2016; and

(3) File 2(32)/Comp Cell/CCP/2015 *Pakistan Engineering Council* decided 20.04.2016.

<sup>209</sup> *Pakistan Poultry Association Case* *ibid*.

<sup>210</sup> See n. 208 *PAMADA case* and *Pakistan Engineering Council Case*.

## **5.5. Relating Interpretive Strategies to Adoption Processes**

The manner in which CCI and CCP have interpreted their analytical tests offers insight into their overall interpretive strategies and their links with the transfer mechanisms and institutions engaged by the countries in adopting their respective competition laws.

### **5.5.1. Interpretive Strategies adopted by CCI and CCP**

#### *(a) Reliance on models from which analytical tests were derived*

In section 5.2.3 above, I had suggested that the CCI was likely to draw inspiration from a variety of international models in interpreting the analytical test, whilst CCP was likely to rely on EU precedents in this regard. I had also indicated that CCI was more likely to adapt the precedents it relied upon to suit the Indian context whereas CCP was more likely to cite these for their normative value.

CCI appears to have met expectations on both counts. Although its express reliance on foreign materials and precedents and materials has been limited,<sup>211</sup> the precedents and materials it has cited are derived from diverse jurisdictions.<sup>212</sup> However, CCI has also *implicitly* relied on foreign precedents and materials and has adopted foreign analytical strategies. CCI appears to especially have leaned towards the EU style of reasoning: it has preferred to examine each allegedly anti-competitive agreements in their economic and legal context and in light of their objectives; it has acknowledged and applied the *de minimis rule* in respect of vertical agreements;<sup>213</sup> it has often balanced anti-competitive and pro-competitive factors even in respect of agreements that were presumed to have AAEC.

In contrast, CCP's interpretive strategy seems to have deviated from expectations. Whilst CCP has relied on foreign precedents and materials in the majority of its orders, it has cited EU and US precedents in almost equal measure. It has also relied on precedents from other jurisdictions albeit not as frequently. CCP has also explicitly followed the analytical approach of the EU and the US, often conflating the two. The EU effect is evident when, in a number of its orders, CCP asserts that it is incumbent

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<sup>211</sup> CCI relied on foreign precedents in only a handful of orders. *See* n. 131, 150 and dissenting orders in n. 90 and 140.

<sup>212</sup> Section 5.2.1.

<sup>213</sup> *See* n. 131.

upon it to examine ‘the object or effect’ of an agreement and that ‘object’ and ‘effect’ are disjunctive concepts. However, the US influence is manifest when CCP interprets ‘object’ to mean ‘per se’;<sup>214</sup> when in a majority of its orders it does not consider the context or possible legitimate objectives of the agreement;<sup>215</sup> when it refers to an effect based enquiry as a rule of reason enquiry;<sup>216</sup> and when it does not allow a *de minimis* style exception in any of its order.<sup>217</sup>

*(b) Transfer mechanisms Employed in the Course of Interpretation*

In interpreting the analytical tests both CCI and CCP appear to have continued with the transfer mechanisms employed by India and Pakistan in their respective adoption processes. *Socialization* is evident in the manner in which CCI adapts foreign precedents and materials to the domestic Indian context. On the other hand, CCP’s extensive reference to foreign precedents and materials suggests *emulation* at work, whereas the extent to which CCP attempts to adapt these principles for the Pakistani context also hints at a degree of *socialization*. However, the attempts at *socialization* remain superficial to the extent that they appear to superimpose meaning on the express wording of the law rather than clarifying it.

*(c) Summing up CCI and CCP’s Interpretative Strategies*

Over time CCI’s interpretation of its analytical test has become increasingly consistent and predictable.<sup>218</sup> In the majority of its orders, CCI begins by considering whether there is an agreement. If an agreement is established it considers whether it is horizontal or vertical with reference to the economic and legal context within which the agreement is to operate. In case of horizontal agreements, CCI most often requires the defendant to rebut the presumption of AAEC with reference to the factors listed in section 19(3), whereas in respect of vertical agreements, it itself considers the effect of the agreement taking into account possible pro-competitive factors. CCI also allows for an exemption from the operation of section 3 on the basis of the *de minimis*

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<sup>214</sup> See particularly, n. 158, 165, 170 and 175 (orders re price fixing agreements), n. 190 (for bid rigging agreements) and n.206 (for market allocation orders).

<sup>215</sup> It may be argued that CCP prefers the orthodox approach of the EU Commission and the narrow interpretation of ‘object’. However, even if this were true, it is likely that it prefers this approach because of its seeming similarity with the per se rule.

<sup>216</sup> See n. 186 and text thereto.

<sup>217</sup> See n. 162 and text thereto.

<sup>218</sup> For early exceptions in this regard see n. 85, 118 and 122.

*rule*.<sup>219</sup> However, CCI does not consider itself bound by this consistency where it forms the view that the sector<sup>220</sup> or practice<sup>221</sup> it is examining merits a flexible or novel approach.

In contrast, CCP's approach appears less consistent and structured. CCP also appears to be aligned with EU and US precedent rather than being anchored in the specific provisions of the Pakistani competition law. In its earliest orders, CCP first categorized an agreement as anti-competitive by object, which term it conflated with the per se rule, or by effect which term it used interchangeably with the rule of reason analysis. CCP then analysed the agreement often with reference to EU and US precedents.<sup>222</sup> In time, however, CCP started skipping the categorization step altogether<sup>223</sup> or categorized an agreement without establishing a basis for doing so.<sup>224</sup> CCP's approach towards bid-rigging agreements,<sup>225</sup> agreements for allocating market shares<sup>226</sup> and its stance towards the exemption provision (section 5) are some examples of the lack of consistency in its approach.<sup>227</sup> Superficially there may appear some similarity between CCP's inconsistency and the US treatment of *stare decisis* in the per se category.<sup>228</sup> However, this similarity overlooks the fact that CCP's switches categories in *emulation* of US precedents rather than due to changes in the economic realities in the country. Similarly, the per se category in the Pakistani context is not defined by CCP's direct experience of the anticompetitive effects of certain practices but by *emulating* practices in foreign jurisdictions.

Despite the considerable disparities, there are also at least two similarities between CCI and CCP's interpretive strategies. First, strategies of both CCI and CCP have

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<sup>219</sup> See n. 131 and 136 and texts thereto.

<sup>220</sup> For example see n 103 (cement); n. 136 (IT sector), and n. 150 (automobiles).

<sup>221</sup> See n.144 and text thereto.

<sup>222</sup> For example n. 160, 173, 184 and 186 and texts thereto.

<sup>223</sup> See n. 175 and 186 and texts thereto.

<sup>224</sup> See n. 190.

<sup>225</sup> The CCP decided one bid-rigging case (n. 186) on the basis of rule of reason (albeit without economic analysis) whilst in the other, it categorized bid rigging as a per se violation (n. 190).

<sup>226</sup> In the *LDI* case (n. 207) CCP engaged in a rule of reason style analysis for market allocation after having identified the infringement as a per se violation in earlier orders.

<sup>227</sup> Whilst in most cases CCP did not allow defendants to avail of a section 5 exemption in the main case (For instance see n.165, 175, 186 and 190) and directed them to keep these two proceedings separate (see n.176), in others it not only allowed for the possibility of a hearing under section 5 to be held alongside the main case but also granted an exemption on the basis of such an application (For example see n. 203).

<sup>228</sup> Section 5.2.1.

rendered their respective analytical tests practically unrecognizable in a strictly EU or US context. However, whilst in India the analytical test is almost entirely Indian-ized in both the language in which it is couched and the manner in which it is applied, in Pakistan the analytical test remains suspended in a certain legal and linguistic limbo between the text of the Pakistani competition law and the international precedents it emulates. Second, and perhaps more damagingly, the interpretive strategies of both CCI and CCP appear to have so far failed to empower CCI and CCP to conduct an incisive economic analysis and keep them focused on the semantics of the laws. This suggests that a lack of confidence or perhaps of capacity which persists regardless of the mechanism through which the country acquired its competition law.

#### 5.5.2. Present Interpretive Strategies and the Adoption Processes

##### (a) *India*

CCI's ability to employ *socialization* at the implementation stage may be attributed to the initial *socialization* through a wide range of bottom-up, participatory and inclusive institutions in the adoption process. It appears that through *socialization*, India succeeded in creating an Indian version of the analytical test for establishing anti-competitive agreements, which combines elements from the EU competition law and US antitrust law but does not belong to fully to either. It is also due to *socialization* that the Indian version of the test is sufficiently clearly and precisely stated so as to be capable of being interpreted without mandatory recourse to its antecedents or the jurisprudence developed around them.<sup>229</sup> Given these foundations, it appears only natural for CCI to utilize the Indian version of the analytical test; its limited need to seek support from foreign precedents and materials in interpreting these tests; when it does turn to these precedents, its ability to look around for the most appropriate precedent from different jurisdictions and to *socialize* it for the local context.

##### (b) *Pakistan*

The continued impact of *coercion* and *emulation* is evident in the manner in which CCP has interpreted its analytical test. *Coercion*, especially when activated through

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<sup>229</sup> CCI cites foreign, particularly EU case law only exceptionally (see n. 103 and 151 *Builders Association & Cartelization of Cement Manufacturers* cases; n. 112 *Reliance Big Entertainment* case; n. 136 *Apple* case; n. 150 *Honda Siel* case). These cases suggest that CCI may have sought support from foreign precedents because it was entering a new sector, which had already been addressed internationally, or because the agreements it was examining were particularly complex.

limited, exclusive, top down institutions, appears to have transferred the law but not the understanding surrounding it. This lack of understanding is evident in CCP's lack of clarity as to whether it should follow EU or US models and its tendency to conflate the two, sometimes leading to disparate results even in case of similar violations.<sup>230</sup> The combination of *coercion*, *emulation* and *regulatory competition* also seems to have imbued the law, and by extension CCP, with an inherent uncertainty about its domestic legitimacy and a continued need to assert its international legitimacy by extensively referring to EU and US competition/antitrust jurisprudence (as well as regulatory guidelines and precedents from the OECD and other jurisdictions). This may also be a factor in its tendency towards retracing the roots of the Pakistani competition law to these models in nearly every Order.

## **5.6. Concluding Remarks**

The discussion in this Chapter suggests that the transfer mechanisms employed by a country in adopting its competition law have a clear impact on the manner in which the Law is interpreted at the implementation stage. However, this impact neither translates into predictable outcomes for the content of the law nor suggests that any particular transfer mechanism is superior to another in its ability to create an optimum outcome. Whilst *socialization* has the initial positive effect of adapting the content of the law to local understanding and context, it may subsequently have a somewhat negative effect of detaching and isolating the law and its understanding from international developments in core principles and, in the worst case scenario, distorting or confusing these principles. Similarly, *coercion*, *emulation* and *regulatory competition* may be deemed to have an adverse effect initially to the extent that these do not allow competition principles to penetrate domestic consciousness, however, it appears that they create greater convergence by keeping the law more connected with international norms and practices whilst, at the same time, not preventing it from being *socialized* for the local context. Most importantly, regardless of the mechanism the country employs in the adoption process it remains entirely possible for it to reassess and adjust its transfer strategies at the implementation stage.

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<sup>230</sup> See n. 186 and 190 and texts thereto.

## **6. INTERACTION BETWEEN COMPETITION LAWS AND THE PRE-EXISTING LEGAL SYSTEMS**

The ability of adopted laws, such as competition laws, to interact productively with other elements in the legal organisms in their countries and to increasingly become integrated into them, is an important benchmark for assessing the quality of their implementation.<sup>1</sup> The discussion in chapter 2 suggests that the ability of the laws to interact productively with the pre-existing legal systems of their countries is commensurate with the extent of their compatibility with the contexts of their countries and the legitimacy they enjoy in these contexts. The discussion further suggests that a law that has been transferred through a mechanism that meaningfully engages a wide range of bottom-up, participatory and inclusive institutions is likely to be more compatible with the context and have greater legitimacy in the country than a law that has been transferred through limited engagement and that too primarily with top-down exclusive institutions.<sup>2</sup> In this chapter, I examine whether the Indian competition law, which had been adopted through *socialization*, interacts more productively with courts in India than its Pakistani counterpart, which had been adopted through a strategy of *coercion*, does with the courts in Pakistan.<sup>3</sup>

In section 1, I retrace the possible points of interaction between the Indian and Pakistani NCAs and the pre-existing legal systems of the two countries and explain reasons for which I will be focusing only on the points of interaction between the first tier NCAs—CCI and CCP—and the courts in their respective countries. I then examine challenges filed before the courts in respect of proceedings pending before CCI and CCP to understand the grounds raised in these challenges, the responses of the courts to these challenges, and the impact of these responses on subsequent proceedings before CCI or CCP. Also, in this section, I compare the nature of interaction between the CCI, CCP and the courts in India and Pakistan and explore possible reasons for the variance in the nature of these interactions in the two countries. In section 2, I explore the impact of the transfer mechanisms and institutions employed by India and Pakistan in the adoption processes, on the relationship between the competition laws (as represented by CCI and CCP

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<sup>1</sup> Chapter 2, Section 2.2.4.

<sup>2</sup> Chapter 2, Section 2.2.2.

<sup>3</sup> Chapter 2, Section 2.5.

respectively) and the courts of the two countries. In section 3, I examine the manner in which the competition appellate systems in India and Pakistan have affected the nature and extent of the interaction between the competition laws/CCI, CCP and the courts and the extent to which this can be also be linked to the adoption processes. In section 4, I examine the impact of India and Pakistan's preferred implementation system on CCI and CCP's ability to enforce their orders. In the final section, I conclude. As in chapter 5, throughout this chapter, I focus on CCI and CCP's final and interim orders in respect of anti-competitive agreements and abuse of dominant position only.<sup>4</sup>

### 6.1. The Nature of Interaction between NCAs and the Courts

To understand the manner in which challenges filed before the courts in respect of proceedings pending before CCI or CCP impact the implementation of these laws, it is important to first establish the possible points of interaction between the NCAs (CCI, CCP and the tribunals) and the courts.

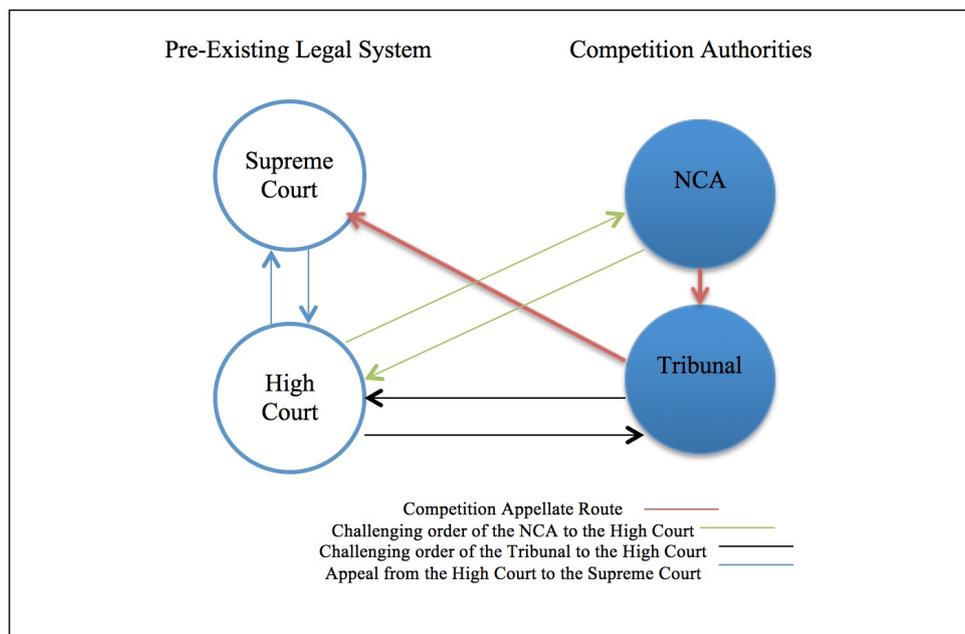


Figure 6.1 Possible Interactions between NCAs and Pre-existing Legal Systems

<sup>4</sup> I refer to final orders as 'final orders' or 'orders' or as if it is necessary to do so in order to distinguish them from interim orders.

As discussed in chapter 4, the Indian and Pakistani competition laws may interact with their respective pre-existing legal systems at, (a) the final tier of the three tier competition appellate system (comprising the Commission [CCI or CCP], the tribunal and the Supreme Court) when appeals from orders of the tribunal are preferred to the Supreme Court, or (b) whilst proceedings are still pending before the NCAs and writ petitions are filed against these proceedings before the high courts.<sup>5</sup> Whilst the Indian and Pakistani competition laws envisage and cater for the possibility of interaction between the NCAs and the Indian and Pakistani courts at the final tier of the competition appellate system, they do not address the possibility or impact of interaction between NCAs and the high courts whilst proceedings are still pending before the NCAs.<sup>6</sup> However, this does not diminish the magnitude of the impact of these challenges on the implementation of the laws.<sup>7</sup>

In this section, I focus on grounds on which proceedings pending before CCI and CCP (rather than before the tribunals) have been challenged before the high courts of India and Pakistan respectively.<sup>8</sup> In case of challenges filed in respect of proceedings pending before CCI, I rely on information recorded in CCI's final orders and, on occasion, on information published in CCI's Annual Reports. In respect of challenges filed against proceedings pending before CCP, I rely on CCP's final orders as well as copies of certain orders of the courts obtained from the CCP.

#### 6.1.1. The Nature of Interaction between CCI and the Courts

##### *(a) An Overview*

As is evident from the relevant data in chapter 4,<sup>9</sup> entities aggrieved by proceedings pending before CCI started filing challenges before the high courts, soon after the law had been made operational. However, only a small fraction of the total proceedings pending before CCI were actually challenged: from 2009 until 2016, out of a total of

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<sup>5</sup> Chapter 4, Section 4.1.1 (b) and Figure 4.2.

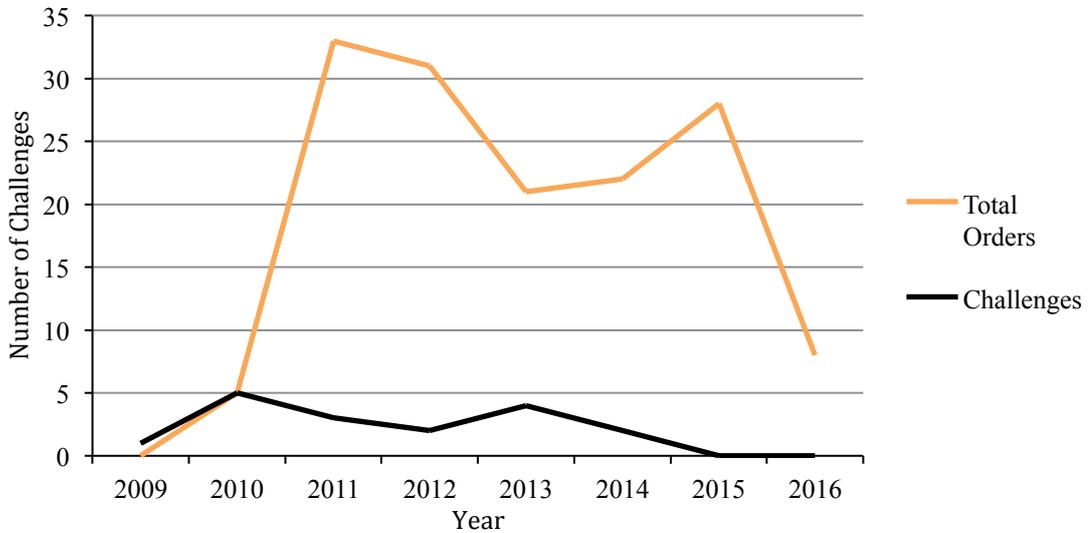
<sup>6</sup> This is represented by the green and black lines in Figure 5.1. The blue line between the high court and the Supreme Court represents the possibility of an appeal from the high courts to the Supreme Court. The reverse lines in all three categories represent orders remanding cases to the high courts, the NCAs or the tribunals as the case may be.

<sup>7</sup> Chapter 4.1.1 (b).

<sup>8</sup> I do not examine challenges that may have been filed before the high courts against proceedings pending before the tribunals for the reason that at the time of writing this, the Pakistani tribunal had passed only eight orders, which does not provide a basis for a meaningful comparative analysis of the orders of tribunals.

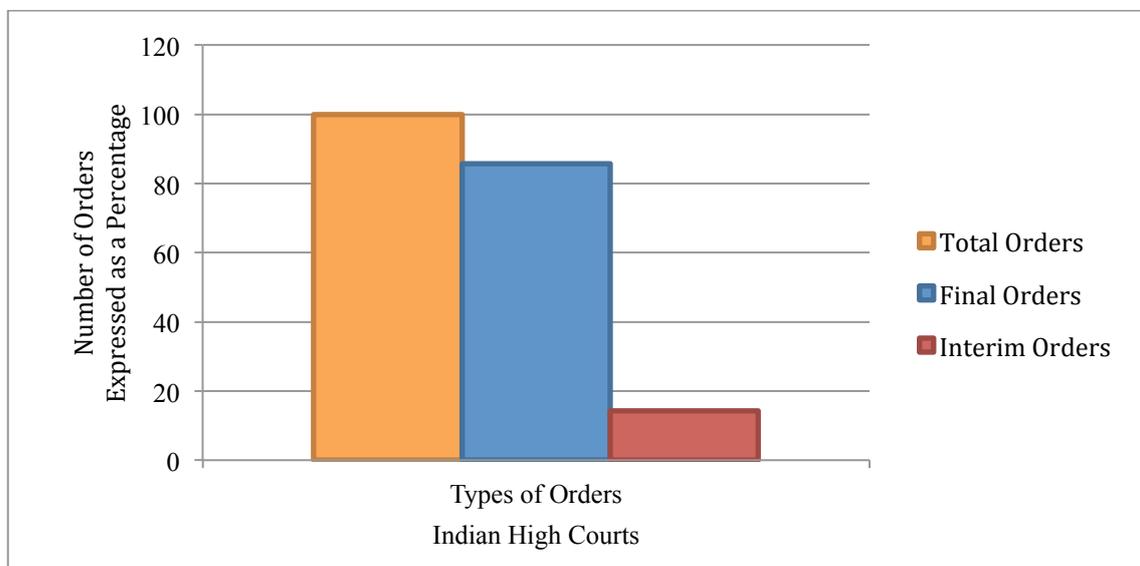
<sup>9</sup> Chapter 4, section 4.3 (ix) and Table 4.15.

148 proceedings that culminated in final orders at CCI, only 17, or 11.48% proceedings, were challenged before the courts. Also, over the years, there has been a steady decline in the number of proceedings challenged before the courts.



**Figure 6.2 Total Orders of CCI and Challenges filed before the High Courts in respect thereof**

The data as presented in Figure 6.3 below records the response of the courts and suggests that the courts have dealt with these challenges decisively—this is evident in the number of final decisions as compared to interim orders—and with relative alacrity—which may be inferred from the fact that a number of final decisions of the courts have already appeared on the legal scene.



**Figure 6.3 Comparison of Types of Orders Passed by Indian Courts 2009-2016**

In the 21 challenges filed before them throughout India, the courts have given their final decisions in 18, and issued interim orders in three, of which two were replaced by final decisions even whilst the proceedings were still pending before CCI.

*(b) Grounds on which Challenges were filed & Response of Indian Courts*

CCI has passed final orders in a number of proceedings that had been challenged before the courts. A review of these orders suggests that the majority of challenges filed before the courts sought writs of ‘mandamus and prohibition’ (ie a direction from the courts that the person carrying out a function in connection with the affairs of the state should refrain from doing anything he is not permitted to do, or be directed to do something he is required to do); writs of ‘certiorari’ (ie a declaration that any act or proceeding performed by a person in connection with the affairs of the federation, has been done without lawful authority and is without legal effect), and writs of ‘quo warranto’ (ie requiring that a person holding public office show the authority of law under which he claims to hold that office).<sup>10</sup>

One ground repeatedly raised before the high courts by entities aggrieved by proceedings pending before CCI, was that CCI did not have the jurisdiction to hear matters, which had been initially taken up by its predecessor anti-monopoly authority, particularly if the authority had initiated an investigation but failed to complete it. However, all the high courts before which this ground was raised unequivocally declared it to be without merit and directed the petitioners to submit to CCI’s jurisdiction.<sup>11</sup> A further related point raised before the high courts was that CCI could not exercise its jurisdiction in respect of practices that had commenced before the coming into force of the relevant provisions of the Indian competition law. However, in each of these petitions the high courts clarified that CCI had the jurisdiction to examine such conduct if it continued even after the provisions had come into force.<sup>12</sup>

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<sup>10</sup> Article 226, Indian constitution.

<sup>11</sup> For example these challenges have been recorded in respect of:

**(1)** CCI Case RTPE 5/2009 challenged in WP 6805/2010 *Interglobe Aviation Limited v. Secretary Competition Commission of India*. Decided by Delhi High Court on 06.10.2010 (CCI Annual Report 2010-2011), and

**(2)** in WP 7766/2010 *Gujarat Guardian Limited v. Competition Commission of India and others*. Decided by Delhi High Court on 23.11.2010.

<sup>12</sup> For example, in Case 4/2009 *MP Merhotra v. Kingfisher Airlines Limited & others* the aggrieved entity, Kingfisher, had challenged CCI’s demand for information before the Bombay High

In at least one case, the aggrieved entity challenged CCI's powers to issue a show cause notice on the ground that doing so was tantamount to pre-judging the case. However, the high courts clarified that CCI had the jurisdiction to form a preliminary view of a case at the time of issuing a show cause notice.<sup>13</sup> In certain other cases, entities aggrieved by investigations initiated by CCI, challenged CCI's jurisdiction to initiate such investigations. However, the high courts did not entertain any petitions filed on this ground.<sup>14</sup>

In a small number of its orders, whilst CCI acknowledges that the proceedings in respect of which it is passing the order, had been challenged before the courts, it only records the response of the high courts rather than the grounds on which the challenges had been filed. The response of the high courts varies according the circumstances of the case and ranges from the high courts expressly endorsing CCI; to refusing to restrain it; to directing it to take certain actions; to restraining it from pursuing the matter against one or more of the parties to the proceedings pending before CCI, and very rarely, to restraining it from continuing with the proceedings

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Court. However, on 31.3.2010, BHC dismissed the petition. Kingfisher then challenged BHC's order before the Supreme Court. However, the Supreme Court did not restrain CCI. CCI continued with its proceedings and imposed a fine on Kingfisher for abuse of dominant position. Kingfisher then appealed before the tribunal, which set aside CCI's order and asked it to reconsider the matter. After reconsidering the matter, CCI through its order dated 09.01.2012, imposed a further fine on Kingfisher. Kingfisher once again appealed to the tribunal and on 29.08.2012, the Tribunal set aside CCI's order.

<sup>13</sup> For example, WP 358/2010 *Amir Khan Productions (Pvt.) Limited v. Union of India*. This was filed before the Bombay High Court and decided on 18.08.2010 (CCI Annual Report 2010-2011).

<sup>14</sup> For example, see petitions referred to in CCI's orders in:

(1) Case RTPE 3/2008 *Federation of Indian Airlines & others* decided 2.12.2010 (para 8); and  
(2) Case 3/2011 *Shri Shamsher Kataria v. Honda Siel Cars Limited India & others (Hyundai)* decided 27.7.2015 (paras 1.5, 7.4.4). In this case, Madras High Court confirmed CCI's jurisdiction and also clarified that although the DG was not authorized to initiate investigations *suo motu*, he had not in fact done so in the present proceedings;

Also see orders in:

(3) WP (C) 2471/2016 *Arun Kumar Bajoria v. Competition Commission of India and another*. This petition was filed against directions issued by CCI on the ground that CCI lacked jurisdiction to issue these. However, on 21.03.2016 Delhi High Court dismissed the petition on the ground that CCI was competent to decide the matter of its own jurisdiction. (<https://indiankanoon.org/doc/71417559/> accessed 4 April 2017); and

(4) WP No. 1006 of 2014 *Telefonaktiebolaget LM Ericsson v. Competition Commission of India & others* in which the petitioner challenged CCI's authority to investigate its affairs on the ground that its operations were governed by the Patents Act. However, Delhi High Court in its order dated 16.04.2016, allowed CCI to continue its investigation. ([http://delhihighcourt.nic.in/dhcqrydisp\\_o.asp?pn=33798&yr=2014](http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=33798&yr=2014) accessed 4 April 2017).

altogether. Where the courts do restrain CCI from proceeding, they do so for only a finite period.<sup>15</sup>

In certain proceedings pending before CCI, the complainant itself appears to have approached the high court. In one instance the complainant sought interim relief against the defendants, however, the high court directed the complainant to approach CCI and dismissed the petition.<sup>16</sup> In another instance, the complainant prayed to the high court that it direct CCI to hear an application on an urgent basis.<sup>17</sup> In at least one recent case, CCI voluntarily gave an undertaking to the high court that it would not to take adverse action against the defendants whilst the proceedings remained pending before the courts.<sup>18</sup>

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<sup>15</sup> For instance see references to proceedings in CCI's orders dated:

(1) 05.09.2012 in Case C-87/2009 *Vedant Bio Sciences v. Chemists & Druggists Association of Baroda*, (paras 11-15). The defendants in this case challenged proceedings before CCI on two occasions. On the first occasion the Gujarat High Court did not restrain CCI, however, on the second occasion, GHC directed CCI to maintain status quo regarding production of evidence by office bearers of the defendant until such time as GHC had finally decided the matter. GHC did not restrain CCI from continuing with the proceedings against the remaining entities;

(2) 09.12.2013 in Case 30/2011 *Peeveear Medical Agencies Kerala v. All India Organization of Chemists & Druggists* (para 12.5.12). In this case, Karnataka High Court in WP 2882/2012 issued a restraining order against CCI;

(3) 09.12.2013 in Case 41/2011 *Sandhya Drug Agency v. Assam Drug Dealers Association & others* paras 11 & 12. In this case a petition was filed before Gauhati High Court. GHC initially restrained CCI, however, soon vacated the injunction and allowed CCI to continue with the proceedings;

(4) 27.10.2014 in *Suo Motu Case 5/2013 Collective Boycott/refusal to deal by the Chemists and Druggist Association Goa etc.* In this case Bombay High Court restrained CCI from hearing the issue of individual culpability in respect of office bearers of the associations/companies. However, BHC did not restrain CCI from hearing the case against the associations/companies themselves;

(5) 25.08.2014 in *Shri Shamsher Kataria Case* (see n.14) (para 22.9). In this case, Delhi High Court issued an order in WP 2734/2013 restraining CCI from giving effect to its order for ten days;

(6) 10.08.2011 in Case 23/2010 *Durga City Cable Network v. In2 Cable (India) Limited & others* (paras 8 & 17). The defendants challenged proceedings pending before CCI, however, Delhi High Court did not issue a restraining order against CCI and CCI was able to proceed with the matter unhindered;

Also see orders in the following petitions:

(7) WP 31808 and 31809/2012 *Hyundai Motors India Limited & BMW India Pvt. Limited v. Competition Commission of India and another*, On 04.02.2015 Madras High Court refused to restrain CCI and dismissed the petitions

([http://judis.nic.in/judis\\_chennai/Judge\\_Result\\_Dispatch.asp?MyChk=210496](http://judis.nic.in/judis_chennai/Judge_Result_Dispatch.asp?MyChk=210496) accessed 4 April 2017); and

(8) WP 6361 and 4362/2014 *DLF Home Developers Limited v. Competition Commission of India & another* decided by Delhi High Court on 10.10.2014 (<https://indiankanoon.org/doc/49365063/> accessed 4 April 2017).

<sup>16</sup> Cases 25, 41, 45, 47, 48, 50, 58, 69/2010 *Reliance Big Entertainment Limited v Karnataka Film Chamber of Commerce* decided 16.2.2010 (para 2.1.20).

<sup>17</sup> Case 20/2011 *Santuka Associates Pvt. Limited v. All India Organization of Chemists and Druggists & others* decided 19.02.2013 (para 3).

<sup>18</sup> For example, WP 7084/2014 *Google Inc. & others v. Competition Commission of India and another* in which petitioners filed a writ asking the High Court to set aside CCI's order directing an investigation into its affairs and its order rejecting Google's review application. The petitioners also

It appears from a review of CCI's Annual Reports, that there may be other proceedings pending before it, in respect of which the high courts have directed it to take a particular action. However, given that there is no final order available in respect of these proceedings on CCI's website, I assume that the matters are still pending before CCI. In any event, in the absence of final orders, it is not possible to ascertain the grounds on which these challenges have been filed or the precise response of the high courts in respect of these challenges.<sup>19</sup>

(c) *Effect of Decisions of Indian Courts on CCI's Subsequent Proceedings*

Decisions of the high courts formed valuable precedents for CCI in subsequent proceedings. For instance, CCI cited the decision of the Delhi High Court in the *Interglobe Case* and the *Gujarat Guardian Case*<sup>20</sup> in several orders including orders in *Varca Druggist & Chemist and others v. Chemists & Druggists Association Goa*,<sup>21</sup> *Cartelization by Cement Manufacturers Case*,<sup>22</sup> and *Shree Cement Limited Case*.<sup>23</sup> Similarly, CCI cited the order of the Bombay High Court in the *Kingfisher Case*<sup>24</sup> in a number of its subsequent orders, including its orders in *Varca Druggist & Chemist and others v. Chemists & Druggists Association Goa*,<sup>25</sup> *Cartelization by Cement Manufacturers Case*,<sup>26</sup> *Shree Cement Case*,<sup>27</sup> *Shri Sonam Sharma v. Apple Inc. USA & others*,<sup>28</sup> *Steel Producers Case*,<sup>29</sup> cases filed in respect of *Jaiprakash Associates Limited*,<sup>30</sup> and the *Cement Manufacturers Association Case*.<sup>31</sup>

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asked the high court to restrain CCI from continuing with proceedings against them. Delhi High Court by its order dated 27.04.2015 directed CCI to reconsider the application for review and CCI itself gave an undertaking that it would not take any adverse action against the petitioners while the application for review remained pending. (<https://indiankanoon.org/doc/190415917/> accessed 4 April 2017).

<sup>19</sup> For example WP 6258, 6259 and 6669/2014 *Pran Mehra v. Competition Commission Of India & another* in which the petitioners contended that CCI had exercised its jurisdiction prematurely against the directors of the company. Delhi High Court decided the matter on 26.02.2015 disposing of the petitions and directing CCI to decide the case expeditiously. (<https://indiankanoon.org/doc/46419093/> accessed 4 April 2017).

<sup>20</sup> See n. 11.

<sup>21</sup> Case MRTP C-127/2009/DG1R4/28 decided 11.06.2012 (para 26.9).

<sup>22</sup> Case RTPE 52/2006 decided 03.07.2012 (para 104).

<sup>23</sup> Case RTPE 52/2006 decided 31.08.2016 (para 51).

<sup>24</sup> See n. 12.

<sup>25</sup> See n. 21 (para 26.11).

<sup>26</sup> See n. 22 (para 106).

<sup>27</sup> See n. 23 (para 55).

<sup>28</sup> Case 24/2011 decided 19.3.2013 (para 14).

<sup>29</sup> Case RTPE 9/2008 decided 09.01.2014 (para 107).

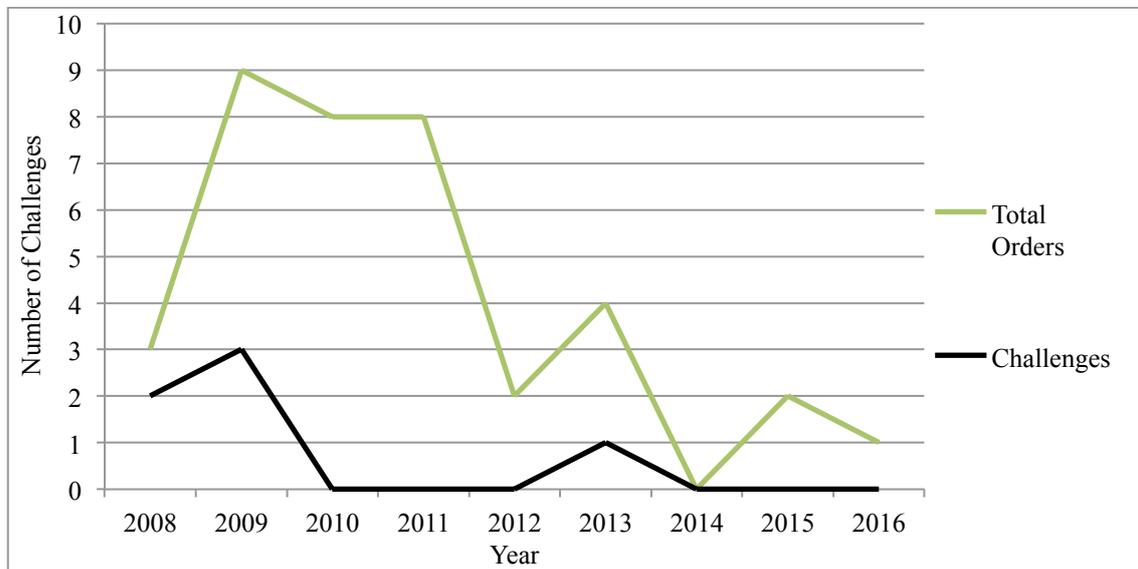
<sup>30</sup> Cases 72/2011, 16/2012, 34/2012, 53/2012, 45/2013 decided 26.10.2015 (para 14).

<sup>31</sup> Case 29/2010 decided 31.08.2016 (para 163).

6.1.2. Relationship between CCP and the Courts in Pakistan

(a) *An Overview*

The relevant data examined in Chapter 4<sup>32</sup> suggests that in Pakistan as in India, entities aggrieved by proceedings pending before CCP have exercised their right to file challenges before the high courts.



**Figure 6.4** *Number of Challenges filed in respect of Proceedings pending before CCP*

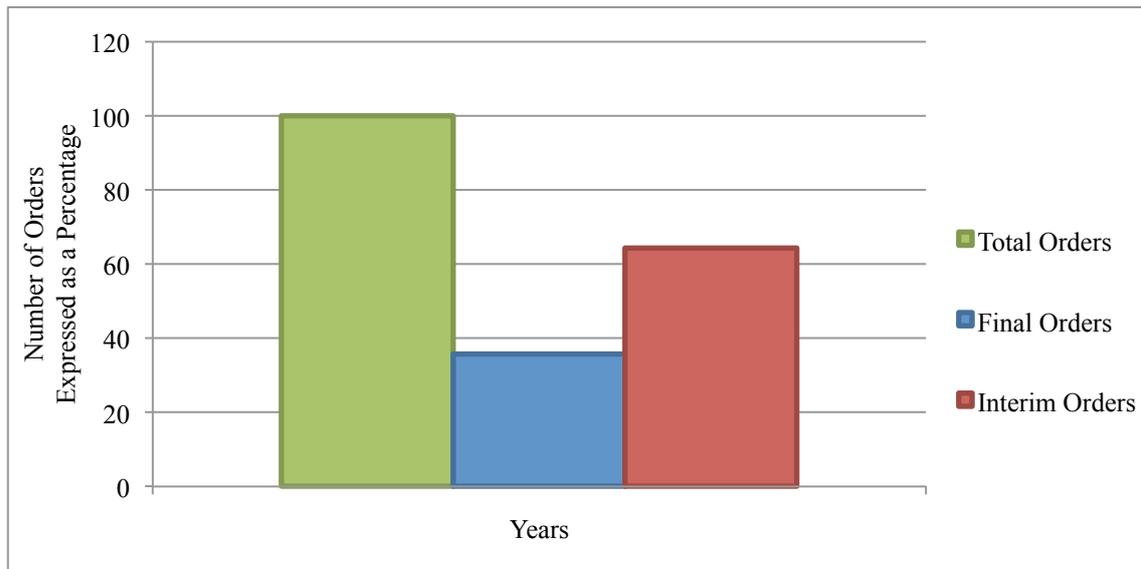
Once again, only a fraction of proceedings pending before CCP challenged were before the high courts. Of the 37 orders passed between 2008 until 2016, only 6 or 16.2% proceedings had been challenged before the courts. The number of challenges filed before the courts has also declined over the years.

Interestingly, however, the data also reveals that the Pakistani courts have responded very differently to these challenges than their Indian counterparts. Of the challenges filed before different high courts throughout the country, the courts pronounced final decisions in only five, whilst they issued interim orders in at least nine.<sup>33</sup> Of these five final orders, the majority merely remanded matters from the Supreme Court to the high courts or decided miscellaneous applications that had been filed along with the

<sup>32</sup> Chapter 4, section 4.3 (ix) and Table 4.16.

<sup>33</sup> There were 20 parties to the *Cement Manufacturers Case* pending before CCP who filed individual petitions before the High Courts. However, the high courts disposed these by a single order. Therefore, for the purposes of this table, I treat these 20 petitions as one petition.

main petitions. None of these orders addressed the merits of the petitions filed before them.



**Figure 6.5 Comparison of the Types of Orders Passed by Pakistani Courts 2008-2016**

*(b) A Review of the Grounds on which Challenges were Filed*

Two types of competition related challenges were filed before the courts in Pakistan. (a) those that challenged the show cause notices or interim orders issued by CCP in the course of proceedings pending before it, and (b) those that challenged the final orders passed by CCP at the end of these proceedings. In this section, I only consider challenges filed before the courts against CCP’s show cause notices or interim orders. This is necessary for the sake of comparison with the interaction between CCI and the Indian courts, which comprised almost entirely of challenges filed in respect of proceedings pending before CCI rather than against its final orders.

These challenges may be divided into two phases: those filed in the period when the First Ordinance 2007 was in force (‘the first phase’) and those filed in the period in which the Second and Third Ordinances 2009 and 2010 were in force and includes the period up to and after the enactment of the Act of 2010 (‘the second phase’).

As in the case of India, entities aggrieved by the proceedings initiated by CCP sought from the courts, writs of ‘mandamus and prohibition’ (ie directions that the person carrying out a function in connection with the affairs of the state should refrain from doing anything he is not permitted to do, or be directed to do something he is required

to do); writs of ‘certiorari’ (ie a declaration that any given act or proceeding performed by a person in connection with the affairs of the federation, has been done without lawful authority and is without legal effect), and writs of ‘quo warranto’ (ie requiring a person holding public office to show the authority of law under which he claims to hold that office).<sup>34</sup>

Some of the grounds raised in the first phase challenges included: (a) that CCP had not issued the show cause notice in accordance with the law; (b) that certain sections of the First Ordinance 2007,<sup>35</sup> and, therefore, CCP’s actions in exercise of these sections, were *ultra vires* the Pakistani constitution and contrary to the fundamental rights stipulated in it;<sup>36</sup> (c) that the president had promulgated the First Ordinance 2007 without legal authority because the subject of competition was not within the legislative competence of the parliament or the president; (d) that the First Ordinance 2007 did not confer jurisdiction upon CCP to exercise its powers against the petitioners.<sup>37</sup> The courts accepted the majority of the petitions filed before them regardless of the specific grounds on which these had been filed, and issued interim orders restraining CCP from proceeding against the petitioners.

A ground repeatedly raised in the challenges filed in the second phase, when the First Ordinance 2007 had lapsed and the Act of 2010 was still to be enacted (ie whilst the Second Ordinance 2009 or the Third Ordinance 2010 were in force) was that CCP

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<sup>34</sup> Article 199, Pakistani constitution.

<sup>35</sup> See, particularly sections 41 and 42, First Ordinance 2007.

<sup>36</sup> For instance Orders of the Sindh High Court relate to CCP proceedings whose vires had been challenged:

(1) CP 786/2008 (*Karachi Stock Exchange & another v. Federation of Pakistan and others*) filed in respect of the *Karachi Stock Exchange Case* decided 02.05.2008; and

(2) CP 938/2008 filed in respect of *Pakistan Banking Association Case* decided 07.11.2008.

CCP appealed both these orders of the Sindh High Court before the Supreme Court and the Supreme Court by its order dated 13.11.2008 in *CPs 759, 760/2008* and order dated 23.10.2008 in *CP 715/2008*, set aside the restraining orders issued by SHC on CCP’s undertaking that it will not recover any fines from the petitioners whilst as the petitions before the SHC remained pending.

<sup>37</sup> The Lahore High Court, in its order dated 10.08.2009, in WP 15616/2009, granted an injunction to *Pioneer Cement Limited* on these grounds. Through further orders dated 11.08.2009, LHC also granted injunctions on the same terms to *All Pakistan Cement Manufacturers Association* (in WP 15624/ 2009) and to 13 others (namely *Askari Cement Limited* in WP 15640/2009, *Attock Cement Limited* in WP 15622/2009, *Bestway Cement Limited* in WP 15639/2009, *Cherat Cement Limited* in WP 15631/2009, *Dandot Cement Limited* in WP 15670/2009, *Dewan Cement Limited* in WP 15623/2009, *DG Khan Cement* in WP 15630/2009, *Fauji Cement Limited* in WP 15669/2009, *Fecto Cement Limited* in WP 15669/2009, *Flying Cement Limited* in WP 15619/2009, *Kohat Cement Limited* in WP 15688/2009, *Lafarge Cement Limited* in WP 15620/2009, *Lucky Cement Limited* in WP 15637/2009 and *Mustehkam Cement Limited* in WP 15638/2009). Also by order dated 11.08.2009 the Lahore High Court granted an injunction to *Maple Leaf Cement Company Limited* in WP 15618/2009.

could not issue show cause notices until such time as the parliament validated the competition law in pursuance of the judgment of the Pakistani Supreme Court in *Sindh High Court Bar Association v. Federation of Pakistan*.<sup>38</sup>

The most notable petition of this period was filed by Liquefied Petroleum Gas Association of Pakistan (LPGAP), in which the courts not only granted an interim injunction in favour of LPGAP and suspended the operation of the show cause notice issued by CCP, but also held that writ petitions against actions or orders of CCP could validly be filed before the high court of any province in which the petitioner carried on its business or where the effect of CCP's actions was most likely to be felt.

CCP challenged the high court's order before the Supreme Court. However, the Supreme Court, instead of deciding the issue on merits, simply remanded it to the high court for a decision on jurisdiction. Whilst the Supreme Court set aside the interim injunction issued by the high court, it did so only on CCP's undertaking that although it would hear the case against the petitioners, it would not take any adverse action against them until such time as the petitions remained pending before the high court. Nearly eight years later, this matter is still pending before the high court and although CCP has passed final orders, it remains unable to enforce these against the petitioners.<sup>39</sup>

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<sup>38</sup> By its order dated 14.01.2010, Sindh High Court granted an injunction on this ground in CP D-110/2010 (*Mirpurkhas Sugar Mills*). This order was relied upon in several other petitions and Sindh High Court granted injunctions in all of these. Section 6.1.2(c) below.

CCP challenged a number of orders passed by the high courts before the Supreme Court (eg in CPs 1065, 1066 and 1067/2010 against orders of the high courts in WPs 2556, 2654 and 2671/2010). However, CCP was unable to explain its delay in filing these CPs and, therefore, the Supreme Court only directed the high courts to hear the petitions expeditiously rather than directing that these may be dismissed altogether. Similarly, the Supreme Court dismissed CPs 521, 522, 523, 524 and 525/2010 filed by CCP in respect of orders of the high courts in WPs 1175, 1174 and 1122/2010 and in CP D.164 and 196/2010 with only an observation that the high courts should expeditiously decide the petitions pending before them.

<sup>39</sup> The Lahore High Court decided *LPGAP's* petition (WP 9518/2009) on 27.05.2009 and CCP challenged this before the Supreme Court (in CP 1022/2009). By its order dated 26.05.2009 the Supreme Court set aside the interim injunction issued by the high court on CCP's undertaking and remanded the matter to LHC where after a further order dated 05.08.2009, it remains pending to date.

A related petition filed by *Jamshoro Joint Venture Limited*, a member of LPGAP (W.P 15493/2009) also remains pending before LHC. LHC had initially passed an interim order against CCP in this petition, and CCP had appealed this before the Supreme Court. However, CCP withdrew the appeal when the Supreme Court set aside the interim injunction on CCP's undertaking that although it would hear and even decide the matter, it would not implement an adverse order until the petition before the high court remained pending (Order of Supreme Court dated 16.09.2009 in CP 1694/2009).

Another important challenge filed in the first phase, but that continued through to the second phase, related to the proceedings in connection with the All Pakistan Cement Manufacturers' Association (APCMA) & its members. On 28<sup>th</sup> October 2008, CCP had issued a show cause notice to APCMA and its members. The defendants challenged the show cause notice before the Islamabad High Court and the high court, by its order dated 10<sup>th</sup> November 2008, restrained CCP from passing a final order against the defendants. However, by a further order dated 5<sup>th</sup> December 2008, the high court dismissed the defendants' petitions as 'premature'.

Given this reprieve from the high court, CCP scheduled a hearing for APCMA and its members for 3<sup>rd</sup> August 2009, however, the defendants approached the Lahore High Court and obtained yet another restraining order against CCP. Once again, this restraining order was lifted (by Lahore High Court's order dated 24<sup>th</sup> August 2009) and CCP was allowed to continue with the proceedings, which culminated in its final order dated 27<sup>th</sup> August 2009.<sup>40</sup> However, before CCP could enforce its order, the Lahore High Court, by a further order dated 31<sup>st</sup> August 2009, once again restrained CCP from taking any adverse action against the defendants.<sup>41</sup>

*(c) Effect of Interaction on Subsequent Proceedings before CCP*

Whilst the interaction between CCP and the courts had a considerable impact on subsequent proceedings before CCP, this impact was largely adverse to CCP's operations. Instead of CCP citing the decisions of the high courts in its orders these decisions formed the basis for further challenges against CCP by aggrieved entities. For example, a number of entities aggrieved by proceedings initiated by CCP in cases related to the Pakistan Sugar Mills Association, relied upon the interim order of the Sindh High Court in a petition filed by Mirpurkhas Sugar Mills, to obtain further restraining orders against CCP in proceedings pending before other high courts in Pakistan.<sup>42</sup>

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<sup>40</sup> For example *see* CCP's order dated 27.08.2009 in File 4/2/sec.4/CCP/2008 (paras 11-13). Also *see* n. 37 and text thereto and order of the Lahore High Court dated 31.08.2009 in CMA 3440/2009.

<sup>41</sup> Section 6.4.2(a).

<sup>42</sup> For instance the Mirpurkhas Sugar Mills order (n. 38) was replicated in Order of the Lahore High Court dated 11.02.2010 in:

(1) WP 1176/2010 *Chishtia Sugar Mills Limited*;

(2) WP 1175/2010 *Gojra Samundari Sugar Limited*;

Similarly, the Lahore High Court's decision in the *LPGAP Case*<sup>43</sup> opened floodgates of interim injunctions against show cause notices issued by CCP. Often, the high courts granted these injunctions at the first hearing and after only a cursory examination of issues and mostly because 'other constitutional petitions raising similar issues have already been heard by the this court.'<sup>44</sup> Although CCP challenged a number of interim injunctions before the Supreme Court, the Supreme Court preferred not to interfere with the jurisdiction of the high courts. At best, it modified the orders of the high courts only to allow CCP to continue with the proceedings whilst restraining it from taking any adverse action against the petitioners. In the majority of appeals, the Supreme Court simply directed the high courts to hear and dispose of the matters expeditiously.

### 6.1.3. Comparing the Interaction with Courts in India and Pakistan

The Interactions between the Indian and Pakistani competition laws (as represented by CCI and CCP respectively) and the pre-existing legal systems of the countries (as represented by their courts) differ not only in the grounds on which proceedings

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- (3) WP 1122/2010 *Shahtaj Sugar Mills Limited*;
  - (4) WP 1173/2010 *Sheikhoo Sugar Mills Limited*;
  - (5) WP 2654/2010 *National Sugar Limited*;
  - (6) WP 2556/2010 *Pattoki Sugar Mills Limited*; and
  - (7) WP 2761/2010 *Shakarganj Mills Limited*.

<sup>43</sup> See n. 39.

<sup>44</sup> A petitioner from the electronics sector (name not provided) made this statement in WP 3530/2010. The high court by its order dated 23.02.2010 allowed an injunction on this basis and also relied on the decision in its orders in subsequent petitions, including:

- (1) WP 22575/2011 *Transfopowers* decided 12.10.2011;
- (2) WP 23640/2011 *AB Ampere (Pvt.) Limited* decided 21.01.2011;
- (3) WP 23743/2011 *Pak Electron* decided 25.10.2011; and
- (4) WP 27488/2011 *KBK Electronics* decided 08.12.2011.

The high court also granted injunctions against CCP in its orders dated 16.06.2011 in:

- (1) WP 13499/2011 *Amin Brothers Limited*;
- (2) WP 13496/2011 *Creative Engineering*;
- (3) WP 13497/2011 *M.R Electric*;
- (4) WP 13500/2011 *Nam International*; and
- (5) WP 13498/2011 *Redco Pakistan Limited*.

Further, the Sindh High Court, by its orders dated 06.06.12 and 08.08.12 in CP D 2125/2012 *Schneider Electric Pakistan* and CP D 2871/2012 *Medical Diagnostics Centre and others*, restrained CCP from taking coercive action against the petitioners and suspended the operation of the notice until the next date of hearing of the petitions. (As per general practice of courts, this injunction was extended at each date of hearing).

CCP filed appeals before the Supreme Court (CPs 1938,1939, 1988, 1989, 2008 and 2009/2011 against orders of the high court in WPs 22575, 22633, 23640, 22965, 23743 and 23860/2011). The Supreme Court disposed of these CPs by order dated 22.12.2011 in terms of which it refused to interfere with interlocutory orders of the high court and merely directed the high court to hear and dispose of the matters expeditiously.

pending before CCI and CCP have been challenged before the courts but also in the manner in which the courts have responded to the challenges filed before them.

*(a) Comparing the Grounds on which Challenges have been filed*

The grounds on which entities aggrieved by proceedings pending before CCI invoked the inherent constitutional jurisdiction of the Indian courts challenge procedural aspects of CCI's operations ie they either call into question CCI's authority to take notice of certain allegedly anti-competitive practices or the manner in which CCI in fact takes such notice. I refer to these as 'procedural' grounds. On the other hand, grounds on which aggrieved entities in Pakistan invoked the inherent constitutional jurisdiction of the Pakistani courts in respect of proceedings pending before CCP may be categorised as both 'procedural' and 'substantive'. Whilst the procedural grounds are comparable to those raised in respect of proceedings pending before CCI, the substantive grounds on which CCP's proceedings have been challenged call into question the constitutionality of the provisions of the Pakistani competition law and therefore the validity of the CCP itself, as well as its power to initiate and pursue proceedings against the aggrieved entities. The majority of the challenges filed before courts in Pakistan in respect of proceedings pending before CCP fall into the latter category.

*(b) Comparing the Response of the Indian and Pakistani Courts*

By and large, the Indian courts have responded to the challenges filed before them in respect of proceedings pending before CCI with reasonable alacrity and clarity and through a number of different types of orders none of which, however, have the effect of indefinitely and fully restraining CCI from continuing with the proceedings pending before it. The response of the Indian courts not only supports CCI in its proceedings but also brings these proceedings into greater conformity with due process norms prevalent in the country and, in doing so increases the compatibility of the Indian competition law with the pre-existing legal system in the country.

Pakistani courts, on the other hand, seem to have adopted a uniformly hesitant strategy in respect of all challenges filed before them, which reveals their reluctance to deal with these challenges. In the majority of petitions filed before them the Pakistani courts have admitted the petitions for hearing and granted interim orders

either restraining CCP from continuing with the proceedings before it altogether or where they have allowed CCP to continue with the proceedings, restraining it from enforcing any orders it may pass at the end of these proceedings.

In a majority of petitions, the Courts granted restraining orders in the very first hearing and often on an *ex parte* basis that is without the presence of CCP in the courts. CCP's failure to block the aggrieved entity from obtaining a restraining order in the critical first hearing placed it on a weak footing in subsequent hearings and effectively prevented it from having the restraining order set aside. Consequently, these petitions are still pending before the courts and the restraining orders passed by them against CCP continue to be important factors in its failure to meaningfully enforce the competition law in the country.<sup>45</sup>

The persistent indecisiveness of the Pakistani courts, which is evident in their not having passed decisions on merits in any matters before them, has multiplied the litigation before the courts. More damagingly, however, it has left CCP in a state of uncertainty as to the legal course it may adopt in future cases. It has possibly also created a sense of insecurity at CCP as to the fate of its orders once they are put to the test of judicial scrutiny.

## **6.2. Possible Explanations for Interactions between CCI, CCP and the Courts**

Given the commonalities in the Indian and Pakistani legal systems it is tempting and indeed appropriate to consider whether the responses of the courts to the challenges filed before them against competition proceedings may be rooted in their inherent natures.<sup>46</sup>

India and Pakistan's common legal history until their independence from British rule in 1947 and the continuance of the legal system introduced by the British in both countries, means that there are significant commonalities not only in their legal

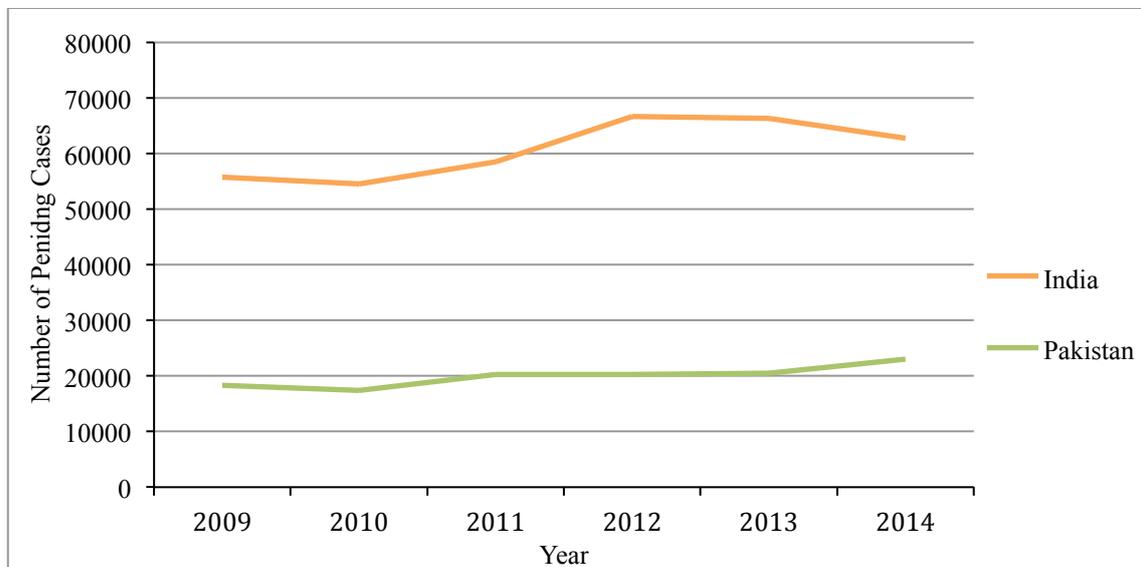
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<sup>45</sup> The fact that courts in Pakistan are most effective at the first hearing and allow a case to linger on thereafter is another instance of the impact of patterns implicit in the context of the adopting country affecting competition laws. However, at this stage these patterns affect the implementation of the Law rather than the process through which it is transferred into the country. *See* chapter 2, section 2.4.3.

<sup>46</sup> My interviewees in Pakistan were unanimously of the few that the delay in decisions from the courts was entirely due to endemic delay in the system.

institutions but also in their legal cultures.<sup>47</sup> If the response of the courts stemmed from the inherent structure and culture of the legal systems of the two countries it is likely to be similar.

Perhaps the most prevalent and bemoaned similarity between the legal systems and legal cultures of India and Pakistan is their proclivity for delay in deciding the cases before them. According to the Annual Reports of the Indian and Pakistani Supreme Courts, the pendency of cases in the two Supreme Courts has either slightly increased (in the case of India) or remained constant (in the case of Pakistan) regardless of the number of cases instituted or disposed of by the Supreme Courts in any given year.<sup>48</sup> Although independent data for each high court is not readily available it may be assumed that the endemic and chronic delay and pendency of cases at the Supreme Court level echoes the pendency at the high court level throughout the two countries.



**Figure 6.6 Comparison of Cases pending before Supreme Courts of India and Pakistan**

If the response of the courts to competition related matters challenges filed before them had been rooted in the inherent dilatory tendencies in the pre-existing Indian and Pakistani legal systems, then the Indian courts would not have disposed of a

<sup>47</sup> Chapter 1 and Chapter 3, Section 3.1.

<sup>48</sup> This observation is based on data contained in Annual Reports of the Supreme Courts of India 2015-2016 and the Annual Report of the Supreme Court of Pakistan 2015-2016. The higher number of cases pending before the Supreme Court may be attributed to it being a much larger country, catering to matters arising from a far greater number of High Courts. The numbers are so significant in the two countries that there is no expectation that these would have declined significantly in 2016.

significant number of competition related challenges filed before them and would have appeared to hesitate much like the Pakistani courts. However, it is evident from the discussion in Section 6.1 that this is not the case.

It is, therefore necessary to look elsewhere for an explanation in the disparity in the responses of the Indian and Pakistani courts. A possible and—plausible—explanation for this stark difference in responses of the Indian and Pakistani courts, may lie in the transfer mechanisms and institutions engaged adopted by the two countries in their respective adoption processes.

The adoption processes have a *direct impact* on the nature of the interactions between the competition laws and the pre-existing legal systems, which stems from the extent to which the judiciary was engaged in the adoption process and directly affects the manner in which the judiciary responds to competition related challenges. However, these adoption processes also have an even more important *indirect impact*, which derives from the extent to which the parliament and the executive engaged with each other and with the judiciary in adopting the competition laws. This determines the attitude and ownership of the institutions towards setting up the competition appellate system in the country, diverting appeal traffic towards it and ensuring that the competition appellate system (ie both the first and second tier NCAs) has sufficient resources for its operations.

(a) *Direct Impact of the Adoption Processes*

As discussed in chapter 3, India had primarily employed *socialization* in adopting its competition law and had engaged a wide range of bottom-up, participatory and inclusive domestic institutions drawn from the executive, the legislature and the judiciary in the process of doing so.<sup>49</sup> The judiciary in India first became involved in the adoption process not by invitation from other institutions but at its own volition. The Indian Supreme Court evaluated the constitutionality of the Indian competition law in the *Brahm Dutt case* which was filed before the Supreme Court soon after the law was first enacted and before the Indian government had set up the institutional machinery to enforce the law in the country.<sup>50</sup> It is important to highlight that the

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<sup>49</sup> Chapter 3, section 3.2.2

<sup>50</sup> *ibid.*

Indian Supreme Court was able to intervene in the process of adapting the Indian competition law to the domestic Indian context, because it was already a robust institution. The intervention of the Supreme Court, therefore, relates more to the pre-existing conditions of transfer in the country and the dynamic of *socialization* rather than purely from the mechanics of the adoption process.<sup>51</sup>

Even though the Indian Supreme Court disposed of the *Brahm Dutt case* on the basis of an undertaking given to it by the Indian government, its decision had an important impact on the implementation of the competition law in the country. The intervention of the Supreme Court required the competition law to be amended to reflect the constitutional principle of separation of powers. The executive proposed the amendment and the parliament passed it to provide, inter alia, for the establishment of the tribunal to hear appeals from CCI's decisions so that CCI itself would not act as both a regulatory and an adjudicatory body.

This amendment brought the Indian competition law into conformity with the Indian constitution and thereby enhanced its compatibility with the country's pre-existing legal system.<sup>52</sup> This intervention also had the effect of acquainting the Indian superior judiciary, and a segment of the legal community, with the fundamentals of the scheme of enforcement envisaged in the competition law. Finally, and most importantly, the engagement of the Supreme Court in the process of revising the law bolstered and endorsed the legality and authority of the competition law, and therefore, its legitimacy in the country.

Pakistan had employed *coercion* as its primary mechanism and had engaged only a limited number of top down and exclusive institutions from the executive in its adoption process. The status of the Pakistani competition law was further complicated due to the historic weakness of the pre-existing legal system<sup>53</sup> and the fact that in 2007, when the Pakistani competition law was first introduced in Pakistan, the Pakistani judiciary was not only weakened by years of intermittent deference to the executive but was also embroiled in an unprecedented battle with the executive and later with the parliament. This meant, among other things, that not only the judiciary

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<sup>51</sup> Chapter 3, section 3.1.1, 3.1.2(a) and 3.1.3(a).

<sup>52</sup> *ibid.*

<sup>53</sup> Chapter 3, section 3.1.1, 3.1.2(b) and 3.1.3(b).

but the entire country had little or no interest in challenging the Pakistani competition law along the lines it had been challenged in India.<sup>54</sup>

The weakness of the judicial system and the stand-off between the executive and the judiciary in Pakistan had a twofold negative effect on the subsequent interaction between CCP and the Pakistani courts: first, the judiciary remained unaware of competition principles and the enforcement strategy contemplated in the Pakistani competition law and second, and more damagingly, the judiciary harboured a distrust for, if not antagonism towards, the competition law simply because it was included in the list of executive actions that were saved by the military chief turned president's contentious constitutional amendment order.<sup>55</sup>

Whilst the enactment of the Act of 2010 by the Pakistani parliament somewhat ameliorated the stalemate between the executive and the judiciary because it demonstrated that the executive had complied with the order of the Supreme Court,<sup>56</sup> it did not lead to a positive change in the overall attitude of the judiciary towards competition matters. Therefore, in a majority of petitions filed before them, the courts continued to grant restraining orders against CCP in the very first hearing of the petition.

*(b) Indirect Impact of the Adoption Processes*

India's engagement of the parliament and the executive in *socialization* had a further positive impact on the interaction between the CCI and the courts,<sup>57</sup> because this engagement generated a greater ownership and understanding of the competition law amongst these institutions as well as an awareness, if not a commitment, on their part

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<sup>54</sup> *ibid.*

<sup>55</sup> Chapter 3, section 3.1.3 (b).

<sup>56</sup> This fact is evident from the *LDI Case*. The order of the Supreme Court dated 21.02.2013 in CP 102-L/2013 (*ADG LDI (Pvt.) Limited v. Brain Telecommunications Limited*) was the only instance in which the Pakistani Supreme Court expressly endorsed CCP by referring a case to it even though the entity filing the case before the Supreme Court, had not impleaded CCP as a party to the proceedings.

The matter had arisen when a Long Distance & International (LDI) operator (*Brain Telecommunications Limited*) filed a petition before the Lahore High Court seeking a restraining order against the Pakistan Telecommunication Authority and the Ministry of Information, which LHC duly granted. Another LDI Operator (*ADG LDI (Pvt.) Limited*) challenged LHC's restraining order before the Supreme Court on the ground that the issues in the petition before the High Court were properly within the jurisdiction of and should have been heard by CCP. The Supreme Court allowed the appeal, set aside LHC's restraining order and directed CCP to take notice of the matter and to decide it expeditiously.

<sup>57</sup> Chapter 3, section 3.2.1.

toward the effective implementation of the competition law in the country. It is likely that this awareness, in turn played an important role in the Indian government setting up the tribunal even before it had fully operationalized CCI, and of the parliament fully supporting this move.<sup>58</sup>

The timely establishment of the tribunal is likely to have ensured that only those matters were filed before the Indian courts that could not appropriately be filed before the tribunal. This was due to the established and long standing principle of the Indian legal system that a constitutional writ does not lie in situations where there is ‘an adequate alternate remedy’ available to the entities.<sup>59</sup>

The mechanism of *coercion* employed by Pakistan and the limited institutional engagement with which it transferred the Pakistani competition law, appears to have had an entirely opposite effect. By keeping the parliament at a distance in the adoption process the Pakistani competition law had not only compromised the compatibility of the law with Pakistan’s pre-existing legal system and its legitimacy in the country but also had kept the parliament uninformed about the principles and purpose of the law.<sup>60</sup> Further, *coercion* led as it was by the World Bank is also likely to have rendered the implementation of the law contingent upon World Bank’s continuing support as well as the priorities of each successive government in its relationship with the World Bank.

The exclusion of the parliament from the adoption process in Pakistan and the Pakistani government’s fluctuating relationship with the World Bank is likely to have cost the government necessary parliamentary support for establishing the tribunal and also affected its own commitment towards meaningfully implementing the

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<sup>58</sup> Although the Indian government established CCI in 2008, it did not start deciding cases until the tribunal was set up in 2009.

<sup>59</sup> In its decision in *Commissioner of Income Tax v. Chhabil Dass Agrawal*[(2014) 1 SCC 603] the Supreme Court of India reiterated the established legal position in the country that when a statutory forum is created by law for redressal of grievances, then subject to certain exceptions, the high court should not entertain a writ petition by ignoring such statutory dispensation. The Supreme Court further stated that although it is within the discretion of the high court to grant relief under Article 226 of the constitution of India despite existence of an alternative remedy, the high court must not exercise this jurisdiction if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the high court without availing it. However, the Supreme Court conceded that the high court may make an exception if the petitioner makes out an exceptional case warranting such interference or if there are sufficient grounds to invoke the extraordinary jurisdiction under Article 226 of the Constitution of India.

<sup>60</sup> Chapter 3, section 3.5.2 (b).

competition law.<sup>61</sup> The fact that the tribunal did not exist for the majority of the life of the competition law in Pakistan played a critical role in increasing the traffic of constitutional challenges in respect of competition matters before the Pakistani courts because aggrieved entities did not have an ‘adequate alternative remedy’ available to them and, therefore, no recourse for their grievances before any other forum.<sup>62</sup>

### **6.3. Competition Appellate Systems and Interaction with the Courts**

The Indian and Pakistani competition laws envisaged nearly identical competition appellate systems: appeals from interim and final orders of CCI and CCP respectively, were to lie to the tribunals and appeals from the orders of the tribunals were to lie to the Supreme Court.<sup>63</sup> However, the Indian and Pakistani governments adopted very different strategies for establishing the competition appellate systems envisaged in these laws. This, in turn, had a considerable impact on the options available to entities aggrieved by CCI or CCP’s proceedings for bringing challenges against CCI or CCP as the case may be. In India, where the aggrieved entities had the option to invoke the competition appellate system, the interaction between CCI and the Indian courts was more streamlined than in Pakistan, where aggrieved entities did not have such an option. In order to understand the operation of the Indian and Pakistani competition appellate systems and their impact on the interactions between CCI, CCP and the courts, it is first important to trace their histories.

#### 6.3.1. History and Operations of the Indian Tribunal

##### *(a) Establishing the Indian Tribunal*

The statutory framework for the Indian tribunal is provided in Chapter VIIIA of the Indian competition law and was inserted in the law by the First Amendment 2007, which was enacted by the Parliament in pursuance of the decision of the Indian Supreme Court in the *Brahm Dutt case* and the undertaking given by the Indian

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<sup>61</sup> Section 6.3.2(a).

<sup>62</sup> As per decisions of the Pakistan Supreme Court in *Anjuman e Ahmedya v Deputy Commissioner* PLD 1966 Supreme Court 639, recently affirmed in *Rana Aftab Ahmed Khan v Muhammad Ajmal and another* PLD 2010 SC 1066 a person can invoke the writ jurisdiction of the Courts if it does not have an adequate alternate remedy available to it.

<sup>63</sup> Chapter 4, section 4.1.1 particularly Figure 4.1. CCP also had an internal appeals mechanism, where an order of a single member of CCP or an authorized officer could lie to an ‘appellate bench’ established in pursuance of section 41 of the Pakistani competition law and comprising two or more members of CCP. The appellate bench is not an independent legal entity and for the purposes of this thesis, I treat it as part of CCP.

government to the Supreme Court.<sup>64</sup> The Indian government established the tribunal on 15th May 2009 soon after CCI itself had become operational,<sup>65</sup> and conferred upon it the express mandate to hear appeals from CCI's interim as well as final orders. On 20<sup>th</sup> May 2009, the government also appointed a former Judge of Supreme Court, Dr. Justice Arijit Pasayat as the first chairperson of the tribunal.<sup>66</sup> For the next eight years the tribunal remained in operation. However, there was a period of approximately one year, when the tribunal operated with only a chairperson but no members, and therefore, was unable to hear any appeals.<sup>67</sup>

On 31<sup>st</sup> March 2017 the Indian parliament amended the Indian competition law to replace the tribunal with a 'National Company Law Appellate Tribunal' and with effect from 26<sup>th</sup> May 2017, all appeals from CCI's interim and final orders were diverted to this new tribunal.<sup>68</sup>

*(b) Operation of the Indian Tribunal*

Several parties aggrieved by CCI's interim orders, preferred appeals to the tribunal rather than challenging these by invoking the constitutional jurisdiction of the Indian courts. However, perhaps the most significant appeal filed against any interim order of CCI was in Case 11/2009 *Jindal Steel and Power Limited v. Steel Authority of India*.<sup>69</sup>

CCI had initiated proceedings against the Steel Authority of India Limited (SAIL) upon receipt of information (or complaint) from Jindal Steel, and had sought comments from it. However, rather than filing its comments, SAIL filed an application before CCI seeking an extension in the time in which it was to file its comments. CCI denied SAIL's application and through an interim order, directed the DG to investigate the allegations and directed SAIL to file its comments directly before the DG.

SAIL filed an appeal against CCI's interim order before the tribunal. By its order

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<sup>64</sup> See n. 50 and text thereto.

<sup>65</sup> The tribunal was established by notification S.O.1240 (E) issued by ministry of corporate affairs, government of India.

<sup>66</sup> See <http://compat.nic.in> (accessed 2 April 2017).

<sup>67</sup> See <http://compat.nic.in/FormersChairman.aspx> (accessed 9 September 2017).

<sup>68</sup> Chapter 3, section 3.2.1(b)(iii).

<sup>69</sup> Order dated 20.12.2011 (para 13).

dated 11<sup>th</sup> January 2010, the tribunal allowed SAIL's appeal and granted it further time to file its reply before CCI. The tribunal also directed CCI to take a fresh decision, taking SAIL's reply into consideration. Through a further order dated 15<sup>th</sup> February 2010, the tribunal also held that whilst there was no requirement for CCI to invite comments from parties to proceedings pending before it, once it had invited such comments it was not open to it to withdraw the opportunity. The tribunal also held that it was incumbent upon CCI to indicate reasons for having formed the view that a particular case was fit for further investigation and indeed for issuing any other order.

CCI appealed the order of the tribunal before the Indian Supreme Court.<sup>70</sup> On 9<sup>th</sup> September 2010, the Supreme Court passed an order which clarified a number of important procedural points for CCI, including:

- (i) only such orders of CCI as are listed in section 53(A)(1)(a) of the Indian competition law may be appealed to the tribunal. CCI taking a *prima facie* view and issuing a direction to the DG are not appealable actions in terms of section 53A;
- (ii) CCI has no statutory duty to issue a notice or grant a hearing to an entity alleged to be in violation of the Indian competition law, before arriving at a decision as to whether or not the case is fit for further investigation;
- (iii) CCI is a necessary and/or proper party to all proceedings that may be brought before the tribunal;
- (iv) in the course of an inquiry ordered by it, CCI may issue an interim order if it is satisfied that issuing such an order meets the requirements of section 33 of the Indian competition law;
- (v) it is incumbent upon CCI to record reasons while forming the *prima facie* view that a case is fit for further investigation and to do so within a reasonable time;
- (vi) it is further incumbent upon CCI and/or the DG to conclude all investigations and inquiries expeditiously so as not to adversely affect any of the entities to the proceedings; and

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<sup>70</sup> CA 7779/2010 *Competition Commission of India vs. Steel Authority of India Limited*.

- (vii) in any matter in which CCI passes an interim order, it must pass a final order within 60 days of the date of the interim order.<sup>71</sup>

CCI's interim order in the *All India Organization of Chemists and Druggists Case* is another example of an order that was appealed before the tribunal.<sup>72</sup> In this case, the DG had asked for some information from the defendant. However, the defendant refused to provide this information on the ground that it had already done so in another case. The DG did not accept this explanation and imposed a fine on the defendant. The defendant appealed this order before the tribunal. The tribunal allowed the appeal and restricted the extent of the penalty imposed by the DG.

In yet another case, CCI had granted interim relief to the complainant and had issued a restraining order against the defendants. The defendants filed an appeal before the tribunal against this interim order. The tribunal allowed the appeal and directed the DG to complete the investigation expeditiously and CCI, to pass a final order within the time stipulated by the tribunal in its order.<sup>73</sup>

### 6.3.2. The Situation in Pakistan

#### (a) *Establishing the Pakistani Tribunal*

The First Ordinance 2007 and Second Ordinance 2009 did not envisage a tribunal. Appeals from CCP's final orders passed by a single member or authorized officer of CCP, lay to the appellate bench and appeals from all other final orders of CCP and those of the appellate bench lay directly to the Supreme Court.<sup>74</sup> In the few months

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<sup>71</sup> Competition Commission of India Annual Report 2010-11.

<sup>72</sup> Case 20/2011 *Santuka Associates (Pvt.) Limited v. All India Organization of Chemists and Druggists & others*.

<sup>73</sup> Case 52/2013 *Financial Software and Systems Pvt. Limited v. ACI Worldwide Solutions Private Limited and others* decided 13.01.2015 (paras 4 & 5).

<sup>74</sup> Sections 41 and 42 First Ordinance 2007 and Second Ordinance 2009. Although some appeals were filed before the Supreme Court during this period, the endemic delay at the Supreme Court along with the fluctuating status of the Pakistani competition law meant that none of these appeals were finally decided.

The appeal filed by the Institute of Chartered Accountants of Pakistan (ICAP) against the order of the appellate bench dated 11<sup>th</sup> March 2009 is an example of an appeal from CCP's order directly to the Supreme Court. The appellate bench had dismissed the appeal filed by ICAP against the CCP's order dated 28.11.2008 passed by a single member (File No. 3/Sec-4/CCP/08 (*The Institute of Chartered Accountants of Pakistan*)). However, the Supreme Court, simply admitted ICAP's appeal and restrained CCP from enforcing its final order. Order of the Supreme Court dated 19.03.2009 in CA 274/2009 (*Institute of Chartered Accountants of Pakistan v. Competition Commission of Pakistan*). It is not clear whether this appeal is still pending before the Supreme Court or has been transferred to the tribunal. It is clear, however, that no order has been passed in this appeal to date

that the Third Ordinance 2010 was in force, appeals from CCP's interim and final orders were directed to the high courts provided that the orders that being appealed had been passed by more than one CCP member or by the appellate bench.<sup>75</sup>

The concept of the tribunal was first introduced in Pakistan in the Act of 2010.<sup>76</sup> However, the government only appointed its first member and chairman on 22<sup>nd</sup> July 2011, nearly nine months after the Act.<sup>77</sup> The government did not appoint the technical members until 2012, nearly a year after the appointment of the chairman.<sup>78</sup> However, the tribunal had been functional for only about five months and had decided only one appeal<sup>79</sup> when in April 2013 one member resigned and the other retired due to having reached retirement age. It took the government nearly two years to re-constitute the tribunal when it appointed members on 10<sup>th</sup> April 2015, 28<sup>th</sup> May 2015 and 22<sup>nd</sup> January 2016 respectively. It was only in 2015, nearly four years after it was first established, that the tribunal made rules to regulate its conduct and proceedings.<sup>80</sup>

*(b) Operation of the Pakistani Tribunal*

The Pakistani tribunal decided one appeal in 2013 in the matter of *I-Link Guarantee Ltd.* when by its order dated 20<sup>th</sup> March 2013, the tribunal dismissed CCP's final order. CCP filed an appeal before the Supreme Court against the order of the tribunal.

Since 2015, the tribunal has been functioning and hearing appeals against CCP's orders with some regularity. Interestingly, however, all appeals filed before the tribunal have been against CCP's final rather than interim orders. This suggests that challenges, if any, in respect of the proceeding initiated by or pending before the CCP are still directed and concentrated towards the high courts.<sup>81</sup>

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<sup>75</sup> Section 42, Third Ordinance 2010.

<sup>76</sup> Section 43 Pakistan competition law.

<sup>77</sup> Notification No. F.15(1)/2010-A.V dated 27.07.2011. <http://pakistannewswire.net/retired-judge-appointed-chairman-competition-appellate-tribunal/> (accessed 3 April 2017).

<sup>78</sup> Notification No. F.21(1)/2011-Admn-III dated 29.05.2012.

<sup>79</sup> Section 6.3.2(b).

<sup>80</sup> The Competition Appellate Tribunal Rules 2015 made by S.R.O 749(1)/2015 dated 31.07.2015 [http://www.cc.gov.pk/images/Downloads/rules/appellate\\_tribunal\\_2015.pdf](http://www.cc.gov.pk/images/Downloads/rules/appellate_tribunal_2015.pdf) (accessed 3 April 2017).

<sup>81</sup> It is also likely that the need to file such challenges has simply not arisen due to the CCP's operations having come to a near halt in recent years. Interestingly, however, this may also be partly due to the absence of a meaningful response from the courts.

### 6.3.3. Competition Appellate Systems and Interactions with the Courts

The Indian tribunal's order in the *SAIL Case*,<sup>82</sup> provided CCI the opportunity to seek and obtain clarity from the Supreme Court with regard to its procedure. This not only helped it to respond to similar objections in subsequent cases<sup>83</sup> but also deterred potential litigants from repeatedly raising the same objections before CCI or the courts.<sup>84</sup>

Consequently, it may be argued that the orders of the tribunal had the effect of narrowing possible grounds on which CCI's interim orders or proceedings could be challenged before the courts. This, in turn, not only reduced the number of appeals filed before the tribunal and challenges filed before the courts but also enabled the tribunal and the courts to deal with any such appeals and challenges more effectively and expeditiously. The appeals heard and decided by the Indian tribunal appear also to have reduced the possibility of frivolous challenges before the courts in respect of proceedings pending before CCI. The orders of the tribunal clarified CCI's procedures, brought them in line with the country's pre-existing legal system and facilitated not only CCI's operations but also its relationship with the courts. It also had a positive impact on the development of competition jurisprudence in the country.

Conversely, the absence of a functional tribunal in Pakistan had the effect of directing not only all challenges in respect of proceedings pending before CCP towards the courts but also gave rise to constitutional challenges against CCP's final orders because aggrieved parties had no alternative forum they could approach. The rush of petitions before the courts and the breadth of grounds on which these were filed, compounded the difficulty and perhaps the reluctance of the courts to respond to these challenges. This not only prevented CCP from obtaining procedural clarity with

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<sup>82</sup> See n. 69 and text thereto.

<sup>83</sup> CCI cited the decision of the Supreme Court in the *SAIL Case* in several final orders including orders in:

(1) *Shri Shamsher Kataria Case* (n. 14), (paras 18.30.6 & 20.3.3);

(2) Case 59/2011 *Shri Jyoti Swaroop Arora v. Tulip Infratech Limited & others* decided 03.02.2015 (para 60);

(3) *Cement Cartelization Case* (n. 11ii) (para 27);

(4) RTPE 20/2008 *All India Tyre Dealers Federation v. Tyre Manufacturers* decided 16.01.2013 (para 115); and

(5) Case 15/2010 *Jupiter Gaming Solutions Private Limited v. Government of Goa & others* decided 12.05.2011 (para 6.1).

<sup>84</sup> See n. 70 and text thereto.

respect to proceedings pending before it but also, and more importantly, deprived it of the necessary endorsement of Pakistan's pre-existing legal system. The combination of these factors had an adverse effect on the development of competition law in the country.

#### **6.4. Competition Appellate System versus the Constitutional Challenge System**

Entities aggrieved by proceedings pending before CCI or its interim or final orders have the option to invoke either the competition appellate system or the constitutional challenge system (ie by filing writs before the courts) to address their grievances. However, until recently, parties aggrieved by proceedings pending before, or interim or final orders of the CCP have only had recourse to the constitutional challenge system because the competition appellate system was simply not functional.

Where the competition appellate system is strong, as it is in India, it is more regularly invoked to challenge CCI's orders. However, where the competition appellate system is weak, as it is in Pakistan, competition matters are challenged in the constitutional challenge system. In this section, I explore whether there are factors in the Indian and Pakistani adoption processes respectively, that have helped India establish a competition appellate system whilst hindering Pakistan from doing so. I also examine whether the choice of competition appellate system or the constitutional challenge system has an impact on the effective implementation of the competition law.

In order to assess effective implementation for the purposes of this section, I examine the manner in which the competition appellate system or the constitutional challenge system have affected CCI and CCP's ability to recover penalties imposed by them in their final orders. I focus on the *quantum* of penalties recovered by CCI and CCP as the case may be, and explore substantive issues such as principles of reasonableness and proportionality as well as other principles of natural justice to the extent these are relevant to understanding the grounds on which the system has revised or endorsement the *quantum* of penalties imposed by the CCI or CCP. I make no assessment as to whether the quantum of penalties imposed by CCI or CCP or as

revised in either system is appropriate in the circumstances of the case in which these penalties are imposed.<sup>85</sup>

#### 6.4.1. The Operation and Effect of the Competition Appellate System in India

##### (a) *Operation of the Competition Appellate System*

The data in Table 6.1 below suggests that nearly half of CCI's final orders that imposed penalties upon the defendants<sup>86</sup> were challenged before the tribunal.

**Table 6.1 Number of Final Orders of CCI appealed before the Tribunal**

Year	Final Orders (u/ s. 27) <sup>87</sup>	Orders Appealed <sup>88</sup>	Appeals dismissed <sup>89</sup>	Penalties revised	Penalties quashed
2011	8	6	6	0	0
2012	16	8	2	4 <sup>90</sup>	1
2013	12	6	0	3	0
2014	18	8	2	2 <sup>91</sup>	4
2015	19	8	1	1	1
2016	3	1	0	0	1
	<b>76</b>	<b>37</b>	<b>11</b>	<b>10</b>	<b>7</b>
	100%	48.7%	14.5%	13.2%	9.2%

However, the response of the tribunal has varied from appeal to appeal. At times the tribunal facilitated the enforcement of CCI's final orders by upholding them and dismissing the appeal(s).<sup>92</sup> In other cases, however, the tribunal allowed the appeal,

<sup>85</sup> The Tribunals evaluate decisions of CCI and CCP on merits as well as on procedural grounds. Whilst, for the present purposes I have focused on a limited aspect of these decisions, it would be interesting to conduct a more detailed assessment of the NCAs penal strategies in a future study.

<sup>86</sup> See n. 88. This does not indicate the total number of appeals filed.

<sup>87</sup> I have only considered final orders passed by CCI under section 27 of the Indian competition law because it was only against these that any appeals were filed before the tribunal.

<sup>88</sup> The numbers in this column represent the orders appealed from and not the total number of appeals filed, as on several occasions a single order could and did give rise to multiple appeals.

<sup>89</sup> This also includes number of cases in which the entities themselves withdrew the appeals.

<sup>90</sup> This includes an order in which the tribunal declared that whilst the penalties needed to be revised, it left them in tact because the amounts in question were negligible.

<sup>91</sup> This includes a case that was remanded to CCI for re-hearing on the question of penalty.

<sup>92</sup> For example appeals in respect of CCI's orders dated:

- (1) 04.10.2011, Case 3/2009 *Uniglobe Mod Travels Pvt. Limited v Travel Agents Association of India & others*. Challenged in Appeals 24/2011 and 8/2012. Decided by the Tribunal on 10.7.2013;
- (2) 17.11.2011, Case RTPE 9/2008 *FCM Travel Solutions India Limited v. Travel Agents Federation of India & others*. Challenged in Appeal 9/2012, decided by the Tribunal on 10.7.2013;
- (3) 25.05.2011, Case 1/2009 *FICCI Multiplex Association of India v. United Producers/Distribution Forum & others*. Challenged in Appeals no. 11, 12 and 13/2011 decided by the Tribunal on 17.01.2014 and in Appeals no. 1, 2 and 3/2012 decided by Tribunal on 05.08.2013;
- (4) 12.08.2011, Cases 19/2010 & related cases *Belaire Owners' Association v. DLF Limited HUDA & other*. Challenged in Appeals no. 20/2011 and 22/2011 decided by the Tribunal on 19.05.2014;
- (5) 23.06.2011, Case 13/2009 *MCX Stock Exchange Limited v. National Stock Exchange of India Limited*. Challenged in Appeal no. 15/2011 decided by the Tribunal on 05.08.2014;
- (6) 23.12.2014, Case 32/2013 *PV Basheer v. Film Distributors Association Kerala*. Challenged in Appeals no. 55, 56 & 61/2015 decided by the tribunal on 27.04.2016, 17.08.2015 & 03.07.2015;

setting aside CCI's order and quashing the penalty.<sup>93</sup> In yet other cases the tribunal upheld CCI's order but revised the amount of penalty imposed by it,<sup>94</sup> whereas in others still, it remanded the case to CCI for re-hearing either in its entirety or on a

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(7) 27.10.2014, Case 88/2013 *Sai Wardha Power Company Limited v. Western Coalfields Limited & others*. Challenged in Appeal no. 80/2014 decided by the tribunal on 09.12.2016; and

(8) 23.06.2015, Case 45/2012 *Kerala Cine Exhibitors Association v. Kerala Film Exhibitors Federation and others*. Challenged in Appeal no. 100/2015 decided by the tribunal on 04.02.2016.

<sup>93</sup> Appeals were allowed in respect of CCI's orders dated:

(1) 25.04.2012, Case 40/2010 *Shri Gulshan Verma v. Union of India & others*. Appeal decided by the tribunal on 14.03.2013;

(2) 10.01.2013, Case 56/2011 *Cinergy Independent Film Services Pvt. Limited v. Telengana Telegu Film Distribution Association & others*. Challenged in Appeal 15/2013, decided by tribunal on 14.10.2015;

(3) 19.02.2013, Case 20/2011, *Santuka Associates Pvt. Limited v. All India Organization of Chemists and Druggists & others*. Challenged in Appeals 21/2013, 6/2014 and 7/2014, decided by tribunal on 09.12.2016;

(4) 06.08.2013, Reference Case 1/2012 *Ministry of Commerce Government of India v. Puja Enterprises & others*. Challenged in Appeals 34, 35, 36, 37, 38, 39, 40, 41, 42, 43/2013 and 8/2014;

(5) 05.11.2013, Case 78/2011 *Reliance Big Entertainment Pvt. Limited v. Tamil Nadu Film Exhibitors Association*. Challenged in Appeal 14/2014 decided by tribunal on 28.04.2015;

(6) 05.02.2014, Case 39/2012 *Mr. Ramakant Kini v. Dr. L.H. Hiranandani Hospital Powai, Mumbai*. Challenged in Appeal 19/2014 decided by the tribunal on 18.12.2015;

(7) 05.02.2014, Case 60/2012 *Arora Medical Hall Ferozpur v. Chemists & Druggists Association Ferozpur*. Challenged in Appeals 21 to 28/2014 decided by the tribunal on 30.10.2015;

(8) 31.10.2014, Case 38/2011 *Indian Sugar Mills Association & others v. India Jute Mills Association and others*. Challenged in Appeals 73, 77, 78, 83, 84, 85, 86, 87, 88/2014 and 8, 9, 10, 11, 12, 13, 14 and 15/2015 decided by the tribunal on 01.07.2016;

(9) 29.01.2015, Case 78/2012 *Rohit Medical Store v. Macleods Pharmaceuticals Limited & others*. Challenged in Appeal 58/2015 decided by the tribunal on 13.06.2016;

(10) 16.2.2015 *Indian Foundation of Transport Research & Training v. Sh. Bal Malkait Singh & others*. Challenged in Appeal 60/2015 decided by the tribunal on 18.04.2016;

(11) 04.06.2015, Case 26/2013 *Bio Med Private v. Union of India & others*. Challenged in Appeals 85 & 86/2015 decided by the tribunal on 08.11.2016;

(12) 10.06.2015 *Suo motu Case 4/2013 Sheth & Co. & others*. Challenged in Appeals 88, 89, 90, 91, 102 and 103/2015 decided by the tribunal on 10.05.2016;

(13) 01.12.2015, Case 28/2014 *PK Krishnan v. Paul Madavana Alkem Laboratories & others*. Challenged in Appeals 5, 9, 14 and 15/2016, decided by the tribunal on 10.05.2016;

(14) 28.07.2016, Case 71/2013 *Maruti & Company v. Karnataka Chemists & Druggists Association & others*. Challenged in Appeal 40/2016 decided by the tribunal on 28.07.2016; and

(15) 11.03.2014, *Suo Motu Case 2/2012 and Ref Case 1/2013*. Challenged in Appeals 42/2014, 34/2014, 37/2014 and decided by the tribunal on 07.12.2015 and 10.05.2016.

<sup>94</sup> Penalties were revised in CCI's orders dated:

(1) 16.04.2012, Case 6/2011 *Coal India Limited v. GOCL Hyderabad & others*. On 18.04.2013 the Tribunal decided Appeals 82, 83, 84, 85, 86, 87, 88, 89 and 90/2012 and reduced the penalty imposed by 10%;

(2) 16.04.2012, Case 43/2010 *A Foundation For Common Cause & People Awareness v. PES Installations Pvt. Limited & others*. In Appeals 93, 94 and 95/2012, the tribunal on 25.02.2013, modified the penalty from 5% to 3% of the turnover;

(3) 23.04.2012, Case 2/2011 *Suo Motu Case re Aluminum Phosphide Tablets Manufacturers*. In Appeals 79, 80 and 81/2012, the Tribunal on 29.10.2013 affirmed the order but revised the penalties;

(4) 11.03.2014 *Suo Motu Case 2/2012 and Ref Case 1/2013*. In Appeal 37/2014 tribunal on 10.05.2016, revised the penalty from 10% to 1%;

(5) 10.07.2015, *Suo Motu Case 2/2014 Cartelization in Public Sector Insurance Companies*. In Appeals 94, 95, 96 and 97/2015 the tribunal on 09.12.2016, reduced the penalty from 2% to 1%.

specific question.<sup>95</sup> Occasionally, parties voluntarily withdrew the appeal they had filed before the tribunal in order to approach the CCI,<sup>96</sup> whilst in certain other instances the tribunal dismissed appeals on technicalities.<sup>97</sup> There was at least one occasion at which even though the tribunal did not agree with the justification provided by CCI for imposing the penalty it chose not to interfere with the penalty imposed by CCI due to the insignificance of the amount involved.<sup>98</sup> A number of entities aggrieved by the orders of the tribunal appealed these before the Supreme Court.<sup>99</sup>

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<sup>95</sup> Tribunal remanded cases in respect of CCI's orders dated:

(1) 24.03.2011, Case 7/2010 *Vijay Gupta v. Paper Merchants Association Delhi & others*. The first respondent challenged CCI's order before the tribunal. The tribunal on 29.08.2011 remanded the case to CCI for rehearing. This led to CCI issuing a supplementary order on 10.01.2013;

(2) 12.08.2011, Case 19/2010 *Belair Owners' Association v. DLF Limited HUDA & others*. The tribunal on 29.03.2012 directed CCI to pass an order under section 27(d) for modification of the agreements between DLF and apartment owners;

(3) 29.08.2011, Cases 18, 24, 30, 31, 32, 33, 34 & 35/2010 *DLF Park Place Residents v. DLF Limited* (same as no. 2);

(4) 20.06.2012, Case 29/2010 *Builders Association of India v. Cement Manufacturers Association & others*. By order dated 11.12.2015 in Appeals 105, 103, 104, 106, 107, 108, 109, 110, 111, 112, 113, 122, 123, 124, 125, 126, 127, 128, 129, 132, 133 and 134/2012, the tribunal revised CCI's order;

(5) 08.02.2013, Case 61/2010 *Shri Surinder Singh Barmi v. Board for Control of Cricket in India*. The tribunal on 23.02.2015 revised CCI's order in Appeal 17/2013;

(6) 09.12.2013, Cases 3, 11, 59/2012 *Maharashtra State Power Generation Company Ltd. v. Mahanadi Coalfields Limited & others; Maharashtra State Power Generation Company Ltd v. Western Coalfields Limited & others; and Gujarat State Electricity Corporation Ltd. v. South Eastern Coalfields Limited & others*. By its order dated 17.05.2016 in Appeals 1, 44, 45, 46, 47, 49 and 70/2014 and 52/2106 the tribunal revised CCI's order;

(7) 24.02.2012, Case 3/2011 *Suo Motu case against LPG Cylinder Manufacturers*. By its order dated 20.12.2013 in Appeals 21 to 65/2012 the tribunal directed CCI to re-hear the case on the issue of penalty. CCI passed a further order on 06.08.2014 which was also appealed in Appeal 47/2015 and the tribunal by its order dated 01.03.2016 once again directed CCI to re-hear the matter on penalty;

(8) 25.08.2014 *Shri Shamsher Kataria Case* (n. 14). The Tribunal on 09.12.2016 in Appeals 60, 61 and 62/2014 revised the criteria for penalties and remanded the case to CCI for re-calculation;

(9) 17.11.2015, Case 30/2013 *Express Industry Council of India v. Jet Airways (India) Limited & others*. The tribunal on 18.04.2016 in Appeals 7, 8 and 11/2016 remanded the case to CCI for rehearing.

<sup>96</sup> Appellants voluntarily withdrew Appeal 137/2012 against CCI's order dated 03.07.2012 in Case 36/2011 *Kansan News (Pvt.) Limited v. Fastway Transmission Pvt. Limited & others*. The tribunal allowed the withdrawal on 10.01.2013.

<sup>97</sup> For instance, the tribunal dismissed nine Appeals against CCI's order dated 16.02.2012 in Cases 52 & 56/2010 (*Sunshine Pictures Private Limited v. Eros International Media Limited v. Central Circuit Cine Association Indore & others*) for non-payment of Court fees. The aggrieved parties filed a further appeal (68/2012), however, the tribunal refused to grant an interim injunction. By its order dated 03.01.2013 the tribunal dismissed the appeal when the parties failed to comply with the tribunal's direction to deposit the amount of the penalty pending proceedings.

Also see, Appeal 72/2012 against CCI's order dated 16.02.2012 in Cases 25, 41, 45, 47, 48, 50, 58, 69/2010 *Reliance Big Entertainment Limited v Karnataka Film Chamber of Commerce* which was dismissed by the tribunal on 03.01.2013 for non-prosecution.

<sup>98</sup> See n.16 for several appeals filed in respect of the CCI's order in *Reliance Big Entertainment*.

<sup>99</sup> See n. 70 the *SAIL Case* and text thereto.

(b) *Competition Appellate System and the Recovery of Penalties*

The impact of the tribunal's operation is not immediately evident in the quantum of penalties realised by CCI. In terms of CCI's Annual Report 2015-2016, most of its orders are either under appeal before the tribunal or under challenge before the courts. From when it commenced operations in 2009 to 31<sup>st</sup> March 2016 the cumulative penalty imposed by CCI equalled Indian Rupees 13,981 crore (IRs 139,810,000,000.00 or Indian Rupees One hundred and thirty-nine billion, eight hundred and million only).<sup>100</sup> However, as a result of appeals pending before the Tribunal or petitions before the courts, as of 31<sup>st</sup> March 2016, CCI had only realized penalties in the sum of Indian Rupees 80.47 crore (IRs. 804,700,000.00 or Indian Rupees Eight hundred and four million, seven hundred thousand only) or a mere 0.57% of the total penalties imposed by it.<sup>101</sup>

However, the impact of the operation of the tribunal is more evident in CCI's methodology for determining penalties. Orders of the tribunals orders also provide clarity and guidelines to CCI as to manner in which it may calculate penalties.<sup>102</sup> For instance:

(i) Order of the tribunal dated 29<sup>th</sup> October 2013 in respect of the appeal filed against CCI's order dated 23<sup>rd</sup> April 2012 in *Suo Motu Case 2/2011 Re Aluminum Phosphide Tablets Manufacturers*. In one of the three appeals considered by it, the tribunal reduced the penalty imposed by CCI, from 9% of turnover to 1/10<sup>th</sup> of the amount. The tribunal's reason for this downward revision was that CCI had failed to provide a justification for fixing the penalty at 9% and had acted arbitrarily in

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<sup>100</sup> This includes penalties imposed by CCI in pursuance of section 27 and sections 42, 43 and 43A of the Indian competition law. The latter sections are invoked to impose penalties in case of failure of an entity to comply with CCI's directions].

<sup>101</sup> CCI's Annual Report 2015-2016.

(<http://www.cci.gov.in/sites/default/files/annual%20reports/annual%20report%202015-16.pdf> accessed 6 April 2017).

<sup>102</sup> This discussion is not intended to detract from the criticism that the tribunal's approach towards penalties does not take into account the role of penalties as deterrents to violations of the competition law. The underlying assumption here is that CCI and tribunal in interacting with each other and with the Supreme Court in a competition appellate system that allows and facilitates engagement between them on substantive issues are more likely to develop more appropriate penal guidelines over time as compared to NCAs operating in a constitutional challenge system which does not envisage such engagement and only provides a window for interaction between the competition laws and the pre-existing legal system on limited constitutional grounds.

selecting the base turnover.<sup>103</sup> CCI appealed the order of the tribunal to the Supreme Court and the Supreme Court in its order dated 8<sup>th</sup> May 2017 upheld the order of the tribunal and reiterated the significance and import of the concept of ‘relevant turnover’ for the purpose of calculating penalties.

In its order, the Supreme Court also stated that adopting the criteria of ‘relevant turnover’ would be ‘more in tune with ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties’. It further stated that accepting CCI’s interpretation of the term ‘turnover’ as ‘total turnover’ in all situations would ‘bring about very inequitable results’. The Supreme Court took note of a number of illustrations, which demonstrated that the imposition of penalty on the basis of “total turnover” in all cases would inequitably discriminate against entities committing the same contravention simply on the basis that they had structured their product or business lines differently.

As regards CCI’s arguments that penalties were designed to act as a deterrent to anti-competitive practices, the Supreme Court held, that nevertheless ‘the penalty cannot be disproportionate to the violation and it should not lead to shocking results’. The Supreme Court also held that the aim of deterrence cannot justify an interpretation of the Law that may lead to “the death of the entity” itself. The Supreme Court emphasized that the doctrine of proportionality, which is based on equality and rationality, is a “constitutionally protected right, which can be traced to article 14 as well as Article 21 of the constitution”. Finally, the Supreme Court outlined a step-wise methodology for CCI to follow in imposing penalties.<sup>104</sup>

(ii) In its order dated 9<sup>th</sup> December 2016 in appeals filed against CCI’s order dated 25<sup>th</sup> August 2014 in Case 3/2011 *Shri Shamsher Kataria v. Honda Siel Cars India Limited & others*, the tribunal revised the criteria on the basis of which CCI had calculated the penalty. CCI had imposed a penalty of 2% of average annual turnover of the appellant companies in the spare parts aftermarket. However, the tribunal took the view that CCI should follow the yardstick of ‘relevant’ turnover and re-calculate

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<sup>103</sup> Joint order of the tribunal dated 29.10.2013 in Appeals 79, 80 and 81/2012 (paras 43-70 and para 69 in particular).

<sup>104</sup> See <<http://competition.cyrilamarchandblogs.com/2017/05/supreme-court-limits-ccis-penalty-powers-relevant-turnover-upheld/>> (accessed 15 July 2017).

penalties on the basis of relevant turnover of the spare parts aftermarket. The tribunal also iterated its policy position that it was not in favour of heavy penalties and preferred that CCI imposed penalties in the spirit of a 'transitory reform process'.<sup>105</sup>

(iii) In certain other cases, the tribunal did not hesitate to quash a penalty if it believed it to be unjustified. For instance in its order dated 10<sup>th</sup> May 2016 in appeals against CCI's order dated 1<sup>st</sup> December 2015 in *P K Krishnan v. Paul Madavena Alkem Laboratories & others*, the tribunal quashed the penalty imposed by CCI on the grounds that it had been imposed in violation of the principles of natural justice because the respondents had not been given an opportunity of hearing in respect of the penalties imposed.<sup>106</sup>

#### 6.4.2. The Operation and Effect of the Constitutional Challenge System in Pakistan

##### (a) *Operation of the Constitutional Challenge System*

The lack of clarity in the Pakistani competition law and the vacillating attitude of the government towards establishing the competition appellate system played an important role in making the constitutional challenge system more important in Pakistan than the competition appellate system. To date the tribunal has decided approximately 16 appeals. It has decided eight appeals in favour of CCP,<sup>107</sup> and the appellants in at least two of these appeals have filed appeals before the Pakistani Supreme Court.<sup>108</sup> The tribunal has also decided six appeals against CCP,<sup>109</sup> and CCP

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<sup>105</sup> Joint order of tribunal dated 09.12.2016 in Appeals 60, 61 and 62/2014 (paras 167 and 168).

<sup>106</sup> Order of tribunal dated 10.05.2016 in Appeal 5/2016, para 34.

<sup>107</sup> The tribunal has decided in favour of CCP in its orders dated:

- (1) 30.11.2016, Appeal 2/2015 *Tara Crop Sciences (Pvt.) Limited v. CCP and other*;
- (2) 25.01.2017 Appeal 3/2016 *Al- Rahim Foods (Pvt.) Limited v. CCP and others*;
- (3) 21.12.2016 Appeal 7/2016 *HASCOL Petroleum Ltd v. CCP and others*;
- (4) 28.09.2016 Appeal 9/2016 *Pakistan Poultry Association v. CCP*;
- (5) 29.03.2017 Appeal 1/2016 *Saleem Habib Godial v. CCP*;
- (6) 29.03.2017 Appeal 1/2016 *Toyota Sahara Motors v. CCP*;
- (7) 10.05.2017 Appeal 3/2017 *Bahria Town (Pvt.) Limited v. CCP*, and
- (8) 10.05.2017 Appeal 4/2017 *PTCL v. CCP*.

<sup>108</sup> Entities aggrieved by orders of the tribunal have filed appeals before the Supreme Court in:

- (1) Appeal 2/2015 *Tara Crop Sciences (Pvt.) Limited v. CCP and other*; and
- (2) Appeal 9/2016 *Pakistan Poultry Association v. CCP*.

Both CCP and the appellant have filed an appeal before the Supreme Court in respect of Appeal No. 3/2016 *Al- Rahim Foods (Pvt.) Limited v. CCP*.

<sup>109</sup> In addition to the appeal against order of the tribunal in the *I-Link Guarantee Ltd Case*, the tribunal has passed orders against CCP on:

- (1) 26.11.2015 in *Reckitt Benckiser Pakistan Ltd v. CCP*;
- (2) 25.01.2017 in Appeal 3/2016 *Al- Rahim Foods (Pvt.) Limited v. CCP and others*;
- (3) 07.06.2017 in Appeal 12/2016 *Synthetic Fibre Development v. CCP*;

has appealed all of these before the Supreme Court. However, to date the Supreme Court has not decided any of the appeals filed by CCP or by other entities aggrieved from the orders of the tribunal. The tribunal has also dismissed two appeals on technical grounds.<sup>110</sup>

The fluctuating legal status and evolving content of the Pakistani competition law left no other option to entities aggrieved by CCP's Orders but to invoke the constitutional challenge system to challenge CCP's final orders. This gave rise to two types of challenges: (a) genuine challenges to the constitutionality of the Pakistani competition law or to the competition appellate system prescribed in the law, and (b) appeals disguised as writ petitions against orders of the CCP (whether passed by members of CCP or its appellate bench) to benefit from the constitutional challenge system in the absence of the competition appellate system. In many instances, petitioners urged grounds from both categories in the same petitions, that is, they challenged the validity of CCP as well as of its actions. In fact, at times these petitioners suggested that CCP's actions lacked validity due to the inherent lack of validity of the Pakistani competition law under which CCP had been established. Such challenges were filed in nearly all matters in which CCP imposed penalties on the entities.

One of the first challenges against CCP's final orders before the courts was filed in respect of CCP's final order in the *APCMA case*. The APCMA case had provoked consideration litigation,<sup>111</sup> however, for a short period it appeared that the on-going tussle between CCP and the courts was resolved in favour of CCP when the courts allowed it to pass a final order in this matter. However, before the CCP could enforce its order, the Lahore High Court, by its order dated 31<sup>st</sup> August 2009, once again restrained CCP from taking any adverse action against the defendants. The only concession the Lahore High Court allowed to CCP at this time was, that it may publish its order on its official website.

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(4) 07.06.2017 in Appeal 5/2016 *Institute of Business Management v. CCP*;

(5) 07.06.2017 in Appeal 6/2016 *WAH Engineering College v. CCP*; and

(6) 07.06.2017 in Appeal 4/2016 *University of Faisalabad v. CCP*.

<sup>110</sup> The tribunal dismissed Appeal 2/2016 *Nauman Anwar Butt v. DHL* by order dated 21.12.2016 and Appeal No. 10/2016 *University of South Asia v. CCP* by order dated 28.09.2016.

<sup>111</sup> CCP's interim orders in the APCMA case had also been challenged before the courts. Section 6.1.2(b).

In this last order, the Lahore High Court acknowledged that important constitutional and jurisdictional issues pertaining to CCP remained undecided, including but not limited to, whether or not the federal legislature was competent to enact the Pakistani competition law; was the provision for a direct appeal to the Supreme Court constitutional and whether CCP's judicial power was contrary to the constitutional principles of separation of powers. The two-pronged effect of the Lahore High Court's order was first, to prevent CCP from enforcing its order against the defendants and thereby to realize any penalties from them and second, to keep it embroiled in court proceedings and in a state of uncertainty with regard to its Orders. Although a number of grounds raised in these petitions are no longer valid given the developments in the law, the courts have still not decided the residual points and the petitions remain pending to date.

A number of other petitions against CCP's final orders raised grounds similar to those that had been raised in respect of challenges filed against interim orders. These included that CCP was not properly constituted; it lacked the quorum required to pass the order at the time of passing the challenged final order; the order was not in accordance with the version of the competition law in force in the country at the time it was passed; that CCP had passed the order with *mala fide* intent and by exercising powers beyond its jurisdiction;<sup>112</sup> the retrospective application of the Pakistani competition law to agreements entered into before the coming into force of the Act of 2010 was not in accordance with the law,<sup>113</sup> and that certain actions of CCP were tantamount to judicial review of subordinate legislation and, therefore, not in accordance with the law.<sup>114</sup> Other petitions raised grounds that urged questions of law

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<sup>112</sup> Examples of petitions in which CCP's jurisdiction was challenged include:

(1) WPs filed in respect of CCP's final order dated 22.03.2011 Case 09/Reg/Comp/CAP/CCP/2010 (*Wateen Telecom & Defence Housing Authority*). WP 1134/2011 *Wateen Telecom Limited* in which Islamabad High Court passed an interim order on 14.04.2011; and WP 1465/2011 *Defence Housing Authority, Lahore* in which Islamabad High Court passed an order on 13.05.2011.

(2) WP 21290/2012 *Allied Bank Limited* filed against CCP's final order dated 28.06.2012 in Case 1/24/ATM Charges/C&TA/CCP/2011 (*I-Link Guarantee Limited & Member Banks*). Lahore High Court passed an order on 07.09.2012.

<sup>113</sup> Petitions challenging retrospective application include CP D-2491/2011 *Engro Vopak Terminal Limited* against CCP's order dated 29.06.2011 in Case 6/LP/CMTA/CCP/2010 (*Implementation Agreement between Port Qasim Authority & Engro Vopak Terminal Limited*). Sindh High Court issued an order on 13.07.2011.

<sup>114</sup> Petitions claiming that CCP was carrying out judicial review include WP 4412/2013 *Institute of Chartered Accountants* against CCP's order dated 10.01.2013 in Case 1(52)/ICAP/C&TA/CCP/2012 (*Institute of Chartered Accountants of Pakistan*). Lahore High Court passed an order on 25.02.13.

as well as of fact including that CCP's order was contrary to government policy and, therefore, exposed the petitioner to possible adverse governmental action,<sup>115</sup> and that CCP had not fully appreciated the facts of the matter in arriving at its final order.<sup>116</sup>

In a majority of cases, the courts simply admitted the petitions and granted a restraining order to the petitioners. Nearly all these petitions are still pending and the interim injunctions granted by the courts against CCP have been allowed to continue from one date of hearing to the next with the result that a majority of these remain in force to date. The few petitions that the courts have actually decided have been decided either on purely technical grounds or because these did not raise fundamental constitutional or jurisdictional issues pertaining to CCP's existence or operation.

Examples of petitions decided on technical issues include those filed by the APCMA before the Islamabad High Court, which were dismissed for being premature.<sup>117</sup> Another petition filed by Attock Cement Limited before the Sindh High Court<sup>118</sup> against CCP's order in the *APCMA case* argued that the show cause notice issued by CCP should be dismissed because the version of the competition law under which CCP had issued the show cause notice was *ultra vires* the constitution and, therefore, the show cause notice was not maintainable. The Sindh High Court had dismissed the petition on the observation that the petitioner already had one appeal pending on this matter before the Supreme Court and another before the Lahore High Court,<sup>119</sup> and, therefore, its petition was not maintainable.

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<sup>115</sup> Petitions claiming that CCP exposed the petitioner to adverse government action include CP D-2494/2011 *Pakistan Ship's Agents Association* against CCP's final order dated 22.06.2011 in File No. 8/APPMA/CMTA/CCP/10/1709 (*Pakistan Ship's Agents Association*). Sindh High Court passed an order dated 15.07.2011.

<sup>116</sup> Petitions on facts include WP 20280/2012 *GCC Approved Medical Centres* against CCP's final order dated 29.06.2012 in File No. 2(2)/JD(L)/POEPA/CCP/2011 (*Employment Promoters Association v. GCC Approved Medical Centres*). Lahore High Court passed an order dated 13.08.2012.

This order was also relied upon by petitioners in WP 20729/2012 (*Canal View Diagnostic Centre*), WP 20729/2102 (*GCC Approved Medical Diagnostic Centre & others*), and WP 21106/2012 (*Urgent Medical Diagnostic Centre & others*) and was used as a basis for securing from the Lahore High Court injunctions restraining the Pakistani tribunal from hearing appeals in relevant matters. LHC granted this by order dated 04.01.2013.

<sup>117</sup> See n. 40 and text thereto.

<sup>118</sup> Order of Sindh High Court dated 31.08.2012 in CP 2086/2009 (*Attock Cement Limited v. Competition Commission of Pakistan and others*).

<sup>119</sup> *ibid.*

The decision of the Islamabad High Court in a merger case is another example of the courts deciding a case because it did not raise important constitutional questions.<sup>120</sup> In this case, the petitioner had challenged the conditions imposed by CCP in a second phase merger review of two fertilizer companies on the ground that CCP had acted in excess of its statutory powers. The high court, however, upheld CCP's order and stated that CCP was well within its rights in imposing conditions on the proposed merger. The petitioner appealed this order of the high court before the Supreme Court and the Supreme Court granted relief to the petitioner on the basis that CCP had not provided it a right of hearing before determining the conditions of the merger. The Supreme Court also remanded the matter to CCP with a direction to re-hear the parties in respect of each of the conditions.<sup>121</sup> Whilst this order of the Supreme Court endorsed the status of CCP as a first tier NCA, it did not have the hoped for impact on the nature or pace of outcomes in other competition petitions pending before the courts.

*(b) Effect on the Constitutional Challenge System on Recoveries*

All CCP orders in which it imposed penalties were challenged before the courts. In all petitions that raised fundamental constitutional and jurisdictional issues, the courts preferred passing interim restraining orders rather than deciding these on their merits. In matters that could be decided on technical grounds or those that did not raise constitutional issues, the courts sometimes issued final orders.

At the time of writing this, the courts have still not decided any of the petitions or appeals pending before them. As a result, even after conducting extensive hearings and passing numerous final orders, CCP remains unable to enforce these orders. The only time CCP has recovered any penalty is when the parties have voluntarily settled the matter with it.<sup>122</sup> However, CCP's inability to realize penalties imposed by it is

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<sup>120</sup> Order of Islamabad High Court dated 16.05.2011 in WP 543/2011 (*Fauji Fertilizer Company Limited v. Competition Commission of Pakistan*) in which Fauji Fertilizer challenged CCP's order dated 26.01.2011 granting conditional approval of its proposed merger with Agritech Limited.

<sup>121</sup> Order of the Supreme Court dated 26.07.2011 in CP 752/2011 (*Fauji Fertilizer Company Limited v. Competition Commission of Pakistan*) (para 4).

<sup>122</sup> CCP has not published an Annual Report since 2012, therefore it is not possible to get accurate data on the total quantum of penalties imposed. However, my interviewees Ms. Kaunain-Hassan and Dr. Joseph Wilson, Acting Chairman, Competition Commission of Pakistan (Islamabad, Pakistan 15 September 2014) both confirmed that CCP has only realized such penalties as were paid to it voluntarily which amount to a very small fraction of the total penalties imposed by CCP.

not the only adverse effect of these multiple challenges against its final orders. Another, and perhaps more fundamentally negative aspect of the situation is, that to date, CCP has received no support from the courts in streamlining its procedures and in making the Law more compatible with the pre-existing Pakistani legal system and more acceptable in the country. None of CCP's final orders have attained finality under the Pakistani legal system and rather than increasingly integrating with it, the Pakistani competition law remains as peripheral and alien to the pre-existing legal system today as it was when it was first enacted.

#### 6.4.3. Comparing the Indian and Pakistani Situations with regard to Recoveries

Given the preceding discussion, it is evident that a superficial examination of the small and comparable quantum of penalties realised by CCI or CCP, is likely to present a limited, if not skewed, perspective of the progress made in the implementation of these laws in the two countries. The real difference between the impact of the competition appellate system and the constitutional challenge system lies in their impact on rationalising CCI or CCP's penal strategies and of improving their credibility as first tier NCAs in the country.

Even in cases where CCI has not been able to realize penalties so far, it has developed an important bilateral dialogue with the tribunal and has had the benefit of feedback from the tribunal as well as from the courts. Conversely, CCP has been deprived of both these benefits. The Pakistani tribunal is still in the earliest stages of its operation and its relationship with CCP is practically non-existent. Also Pakistani courts have failed to decide any matters before them let alone prescribe any guidelines in support of CCP's actions. In doing so, if they have not actually encouraged the confusion generated by multiple proceedings before different forums, they have certainly tolerated it.

Therefore, whilst in India the disadvantage of limited recoveries is offset by the strengthening and rationalising of India's competition appellate system, there is no such corresponding advantage in Pakistan. Going forward, this productive and supportive interaction between CCI, the tribunal and the Indian courts is likely to play a considerable role in the pace at which the Indian competition law develops and integrates with India's pre-existing legal system as well as the extent to which it is

understood, utilised and applied in the country. This interaction is also likely to enable the competition law to be implemented with greater consistency and transparency.

On the other hand, the impact of the hitherto erratic interactions between CCP, the tribunal and the Pakistani courts remains uncertain at best. The absence of a bilateral dialogue between CCP and the tribunal or with the courts suggests that the country has still some way to go before competition law can be integrated into the Pakistan's pre-existing legal system or be appropriately understood, utilised and applied in the country, and before CCP may be recognised as a strong regulatory body in the country.

### **6.5. Concluding Remarks**

The analysis in this chapter demonstrates that transfer mechanisms and the institutions through which they are delivered in a country have a discernible impact on the manner in which the competition laws and the NCAs created by these laws interact with the country's pre-existing legal system. A country, such as India, which employs the more inclusive *socialization* in adopting its competition law succeeds not only in developing a more productive interaction with the courts but also sufficiently engages state institutions so that they are more invested in and committed to ensuring that the infrastructure necessary for meaningfully implementing the law is duly established. However, a country like Pakistan, that employs the mechanism of *coercion* and keeps state institutions, particularly the pre-existing legal system, at a distance from the adoption process, not only diminishes the ability of the pre-existing legal system to productively interact with the law but also adversely affects the level of commitment of state institutions to make available the necessary recourses for the meaningful implementation of the law.

Perhaps the most interesting discovery of this analysis is that the extent and quality of the interaction between the NCAs and the courts does not take place in a vacuum and is impacted by factors (such as the commitment of other state institutions) that are not directly part to this interaction. On the positive side this means that regardless of the adoption process that a country may have adopted, the interactions between the laws and the pre-existing legal system may be managed and improved without the necessity of overhauling the entire legal system of the country. Therefore, even though the Pakistani parliament and judiciary were excluded from the adoption

process, it is still open to them to take ownership of the law at a later stage and thereby to mitigate the impact of the earlier exclusion. If the judiciary takes ownership of competition matters and begins to clear the backlog of competition petitions and appeals before the courts, and the parliament and the government simultaneously take ownership and sustain the competition appellate system, there is still a possibility of the meaningful enforcement of the Pakistani competition law in the coming years.

## **7. CONCLUSION**

As I write this, the Indian competition law is anticipating the 16<sup>th</sup> anniversary of the original Competition Act 2002 whilst the Pakistani competition law is approaching the 10<sup>th</sup> birthday of the First Ordinance 2007. However, the age of the laws is not indicative of the years these laws have actually been in operation or the quality of their implementation in their respective countries. Whilst the relatively younger Pakistani competition law has been active almost from the day the First Ordinance 2007 was promulgated, it has encountered considerable turbulence in the course of its implementation. The Indian competition law, on the other hand, has only been in operation since 2009, and then too only after it had been significantly amended by the First Amendment 2007. However, its implementation experience has been relatively steadier.

The purpose of this research was to explore the extent to which the implementation of competition laws in India and Pakistan may be attributed to the adoption processes employed by the countries in acquiring their respective laws. I have found in the course of this research, that the adoption processes in India and Pakistan were characterised by unique combinations of transfer mechanisms and legal and political institutions pre-existing in the countries. Whilst assessing the extent to which the transfer mechanisms employed by the country selected the institutions, or the existence of institutions dictated the choice of mechanisms is beyond the scope of this research, it is evident that the distinctive interplay of mechanisms and institutions in each country shaped not only the content of the laws, but also their compatibility and legitimacy in the countries, and thereby, their implementation.

The Indian and Pakistani competition laws presented natural counterpoints for this research. The laws had been adopted contemporaneously; on a superficial reading appear to be very similar to each other, and were injected into nearly identical contexts. India and Pakistan share a nearly 3000 km border; a history that can be traced to antiquity, and a nearly identical legal culture and system that had been introduced in the Indian sub-continent in the 18<sup>th</sup> century by the British and has been retained by the countries even after independence in 1947. More importantly, the comparative analysis was insightful because India and Pakistan had employed very different adoption processes for acquiring these laws. Whilst India had deliberated the

law extensively through indigenous institutions before enacting it through the parliament, Pakistan had largely outsourced the deliberation process to a World Bank led team and had by-passed the parliament in promulgating the law in some haste, as a temporary presidential ordinance.

(a) *The Integrated Theoretical Framework*

My first challenge in this research was to construct a theoretical framework for examining the links between the adoption processes of these laws and their implementation in their respective countries. The legal transplant literature was an obvious starting point for the construction of this framework. However, whilst it emphasised the importance of compatibility of the legal transplant with the context of the adopting country,<sup>1</sup> it was inadequate for at least three critical reasons: first, for not considering factors that were likely to generate or enhance compatibility; second for largely neglecting possible links between the transplantation process and the compatibility of the law with the context, and finally for its cursory treatment of the impact of compatibility on the implementation of the legal transplant in the adopting country.<sup>2</sup>

I therefore turned to diffusion and transfer literatures, which focused on the motivations for and mechanisms through which countries acquire foreign policies and laws. I found transfer literature more appropriate than diffusion literature for two reasons: (i) it focuses on mechanisms through which policies are transferred bilaterally from one country to another, through the agency of actors, which mirrored the manner in which India and Pakistan had acquired their competition laws, and (ii) it emphasizes qualitative, process-tracing rather than quantitative pattern-finding which matched the nature of information and data that could be obtained from India and Pakistan for examining the transfer mechanisms employed in the two countries.<sup>3</sup> Given the overwhelming overlaps between transfer and diffusion literatures, I also relied on diffusion literature where relevant, provided that it did not contradict transfer literature. However, transfer literature had limited interest in the outcomes of

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<sup>1</sup> Chapter 2, sections 2.1.1 and 2.1.2.

<sup>2</sup> Chapter 2, section 2.1.3.

<sup>3</sup> Chapter 2, section 2.2.1.

### *Conclusion*

transfer and, to address this aspect of my research, I drew upon development economics literature.

Development economics literature has always been interested in understanding factors that enable economic institutions to perform to higher standards in developing countries. However, in the post-Washington Consensus era, development economics (or new institutional economics, as it is sometimes called) shifted its focus to studying the impact of institutions through which the economic institutions are created (or adapted), on their subsequent performance.<sup>4</sup> Whilst North argued that economic institutions perform best when they evolve organically from the context of the country, Rodrik emphasized the role of bottom-up, participatory institutions in generating compatibility between economic institutions and the context of the country in enhancing their performance and Acemoglu highlighted the importance of engaging inclusive political institutions in producing inclusive rather than extractive economic institutions.<sup>5</sup>

In integrating principles and concepts from these literatures I kept in mind that the adoption processes comprised at least two successive stages of deliberation and formal adoption at which the adopting country may not only employ different transfer mechanisms but also engage a different range and nature of institutions. I also remembered that it was necessary to identify factors or institutions, which could link the adoption processes and the implementation stage. And, most importantly, I remained focused on the implementation of competition laws as legal instruments and not in their success in realising their economic goals.

Given these considerations, I integrated principles and concepts from the three literatures as follows: from the legal transplant literature, I borrowed the concept and significance of the context of the adopting country. From the transfer literature the importance of the pre-existing conditions at the time of transfer. The concept of 'context' as used in legal transplant literature, had been invoked primarily to ascertain the compatibility of the adopted law with the adopting country and included social, political and legal institutions in the country as well as actors who come into contact

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<sup>4</sup> Chapter 2, section 2.3.1.

<sup>5</sup> *ibid.*

with the adopted law.<sup>6</sup> The concept of ‘pre-existing conditions’ from the transfer literature highlighted the significance of a country’s legal and political institutional landscape. In terms of transfer literature, these ‘pre-existing conditions’ are not only a backdrop against which the transfer was played out but also engage symbiotically with the transfer mechanisms to produce outcomes which are unique to each country.<sup>7</sup>

Also for this stage, I rationalised and consolidated the typology of transfer mechanisms presently in use in transfer and diffusion literatures to devise a typology more suited for the transfer of laws from developed to developing countries. The four transfer mechanisms I identified in this regard are *coercion*, *emulation*, *regulatory competition* and *socialisation*,<sup>8</sup> which I described as follows:

(i) *Coercion* refers to transfer of laws from a more powerful country or multilateral agency to a less powerful one, through direct or indirect pressure. Whilst direct pressure relates to the use of material power, whether military or economic, indirect pressure refers to conditionalities that may be imposed by multilateral agencies or persuasion on their part, on the basis of their superior knowledge. I also include *contractualization* within this category, however, only in circumstances when it occurs between countries in asymmetrical positions of power.

(ii) *Emulation* refers to the mechanism through which a country adopts a foreign law for its normative value and potential to confer international legitimacy on the adopting country rather than for its appropriateness for the context of the country or its ability to address indigenous needs. The distinctive feature of this mechanism is that it requires limited application of mind on the part of the adopting country and does not lead to an understanding of the adopted law in that country. *Emulation*, so defined, includes *copying* and *mimicry*.

(iii) *Regulatory Competition* is similar to *emulation* in that in employing this mechanism, a country is more interested in the normative value and legitimation potential of a Law than its ability to meet indigenous needs or to address domestic issues. Regulatory competition may be motivated by a ‘race to the top’ in which

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<sup>6</sup> Chapter 2, section 2.1.2

<sup>7</sup> Chapter 2, section 2.2.2(c).

<sup>8</sup> Chapter 2, section 2.2.3(a).

lawmakers focus on reputational rather than economic competition or a ‘race to the bottom’ in which lawmakers adopt the lowest regulatory standards of competing countries to avoid capital flight.

(iv) *Socialization* includes all mechanisms through which a country develops an understanding of, assimilates and adapts the law for the country’s context. However, it is not necessary that this understanding be rational and comprehensive. It is still *socialization* if the choice and decisions of lawmakers regarding the adopted law are influenced and bounded by their cognitive biases of availability, representativeness and anchoring. The important factor which distinguishes this mechanism from *emulation*, is that in activating it the adopting country sets out to persuade itself of the appropriateness of the law it proposes to adopt for its domestic context rather than seeking it merely for its normative value or legitimation potential.

Transfer literature also indicated that each mechanism had a different potential to generate domestic legitimacy, which though not always an explicit motivation, is an important underlying driver in a country adopting a foreign law and is linked to the country’s need for international legitimacy. However, the literatures did not fully explore this concept or its importance to the adopted law. I drew upon political and legal philosophy to understand domestic legitimacy and came to the three-pronged conclusion that (i) legitimacy is a subjectively held belief about a law, distinct from the related concepts of legality, authority and justice; (ii) it influences the manner in which a law is implemented because of its impact on the perceptions of potential users of the law and of institutions that may implement the law, and (iii) consent, whether actual or constructive, is the critical factor in creating legitimacy. Consent is actual where it is given due to the perceived benefits of the law whereas it is constructive where it may be assumed to have been given due to the range and nature of institutions engaged by the country in the adoption process.<sup>9</sup>

Development economics literature added a further dimension to the analysis of the adoption process, by highlighting the importance of examining institutions engaged in the course of adoption. Interestingly, both legal transplant and transfer literatures had alluded to the relevance of institutions: legal transplant literature included legal,

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<sup>9</sup> Chapter 2, section 2.2.3 (b).

Conclusion

political and social institutions in the description of context whilst transfer literature identified them as constructs in the pre-existing context, within which actors engaged with the transfer process, carried out their actions. However, development economics focused on the effect of institutions involved in the creation of economic institutions on the subsequent performance of these institutions. It argued that bottom-up and participatory institutions were likely to create economic institutions that are compatible with the context of the adopting country and, therefore able to perform to a higher standard as compared to economic institutions created through top-down institutions. It further suggested that inclusive political institutions were likely to create inclusive economic institutions that were less likely to be captured by the political or economic elite.

The theoretical framework that emerged from these discussions may be represented as follows:

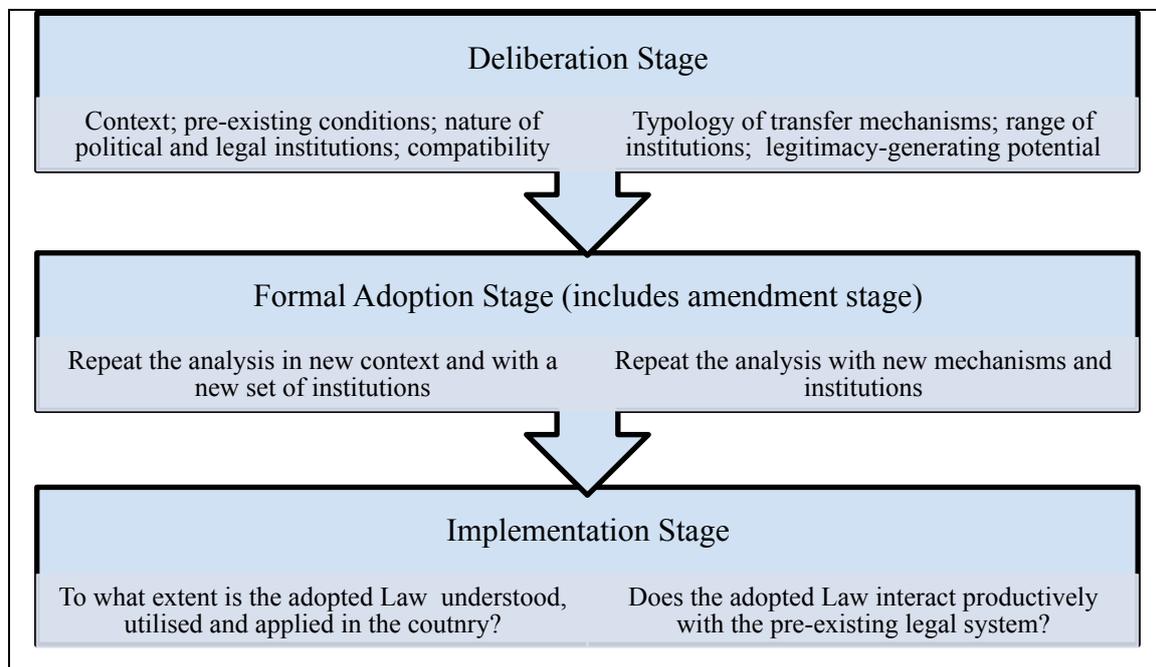


Figure 7.1 Breakdown of Analytical Steps in the Integrated Theoretical Framework

For assessing the implementation of the laws in their respective countries, I relied upon the legal transplant and development economics literatures both of which identify benchmarks for the ‘success’ of adopted laws. In terms of the legal transplant literature, an adopted law must not be ‘rejected’ in the adopting country and must ‘continue to grow in and become a part of its context. The law should be compatible with the ‘machinery of justice’ in the country and be able to ‘interact productively

with' other 'elements in the legal organism'. The adopted law should also be understood, utilised and applied in the adopting country. Also according to the legal transplant literature the role of actors, especially those who in their capacity as interpreters, influence and shape the performance of the adopted law, must be taken into consideration.<sup>10</sup> In terms of development economics literature, to be considered a success, the law in question must be active in the country rather than merely remaining on the books and should not be captured by local elites for their own ends.<sup>11</sup>

For ease of analysis, I organised these benchmarks into two categories, which represent two aspects of the implementation of the competition laws. The first category relates to the independent performance of the competition laws as defined by the operation of the NCAs, whilst the second category relates to the interaction between the competition laws (as represented by the NCAs) and the pre-existing legal systems of the countries (as represented by the courts). Benchmarks relevant for the assessment of the independent performance of the competition laws are the extent to which the laws are active and are understood, utilised and applied in the country whereas the benchmark for assessing the interaction between the competition laws and the pre-existing legal systems includes the productivity of the interaction between the NCAs and the courts. The extent to which the competition laws integrate into the pre-existing legal system of the country over time, is a benchmark for determining the overall quality of the implementation of the competition laws in the countries. I assimilated the role of actors into this analysis by focusing on the NCAs both as interpreters and enforcers of the laws as well as institutions within whose constraints the actors engaged with the NCAs carry out their duties of interpretation and enforcement.

*(b) Adoption Processes in India and Pakistan*

Tracing and understanding the adoption processes and understanding the manner in which these shaped the content of the competition laws as well as their compatibility and legitimacy in the contexts of the countries, was the necessary next step in this analysis.

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<sup>10</sup> Chapter 2, section 2.1.3 (c).

<sup>11</sup> Chapter 2, section 2.3.3.

(i) Identifying the Mechanisms and the Institutions

In the case of India and Pakistan, the adoption processes were introduced in remarkably different pre-existing conditions. Whilst the adoption process in India was activated in a stable democracy with a strong tradition of separation of powers and of instituting committees to study and propose law reform, in Pakistan it was executed in a country only recently emerging from military rule, where the executive remained powerful and where the process of law reform had traditionally been outsourced to multilateral agencies.<sup>12</sup>

**Table 7.1 Breakdown of Adoption Processes in India and Pakistan and their Outcomes**

Adoption Process	India	Pakistan
<b>Pre-conditions of Transfer</b>	<ul style="list-style-type: none"> <li>• Strong tradition of domestic committees for legal reform;</li> <li>• Strong tradition of Parliamentary governance;</li> <li>• Independent judiciary.</li> </ul>	<ul style="list-style-type: none"> <li>• Military chief turned President;</li> <li>• Young and fragile Parliament;</li> <li>• Judiciary weakened by military takeovers;</li> <li>• Strained relationship between executive, Parliament and judiciary.</li> </ul>
<b>Transfer Mechanism</b>	<i>Primary:</i> Socialization <i>Secondary:</i> Emulation; Regulatory Competition.	<i>Primary:</i> Coercion <i>Secondary:</i> Emulation; Regulatory Competition.
<b>Nature of Institutions</b>	Wide ranging; bottom-up, participatory and inclusive.	Limited, top-down and exclusive.
<b>Content</b>	Impact of: <ul style="list-style-type: none"> <li>• <i>Socialization:</i> evident in provisions related to structure and composition of CCI;</li> <li>• <i>Emulation:</i> evident in provisions related to mandate of CCI.</li> </ul>	Impact of <ul style="list-style-type: none"> <li>• <i>Coercion:</i> evident in provisions related to structure, mandate and composition of CCP, also allowed implicit prevalent patterns to enter into the Law.</li> <li>• <i>Emulation</i> in the mandate of the CCP.</li> </ul>
<b>Compatibility</b>	Engagement of bottom-up, participatory and inclusive institutions generated a higher degree of compatibility and inclusivity.	Engagement of top-down, exclusive institutions generated a comparatively less compatibility and inclusivity.
<b>Legitimacy</b>	Engagement of a wide range of institutions drawn from each of three organs of State generated considerable legitimacy	Engagement of a limited number of institutions drawn initially only from the executive, generated

<sup>12</sup> Chapter 3, section 3.1.

considerably less legitimacy. The situation was rectified by subsequent engagement of more institutions, however, the extent of rectification was limited.

Tracing the adoption process in India revealed a strong focus on understanding competition principles and adapting these to the local context. The Indian government entrusted the task of deliberation of the Law to the especially constituted Raghavan Committee, which after consulting foreign models and seeking feedback from local stakeholders over a period of more than two years, submitted a draft to the government. The government then submitted the draft to the parliament for scrutiny, which enacted the law after a further round of consultations. Almost immediately after its enactment, the law was challenged before the Indian Supreme Court, which led to a round of amendments of the Law and a repeat of the entire legislative process.<sup>13</sup>

The institutions engaged in India throughout this process were indigenous, drawn from each of the three organs of state, and were equipped to aggregate local information. The institutions not only exercised their power to aggregate this information but also adapted the Law in light of this information as well as in accordance with the broader policy objectives of the country. This adaptation of foreign models for India's context may be most appropriately characterised as *socialization* albeit with some shades of *emulation* and *regulatory competition*.<sup>14</sup>

A similar examination of the adoption process in Pakistan indicated that the Pakistani government had leaned on and sought technical assistance from the World Bank for drafting the competition law. Although the WB-led team comprised international as well as domestic experts, it had limited engagement with domestic institutions and prepared its report largely on the basis of its own experience and knowledge of foreign jurisdictions. The competition law was then drafted by a Europe based law firm and passed into law as an ordinance by the order of the then President, without

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<sup>13</sup> Chapter 3, section 3.2.

<sup>14</sup> Chapter 3, section 3.4.1.

any debate in parliament. Over the next three years, the Law was promulgated twice as a Presidential ordinance before finally being enacted as an act of parliament.<sup>15</sup>

Pakistan engaged a mix of foreign and domestic institutions in the first three iterations of the adoption process. However, the domestic institutions were drawn only from executive and were top-down and exclusive. These institutions not only lacked the means to aggregate local information, but also had little incentive to do so. Consequently, the engagement of these institutions was limited to formalistic adoption of the law whilst the crucial process of defining the parameters of the law was almost entirely outsourced. Although there was some attempt to adapt the law for local purposes at the time of enactment of the Act of 2010, the scope of this adaptation was circumscribed by the parameters of the first three Ordinances, the lack of capacity of a fragile parliament, and possibly the continuing influence of the World Bank. The limited domestic engagement with the law and failure to adapt it to local context may be characterised as *coercion*, with some traces of *emulation* and *regulatory competition* and *socialisation*.<sup>16</sup>

(ii) Shaping the Content, Compatibility and Legitimacy of the Laws

Having traced the adoption processes, I evaluated the manner in which the mechanisms and institutions engaged by India and Pakistan had shaped the content of the Indian and Pakistani competition laws and their compatibility with and legitimacy in their respective contexts.

With regard to the content of the competition laws I focused on the provisions related to the structure, mandate and composition of the first tier NCAs— the Competition Commission of India (CCI) and the Competition Commission of Pakistan (CCP). CCI and CCP link the adoption processes and the implementation stage because whilst their structures, mandates and compositions are shaped through the adoption processes, they also form the basis of all future actions taken by the NCAs under the law. I noted that the adoption processes had a considerable impact on the content of the Indian and Pakistani competition laws. In India, the impact of *socialisation* was most evident in the manner in which provisions related to CCI's structure and

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<sup>15</sup> Chapter 3, section 3.2.

<sup>16</sup> Chapter 3, section 3.4.2.

composition had been adapted to suit India's pre-existing legal system.<sup>17</sup> Whilst in the case of Pakistan, the impact of *coercion* was directly apparent from the fact that ideas related to CCP's structure and mandate had been retained almost entirely as they had been introduced by the WB-led team. It was also indirectly evident in the absence of debate and scrutiny for defining provisions related to CCP's composition, which were allowed to continue to be governed by patterns present in other regulatory laws in the country.<sup>18</sup>

*Socialization* in India and the engagement of a broad spectrum of bottom-up, participatory and inclusive institutions which interacted extensively with domestic stakeholders drawn from all three organs of the state as well as from the public, not only helped bring the law into alignment with domestic legal requirements and exigencies but also conferred on it a degree of legitimacy and provided to institutions and persons that engaged with it in the adoption process, an understanding of the core purpose, aim and principles of the law.<sup>19</sup>

In stark contrast, *coercion* in the first three iterations of the competition law in Pakistan and the limited engagement with only top-down, and exclusive institutions that had their locus either outside Pakistan or in the executive, generated a law that was more attuned to international best practices rather than to the context for which it was intended. The law also did not enjoy as much legitimacy as its Indian counterpart as it had not received the endorsement of the Pakistani parliament or the judiciary in the course of adoption. It was only by the time Pakistan enacted the Act of 2010 that it engaged a wider range of bottom-up, participatory and inclusive institutions. However, this engagement came too late in the adoption process and had only a limited and superficial impact.<sup>20</sup>

(c) *Implementing the Competition Laws*

(i) An Overview

After completing the analysis of the adoption process, I was ready to examine the manner in which these competition laws are being implemented in the two countries

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<sup>17</sup> Chapter 3, section 3.5.1.

<sup>18</sup> *ibid.*

<sup>19</sup> Chapter 3, section 3.5.2.

<sup>20</sup> *ibid.*

### *Conclusion*

against the benchmarks developed for assessing CCI and CCP's individual performance as well as their relational interaction with the courts in their respective countries.

For this purpose, I relied on the final orders of CCI and CCP in respect of abuse of dominant position and anti-competitive agreements (referred to as prohibited agreements in the Pakistani competition law) from the commencement of their operations until December 2016. I preferred final orders of CCI and CCP to those of the tribunals because at the time of writing this, the Pakistani tribunal had been operational for a very short time and had not generated sufficient data for a comparative analysis. Similarly, I focused on abuse of dominant position and anti-competitive agreements because the Indian merger regime had only been enforced in 2011 and had not produced enough orders to support the present research. Finally, for the overview I examined final rather than interim orders of CCI and CCP to avoid duplication of data.

I considered CCI and CCP's final orders as the most appropriate source of data for evaluating the implementation of the competition laws for at least three reasons: (i) first, that these represent the Law in action both when the government activates and interprets the laws to establish the NCAs and second, when the NCAs interpret and employ the laws to exercise their respective mandates; (ii) second, CCI and CCP orders are comparable in that both arrive at these orders through similar decision-making procedures, and (iii) third, that these orders form a reliable, available and accessible record the interactions between CCI, CCP and the courts. This last is a particularly important factor given that there is no consolidated database for such interactions and obtaining records from individual courts in India and Pakistan is impractical if not altogether impossible.<sup>21</sup>

In order to examine the final orders, I identified ten 'indicators' or inherent features of these orders. Some of these indicators related to one or more aspects of the structure, mandate or composition of the NCAs and thereby to the relevant provisions of the competition laws whilst others indicated the extent of the compatibility and legitimacy of the competition laws in their respective contexts. Certain indicators

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<sup>21</sup> Chapter 4, section 4.1.2.

### Conclusion

demonstrated features of the performance of CCI or CCP whereas others helped explore the nature of the interaction between CCI, CCP and the courts in their respective countries. A few indicators elucidated more than one aspect of the implementation of competition laws. Taken together, they provided a rare insight into the mark left by the adoption process on the implementation of these laws.<sup>22</sup> A comparison of these indicators revealed that whilst the operations of both CCI and CCP are comparable in their scope and extent to which they have succeeded in activating the laws in their respective countries (represented by indicators 1 and 2 respectively), their approach towards implementation is starkly different.

**Table 7.2 Comparing the Indicators in Final Orders of CCI and CCP<sup>23</sup>**

Indicators	CCI	CCP
<u>Indicator 1:</u>		
Total number of Final Orders	<ul style="list-style-type: none"> <li>• Initially slow.</li> <li>• Then dramatic increase.</li> <li>• Generally stable and steady.</li> </ul>	<ul style="list-style-type: none"> <li>• Initial burst of activity.</li> <li>• Subsequently consistent downward trend.</li> <li>• Enforcement came to a halt in 2014</li> <li>• Subsequent recovery has been modest.</li> </ul>
<u>Indicator 2:</u>		
Sectors of Enforcement	<ul style="list-style-type: none"> <li>• Passed orders in 18 sectors</li> <li>• Concentrated in Film/TV/Entertainment/Print media sector.</li> </ul>	<ul style="list-style-type: none"> <li>• Passed orders in nearly 18 sectors</li> <li>• Orders are more evenly distributed throughout the sectors.</li> </ul>
<u>Indicator 3:</u>		
Final orders in proceedings initiated upon government references	<b>6.75%</b>	<b>5.4%</b>
<u>Indicator 4:</u>		
Final orders passed in proceedings initiated upon complaints	<b>73.64%</b>	<b>29.7%</b>
<u>Indicator 5:</u>		
Final orders initiated by taking <i>suo motu</i> notice	<b>6.75%</b>	<b>64.8%.</b>
<u>Indicator 6:</u>		
Final orders imposing directions or penalties or both.	Penalties <b>37.1%</b> Directions <b>34.4%</b> Penalties & Directions <b>26.3%</b>	Penalties <b>72.9%</b> Directions <b>70.2%</b> Penalties & Directions <b>43.24%</b>

<sup>22</sup> Chapter 4, section 4.2.

<sup>23</sup> Chapter 4, section 4.3.

### Conclusion

Indicator 7:

Final orders which cite case law, legal instruments or authoritative texts whether foreign, domestic or CCI and CCP's own.	Case law generally <b>30.41%</b> Domestic <b>12.83%</b> Foreign <b>9.46%</b> CCI's own <b>18.91%</b>	Case law generally <b>89%</b> Domestic <b>35%</b> Foreign <b>83.7%</b> CCP's own <b>64.8%</b>
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Indicator 8:

Strength in passing final orders	Full strength <b>29%</b> Partial strength <b>64.8%</b> Single Members <b>none</b> Strength not known <b>4.72%</b>	Full strength <b>none</b> Partial strength <b>72.9%</b> Single Members <b>18.9%</b> Strength not known <b>none</b>
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Indicator 9:

Final orders in respect of which dissenting opinions recorded	<b>41.2%</b>	<b>None</b>
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Indicator 10:

Final orders which record challenges filed before Courts	Proceedings challenged <b>11.48%</b> Courts final decisions <b>85.7%</b> Courts interim orders <b>14.3%</b>	Proceedings challenged <b>16.2%</b> Courts final decisions <b>35.7%</b> Courts interim orders <b>64.3%</b>
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The data indicated that whilst CCI responded primarily to complaints filed before it, CCP leaned towards taking action on its own initiative—or through *suo motu* notice (indicators 3, 4 and 5).<sup>24</sup> This suggested that the Pakistani competition law was perhaps not as well understood, utilised or applied by the general public in Pakistan as it was by the public in India. However, CCP's somewhat more aggressive sanctioning strategy in its early years suggests that, at least initially, CCP exercised its mandate with greater surety (indicator 6). This may either be taken to indicate that CCP itself understood, applied and utilised the Pakistani competition law effectively or that it was less sensitive to the context in which it operated. CCI on the other hand may be taken to be exercising greater care to ensure that its application of the Law did not create shockwaves in the Indian economy.

The data also revealed that in arriving at its decisions CCI has relied less on case law generally than CCP (indicator 7). CCI preferred a common sense approach in analysing competition matters brought before it, whilst CCP opted for a more legalistic attitude. This suggests that whilst CCI viewed itself primarily as a regulatory body, CCP often acted like an adjudicatory body. A closer look at the source of case law cited by CCI and CCP (also indicator 7) indicates that CCI relied on a number of non-competition decisions of the Indian courts whilst CCP displayed a

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<sup>24</sup> The percentage of final orders passed in cases initiated by government references is nearly the same and, therefore, not of immediate interest.

### *Conclusion*

marked preference for competition related foreign cases and materials. In respect of CCI, this may be taken to mean that the provisions of Indian competition law are sufficiently clearly expressed so as not to require interpretation with reference to foreign authorities; CCI is more confident about interpreting these provisions without recourse to foreign materials, and CCI and the Indian competition law do not have the need to leverage their international legitimacy to gain greater domestic legitimacy. The starkly different data for CCP suggests that all three factors are missing with respect to the Pakistani competition law.

In arriving at its decisions, CCI largely harnessed all or the majority of its members (indicator 8) whilst CCP acted below full strength, and at times relied only upon single members. This indicates that CCI benefitted from a greater range and variety of expertise and opinion in deliberating the issues before it, which once again speaks to CCI's broader and deeper understanding of the law and the willingness and ability of its members to participate in the decision-making process. This, in turn, indicates the individual capacity of CCI members, which is also reflected in the fairly high percentage of dissenting orders passed by them (indicator 9).

On the other hand, CCP's preference for smaller panels may be deemed either to indicate a certain hesitation on its part in harnessing its available strength for the purpose of passing orders or the need to marshal its resources more effectively. Similarly, the complete absence of dissenting orders may also suggest CCP's strategy to speak with one voice or the supremacy of the chairman within CCP structure which detracts from a truly collegial atmosphere. This supremacy may derive from CCP Regulations, in terms of which all appointments of members are to be made with the concurrence of the CCP chairperson. This has the effect of raising the chairperson above his peers and of allowing him to influence the opinion of individual members. Whilst CCP's strategy in this regard lends an aura of uniformity to CCP's actions, it deprives it of the varied opinion of its members and their contribution to the development of the law in the country.

As far as interaction with the courts is concerned (indicator 10), the small percentage of proceedings before CCI and CCP that have been challenged before the Indian courts and Pakistani courts respectively, at first suggested that not only is the interaction comparable in the two countries but also that it is perhaps too negligible to

be of concern. However, a closer examination of these challenges and the responses of the courts placed the interaction in a different and more complex perspective. It appeared that whilst courts in India have issued final orders in the majority of challenges filed before them, the Pakistani courts have preferred to shelve the matters through interim restraining orders. This indicates not only that CCI is more compatible with the 'machinery of justice' in India, but also enjoys greater legitimacy in the country than CCP does in Pakistan.

(ii) A Deeper Insight into the Implementation Stage

In order to delve deeper into the implementation stage of the Indian and Pakistani competition laws, I examined the strategies adopted by CCI and CCP in interpreting their respective laws and the nature of their interactions with the courts. Interpretive strategies were particularly interesting to me not only because they drive the implementation stage but also because they reflect the impact of the adoption processes by combining a number of indicators including, indicator 6 (reliance on case law); indicator 8 (strength in passing orders) and indicator 9 (number of dissenting opinions).

The interaction between CCI, CCP and the courts appealed to me for two reasons: first, because it represented the crossroads at which largely technical systems such as the competition laws, derived from foreign sources and espousing economic goals, interacted with the general legal systems of the countries, which themselves are derived from foreign sources and have merely become indigenised over time. And second because this interaction plays a significant role in the implementation of the laws in the countries. It not only determines the clarity of the performance of CCI and CCP (and, therefore, of the competition laws) but also the pace at which the laws integrate into the pre-existing legal systems of the countries. However, this role and its impact remains largely invisible because not being expressly contemplated and addressed in the competition laws, its impact on the performance is either overlooked or attributed to factors unrelated to the competition laws.

*Strategies adopted by CCI and CCP for Interpreting the Competition Laws*

Although the scope and significance of interpretive strategies merits a more thorough independent examination, for the purposes of this research, I focused only on CCI and

CCP’s interpretation of the analytical tests for anti-competitive agreements provided in their respective competition laws. A qualitative analysis of the final orders of CCI and CCP passed in exercise of their mandates in respect of anti-competitive agreements not only revealed important features of their respective interpretive strategies, but also formed the basis for conclusions about CCI and CCP’s overall interpretive strategies. I specifically examined (i) whether CCI and CCP relied on case law and materials in interpreting these analytical tests; (ii) the extent to which they adapted the case law and precedents for local context rather than merely copying these, and (iii) whether and the manner in which their strategies in this regard evolved over time. For each of these factors I considered whether and in what way these could be traced to the adoption process of the countries.

**Table 7.3 CCI and CCP’s Interpretive Strategies for Analytical Tests<sup>25</sup>**

<b>Interpretive Strategy</b>	<b>CCI</b>	<b>CCP</b>
<b>Reliance on Case Law</b>	Limited.	Extensive.
<b>Foreign, Domestic or NCAs Own</b>	Domestic or NCAs Own.	Foreign or NCAs Own.
<b>Transfer Mechanism</b>	<i>Socialization</i> of material derived from a variety of sources.	<i>Socialization</i> and <i>Emulation</i> of material derived from a variety of sources.
<b>Literal Interpretation</b>	Extensive.	Limited.
<b>Economic Analysis</b>	Limited.	Limited.
<b>Evolution of Strategy</b>	Greater opening up to international influence.	Greater focus on CCP’s own decisions.

It was evident from this analysis that whilst CCI consistently anchored itself in the text of the Indian competition law, and thereby developed a more predictable, contextualised and Indian-ized approach towards establishing anti-competitive agreements, CCP remained somewhat detached from the black letter law with the result that its approach remained more erratic and outward looking. However, both strategies had their disadvantages and advantages. Whilst CCI’s determination to be rooted firmly in the law appeared to isolate it, at least initially, from international developments in competition law, CCP’s keen international focus seemed to keep it

<sup>25</sup> Chapter 5, sections 5.3 & 5.4.

### *Conclusion*

disengaged from Pakistan's legal and economic realities.<sup>26</sup> Most interestingly perhaps, both approaches kept the NCAs anchored in the wording or antecedents of the laws rather than in the economic analysis underpinning it.

#### *Interaction of CCI and CCP with the Indian and Pakistani Courts*

In examining the relationship between the NCAs and the courts, I first established that the scope of the interaction between them is restricted to due process norms existing in the countries and the constitutional grounds stipulated in the respective constitutions of the countries and does not extend to the merits of competition matters. I initially focused on the interactions that took place whilst proceedings were pending before the CCI or the CCP ie challenges from the show cause notices issued by them or against their interim orders. My reason for doing so was twofold: first, these challenges had the potential to disrupt, if not derail, competition enforcement in the countries and also because challenges of this nature were common to both India and Pakistan. I examined the grounds on which these challenges had been filed and the response of the courts thereto as recorded in the final orders of CCI or CCP.

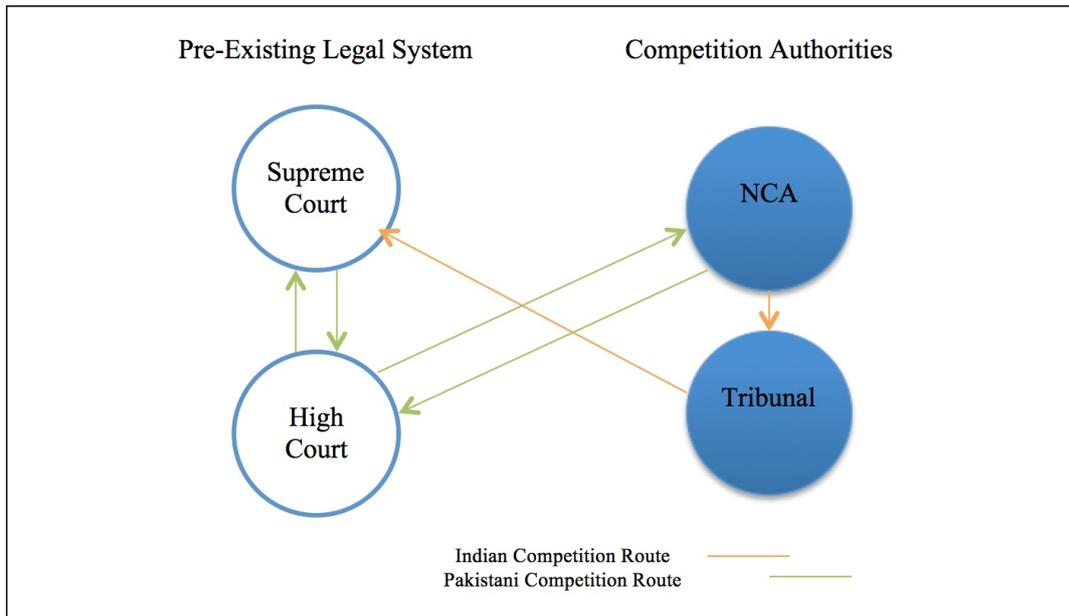
Whilst the percentage of proceedings pending before CCI or CCP that were challenged before the courts of either country was quite small and similar in the two countries, a closer examination revealed that there was a stark difference between India and Pakistan in the grounds on which these challenges had been filed and in the responses of the courts to these challenges.

A review of the grounds on which proceedings pending before CCI and CCP had been challenged, revealed that whilst challenges before Indian courts related only to procedures followed by CCI, those filed before Pakistani courts questioned the constitutional basis of the law and the CCP and its actions, which in turn suggested that the Pakistani law was perceived as lacking legitimacy as compared to its Indian counterpart. This perception is also reflected in the detached, hesitant attitude of the Pakistani courts that preferred not to confer legitimacy on the law as well as in the Pakistani government's failure to provide necessary resources to CCP and its delay in establishing a functioning competition appellate system. It is also likely to be a factor

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<sup>26</sup> Chapter 5, section 5.5.

behind the parliament's failure to insist upon the meaningful enforcement of the law.<sup>27</sup>



**Figure 7.2 Competition Enforcement Routes in India and Pakistan**

Most importantly, this difference in perceptions about the law is reflected in the response of the courts to these challenges. The response of the Indian courts was generally supportive of CCI. The Indian courts passed final decisions in the majority of challenges filed before them from proceedings pending before CCI. They decisively clarified the points of law or procedure raised in these petitions. Consequently, the implementation trajectory as envisaged in the law was gradually strengthened (orange line in Figure 7.2). However, the response of the Pakistani courts was obstructive in nature. The Pakistani courts preferred issuing interim restraining orders in the majority of cases before them and thereby, rather than finally deciding these matters. This had the effect of keeping competition matters concentrated in the courts (green line in Figure 7.2) and thereby choked the system and made it even less likely to respond.

*(d) Relationship between the Adoption Process and the Implementation Stage*

In order to ascertain the extent to which each of these aspects of implementation may be attributed to the adoption processes in India and Pakistan, I examined possible

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<sup>27</sup> Chapter 6, section 6.4.

links between each of these aspects and the transfer mechanisms and institutions employed by the two countries in the course of acquiring their competition laws. For each aspect, I focused on three 'linking factors' that though shaped in the adoption process are critical to performance and interactions of the laws at the implementation stage: the content of the law particularly provisions stipulating the structure, mandate and composition of CCI or CCP; the compatibility of the law with the context of its country, and its legitimacy in that country.

(i) Content of the Laws: Provisions related to Structure, Mandate and Composition

In India, whilst *socialization* shaped the entire content of the Indian competition law, its impact is particularly discernible in provisions stipulating CCI's structure and composition. An examination of the implementation stage in India suggests that CCI being structured as a collegial, regulatory (rather than adjudicatory) body and comprising members appointed by a high level, statutorily appointed selection committee, had considerable impact on CCI's decision-making strategy and the substance of its orders. Its structure and composition appears to have enabled CCI to pool its intellectual resources in arriving at its decisions and to allow, if not encourage, dissent amongst its members. This not only increased the scope and pace of development of competition jurisprudence in the country, but more importantly, bolstered CCI's judgment and confidence in its internal ability to interpret and apply the competition law.

In Pakistan, the content of the competition law, particularly the provisions related to CCP's structure and composition, were shaped by *coercion*, both express, in terms of what Pakistan was 'persuaded' to adopt, and implied to the extent that certain patterns implicit and prevalent in the country were allowed to slip through due to the absence of debate. However, at the implementation stage the un-scrutinised factors, which vested the appointment of CCP members entirely in the government, and which had been allowed to slip into the Law without any discussion or debate, had a greater impact, because they rendered CCP vulnerable to the changing priorities of each successive government. Further, the fact that the government exercised its power of appointment in consultation with CCP chairperson detracted from CCP's collegial

atmosphere and its ability to dissent which in turn limited the scope and pace of development of competition jurisprudence in the country.<sup>28</sup>

The overriding powers of the government in this regard appear to have been particularly damaging for the operations of CCP in the wake of the 2013 general elections. At the time the elections took place, CCP was ready for the appointment of a new chairperson. However, the appointment of chairpersons of all regulatory bodies had come under judicial scrutiny and had become too cumbersome and perhaps also a low priority for the new government. CCP unwittingly found itself embroiled in this tussle between the executive and the judiciary and remained under an acting chairman for nearly a year. This in turn had an adverse impact on CCP's overall performance perhaps because the acting chairman did not feel he had sufficient authority to undertake enforcement actions or perhaps due to the government's lack of interest in the CCP, which manifested itself in the government's failure to allocate necessary resources to CCP. The government also delayed appointing other CCP members, which meant that even if it wanted to, CCP was not able to benefit from the collegial structure and the diverse points of view of members.<sup>29</sup>

(ii) Compatibility of the Competition Laws with the Indian and Pakistani Contexts

In India, the combination of *socialization* through bottom-up, participatory and inclusive institutions generated a significant degree of compatibility between the Indian competition law and the context into which it was injected. This compatibility is evident in CCI's overall performance, which steadily increased over time and became more focused on genuine competition complaints. The large number of complaints filed before CCI is a reflection of its inherent compatibility with the context because it indicates that a considerable number of persons in India realised that the law existed (even if they did not fully understand what it entailed) and were willing to utilise it. Compatibility is also reflected in CCI members exercising their mandate and applying the law without extensive recourse to or support from case law, especially foreign case law and materials, to the extent that it indicates their confidence in their understanding of the law. Finally, the productive interaction

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<sup>28</sup> Chapter 4, section 4.4.

<sup>29</sup> *ibid.*

### Conclusion

between CCI and the courts in India may at least partly be attributed to the compatibility of the law with the context.<sup>30</sup>

In the case of Pakistan, the mechanism of *coercion* activated through exclusive, top-down institutions did not generate a high level of compatibility between the law and the context. This is evident in CCP's overall performance (indicator 1), which has been on a downward trajectory after an initial burst of activity. It is also evident in the considerably smaller number of complaints filed before CCP which indicate that the general public perhaps does not understand and is not comfortable utilising the Law for its benefit (indicator 4). However, it may be argued that the extensive *suo motu* actions taken by CCP itself are proof of its own understanding of the law and capacity for utilising it (indicator 5) which in turn is a reflection of the compatibility of the law with the context. However, the positive effect of CCP's utilisation and application of the law is diluted by the lack of support shown to it by the court, which may also in part be attributed to its lack of compatibility (indicator 10).

#### (iii) Legitimacy of the Laws in their Contexts

In India, the combined effect of *socialization* and the range of institutions (drawn from the executive, legislatures and judiciary) engaged by it, led to a considerably widespread acceptance of the law and had a positive impact on the legitimacy of the law in the domestic Indian context. Legitimacy, like compatibility, is manifested in the extent to which the law is understood, applied and utilised in the country not only by CCI itself but also by persons who file complaints before it and invoke its jurisdiction.

Legitimacy, and CCI's confidence in it, is also evident in that CCI does not consider it incumbent upon itself to declare the international antecedents of the Indian competition law or to incessantly cite foreign case law and materials primarily to assert its international credentials. The positive and supportive response of the courts to the challenges filed before them in respect of proceedings pending before CCI may also be attributed to their perception of the legitimacy of the law, whilst CCI's relatively lenient approach towards penalties may be attributed to its desire to

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<sup>30</sup> Chapter 3, section 3.5.2; Chapter 4, section 4.4.2; Chapter 5, section 5.5; Chapter 6, section 6.2.

### Conclusion

maintain its domestic legitimacy.<sup>31</sup> The government setting up the competition appellate system is a further reflection of the legitimacy of the law and of the fact that this legitimacy remains intact regardless of transfer of power from one government to another.

In Pakistan, the combination of *coercion* and the engagement of a very narrow range of institutions (drawn only from the executive in the first three iterations of the law) had a negative impact on the legitimacy of the law in the domestic context. The fact that the law was introduced in the country virtually behind closed doors meant that not only the general public but also institutions such as the parliament and the judiciary whose support was necessary for CCP's stable operation, either did not understand the competition law or were suspicious of its aims.

This lack of legitimacy was reflected in the very few numbers that approached CCP on their own volition as well as in the hesitant attitude of the courts towards challenges brought in respect of competition proceedings. A combination of these factors led to CCP's extensive reliance on *suo motu* notices, which stretched its already meagre resources, and choked the court system with competition related challenges. The lack of legitimacy is also evident in the absence of support from the government both in terms of allocating resources for CCP's operations as well as for establishing the competition appellate system. This also suggests that when laws are transferred via *coercion* the limited legitimacy they have is not automatically transferred from one government to the next.

The regularity with and extent to which CCP relied on case law generally and foreign case law particularly may also be seen as evidence of its lack of legitimacy and its need to claim international legitimacy in order to generate greater domestic legitimacy. However, the CCP remains thwarted in these attempts as long as the Pakistani government fails to establish and maintain the competition appellate system and Pakistan's pre-existing legal system fails to endorse CCI's actions and decisions whether in its constitutional or its competition appellate capacity. Perhaps the only positive effect of this lack of domestic legitimacy and CCP's apparent nonchalance towards it, is that CCP, at least in its early years, imposed penalties without concern

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<sup>31</sup> *ibid.*

for whether doing so would generate negative domestic press as long as it received positive feedback from international reviewers of its performance. However, this positive effect remains superficial if CCP is blocked from recovering these penalties due to pending constitutional challenges to its orders.<sup>32</sup>

(iv) Impact of CCI and CCP's Interpretive Strategies at the Implementation Stage

The impact of CCI and CCP's respective interpretive strategies is evident from their impact on the content, compatibility and legitimacy of the laws in the two countries through the implementation stage. In its orders so far, CCI's interpretive strategy has sought to align the interpretation of the law with its text. However, in doing so, whilst it has succeeded in giving depth to the content of the Indian competition law it has also distanced itself from international competition jurisprudence. Interestingly, in its most recent decisions, CCI seems to have become aware of this distancing and it will be worth following its future orders to see how it adjusts its course in this regard. On the other hand, in interpreting the Pakistani law, CCP has preferred to align itself with foreign precedents rather than with the specific wording of the law itself. Whilst this may have offered CCP some international recognition, it has certainly failed to create a body of competition principles that are firmly anchored in the domestic context and to give certainty to the law.

It follows, therefore, that CCI's inward looking interpretive strategy has enhanced the compatibility of the law with the context as well as its domestic legitimacy and has, thereby positively impacted not only on the overall performance of the Indian competition law but also its interaction with the India's pre-existing legal system. However, it is difficult to assess the impact of India's strategy on the Indian law's international legitimacy or indeed to speculate whether and to what extent India or CCI needs such international legitimacy at the implementation stage. CCP's interpretive strategy, on the other hand, has been focused on locating itself in and converging with international precedents and has done little to make the Pakistani competition law better understood or accepted in the domestic context. Whilst CCP's strategy may have had a positive impact on the international standing of the Pakistani competition law it has done little to improve its domestic legitimacy and is likely to

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<sup>32</sup> *ibid* and Chapter 6, section 6.4.

have contributed to the downward trend in CCP's overall enforcement as well as its standoff with the Pakistani courts.<sup>33</sup>

(v) Interaction of the Laws with Pre-existing Legal Systems and its Impact of Implementation of the Laws

The impact of the adoption process on the interaction between the Indian and Pakistani competition laws (as represented by the CCI and CCP respectively) and the pre-existing legal systems of the countries (as represented by the courts) and thereby on the implementation of the laws is both direct and indirect. The direct impact relates to the extent the adoption process affects the response of the courts to the competition challenges filed before them, whilst the indirect impact relates to the government's ability to establish a competition appellate system which, in turn, has an effect on the extent to which the courts are utilised for challenging proceedings or orders of CCI or CCP. However, this impact is not immediately apparent, because the percentage of proceedings of CCI and CCP that have actually been challenged before the courts and the quantum of penalties realised by CCI and CCP are comparably low.

To understand this impact it is more important to examine the response of the courts to challenges filed before them. The interaction between CCI and the Indian courts is mostly confined to the stage at which proceedings are still pending before CCI. The response of the courts to these challenges has been clear and decisive. The courts have provided guidelines to CCI for its general procedures as well as for its penal strategies and have allowed the proceedings to continue. Consequently, over time, the number of challenges filed before the courts has decreased, the competition appellate system has strengthened and CCI has relied on the decisions of the courts in subsequent proceedings both to streamline its procedures as well as to rationalise its penal strategy. The existence of the competition appellate system has supported the courts by providing an alternative route to parties aggrieved by CCI's orders or operations.

In Pakistan, the interaction between CCP and the Pakistani Courts has taken place whilst proceedings are still pending before CCP as well as after these proceedings have been concluded and CCP has passed final orders. The response of the Courts to

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<sup>33</sup> Chapter 5, section 5.5.

both categories of challenges has been dilatory and indecisive. The courts have merely issued restraining orders and have not decided any matter on its merits. Consequently, over time, the number of challenges filed before the courts has multiplied as aggrieved parties have relied on decisions of the courts to bring further challenges against CCP. This has not only deprived CCP, and the competition law, of a much need boost to its legitimacy but also has left it in a state of uncertainty as to the fate of its orders once they undergo judicial scrutiny. The absence, until recently, of the competition appellate system has played a significant role in the number of matters filed before the courts because parties aggrieved by CCP's orders or operations an alternative forum before which to challenging these.

(e) *Recent Reforms and Final Thoughts*

As the Indian and Pakistani competition laws enter the second decade of their existence, the impact of the initial *socialisation* and *coercion* is still evident in their operations and their development. It is evident from the Indian parliament amending the competition law to consolidate competition appeals in a single 'National Company Law Appellate Tribunal';<sup>34</sup> the Ministry of Corporate Affairs in India recommending that the number of CCI members be halved,<sup>35</sup> and CCI itself amending its leniency regulations,<sup>36</sup> that India has entered a new phase of *socialization* and continues to adapt the law to meet domestic exigencies. Similarly, the impact of *coercion* in Pakistan is manifested in the fact that CCP has remained captured by the elite, whether these are World Bank nominees as was the case in its earliest years, or powerful Pakistani politicians and lobbyists. In recent years, CCP has been rendered practically dysfunctional due to the failure of the government to appoint members<sup>37</sup> and the failure of the courts to render judgments in matters pending before them.<sup>38</sup>

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<sup>34</sup> Chapter 3, section 3.2.3.

<sup>35</sup> Amitav Ranjan 'MCA proposes to halve CCI member strength to three' <<http://indianexpress.com/article/business/business-others/mca-proposes-to-halve-cci-member-strength-to-three-4809132/lite/>> (accessed 29 August 2017).

<sup>36</sup> Anshuman Sakle and Bharat Budholia 'Leniency Regulations Amended' <<http://competition.cyrilamarchandblogs.com/2017/08/leniency-regulations-amended/>> (accessed 13 September 2017).

<sup>37</sup> Editorial 'CCP Virtually Defanged without Key Appointments' <<https://www.thenews.com.pk/print/223906-CCP-virtually-defanged-without-key-appointments>> and Wasim Iqbal and Sohail Sarfaraz 'MoF yet to Appoint three CCP members' <http://fp.brecorder.com/2017/09/20170910216480/> (accessed 13 September 2017).

<sup>38</sup> Kalbe Ali 'SECP declines to give details of Chaudhary Sugar Mills Case to Senate Panel'

### Conclusion

Given the situation, it is tempting to conclude that because the performance and interaction of the Indian competition law is comparatively more in accordance with the relevant benchmarks than the performance and interaction of the Pakistani competition law, the transfer mechanism of *socialization* is automatically superior to *coercion*. However, such a conclusion is superficial if not fallacious and belies a more complex reality. The truth is that countries, such as Pakistan, that are characterised by weak political and legal institutions that have no interest in and cannot be compelled to aggregate local information, could only have acquired the law through *coercion* because the alternative may have been no law at all. However, regardless of its shortcomings, *coercion* does not prevent such a country from subsequently adjusting its course to match its competition goals. Conversely, countries such as India, that have stronger institutions that can assert themselves in the adoption process, but only marginally greater capacity, whilst capable of acquiring a law through *socialization* remain in danger of becoming victims of their own self-confidence and their need to assert their independence and, thereby, of veering away from their competition goals.

Therefore, rather than focusing only on mechanisms it is important to understand that irrespective of whether a law is acquired through *socialization* or *coercion* it is ultimately up to the country to strike a balance between its international and domestic legitimacy. Whilst the first is relevant for the country to retain its membership of the international community it entered when it acquired the law, the latter is imperative for its survival as a law-in-action in the domestic context. It also appears that the political concept of legitimacy of laws has almost as much significance for the implementation of the law in a country as does the more legally familiar concept of compatibility. A law that is not recognised as legitimate and does not seek to enhance its legitimacy through its actions, remains under-utilised by the users for whom it is intended and under-applied by the institutions mandated to enforce it. More damagingly, for countries acquiring competition laws for economic aims, is the realisation that a law that does not work efficiently is thwarted in realising its economic aims.

Eventually, the lesson for India and Pakistan, certainly for the entire South Asian region where the gap between law on the books and law in action remains large, and

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<<https://www.dawn.com/news/1352282>> (accessed 29 August 2017).

### *Conclusion*

for all developing countries that are seeking economic transformation through law, is that the mechanism that a country adopts for acquiring a law is a question of trade-offs and priorities. For some, such as India, initial consensus-building may be more important whilst for others such as Pakistan, acquiring a near perfect law may have a greater priority. Regardless, however, law reform remains an on-going process and demands adjustments along the way. This includes not only conceptual corrections, as in the case of India, but also corrections to the legal status of the law as in the case of Pakistan. Whilst Legrand's prophecy, that legal transplants are impossible because of the impossibility of transferring meanings of the law, casts a long shadow on all law reform processes, which entail adopting laws from elsewhere, this research affirms the importance of the context of the adopting country and particularly of the strength of the institutions in engages in the process, in making the process viable.

**Questionnaire For the Competition Commission of Pakistan**

(Questions are in italics)

*What is the overall verdict on the success of the Competition regime?*

The Competition Commission of Pakistan (hereinafter the ‘CCP’) since its inception has been enforcing the provisions of the Competition Law across the economy of Pakistan with diligence and without any discrimination. The performance of the CCP is self explanatory with reference to its success. The details are as follows:

Orders:

Section 3: 13 Abuse of Dominance

Section 4: 20 Prohibited Agreements (Cartel)

Section 10: 10 Deceptive Marketing

Section 11: 04 Mergers

Section 39: 01 Leniency

Section 5: 02 Exemption

Regulation 21(Withdrawal of complaint): 01 Eltek Valare A.S

Appellate Bench: 05

Interim Orders: 03 (ICAP, Pak Steel, KSE)

MRTPO Orders: 03 (Polyester, FFC, Mobilink)

Non Compliance (Sec 38 & MRPTO): 02 Bahria & FFC

Total: 64

Exemptions granted 429

Merger & Acquisitions NOCs:

Acquisition of shares: 271

Merger 62

Joint ventures 09

Total 342

Hearings Conducted 145

Show cause notices issued 434

Search & Inspections 18

Enquiry Reports 37

Policy Notes 13

Opinions 2

In addition to the above, the achievements of the CCP so far are described below which are in itself a testament of CCP's success:

A fine of **Rs. 23 Million** imposed on Pakistan Jute Mills Association and its Members for operating as a price fixation cartel. The penalty so imposed was recovered and the tender terms of PASSCO and Punjab Food Department were also amended in compliance with the Order of CCP. The fine was deposited in the Public Account of the Federal Government.

The **first ever leniency application** was made to CCP by M/s Siemens (Pakistan) Engineering Company Limited and provided additional and corroboratory evidence in support of the evidence already with CCP to unearth cartels of switchgear and distribution transformer market mainly procured by the public sector. The media has termed this as CCP's regulatory breakthrough.

In the matter of Bahria University, in compliance of the Order of CCP the Tie-in arrangement/Mandatory sale of laptops to the students was discontinued and the monies received from the students were paid back on prorated basis.

In the matter of Trading Corporation of Pakistan, in compliance with the Order of the CCP, the tender terms and conditions regarding the import of sugar were amended.

In the matter of Abuse of dominant position by Tetra Pack Limited, in compliance with the Order of CCP the practice of tie-in i.e. mandatory sale of packaging material with the packaging machine was discontinued and the agreements were amended and modified.

In the matter of mandatory sale of coupons with the tickets at cinepax, the practice was discontinued and in compliance of the Order five free screenings for the underprivileged children were held.

In the matter of price fixing cartel by All Pakistan Akhbar Farosh Federation, All Pakistan News Papers Society, in compliance with the Order of CCP the practice was discontinued and to this effect proclamations were also published in the newspapers.

In all the matters of deceptive marketing practices by two major mobile operators i.e. M/s China Mobile Pakistan Ltd (ZONG) and M/s Pakistan Telecom Mobile Ltd (Ufone) pertaining to the dissemination of misleading and false information regarding call rates, CCP reprimanded their misleading marketing practices and safeguarded the interest of the consumer for the telecom services;

In the matter of Askari Bank Ltd, United Bank Ltd, My Bank Ltd, Habib Bank Ltd wherein exorbitant and misleading rates were advertised by the Banks, CCP concluded the enquiry and declared such rates to be misleading and false and therefore safeguarded the interest of the general public and protected them from the misleading advertisement by Banks;

In the matter of Proctor & Gamble Pakistan (Pvt.) Ltd., CCP declared the claim of 100% dandruff free without any reasonable basis and directed the company to include certain disclaimers in their advertisements.

The CCP took action of the fraudulent use of renowned trademarks of BMW and Harley Davidson by M/s. Ace Group of Industries on its website and products. The undertaking admitted its guilt and rectified its behaviour. Through this the consumers were in fact protected from the counterfeit goods sold under the trademark of famous trademarks;

CCP declared the claim of RITS Incorporation regarding one of its product for dandruff treatment to be lacking reasonable basis and ordered them to rectified the claim. The claim was rectified and the innocent consumers were protected from the products which cannot perform up to their claims.

CCP declared the practice of placing tokens inside the pain packs by the paint manufacturers, to be deceptive and required them to advertise in leading news paper regarding the availability of token inside their pain packs and also to conspicuously put the information on the pain box regarding the token inside the box. The order has been complied and the consumers have been informed about the existence of token.

In the wake of dengue fever in Lahore, Bygone made a claim of being No. 1 in Pakistan in order to capitalize on the vary consumers, CCP declared the claim to be lacking reasonable basis and directed them to remove the claim from all of their advertisements. The clam was removed forthwith by the company.

The enforcement activities of CCP have also been lauded across the globe. Following are the examples in this regard:

Addressing the International Conference on “*Competition Enforcement Challenges and Consumer Welfare in Developing Countries*” held in Islamabad December 2011. **Former Prime Minister Yousuf Raza Gillani praised CCP for being quite active since its inception in addressing manipulation of local markets.** He further stated that like most countries, **it has also faced opposition as it has challenged powerful vested interests.**

CCP was invited at national level (by Sidat Hyder Morshed Associates (Pvt.) Ltd) to participate and apprise others of its accomplishment on the Best Practices Day, 2011, *CCP was termed to personify the essence of corporate best practices* – no other public sector organization was nominated or invited for this purpose.

William Kovacic, a former Chairman and member of the USA Federal Trade Commission (FTC), recognized *CCP among the tip two performing recently established competition agencies.*

One of the senior representatives of FTC (Russel Damtoft) stated in the international conference (held in Islamabad Dec. 2011) that “*CCP has done so much work in its first 4 years which FTC had not done in its first 40 years.*”

One of the members Mr. Justice Dhingra, of the Competition Commission of India, (in a conference held in India, 2011) had no hesitation in acknowledging the proactive role of CCP and the fact that CCI has yet to take off.

Mr. Pardeep Mehta, Secretary General, Consumers Unity & Trust Society (CUTS) (in the recently held Fordham Competition Law Conference in New York, Sept. 2012) termed CCP as the “*shining beacon in the South Asian Region*”.

Professor John M. Connor of Purdue University termed CCP’s investigative reports as exemplars of clarity, logic and restraint.

Richard Hoagland Acting Ambassador for US: “CCP is the future of a globally competitive Pakistan”.

CCP is perhaps the only regulatory body in Pakistan that submitted itself to international third party independent evaluation under the current leadership and has become the first regulatory authority from South Asia – ahead of its counterparts in China, India and Singapore – to be included in the Global Competition Review’s Annual “Rating Enforcement” and has achieved fair and consistent rating for the years 2010 and 2011. GCR lauded the CCP’s inclusion in the ratings as a testament to the fact that “*the Commission has established itself as a truly effective enforcer*”. (Emphasis added)

In what was undoubtedly the major recognition of CCP’s work by the international community, CCP was shortlisted by the Global Competition Review (GCR) for the Enforcement Award in the category ‘*Agency of the Year – Asia-Pacific, Middle East and Africa*’ for 2012 and 2013. This is indeed commendable for the CCP to be considered along with the agencies like those of Australia, China, Japan and Korea.

CCP’s Order dated 03-04-2012 on the first ever Leniency Application filed by M/s Siemens (Pakistan) Engineering Company Limited in Pakistan was nominated/shortlisted for Behavioral Matter of the Year in the region of Asia Pacific, Middle East and Africa for the year 2013.

CCP has also voluntarily requested UNCTAD to undertake a peer review of competition law and policy in Pakistan which is to be carried out by competition policy experts that are to prepare an assessment report “Voluntary Peer review of Competition Law and Policy: Pakistan” to be presented in the 13th Session of the Intergovernmental Group of Experts in Competition Law and Policy. The assessment report is to be finalized before the 13th Session of the Intergovernmental Group of Experts in Competition Law and Policy to be held in July 2013.

*How is it perceived by the general public?*

The perception of the Competition Law by the General Public may be gauged from the increasing number of complaints that are received by the CCP regarding possible violations. The CCP has established an online complaint cell so that the public may be

able to report any behavior or conduct that they perceive as being violative of the provisions of the Competition Act. Furthermore, the CCP's work receives positive media coverage by the local media.

The perception of the work of the CCP at the international level has also been greatly appreciated and recognized. The CCP has held two international conferences to date which have been attended by representatives of a large number of competition agencies from around the world. At the 2<sup>nd</sup> International Conference held by the CCP in December 2011, Mr. Russel Damtfof of US FTC said that “*the US FTC could not achieve in 50 years what CCP has achieved in 4 years*”.

The performance of the CCP has been appreciated at other platforms such as the 3<sup>rd</sup> International Conference organized by International Academy of Law held in Delhi in November 2011 where William Kovacic said that “*Pakistan and Egypt are one of the best performing recently established agencies*”. Professor John M. Connor (Professor Emeritus of Agricultural Economics) at Purdue University in his letter of appreciation for the work of the CCP stated that the decisions of the CCP are “*exemplars of clarity, logic and restraint*”. The CCP in 2011 became first regulatory authority from South Asia to be short-listed by the Global Competition Review for an award in the category ‘Agency of the Year – Asia-Pacific, Middle East and Africa’ for 2012 and 2013 which in itself speaks of its performance.

Another example of the perception of the work of the CCP is the matters referred by the Supreme Court to the CCP for its input and expertise regarding competition aspects, which include the costing of sugar and the International Clearing House Exchange arrangement between the LDI Operators. More recently, the Hon’able Lahore High Court has also engaged the CCP to review the Hajj Policy and the State of Competition in the Hajj Sector. This shows that the trust of the Judiciary in the expertise of the CCP regarding competition law related matters.

*What are its social aims, if any?*

It needs no emphasis that the main objective of having the Competition Law/Antitrust Laws has been to prohibiting cartels, abuse of dominant position, deceptive marketing practices and scrutinize mergers and acquisitions to check their effects and promote competition by introducing a system of checks and balances so that the economy flourishes in a manner that is beneficial for the consumers.

There is no cavil to the proposition that the Competition law is a *unique law* as it stresses the necessity of protecting the process of competition and also refers to the broader political and social policy goals. It aims to strike a balance between unrestrained interaction of competitive forces and the preservation of democratic, political and social institutions. This balance is essential for the co-achievement of economic goals such as lowest prices, highest quality, greater variety of products, faster pace of invention and innovation, improvement in economic welfare and of social goals like consumer welfare, self reliance, optimum allocation etc. which are interrelated by their very nature.

The social objectives of competition law through wide in scope and dimension, however, the prime area of focus of such objectives is to safeguard the public interest and welfare. The social objectives of Competition Law *inter alia* include:

**Education, Employment, and Health:** All laws need to give due regard to the basic human rights and competition law is no exception to this. Market imperfections have to be corrected for achieving the goal of ensuring basic freedoms for all people. The basic ingredients of a dignified human life like education, employment and health have to be given proper impetus and equal opportunities have to be afforded to all. It is necessary to achieve and maintain a high level of employment and to improve job distribution. In addition, all acts purporting to infringe these basic human rights should be curbed.

**Optimum Allocation of Available Resources:** Competition Law aims at promoting efficiency in respect of production, supply, distribution, acquisition and control of goods or provision of services which is possible only when the present resources are judiciously utilized and maximum benefit is accrued from them. For this purpose it is necessary that there is optimum allocation of resources in the competitive market. Fairness and reasonableness are the keys to achieve this objective.

Another important aspect is that growth and welfare can only be sustained when there is minimum wastage and so it is imperative that all resources should be effectively and efficiently utilized for the greatest good of the greatest number.

**Open Market Policy:** An open market is essential to promote and sustain the competitive process. An open market policy aims at enhancing the competition or competitive outcomes in the markets which ultimately promotes efficiency and social welfare. On the other hand, a closed market limits the competition by restricting the quantity and quality of market players and may also give rise to monopoly and abuse. A closed market policy also harms innovativeness and efficiency and consequently the consumers may get unsatisfactory quality of goods and services. Important aspects of an open market policy are a liberalized trade policy, conducive entry and exit conditions, reduced controls and greater reliance on market forces.

**Achieving Self Reliance:** Self reliance or non dependence is the key to success in any field. Dependency is a sign of weakness and promotes subjugation. Hence, competition law strives to achieve strength in the form of self reliance because any sort of dependence or subjugation will harm the social interests. For this purpose it is necessary to promote, build and sustain strong competition culture within the country. At the same time, practices that make or are likely to make the country dependent on outside forces also need to be discouraged. Self reliance will also help the domestic firms and companies in realizing their aim of becoming globally competent.

**Concept of Single National Market:** A single national market is desirable because fragmented markets are impediments to competition. For establishing and sustaining such a market it is important to achieve harmonization of policies, laws and procedures regarding different dimensions of competition at all levels of governance. Further, an institutional mechanism with a synergized relationship between the national and sectoral regulators will also be required.

Establishment of such a market would also result in the capacity building of all the stakeholders including law makers, judiciary, policy makers, business, trade associations, consumers and their associations, and the members of the civil society

**Resale Price Maintenance:** Manufacturers and suppliers have always inadvertently tried to enforce a minimum price at which their goods can be resold by dealers or retailers. This practice adversely affects the public because it causes an increase of prices in the resale market. Competition law aims at curbing this practice and allowing for free pricing of goods in the resale market.

**Consumer Welfare and Protection:** It is most essential to encourage the competitive process so as to maximize consumer welfare and to protect consumer interests. The benefits from competition in economic growth and in enhancement of consumer welfare are self evident and widely recognized. An important aspect of consumer welfare is offering wider choice to consumers at lower prices. In common parlance, competition in the market means sellers striving individually for buyer's patronage to maximize profit or other business objectives. Such competition makes enterprises more efficient and innovative and consequently the consumers are benefited.

**Competition Advocacy:** The need for Advocacy is obvious in a subject like competition. Enforcement of the competition law alone is not sufficient for ensuring competition in the market because the purpose will not be completely achieved until and unless there is strong competition awareness amongst market players. This is essential because it would encourage self compliance and reduce the need for direct action against erring firms or companies. Advocacy is often referred to as compliance without enforcement. Thus, competition advocacy and enforcement can be said to be mutually complementary. Seminars, workshops, training and awareness programmes are some modes of achieving the above stated purpose.

**Principles of Equity:** There are certain special aspects like allocative efficiency, greater good of greater numbers, consumer sovereignty, equality of opportunity, and freedom to trade which are sacrosanct and any infringement is to be seriously viewed. There maybe different situations and each one has to be handled in a fair and reasonable manner, and thus a same approach may not be adopted in every matter.

The relationship between competitive markets and democracy is also evident here, as the nature of market mechanism is judged by its allocative efficiency in the same manner as democratic institutions are judged by the degree of equity they create. It may also be said that the concepts of consumer sovereignty in economic literature and voter rights in democracy have the same philosophical source.

**Democratic Principles:** The basic tenets of a democracy and of market competition are ingrained in the same value system, i.e., the pillars of public interest, common good, welfare and prevention of practices that result in common detriment. The goals of democracy and market competition are similar in many respects and the most important among them are freedom of individual choice, abhorrence of concentration of power, decentralized decision making, and adherence to rule of law.

Competitive markets and democratic governments can therefore be considered complementary in correcting market imperfections. They need to interact in a manner that maximizes the larger public interest and such an interaction would be the most ideal relationship for achieving the above stated goals

**Welfare State Principles:** The aims of the national competition policy are to a certain extent similar to those of the welfare state principles like preservation of the

competitive process, encouragement of competition in the domestic market, optimization of efficiency, maximization of consumer welfare, and most importantly, harmonization of social justice with economic growth.

*What kind of economic environment was this law introduced in?*

A growing economy is by definition a more competitive economy as it opens up opportunities for new investors and entrepreneurs and brings them into the economic mainstream. Following a lackluster performance during much of 1990s the Pakistan economy enjoyed period of markedly faster output growth between 2003-04 and 2006-07. The highlights of the economic environment<sup>1</sup> at the time of promulgation of Competition Law are as follows:

The Economic Growth was 7.0 percent. The economy grew at an average rate of 7.5 percent per annum during last four years (2004-07). It grew at an average rate 7 percent per annum during the last 5 years (2003-07).

The real per capita GDP grew by 5.2 percent and maintained an average growth of 5.5 percent per annum over last four years;

Per capita income in current dollar-term was up by 11.0 percent, to \$925 from \$833 of last year. A strong recovery in overall agricultural growth at 5.0 percent and major crops at 7.6 percent.

Highest production of wheat (23.52 million tons) in the country's history. An impressive 22.6 percent increase in sugarcane production (54.7 million tons--second highest production level in the history);

Large-scale manufacturing continued to grow robustly at 8.8 percent, albeit at a somewhat less torrid pace than last year. The overall services sector continued to maintain solid pace of expansion at 8.0 percent;

A sharp pickup in overall investment, reaching a new height of 23 percent of GDP and, most notably, private investment remained buoyant owing to the persistence of strong consumer demand. Despite monetary policy tightening the credit to private sector continued to grow strongly (12.2 percent) on the back of improving investment climate;

On the fiscal side, the overall budget deficit target (4.2 percent of GDP) and revenue collection target of the Central Board of Revenue (CBR) were achieved. Across all measures of vulnerability to external shocks, Pakistan's debt profile improved significantly over the past year;

Public debt declined from 56.9 percent to 53.4 percent of GDP and external debt and liabilities declined from 29.4 percent to 27.1 percent. Workers' remittances totaled \$4.5 billion in the first ten months (July-April) of the fiscal year as against \$3.6 billion in the same period of last year, depicting an increase of 22.6 percent. If this

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<sup>1</sup> Economic Survey of Pakistan 2006-2007

trends is maintained, workers' remittances are likely to touch \$5.5 billion for the year -the highest so far in the country's history;

Highest foreign investment flows at around \$6 billion in ten months (July-April), and the year is expected to end with \$6.5 billion. Exchange rate continued to remain stable despite widening of trade and current account deficits, clearly indicating strong inflows of external resources;

The successful launch of a new \$75.0 million 10-year sovereign bond in international debt capital market with seven times over-subscription has been the defining moment in Pakistan's history as it reflected a strong vote of confidence by global investors on Pakistan's current economic prospects and future economic outlook.

Despite of the above economic conditions at the relevant time, the economy was still dominated by the monopolies and the trend of cartelization was alarmingly high in various sectors of economy. This was due to the fact that in the past few economic and trade organizations had been given a “free hand” in and they were allowed to make cartels and steal from the people through arbitrary fixation of prices.

*What kind of legal environment was the law introduced in?*

At the time of promulgation of the Competition Law in Pakistan i.e. 02-10-2007 the Monopolies and Restrictive Trade Practices (Prevention and Control) Ordinance, 1970 (hereinafter the ‘**MRTPO**’) was in place.

In addition to the MRTPO other Sector Specific Laws being administered by Sector Specific Regulators were also in place i.e. The State Bank of Pakistan Act, 1956 (**Banking Sector**), Pakistan Civil Aviation Authority Ordinance, 1982 (**Aviation Sector**), Securities and Exchange Commission of Pakistan Act, 1997 (**Corporate Sector**), Pakistan Telecommunication (Re-organization) Act 1996 (**Telecom Sector**), Pakistan Electronic Media Regulatory Authority Ordinance, 2002 (**Electronic Media Sector**), Oil and Gas Regulatory Authority Ordinance, 2002 (**Oil & Gas Sector**), National Electric Power Regulatory Authority Act, 1997 (**Electric Power Sector**), Pakistan Nuclear Regulatory Authority Ordinance, 2001 (**Nuclear Power Sector**), Pakistan Procurement Regulatory Authority Ordinance 2002 (**Procurement Sector**), Pakistan Environmental Protection Act, 1997 (**Environment**) and National Database Registration Authority Ordinance, 2000 (**Database Registration Sector**).

Although the newly established regulators are entrusted with the responsibility to promote competition in their respective sectors; however, no specific provision or mandate was available to them to take action against anti-competitive practices such as the abuse of dominance, prohibited agreements (cartelization), deceptive marketing practices and mergers/acquisitions that substantially lessens the competition. Moreover, the MCA had no power over the governmental bodies or state owned entities and undertakings who are regulated by any other body i.e. sector specific regulator.

The Government was conscious of the foregoing and, therefore, with the aim of to promoting sustainable economic development and improving the well-being of all citizens by protecting and promoting competition in the economy promulgated the specialized Competition Law in the shape of Competition Ordinance, 2007 on 02-10-

2007 and established a specialized body to implement the said law i.e. the Competition Commission of Pakistan.

*What competition regime existed prior to 2007?*

1960's was a decade of rapid economic growth in Pakistan, which at the same time became concentrated in the hands of twenty family groups.<sup>2</sup> These groups collectively held "two thirds of the industrial assets, 80 percent of banking and 70 percent of insurance in Pakistan."<sup>3</sup> This growing concentration of market-shares in the hands of a few prompted the government to commission a detailed study into the trade, commerce, and industry of the country. To this end, in 1963 the government constituted an Anti-Cartel Laws Study Group,<sup>4</sup> which in its report found that certain monopolies, cartels, and vertically-integrated situations existed in the country. On the basis of the Anti-Cartel Laws Study Group report, a draft anti-monopoly and anti-cartel law was published in the Gazette of Pakistan (Extraordinary) on June 28, 1969 for public comment.<sup>5</sup> On February 26, 1970, the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (the 'MRTPO') was promulgated.<sup>6</sup> It came into force on August 17, 1971.<sup>7</sup> Section 8 of the MRTPO stipulated the establishment of the Monopoly Control Authority (the 'MCA') for the implementation of the MRTPO. The MCA was constituted the same day the MRTPO became effective.<sup>8</sup>

The bare reading of the provisions, leads to the conclusion that the MRTPO was designed mainly to break up single or familial ownership of businesses in the country by introducing ceilings on private ownership and limits on mergers and acquisitions. MRTPO also sought to prohibit collusive behavior, both horizontal and vertical. However, it allowed for exceptions to certain prohibitions by introducing the concept of economic efficiency. To oversee implementation, the Monopoly Control Authority (MCA) was formed and vested with the power to conduct enquiries into possible violations and, on finding violations, to order remedial measures and impose penalties.

*What spurred the need for a new competition law?*

MCA lost its independent existence as in 1981 it was made part of the Corporate Law Authority.

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<sup>2</sup> Ul Haq, Mehub, *The Poverty Curtain: Choices for The Third World* 5-6 (1976).

*See also Pakistan: Competition and Price Regulations*, EIU VIEWSWIRE, Oct. 18, 2005, available at 2005 WLNR 16882705 [hereinafter *Pakistan: Competition*] ("No major monopolies remain in Pakistan (apart from public-sector utilities), despite the pre-1970s dominance of cartels and monopolies controlled by a handful of powerful families.").

<sup>3</sup> *Ibid.*

<sup>4</sup> Organization for Economic Cooperation and Development, *Global Forum on Competition: Roundtable on Bringing Competition into Regulated Sectors*, Contribution from Pakistan; (Feb. 9, 2005), available at <http://www.oecd.org/dataoecd/14/44/19936969.pdf> [hereinafter CONTRIBUTION FROM PAKISTAN].

<sup>5</sup> Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (Pakistan) (Published in the Gazette of Pakistan, Extraordinary, Feb. 26, 1970) [hereinafter MRTPO].

<sup>6</sup> *Ibid.*

<sup>7</sup> *In re Messrs Jupiters Textile Mills Ltd.*, Monopoly Control Authority, 1986 CLC 2744 at 2745.

<sup>8</sup> Contribution from Pakistan, *supra* note 3

MRTPO proved far from efficacious due to several legal, economic and political considerations. Almost immediately after its promulgation, the government nationalized all major industries, which then, due to the exemption given to state owned enterprises, did not attract the application of the MRTPO till the privatization process started in the nineties. The MCA started asserting itself in the mid 1990's, but had to face a lot of interference in carrying out its functions.

In wake of the changing economic realities, MCA found itself to be rather toothless: it had no power to make pre-merger notification mandatory, or go after state owned enterprises, or after the undertakings who are already regulated by sector specific regulators or to do anything more than slap a violator on the wrist by imposing a maximum fine of Rs. 100,000/- (Rupees One Hundred Thousand Only).

At that time, it was obvious that the MCA could not accomplish in light of changing economic and business conditions taking shape in the world and the trends affecting competition regimes. The weaknesses in the old competition regimes also became apparent as Pakistan embarked on a reform program, generally referred to as first generation reforms, in the early 2000s.

The Government of Pakistan soon became aware that all over the world institutions such as the MCA were being replaced by Competition Agencies that had a broader, more progressive and more refined mandate. The work of such competition agencies was playing a more specific role in ensuring better quality of goods and services and lower prices for consumers. Given the imperative to adapt to global trends and changes, the Government, under the umbrella of second-generation reforms, has enacted a new competition law with assistance from the World Bank.

At the strategic level, an effective competition policy framework involving a multifaceted set of initiatives was formulated by the Government with the aim of providing equal opportunity to all capable entities to participate in economic activity. This competition policy framework included (i) a modern enabling law, (ii) specific rules and regulations to make the law operational, (iii) guidance for corporate behaviour, (iv) the education and empowerment of consumers and other stakeholders, (v) public policy advocacy, (vi) a professionally competent, autonomous institution to enforce the law.

It was expected that implementation of the new law would empower consumers and instill confidence among domestic and foreign investors. Undertakings will be compelled to compete on prices, improve quality, enhance choices, and expand availability of goods and services. They will be better encouraged to observe better standards of business standards. Accordingly, the Competition Ordinance, 2007, which replaced the MRTPO, was promulgated on 02-10-2007 and the Competition Commission of Pakistan was established on 12-11-2007 to implement the Competition Law.

*What are the international influences on this law? (Which regime has had the strongest impact and why? Were there any ideological reasons for this impact? Or was it only a coincidence?)*

The Competition Act is primarily based on the Treaty of Rome and has been tailored to take into account the socio economic realities. However, in doing so, it is still on all

counts in accord with international best practices and conforms to the recommendations of the Organization for Economic Co-operation and Development (the 'OECD') and other international regional bodies.<sup>9</sup>

However, while interpreting the provisions of the Competition Act, the CCP takes guidance from the judicial precedents from the mature jurisdiction in Competition Law such as the U.S.A and European Union.

*How are Constitution law institutions structured in Pakistan?*

This Question is not clear. The questionnaire which has been forwarded to the undersigned pertains to the evolution of competition law and the competition law in Pakistan; however, if you require for provision of the structure of all the institutions under the Constitution, this would require a tedious and long exercise, and perhaps the same would be of no relevance to the instant questionnaire.

In light of the above, you are requested to kindly review and rephrase and/or clarify this question in order for the undersigned to respond appropriately.

*What is the extent of the Commission's interaction with foreign authorities? Are there any agreements or protocols that it has signed?*

CCP is striving to play an active role at the international level because anti-competitive practices stemming from cross-borders may also affect welfare of Pakistani citizens. CCP actively participate in activities of the International Competition Network, OECD, WIPO, IBA and UNCTAD. Apart from being represented at various conferences and workshops (including tele-conferences for training purposes) organized by these bodies, groups of CCP officers participated in the training specifically organized by the OECD, JAICA, U.S. Federal Trade Commission, Kings College London, U.K. Office of Fair Trading and Turkish Competition Agency for CCP.

*Does the Commission engage with the public, on what areas of the economy it wishes to focus on? Does it issue "Practice Notes" or Guidelines for the benefit of the general public? How does the Commission determine its enforcement agenda?*

Under the provisions of clause (d) of subsection (1) of Section 28 of the Competition Act CCP is empowered to promote competition through advocacy in addition to rigorous enforcement. The CCP is of the view that the perception of a regulatory authority in the eyes of the general public, business community and other government and regulatory bodies has a significant impact on the its effectiveness. Being aware that like other developing countries Pakistan also faces the challenge to build competition culture, the CCP is vigorously pursuing an advocacy agenda to inform, educate and persuade its stakeholders on the need and implementation of competition law. The advocacy agenda of the CCP is broad-based and focuses on education of a wide range of stakeholders including the government, industry, media, undertakings and the civil society. Advocacy activities of the CCP include media appearances/coverage, interviews, press releases, seminars, advocacy meetings and media training

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<sup>9</sup> [http://www.oecd.org/document/59/0,3343,en\\_2649\\_34715\\_4599739\\_1\\_1\\_1\\_37463,00.html](http://www.oecd.org/document/59/0,3343,en_2649_34715_4599739_1_1_1_37463,00.html)

workshops, roundtables and bilateral meetings with sector-specific regulators. The CCP has also held to date one national conference and two international conferences in order to create awareness and understanding about the competition regime in Pakistan.

The CCP has also established an informal think tank in the form of the Competition Consultative Group (CCG). The purpose of establishing CCG is to provide a platform for informal feedback and guidance with respect to the CCP's ongoing activities and proposed initiatives. It is a small, select body comprising of around 15 eminent persons essentially drawn from sector-specific regulatory agencies, relevant professional bodies, and the private sector. The regulatory bodies represented at the CCG are: The Oil and Gas Regulatory Authority (OGRA) ; Pakistan Electronic Media Regulatory Authority (PEMRA) , National Energy & Power Regulatory Authority (NEPRA), Pakistan Telecommunications Authority (PTA), State Bank of Pakistan (SBP), Civil Aviation Authority (CAA), and the Securities and Exchange Commission of Pakistan (SECP) . The CCG convenes quarterly to discuss and deliberate on issues pertaining to competition. The CCG is aimed at bringing together these participants and to address the concerns of all stakeholders in a positive manner.

Under the provisions of Section 29 of the Competition Act, the CCP also conducts open public hearings on the state of competition in any given sector and may issue its opinion for the concerned to take into account. So far the CCP has issued opinion in the following two matter: Opinion on Fixing of Minimum price in the Cigarette Industry; and Opinion on Exemption of Regulatory Duty on Import of Ware Potatoes.

It is worth mentioning that under the provisions of Regulation 41 of the Competition Commission (General Enforcement) Regulations, 2007, CCP is empowered to issue guidelines. In this regard following guidelines have been issued by the CCP so far:

- (i) Guidelines regarding “Deceptive Marketing for Telecom Sector”
- (ii). Guidelines regarding “Merger”
- (iii). Guidelines regarding “Conduct of Proceedings before the Commission”
- (iv). Guidelines regarding “Imposition of Financial Penalties (Fining Guidelines)”
- (v). Guidelines regarding “Online Submission of Pre-Merger Applications”
- (vi). Guidelines regarding “Seeking Advice”
- (vii). Guidelines regarding “Reward Payment to Informants Scheme”.

It is also worth mentioning that more recently the CCP has also issued a Voluntary Compliance Code for the Corporate/business entities. Moreover, under the provisions of Section 57 and 58 of the Competition Act, any rules and regulations or amendment thereon before coming into force are subject to publication in the official gazette and in two newspapers of wide circulation for eliciting public opinion thereon within a period of not less than thirty days from the date of publication to solicit the opinion of general public.

Even in the enforcement actions, the Competition Act obligates it upon CCP to provide the undertakings concerned (stakeholders) a reasonable time to respond in writing and also to avail the opportunity of hearing. Due process is observed in its entirety before passing of any decision.

While allocating resources, enforcement remains our priority. Those issues are chosen that may cause more harm to competition and the economy and where impact on public is highest. However, CCP is flexible in its approach and takes decision according to the circumstances and importance of an activity. Generally, the guiding principles are:

- (i). *Strategic value*: Focusing on work that best fits within CCP's overall mandate.
- (ii). *Impact*: Focusing on work that is expected to have a higher impact in meeting our objectives, given the resources used.

*How and to what extent does the Commission interact with other policy-making and legislative bodies to ensure that competition matters are taken into account?*

Under the provisions of Section 29 of the Competition Act and in particular clause (b) of Section 29, the CCP is empowered to review policy frameworks for fostering competition and making suitable recommendations for amendments to the Competition Act and any other laws that affect competition in Pakistan to the Federal Government and Provincial Governments. In this regard, CCP to date has issued 13 Policy Notes to the concerned. They are as follows:

- (i). To Securities & Exchange Commission of Pakistan on IAS 39;
- (ii). To Securities & Exchange Commission of Pakistan on Circular no. 26/08 regarding fixing of percentage of discount rates on debt securities;
- (iii). On the demutualization and integration of Stock Exchanges in Pakistan;
- (iv). To the Government of Pakistan to amend Bilateral Air Services Agreement of 1972;
- (v). On Price Fixing Agreement between All Pakistan Sugar Mills Association and Ministry of Industries and Production;
- (vi). To the Civil Aviation Authority on entry fee at the Benazir Bhutto Air Port, Islamabad;
- (vii). To the Karachi Stock Exchange regarding their listing regulations;
- (viii). To the Securities & Exchange Commission of Pakistan to assist in developing the new framework for cost accounting information sharing;

- (ix). To the local authorities for the reform of price determination practice for fresh milk;
- (x). To the Government of Punjab regarding the complete ban on the establishment of new sugar mill and on the expansion in the capacity of existing sugar mills;
- (xi). To the Ministry of Information & Technology on the Policy Directive dated 13-08-2012 for establishment of International Clearing House Exchange;
- (xii). To the Ministry of Finance and Revenue on the amnesty scheme for smuggled/seized vehicles; and
- (xiii). On the rationalization of duty structure on pet resin

## ANNEXE B

### List of Persons Interviewed in India and Pakistan

INDIA	
No.	Name & Position
1.	Dr. Aditya Bhattacharjea Professor, Delhi School of Economics, University of Delhi
2.	Mr. Percival Billimoria, Advocate, Senior Partner AZB & Partners New Delhi (now head Delhi Office, Cyril Amarchand Mangaldas)
3.	Dr. Geeta Gauri, Former Member Competition Commission of India
4.	Dr. Seema Gaur, Advisor, Competition Commission of India
5.	Mr. John Handoll, Lawyer, Competition Specialist, Shardul Amarchand Mangaldas
6.	Mr. Dhanendra Kumar, Former Chairman, Competition Commission of India
7.	Mr. M S Sahoo, Member, Competition Commission of India
8.	Mr. K. K. Sharma Former DG Investigations, Competition Commission of India
9.	Mr. Udai Mehta, Deputy Executive Director, CUTS International, Jaipur
PAKISTAN	
10.	Mr. Ijaz Ahmed, Advocate Supreme Court of Pakistan, Ijaz Ahmed & Associates
11.	Mr. Uzair Karamat Bhandari, Advocate Supreme Court of Pakistan, Senior Partner, HaidermotaBNR, Lahore
12.	Mr. Bilal Hamid, Chief Financial Officer, Lafarge Pakistan Limited
13.	Ms. Rahat Kaunain Hassan, Former Chairperson, Competition Commission of Pakistan
14.	Mr. Ejaz Ishaq Khan, Advocate Supreme Court of Pakistan, Partner, Aqlaal Advocates
15.	Major General (Retd.) Rehmat Khan Former Chief Executive Officer, Lafarge Pakistan Limited
16.	Mr. Salman Akram Raja, Advocate Supreme Court of Pakistan, Senior Partner, Raja Muhammad Akram & Co.
17.	Mr. Asif Saad, Former Chief Executive Officer, Lotte Pakistan Limited
18.	Dr. Joseph Wilson, Chairman, Competition Commission of Pakistan

ANNEXE C

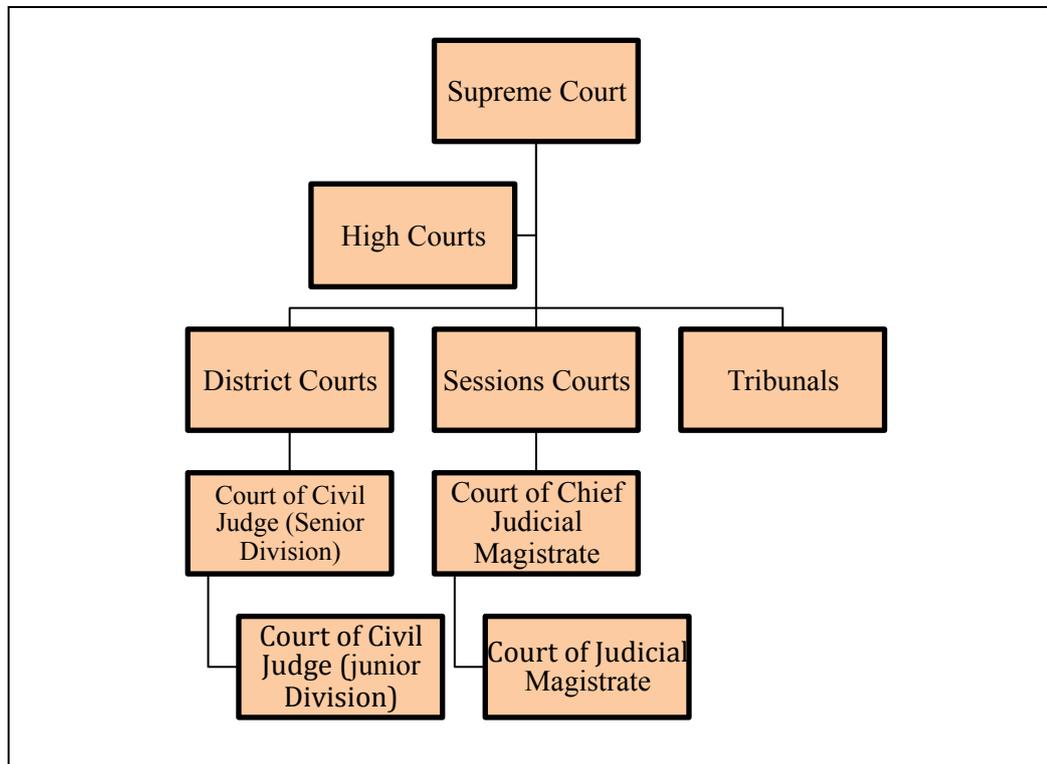
**Presidents, Prime Ministers and Martial Law Administrators**

**India and Pakistan 1947-2017**

Year	India			Pakistan		
	Governor General	President	Prime Minister	Governor General	President	Prime Minister
1947	Lord Mountbatten		J. Nehru	M.A. Jinnah		L.A. Khan
1948				K. Nazimuddin		
1950		R. Prasad				
1951				G. Mohammad		K. Nazimuddin
1951						M. A. Bogra
1955				Major Gen. Iskander Mirza		C.Muhammad Ali
1956					Major Gen. Iskander Mirza	H.S. Suhrawardy
1957						I.I. Chundrigar
1957						F.K. Noon
1958					[Military Coup]	[Constitution Suspended]
1962		S.Radhakrishnan			Field Marshall M. A. Khan	
1964			G. Nanda			
1964			L.B. Shastri			
1966			G. Nanda			
1966			I. Gandhi			
1967		Z. Hussain				
1969		V.V. Giri			General Yahya Khan	[Constitution Suspended]
1969		M. Hidayatullah				
1969		V.V. Giri				
1971					Z.A. Bhutto	Nurul Amin
1971						[Constitution Suspended]
1973					F.E. Chaudhry	Z.A. Bhutto
1974		F. Ahmed				
1977		B.D. Jatti	M. Desai			[Constitution Suspended]
1977		N. S. Reddy				
1978					General M. Zia-ul-Haque	
1979			C. Singh			
1980			I. Gandhi			

1982	G.Z. Singh			
1984		R. Gandhi		
1985				M. K. Junejo
1987	R. Venkatraman			
1988			G.Ishaq Khan	[Constitution Suspended] B. Bhutto
1988				
1989		V.P. Singh		
1990		C. Shekhar		G.M. Jatoi
1990				N. Sharif
1991		P.V.N Rao		
1992	S.D. Sharma			
1993			W. Sajjad	B.S. Mazari
1993			F.A.K. Leghari	N. Sharif
1993				M.A. Qureshi
1993				B. Bhutto
1996		A.B. Vajpayee		M.M. Khalid
1996		H.D.D. Gowda		
1997	K.R. Narayanan	I.K. Gujral	W. Sajjad	N. Sharif
1998		A.B. Vajpayee	M.R. Tarar	
1999				[Constitution Suspended]
2001			General P. Musharraf	
2002	A.P.J. Abdul Kalam			Z. Jamali
2004		M. Singh		C.S. Hussain
2004				S. Aziz
2007	P.Patel			M.M. Soomro
				[Constitution Suspended]
2008			M.M. Soomro	Y.R. Gillani
2008			A.A. Zardari	
2012	P.Mukherjee			R.P. Ashraf
2013			M. Hussain	N. Sharif
2014		N. Modi		
2015				
2016				
2017				

## An Overview of the Indian Legal System<sup>1</sup>



### 1. THE SUPREME COURT

The Supreme Court of India is the apex court of the country comprising the Chief Justice of India and 30 other judges.<sup>2</sup> The Supreme Court primarily acts in the exercise of three distinct jurisdictions:

- a. appellate jurisdiction in respect of any judgment, decree or final order of a high court whether in a criminal, civil or other proceeding on the basis of any grounds specified in the Indian constitution or if the high court concerned certifies that the case involves a substantial question of law as to the interpretation of the Indian constitution or if the Supreme Court gives special leave to appeal;<sup>3</sup>
- b. original jurisdiction in respect of any disputes between the government of India and any of the states or disputes between states,<sup>4</sup> as well as by way of writ jurisdiction which includes the power to issue writs of habeas corpus, mandamus,

<sup>1</sup> In this diagrammatic representation, I have shown the tribunals to be under the high courts for the reason that tribunals established under the Indian constitution are under the administrative control of the high courts of their states. This does not mean, however, that the appeals from decisions of tribunals automatically lie to the high courts as appeals may lie to any court specified in the legislation establishing the tribunal.

<sup>2</sup> Article 124(1) Indian constitution.

<sup>3</sup> Article 132, 133, 134 and 136 Indian constitution.

<sup>4</sup> Article 131 Indian constitution.

prohibition, quo warranto or certiorari to enforce any of the fundamental rights secured by the Indian constitution or in respect of such other matters as the Parliament may be legislation specify.<sup>5</sup> In addition to jurisdiction in these matters, the Supreme Court may in pursuance of article 138 of the Indian constitution, have and exercise such further jurisdiction and powers as the parliament may by law confer on the Supreme Court, and

- c. advisory jurisdiction on a matter of public importance that may be referred to it by the President.<sup>6</sup>

Any person may be appointed as a judge of the Supreme Court if he or she is a citizen of India and has been a judge of the high court for a period of at least five years, an advocate of the high courts for a period of at least 10 years or is, in the opinion of the President, a distinguished jurist.<sup>7</sup> The President appoints judges of the Supreme Court in consultation with such judges of the Supreme Court and of the high courts as he may deem fit. Provided that the President always consults the Chief Justice of the Supreme Court, for the appointment of any judge of the Supreme Court other than its Chief Justice. Judges of the Supreme Court hold office until the age of 65 and may only be removed by the President on the ground of misbehaviour or incapacity, passed after an address of each house of parliament supported by a majority of the total membership of that house and by a majority of not less than two-thirds of the members of the house present and voting in this regard.<sup>8</sup>

## 2. THE HIGH COURTS

India is administratively divided into 29 states.<sup>9</sup> Each state has its own high court (which at times it may share with another state) consequently there are 24 high courts in India, each comprising a Chief Justice and such other judges as the President may appoint.<sup>10</sup> A number of Indian high courts were established during the time of the British.<sup>11</sup> In terms of article 225 of the Indian constitution, these high courts were allowed to exercise their original and appellate jurisdiction as it had been exercised prior to Independence in 1947. All high courts in India exercise appellate and original jurisdictions:

- a. appellate jurisdiction from decisions of the subordinate courts, and
- b. original jurisdiction in respect of matters in which the subordinate courts are not empowered to exercise jurisdiction or the jurisdiction is specifically conferred on

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<sup>5</sup> Articles 32 and 138 Indian constitution.

<sup>6</sup> Article 143 Indian constitution.

<sup>7</sup> Article 124(3) Indian constitution.

<sup>8</sup> Article 124(4) Indian constitution.

<sup>9</sup> The names of Indian States (in alphabetical order) are: (1) Andhra Pradesh (2) Arunachal Pradesh (3) Assam (4) Bihar (5) Chhattisgarh (6) Goa (7) Gujarat (8) Haryana (9) Himachal Pradesh (10) Jammu & Kashmir (11) Jharkhand (12) Karnataka (13) Kerala (14) Madhya Pradesh (15) Maharashtra (16) Manipur (17) Meghalaya (18) Mizoram (19) Nagaland (20) Orissa/Odisha (21) Punjab (22) Rajasthan (23) Sikkim (24) Tamil Nadu (25) Telangana (26) Tripura (27) Uttar Pradesh (28) Uttarakhand, and (29) West Bengal.  
<http://www.mapsofindia.com/maps/schoolchildrens/statesandcapitals.html>

<sup>10</sup> Articles 214 and 216 Indian constitution.

<sup>11</sup> In exercise of their powers under the Indian High Court Act 1861, the government of India Acts 1915 and 1935 and other special legislation for establishing particular high courts (e.g. the Mysore High Court Act 1884).

the high courts in pursuance of an act of parliament, and by way of writ jurisdiction which includes the power to issue to any person, authority or government within its territory, directions, orders and writs (including writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari) for enforcement of fundamental rights specified in the Indian constitution.<sup>12</sup>

Chief Justices of the high courts are appointed by the President in consultation with the Chief Justice of India and the governor of the relevant state, whereas all other judges of the high courts are appointed by the President in consultation with the Chief Justice of the relevant high court. A person is considered qualified to hold office as a judge of the high court if he is a citizen of India and has held a judicial position in India for a minimum of ten years or has been an advocate of the high court for a minimum of ten years. A judge of the high court may hold office until the age of 62,<sup>13</sup> unless removed earlier on the grounds of misbehaviour or incapacity, by a parliamentary resolution authorizing such removal.<sup>14</sup>

### 3. THE DISTRICT AND SESSIONS COURTS

The ‘subordinate courts’<sup>15</sup> or the district and sessions courts, with civil and criminal jurisdiction respectively, are at the very base of the Indian legal system as established by the Indian constitution.<sup>16</sup> These are the highest courts of the state governments in India. There may be one court for every district or for one or more districts depending on the number of cases and population distribution in the district. There may also be one or more additional district and sessions courts in each district. These courts are under the administrative control of the high court of the state to which the district belongs and appeals from the decisions of the district and sessions courts lie to the high courts.<sup>17</sup>

Courts subordinate to the district court on the civil side are:

- c. Court of the Civil Judge (Junior Division) which has jurisdiction over civil cases of a limited pecuniary jurisdiction, and
- d. Court of the Civil Judge (Senior Division) which has jurisdiction over cases of all valuation.

There may also be several Additional Courts of Civil Judge (Senior Division) that may exercise the same jurisdiction as the principal court.

Similarly, on the criminal side courts subordinate to the sessions court are:

- a. Court of the Judicial Magistrate that has jurisdiction over crimes punishable with imprisonment of up to five (5) years, and

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<sup>12</sup> Article 226 Indian constitution.

<sup>13</sup> Articles 127(1),(2), Indian constitution.

<sup>14</sup> Article 217(1), 124(4) Indian constitution.

<sup>15</sup> Indian constitution Part VI Chapter VI Articles 233-236 <http://lawmin.nic.in/olwing/coi/coi-english/coi-indexenglish.htm>

<sup>16</sup> <http://indiancourts.nic.in/districtcourt.html>

<sup>17</sup> Article 235 Indian constitution.

- b. Court of the Chief Judicial Magistrate that has jurisdiction over crimes punishable with imprisonment of up to seven (7) years.

There may also be a number of additional courts of Chief Judicial Magistrate with the same jurisdiction as the principle court.<sup>18</sup>

#### 4. TRIBUNALS

In addition to courts a, the Indian constitution also provides for the establishment of specialized tribunals in respect of matters listed in the relevant articles through special legislation passed either by the central or the state government in this regard. The constitution also allows for the exclusion of the jurisdiction of all courts (other than the Supreme Court) of matters falling within the scope of powers conferred upon these tribunals.<sup>19</sup> The high court of the state has superintendence over all tribunals operating throughout its jurisdiction.<sup>20</sup>

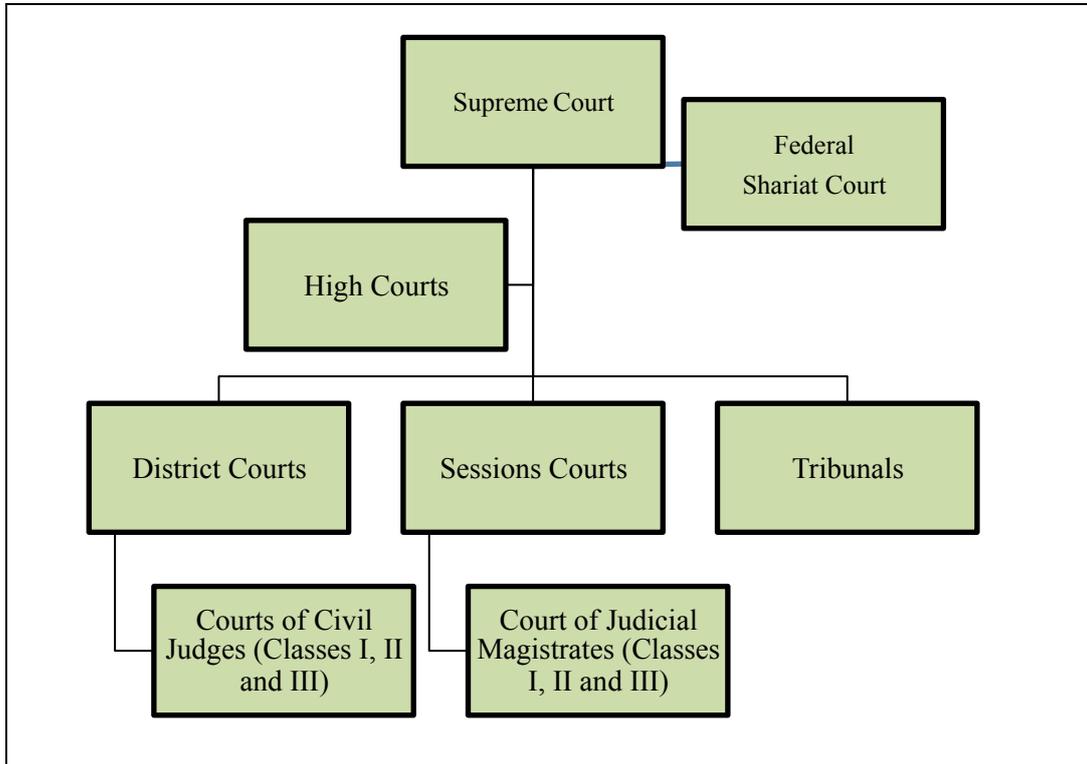
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<sup>18</sup> <http://indiancourts.nic.in/districtcourt.html>

<sup>19</sup> Articles 323A and 323B Indian Constitution. Although competition is not listed as one of the subjects in respect of which a tribunal may be set up and none of the constitution amending acts appear to amend these sections to allow for a competition appellate tribunal, the competition appellate tribunal is nevertheless lawful having been established in pursuance of valid legislation.

<sup>20</sup> Article 227 Indian constitution. Given that the competition appellate tribunal has not been established in pursuance of Articles 323A or 323B Indian constitution and is not located in or specific to any one state, it is likely that high courts do not have administrative control of the competition appellate tribunal.

## An Overview of the Pakistani Legal System<sup>1</sup>



### 1. SUPREME COURT

The Supreme Court is the apex court of the country and comprises a Chief Justice and such number of other judges as may be determined by the law or fixed by the President.<sup>2</sup> At the time of writing this, the Pakistani Supreme Court comprised the Chief Justice of Pakistan and 16 other judges.<sup>3</sup> The Supreme Court exercises three jurisdictions:

<sup>1</sup> In this diagrammatic representation, I show tribunals to be under the high courts for the reason that tribunals established under the Pakistani constitution are under the administrative control of the high courts of the provinces in which they operate. This does not mean, however, that appeals from decisions of tribunals automatically lie to the high courts as appeals may lie to any court specified in the legislation establishing the tribunal. Further, in this representation, I do not show the connection between the criminal courts and the FSC. This is so because there is no automatic right of appeal from decisions of the criminal courts to the FSC but only a discretionary power vested in the FSC to take cognizance of certain matters in relation to the question of Islamic law alone.

<sup>2</sup> Article 176 Pakistani constitution.

<sup>3</sup> In addition to the Chief Justice and 16 permanent judges, the Supreme Court of Pakistan presently also has two *ad hoc* judges.

- a. appellate jurisdiction in respect of final judgments, orders and decrees. In certain circumstances specified in the Pakistani constitution,<sup>4</sup> an appellant may invoke this jurisdiction as of right, or in all other circumstances, by obtaining leave to appeal from the Supreme Court;<sup>5</sup>
- b. original jurisdiction in respect of any disputes between any government within Pakistan<sup>6</sup> as well as by way of writ jurisdiction if it considers that the matter involves an issue of public importance with respect to the enforcement any of the fundamental rights secured through the Pakistani constitution.<sup>7</sup> In addition to these jurisdictions, the Supreme Court may exercise in any other matter as may be prescribed by the law,<sup>8</sup> and
- c. advisory jurisdiction in respect of a matter of public importance that may be referred to it by the President.<sup>9</sup>

The President appoints the Chief Justice and all other judges of the Supreme Court.<sup>10</sup> To be eligible for appointment as a judge of the Supreme Court a person is required to be a citizen of Pakistan and to have been a judge of the high court for a minimum of five years or an advocate of the high court for a minimum of 15 years.<sup>11</sup> The President may appoint such an eligible person as a judge of the Supreme Court upon the recommendation of a parliamentary committee, which in turn receives nominations from an appropriate judicial commission constituted for the purpose.<sup>12</sup> The president appoints the senior most judge of the Supreme Court as the Chief Justice of Pakistan.<sup>13</sup> Pakistan Supreme Court judges may remain in office until the age of 65,<sup>14</sup> unless removed by the president on grounds of misconduct or incapacity,<sup>15</sup> provided that the president must act in this regard on the recommendation of the Supreme Judicial Council<sup>16</sup> comprising the Chief Justice of Pakistan, two next senior most judges of the Supreme Court and two senior most judges of the high courts, other than the judge whose behaviour or capacity is being called into question.<sup>17</sup>

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<sup>4</sup> Article 185(2) Pakistani constitution.

<sup>5</sup> Article 185(3) Pakistani constitution.

<sup>6</sup> Article 184(1) Pakistani constitution.

<sup>7</sup> Article 184(3) Pakistani constitution.

<sup>8</sup> Article 175(2) of the Pakistani constitution.

<sup>9</sup> Article 186 of the Pakistani constitution.

<sup>10</sup> Article 177(1) of the Pakistani constitution.

<sup>11</sup> Article 177(2) of the Pakistani constitution.

<sup>12</sup> In terms of Article 175(2) of the Pakistani constitution, members of the judicial commission set up to appoint a judge of the supreme court, include the Chief Justice of Pakistan, four most senior judges of the Supreme Court, a former Chief Justice of Pakistan (nominated to the judicial commission for a period of two years, the Federal Minister for Law and Justice, the Attorney General of Pakistan and a senior advocate of the Supreme Court of Pakistan nominated by the Pakistan Bar Council for a period of two years. The parliamentary committee established in pursuance of article 175(9) comprises eight members drawn from both houses of parliament and representing in equal measure, the treasury and opposition.

<sup>13</sup> Article 175(3), Pakistani constitution.

<sup>14</sup> Article 179 Pakistani constitution.

<sup>15</sup> Article 209(6), Pakistani constitution.

<sup>16</sup> Article 209(7), Pakistani constitution.

<sup>17</sup> Article 209(2), Pakistani constitution.

## 2. HIGH COURTS

There are five high courts in Pakistan, one for each of the four provinces<sup>18</sup> and one for the Islamabad Capital Territory. Each high court comprises a Chief Justice and such other judges as may be appointed in accordance with the provisions of the Pakistani constitution.<sup>19</sup> The high courts exercise both appellate and original jurisdictions:

- a. *appellate jurisdiction* in respect of certain decisions of the district and sessions courts, and
- b. *original jurisdiction* in respect of matters beyond the pecuniary or other jurisdiction of the district and sessions court, as well as by way of writ jurisdiction which includes the power to issue to any person, authority or government within its territory, directions, orders and writs (including writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari) for enforcement of fundamental rights specified in the Pakistani constitution.<sup>20</sup>

The president appoints the Chief Justice and all other judges of the high court.<sup>21</sup> A person is considered eligible for appointment if he is a citizen of Pakistan, at least 45 years of age and an advocate of the high court for a minimum of ten years; a member of the appropriate civil service for a minimum of ten years and has served as a district judge for at least three years, or has held judicial office in Pakistan for a minimum of ten years. The president may make the appointment upon the recommendation of a parliamentary committee, which in turn receives nominations from an appropriate judicial commission constituted for the purpose.<sup>22</sup> A judge of the high court may hold office until the age of 62<sup>23</sup> unless removed by the president on the grounds of misconduct or incapacity,<sup>24</sup> provided that the President may only remove a judge on the recommendation of the Supreme Judicial Council.<sup>25</sup>

## 3. THE DISTRICT AND SESSIONS COURTS

The subordinate courts comprising the civil courts (established under the West Pakistan Civil Court Ordinance 1962) and the criminal courts (established under the Criminal Procedure Code 1898) respectively lie at the very base of the Pakistani legal system as established by the Pakistani constitution. In terms of Article 203 of the Pakistan constitution, the supervision and control of all subordinate courts is vested in the relevant high court. The civil courts consist of a District Judge, Additional District Judge, Senior Civil Judge, Class I, II and III. Similarly, the criminal courts comprise a Sessions Judge, Additional Session Judge and Judicial Magistrate Class I, II and III. Cases are brought before these courts in accordance with their pecuniary and territorial jurisdictions as fixed by provincial legislation for the provinces in which these courts operate. Appeal against the decision of civil courts lies to the District Judge and to the high court, if the value of the suit exceeds specified amount.

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<sup>18</sup> Sindh, Punjab, Baluchistan and Khyber Pakhtunkhwa.

<sup>19</sup> Article 175 and 175A, Pakistani constitution.

<sup>20</sup> Article 199, Pakistani constitution.

<sup>21</sup> Article 193, Pakistani constitution.

<sup>22</sup> See n. 12.

<sup>23</sup> Article 195, Pakistani constitution.

<sup>24</sup> Article 209(6), Pakistani constitution.

<sup>25</sup> Article 209(7), Pakistani constitution. See n. 16.

Similarly, in keeping with the quantum of penalty, appeals against criminal courts lie to Session Judge or high court. Appeals from judgments of the district and sessions courts usually lie to the high court.<sup>26</sup>

#### 4. TRIBUNALS

The Pakistani constitution also provides for the establishment of administrative courts and tribunals in respect of matters listed in the relevant articles of the constitution. These administrative courts and tribunals are created through special legislation passed either by the federal or provincial legislature in this regard. The constitution allows for a direct appeal to the Supreme Court from decisions of such administrative courts and tribunals provided that the conditions specified in the Pakistani constitution in this regard are satisfied.<sup>27</sup> The high court of the state has superintendence over all administrative courts and tribunals operating throughout its jurisdiction.<sup>28</sup>

#### 5. FEDERAL SHARIAT COURT

The Federal Shariat Court (the FSC) represents the most significant departure made by the formal Pakistani legal system from the legal system it had inherited at the time of Independence. The provisions relating to the FSC became effective on 26th May 1980 and the FSC was established soon thereafter and continues to operate to date. The FSC comprises eight (8) judges,<sup>29</sup> and may, either of its own accord, or on the petition of a citizen of Pakistan or any government within Pakistan, examine and decide whether or not any law or a provision of any law is contrary to Islam.<sup>30</sup> If the FSC finds that the law or provision of law that it has examined is contrary to Islam, its decision will take effect only after the period provided for appeal from that decision to the Supreme Court has expired and in cases where an appeal has been filed, until after the disposal of the appeal.<sup>31</sup> The FSC may also call for and examine the record or any case decided by a criminal court relating to the enforcement of certain Islamic laws. Appeal does not appear to be allowed from decisions of the FSC in this regard. In addition to the jurisdiction presently enjoyed by the FSC, the Pakistani constitution envisages the possibility of enhancing the jurisdiction of the FSC by appropriate legislation<sup>32</sup>

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<sup>26</sup> Hussain, *The Judicial System of Pakistan*.

<sup>27</sup> Article 212 Pakistani constitution. Although competition is not listed as one of the subjects in respect of which a tribunal may be set up, the competition appellate tribunal is nevertheless lawful having been established in pursuance of valid legislation.

<sup>28</sup> Article 203 Pakistani constitution. Given that the competition appellate tribunal has not been established in pursuance of Article 212 of the Pakistani constitution and is not located in or specific to any one province, it is likely that it does not fall within the administrative control of the relevant high court.

<sup>29</sup> Article 203(C)(2), Pakistani constitution.

<sup>30</sup> Article 203(D)(1), Pakistani constitution.

<sup>31</sup> Article 203(D)(2), Pakistani constitution

<sup>32</sup> Article 203(DD), Pakistani constitution.

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No.	Author	Text
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**A section-by-section View of the Indian Competition Law**

**THE COMPETITION ACT 2002**

**No. 12 of 2003 dated 13<sup>th</sup> January 2003**

**As amended by The Competition (Amendment) Act 2007 No. 39 of 2007 dated 24<sup>th</sup> September 2007**

Chapters		Titles			
Chapter I		Preliminary			
Section No.	Section title	Amended in 2007	Inserted in 2007	Omitted in 2007	Date notified
1.	Short title, extent and commencement				31.03.2003 <sup>1</sup>
2.	Definitions		2(ba) <sup>2</sup>		31.03.2003 (d), (g), (j), (k), (l) and (n) 19.06.2003 <sup>3</sup> 12.10.2007 <sup>4</sup>
Chapter II		Prohibition Of Certain Agreements, Abuse Of Dominant Position And Regulation Of Combinations			
3.	Anti-competitive Agreements				20.05.2009(1) <sup>5</sup> 20.05.2009(2) <sup>6</sup>
4.	Abuse of dominant position	4(1), 4(2), 4(2)(c), 4Exp (c)			20.05.2009(1)
5.	Combination	5(a)(i)(B), 5(a)(ii)(B),			04.03.2011 <sup>7</sup>

<sup>1</sup> S.O. 340(E) dated 31.03.2003.

<sup>2</sup> Amended by the Finance Act 2017, notified 26<sup>th</sup> May 2017.

<sup>3</sup> S.O. 715 (E) dated 19.06.2003.

<sup>4</sup> S.O 1747 (E) dated 12.10.2007.

<sup>5</sup> S.O. 1241(E) dated 15.05.2009.

<sup>6</sup> S.O. 1242(E) dated 15.05.2009.

6.	Regulation of combinations	5(b)(i)(B), 5(b)(ii)(B), 5(c)(i)(B), 5(c)(ii)(B) 6(2)	6(2A)	12.10.2007 04.03.2011
<b>Chapter III</b>		<b>Competition Commission of India</b>		
7.	Establishment of Commission			19.06.2003 12.10.2007
8.	Composition of Commission	Entire section substituted		31.03.2003 12.10.2007
9.	Selection Committee for Chairperson and Members of Commission	Entire section substituted		31.03.2003 12.10.2007
10.	Term of office of Chairperson and other members	10(1) Proviso		31.03.2003 20.05.2009(2)
11.	Resignation, removal and suspension of Chairperson and other members			19.06.2003 12.10.2007
12.	Restriction on employment of Chairperson and other members			19.06.2003 12.10.2007
13.	Administrative powers of Chairperson	Entire section substituted		19.06.2003 20.05.2009(2)
14.	Salary and allowances and other terms and conditions of service of Chairperson and other members			31.03.2003
15.	Vacancy etc. not to invalidate proceedings of Commission			19.06.2003 20.05.2009(2)
16.	Appointment of Director General	16(1), 16(2), 16(3), 16(4)	16(1A)	31.03.2003 20.05.2009(2)
17.	Appointment of secretary, experts, professionals and officers and other employees of Commission	Entire section substituted		31.03.2003 12.10.2007
<b>Chapter IV</b>		<b>Duties, Powers and Functions of Commission</b>		
18.	Duties of Commission			12.10.2007 20.05.2009(1)
19.	Enquiry into certain agreements and dominant position of enterprise	19(1)(a)		20.05.2009(1) 20.05.2009(2)
20.	Enquiry into combination by Commission	20(2)		20.05.2009(2)

<sup>7</sup> S.O. 479(E) dated 04.03.2011.

21.	Reference by statutory authority	21(1) Proviso, 21(2)		04.03.2011 20.05.2009(1) 20.05.2009(2)
21A.	Reference by Commission		New Section	
22.	Meetings of Commission	Entire section		19.06.2003
23.	[Distribution of business of Commission among benches]		Entire section	
24.	[Procedure for deciding a case where members of a bench differ in opinion]		Entire section	
25.	[Jurisdiction of Bench]		Entire section	
26.	Procedure for inquiry under section 19	Entire section		20.05.2009(1) 20.05.2009(2)
27.	Orders by Commission after enquiry into agreements or abuse of dominant position	27(b) Proviso, 27(g) Proviso,	27(c), 27(f)	12.10.2007 20.05.2009(1)
28.	Division of enterprise enjoying dominant position	28(1)	28(2)(d)	20.05.2009(1) 20.05.2009(2)
29.	Procedure for investigation of combination	29(1), 29(2)	29(1A)	12.10.2007 04.03.2011
30.	Procedure in case of notice under sub-section (2) of section 6	Entire section		12.10.2007 04.03.2011
31.	Orders of Commission on certain combinations	31(11)		20.05.2009(2) 04.03.2011
32.	Acts taking place outside India but having an effect on competition in India	Para 2 of section		12.10.2007 20.05.2009(1)
33.	Power to issue interim orders	Entire section		20.05.2009(2)
34.	[Power to award compensation]		Entire section	
35.	Appearance before Commission	First para		20.05.2009(1)
36.	Power of Commission to regulate its own procedure	Entire section		19.06.2003 20.05.2009(2)
37.	[Review of Orders of Commission]		Entire section	
38.	Rectification of Orders			20.05.2009(1) 20.05.2009(2)
39.	Execution of Orders of Commission imposing monetary	Entire section		20.05.2009(1)

40.	penalty [Appeal to Supreme Court]		Entire section	20.05.2009(2) 12.10.2007
<b>Chapter V</b>		<b>Duties of Director General</b>		
41.	Director General to investigate contravention	Explanation		12.10.2007 20.05.2009(1)
<b>Chapter VI</b>		<b>Penalties</b>		
42.	Contravention of Orders of Commission	Entire section		12.10.2007 20.05.2009(1)
42A.	Compensation in case of contravention of orders of Commission		Entire section	
43.	Penalty for failure to comply with directions of Commission and Director General	Entire section		12.10.2007 20.05.2009(1) 20.05.2009(2)
43A	Power to impose penalty for non-furnishing of information on combinations		Entire section	
44.	Penalty for making false statement or omission to furnish material information			12.10.2007
45.	Penalty for offences in relation to furnishing of information	45(1)		12.10.2007 20.05.2009(1)
46.	Power to impose lesser penalty	1 <sup>st</sup> , 2 <sup>nd</sup> , 3 <sup>rd</sup> Provisos		12.10.2007 20.05.2009(1)
47.	Crediting sums realized by way of penalties to Consolidated Fund of India			12.10.2007 20.05.2009(1)
48.	Contravention by companies			12.10.2007 20.05.2009(1)
<b>Chapter VII</b>		<b>Competition Advocacy</b>		
49.	Competition Advocacy	49(1), 49(2), 49(3)		19.06.2003 12.10.2007
<b>Chapter VIII</b>		<b>Finance, Accounts and Audit</b>		
50.	Grants by Central Government			19.06.2003
51.	Constitution of Fund	51(1)(d)	51(1)(b)	19.06.2003
52.	Accounts and Audit	Explanation to 52(2)		19.06.2003

53. Furnishing of Returns etc. to Central Government 19.06.2003

Chapter VIII A		Competition Appellate Tribunal	
53A.	Establishment of Appellate Tribunal <sup>8</sup>	Entire section	12.10.2007 15.05.2009
53B.	Appeal to Appellate Tribunal	Entire section	20.05.2009(2)
53C.	Composition of Appellate Tribunal	Entire section	20.12.2007 <sup>9</sup>
53D.	Qualifications for appointment of Chairpersons and Members of Appellate Tribunal	Entire section	20.12.2007
53E.	Selection Committee	Entire section	20.12.2007
53F.	Term of office of Chairperson and Members of Appellate Tribunal	Entire section	20.12.2007
53G.	Terms and conditions of service of Chairperson and Members of Appellate Tribunal	Entire section	20.12.2007
53H.	Vacancies	Entire section	20.12.2007
53I.	Resignation of Chairperson and Members of Appellate Tribunal	Entire section	20.12.2007
53J.	Member of Appellate Tribunal to act as its chairperson in certain cases	Entire section	20.12.2007
53K.	Removal of Suspension of Chairperson and Members of Appellate Tribunal	Entire section	20.12.2007
53L.	Restriction on Employment of Chairperson and other Members of Appellate Tribunal in certain cases	Entire section	20.12.2007
53M.	Staff of Appellate Tribunal	Entire section	20.12.2007
53N.	Awarding Compensation	Entire section	20.05.2009(2)
53O.	Procedures and Powers of Appellate Tribunal	Entire section	20.05.2009(2)
53P.	Execution of orders of Appellate Tribunal	Entire section	20.05.2009(2)
53Q.	Contravention of Orders of Appellate Tribunal	Entire section	20.05.2009(2)

<sup>8</sup> Amended by the Finance Act 2017, notified 26<sup>th</sup> May 2017

<sup>9</sup> S.O.2167(E) dated 20.12.2007

53R.	Vacancy in Appellate Tribunal not to invalidate acts or proceedings		Entire section	20.05.2009(2)
53S.	Right to Legal Representation		Entire section	20.05.2009(2)
53T.	Appeal to Supreme Court		Entire section	20.05.2009(2)
53U.	Power to Punish for Contempt		Entire section	20.05.2009(2)
<b>Chapter IX</b>		<b>Miscellaneous</b>		
54.	Power to exempt			19.06.2003 20.05.2009(1)
55.	Power of Central Government to issue directions			19.06.2003 20.05.2009(1)
56.	Power of Central Government to supersede Commission			19.06.2003 20.05.2009(1)
57.	Restriction on disclosure of information	Main section		19.06.2003
58.	Chairperson, members, Director General, Secretary, Officers and other employees etc. to be public servants	Entire section		19.06.2003
59.	Protection of action taken in good faith	Main section		19.06.2003
60.	Act to have overriding effect			19.06.2003
61.	Exclusion of jurisdiction of civil courts	Main section		19.06.2003
62.	Application of other laws not barred			19.06.2003
63.	Power to make rules	63(2)(a), 63(2)(e), (f), (g), (n)	63(2)(da), (ma) to (mf)	63(2)(c), (h), (i), (j)
				31.03.2003 (2)(a), (b), (d), (e), (f) and (g) 19.06.2003 all except the above and (n)
64.	Power to make regulations	64(2)(d)		19.06.2003
65.	Power to remove difficulties			19.06.2003
66.	Repeal and Saving	66(1), Provisos 1, 2, and 3 to 66(2), 66(3), 66(5)	66(1A),	

**A section-by-section View of the Pakistani Competition Law**

**COMPETITION ACT 2010**

**No. XIX of 2010 dated 13<sup>th</sup> October 2010**

**& COMPETITION ORDINANCE 2007<sup>1</sup>**

**No. LII of 2007 dated 2<sup>nd</sup> October 2007**

Competition Ordinance 2007		Competition Act 2010 <sup>2</sup>	
<b>Chapter I</b>	<b>Preliminary</b>	<b>Chapter I</b>	<b>Preliminary</b>
1.	Short title, extent, application & commencement	1.	Short title, extent, application & commencement
2.	Definitions	2.	Definitions 2(1)(n) inserted to add definition of 'tribunal'
<b>Chapter II</b>	<b>Prohibition of Abuse of Dominant Position, Certain Agreements, Deceptive Marketing Practices and Approval of Mergers</b>	<b>Chapter II</b>	<b>Prohibition of Abuse of Dominant Position, Certain Agreements, Deceptive Marketing Practices and Approval of Mergers</b>
3.	Abuse of Dominant Position	3.	Abuse of Dominant Position
4.	Prohibited Agreements	4.	Prohibited Agreements
5.	Individual Exemptions	5.	Individual Exemptions
6.	Cancellation etc. of individual exemptions	6.	Cancellation etc. of individual exemptions
7.	Block exemption	7.	Block exemption
8.	Block exemptions procedure	8.	Block exemptions procedure
9.	The criteria for individual and block exemptions	9.	The criteria for individual and block exemptions <sup>3</sup>
10.	Deceptive Marketing Practices	10.	Deceptive Marketing Practices
11.	Approval of Mergers	11.	Approval of Mergers
<b>Chapter</b>	<b>Competition Commission of Pakistan</b>	<b>Chapter</b>	<b>Competition Commission of Pakistan</b>

<sup>1</sup> 2010 Act came into force on 13.10.2010 whilst the Ordinance had come into force on 02.10.2007.

<sup>2</sup> In the Competition Act 2010, the word 'Ordinance' wherever it occurred throughout the Competition Ordinance 2007, had been changed to 'Act'.

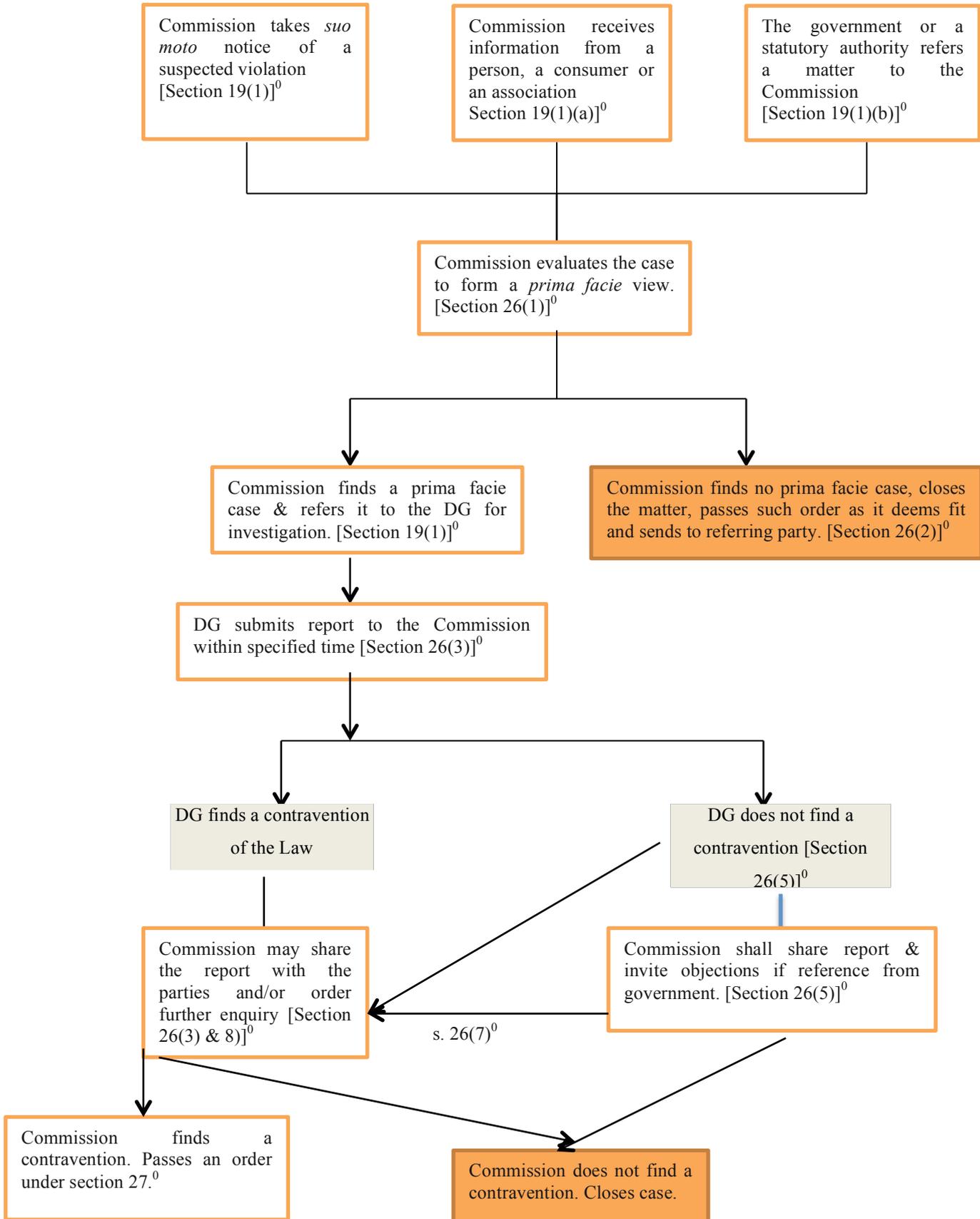
<sup>3</sup> The style of numbering had been changed in this section.

III		III	
12.	Establishment of Commission	12.	Establishment of Commission
13.	Head Office	13.	Head Office
14.	Composition of Commission	14.	Composition of Commission
15.	The Chairman	15.	The Chairman
16.	The Acting Chairman	16.	The Acting Chairman
17.	Term of Office	17.	Term of Office
18.	Restriction on the employment of the Chairman and other Members in certain cases	18.	Restriction on the employment of the Chairman and other Members in certain cases
19.	Termination of Appointment of Members	19.	Termination of Appointment of Members
20.	Commission Fund	20.	Commission Fund 20(2)(a) Grants added; 20(2)(b) penalties deleted
21.	Audits and Accounts	21.	Audits and Accounts
22.	Annual Accounts	22.	Annual Accounts
23.	Appointments by Commission	23.	Appointments by Commission
24.	Meetings of Commission	24.	Meetings of Commission
25.	Disclosure of interest by Members	25.	Disclosure of interest by Members
26.	Notification of interest by staff of Commission	26.	Notification of interest by staff of Commission
27.	Officers and Employees etc. to be public servants	27.	Officers and Employees etc. to be public servants
Chapter IV	Functions and Powers of the Commission	Chapter IV	Functions and Powers of the Commission
28.	Functions and Powers of the Commission	28.	Functions and Powers of the Commission
29.	Competition Advocacy	29.	Competition Advocacy
30.	Proceedings in cases of contravention	30.	Proceedings in cases of contravention
31.	Orders of Commission	31.	Orders of Commission
32.	Powers to issue interim orders	32.	Powers to issue interim orders
33.	Powers of the Commission in relation to a proceeding or enquiry	33.	Powers of the Commission in relation to a proceeding or enquiry
34.	Power to enter and search premises	34.	Power to enter and search premises 34(1) 'for reasonable grounds to be recorded in writing' added
35.	Forcible Entry	35.	Forcible Entry
36.	Power to call for information relating to undertaking	36.	Power to call for information relating to undertaking
37.	Enquiries and Studies	37.	Enquiries and Studies
Chapter V	Penalties and Appeals	Chapter V	Penalties and Appeals
38.			38(2) 50 million changed to 75 million and 15% of turnover changed to 10% of turnover

39.	Leniency	39.	38(4) Omitted
40.	Recovery of Penalties	40.	Recovery of Penalties
			40(8) 'All penalties and fines recovered under this Act shall be credited to the Public Accounts of the Federation' added
41.	Appeal to the Appellate Bench	41.	Appeal to the Appellate Bench
42.	Appeal to the Court	42.	Appeal to the Court
			In the text, 'Supreme Court' replaced by 'Competition Appellate Tribunal'
		43.	Competition Appellate Tribunal
			New section inserted
		44.	Appeal to Supreme Court
			New section inserted

Chapter VI	General	Chapter VI	General
43.	Common Seal	45.	Common Seal
44.	Services of notices and other documents	46.	Services of notices and other documents
45.	Compensation	47.	Compensation
46.	Indemnity	48.	Indemnity
47.	Agreement for exchange of information	49.	Agreement for exchange of information
48.	Sharing and Supply of Information	50.	Sharing and Supply of Information
49.	Obligation of confidentiality	51.	Obligation of confidentiality
50.	Permitted Disclosure	52.	Permitted Disclosure
			Reference to section 49 not corrected to 51 under the new scheme.
51.	Assistance and advice to the Commission	53.	Assistance and advice to the Commission
52.	Power to exempt	54.	Power to exempt
53.	Act not to apply to trade unions	55.	Act not to apply to trade unions
			Reference to Industrial Relations Ordinance 2002 omitted
54.	Powers of the Federal Government to issue directives	56.	Power of the Federal Government to issue directions
55.	Power to make rules	57.	Power to make rules
56.	Power to make regulations	58.	Power to make regulations
57.	Acts to override other laws	59.	Acts to override other laws
58.	Removal of difficulties	60.	Removal of difficulties
59.	Repeal and Savings	61.	Repeal and Savings
		62.	Validation of etc. etc.

**Decision-Making Process for matters falling under Sections 3 & 4 of Indian Competition Act 2002**



## **Text of Relevant Sections**

### INQUIRY INTO CERTAIN AGREEMENTS AND DOMINANT POSITION OF ENTERPRISE

19(1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—

(a) receipt of any information, in such manner and] accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or

(b) a reference made to it by the Central Government or a State Government or a statutory authority.

### PROCEDURE FOR INQUIRY UNDER SECTION 19

26(1) On receipt of a reference from the Central Government or a State Government or a statutory authority or in its own knowledge or information received under section 19, if the Commission is of the opinion that there exists a prima facie case it shall direct the Director General to cause an investigation to be made into the matter:

Provided that if the subject matter of an information received is, in the opinion of the Commission, substantially the same as or has been covered by any previous information received, then the new information may be clubbed with the previous information.

26(2) Where on receipt of a reference from the Central Government or a State Government or a statutory authority or information received under section 19, the Commission is of the opinion that there exists no prima facie case it shall close the matter forthwith and pass such orders as it deems fit and send a copy of its order to the Central Government or the State Government or the statutory authority or the parties concerned as the case may be.

26(3) The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission.

26(4) ....

26(5) If the report of the Director General referred to in sub-section (3) recommends that there is no contravention of the provisions of this Act, the Commission shall invite objections or suggestions from the Central Government or the State Government or the statutory authority or the parties concerned, as the case may be, on such report of the Director General.

26(6) ...

26(7) If, after consideration of the objections or suggestions referred to in sub section (5), if any, the Commission is of the opinion that further investigations is

called for, it may direct further investigation in the matter by the Director General or cause further inquiry to be made by in the matter or itself proceed with further inquiry in the matter in accordance with the provisions of this Act.

26(8) If the report of the Director General referred to in sub-section (3) recommends that there is contravention of any of the provisions of this Act, and the Commission is of the opinion that further inquiry is called for, it shall inquire into such contravention in accordance with the provisions of this Act.]

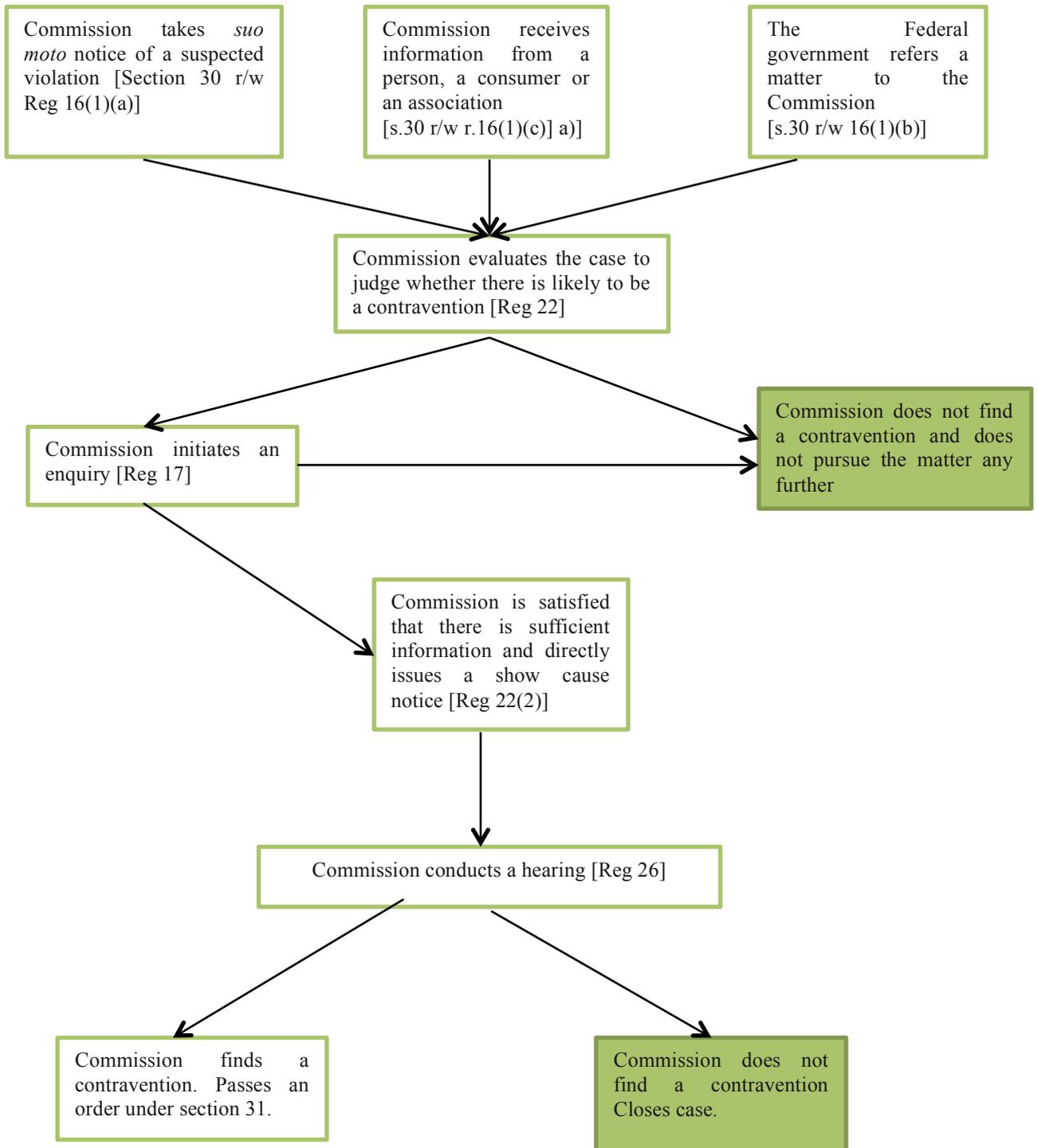
ORDERS BY COMMISSION AFTER INQUIRY INTO AGREEMENTS OR ABUSE OF  
DOMINANT POSITION (RELEVANT PORTION ONLY)

27. Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or 4, as the case may be, it may pass all or any of the following orders...'

- (a) ....
- (b) impose such penalty, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse: [Provided that in case any agreement referred to in section 3 has been entered into by a cartel, the Commission may impose upon each producer, seller, distributor, trader or service provider included in that cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or ten per cent. of its turnover for each year of the continuance of such agreement, whichever is higher.]
- (c) ...
- (d) direct that the agreements shall stand modified to the extent and in the manner as may be specified in the order by the Commission;
- (e) direct the enterprises concerned to abide by such other orders as the Commission may pass and comply with the directions, including payment of costs, if any;
- (f) ...
- (g) pass such other [order or issue such directions] as it may deem fit.

ANNEXE J

**Decision-Making Process for matters falling under Sections 3 & 4 of Pakistan Competition Act 2010**



### **Texts of Relevant Sections**

#### PROCEEDINGS IN CASES OF CONTRAVENTION [RELEVANT PORTION ONLY]

30(1) Where the Commission is satisfied that there has been or is likely to be, a contravention of any provision of Chapter II, it may make one or more of such orders specified in section 31 as it may deem appropriate. The Commission may also impose a penalty at rates prescribed in section 38, in all cases of contravention of the provisions of Chapter II.

30(2) Before making an order under sub-section (1), the Commission shall—

- a. give notice of its intention to make such order stating the reasons therefore to such undertaking as may appear to it to be in contravention; and
- b. give the undertaking an opportunity of being heard on such date as may be specified in the notice and of placing before the Commission facts and material in support of its contention:’

#### ORDERS OF THE COMMISSION [RELEVANT PORTION ONLY]

31(1) The Commission may in the case of-

- a. an abuse of dominant position, require the undertaking concerned to take such actions specified in the order as may be necessary to restore competition and not to repeat the prohibitions specified in Chapter II or to engage in any other practice with similar effect; and
- b. prohibited agreements, annul the agreement or require the undertaking concerned to amend the agreement or related practice and not to repeat the prohibitions specified in section 4 or to enter into any other agreement or engage in any other practice with a similar object or effect; or

#### PENALTY [RELEVANT PORTION ONLY]

38(2) The Commission may impose penalties at the following rates, namely:--

- a. or a contravention of any provision of Chapter II of the Act, an amount not exceeding seventy-five million rupees or an amount not exceeding ten percent of the annual turnover of the undertaking, as may be decided in the circumstances of the case by the Commission; or
- b. for non-compliance of any order, notice or requisition of the Commission an amount not exceeding one million rupees, as may be decided in the circumstances of the case by the Commission; and
- c. for clause (e) in sub-section (1), an amount not exceeding one million rupees as may be decided in the circumstances of the case by the Commission.

(3) If the violation of the order of the Commission is a continuing one, the Commission may also direct the undertaking guilty of such violation shall pay by way of penalty a further sum which may extend to one million rupees for every day after the first such violation.

COMPETITION COMMISSION (GENERAL ENFORCEMENT) REGULATIONS, 2007  
INQUIRY

16(1) Without prejudice to the generality of the powers conferred under section 37 and subject to sub-regulation (2) hereof, the Commission may commence an inquiry:

- a. suo moto; or
- b. upon a reference made to it by the Federal Government under regulation 17; or
- c. on receipt of a complaint from an undertaking or a registered association of consumers under regulation 17.

REFERENCE AND COMPLAINTS

17(1) The Commission shall upon a reference made to it by the Federal Government, conduct enquiries into any matter relevant to the purposes of the Ordinance.

17(2) Without prejudice to the foregoing where the Commission receives from an undertaking or a registered association of consumers a complaint in writing, it may, unless it is of opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by prima facie evidence, conduct an inquiry into the matter to which the complaint relates.

INITIATION OF PROCEEDINGS UNDER SECTION 30

22(1). Where the Commission on its own or upon filing of the complaint is satisfied, that there has been or is likely to be, a contravention of any provision of the Ordinance, the Commission may issue a show cause notice stating the reasons thereof to such person as may appear to it to have been or likely to be in contravention.

22(2) If the information available on the record is sufficient to satisfy the Commission that the contravention of any provision of Chapter II has been committed or is likely to be committed the Commission may proceed under sub-regulation (1) above without conducting inquiry under these regulations.

HEARING AFTER SUBMISSION OF INQUIRY REPORT (RELEVANT PORTION ONLY)

26(1) Upon receipt of inquiry report where the Commission is satisfied that there has been or is likely to be, a contravention of any provision of Chapter II of the Ordinance, the Commission shall:

- a. give notice of its intention to make such order stating the reasons therefor to such person as may appear to it to be in contravention; and
- b. give the person an opportunity of being heard on such date as may be specified in the notice and of placing before the Commission facts and material in support of its contention.

## ANNEXE K

### Membership of CCI and CCP Since their Inception

#### CCI's year-wise strength (with changes in Italics)<sup>1</sup>

Year	Strength	Members
2009	7	Kumar (Chairperson) and Gupta, Prasad, Parashar, Gauri, Tayal and Goel
2010	7	Kumar (Chairperson) and Gupta, Prasad, Parashar, Gauri, Tayal and Goel
2011	7	Chawla (Chairperson) Gupta, Prasad, Dhingra, Gauri, Tayal and Goel
2012	7	Chawla (Chairperson) Gupta, Prasad, Dhingra, Gauri, Tayal and Goel
2013	7	Chawla (Chairperson) Gupta, Bunker, Dhingra, Gauri, Tayal and Goel
2014	6	Chawla (Chairperson) Bunker, Dhingra, Gauri, Tayal and Goel
2015	7	Chawla (Chairperson) Bunker, Mital, Peter, Nahta, Sahoo and Mittal
2016	7	Sikri (Chairperson) Bunker, Mital, Peter, Nahta, Sahoo and Mittal

#### CCP's year-wise strength (changes in italics)<sup>2</sup>

Year	Strength	Membership
2007	5	Mirza (Chairperson), Ghaffar, Hassan, Bangash and Wilson
2008	5	Mirza (Chairperson), Ghaffar, Hassan, Bangash and Wilson
2009	5	Mirza (Chairperson), Ghaffar, Hassan, Bangash and Wilson
2010	4	Hassan (Chairperson), Ghaffar, Wilson and Khalil
2011	6	Hassan (Chairperson), Ghaffar, Wilson, Khalil, Batlay and Ansar
2012	6	Hassan (Chairperson), Ghaffar, Wilson, Khalil, Batlay and Ansar
2013	Not known	Not known
2014	Not known	Not known
2015	4	Khalil (Chairperson), Batlay, Ansar and Qureshi
2016	strength 4	Khalil (Chairperson), Batlay, Ansar and <i>Qureshi</i>

<sup>1</sup> Source: CCI's Annual Reports. There are likely to be some overlaps as these Reports run from June to June whereas I have followed the calendar year.

<sup>2</sup> Source: CCP's Annual Reports and website. However, Annual Reports have not been published after 2012 and information regarding CCP membership for 2013 and 2014 is not available.

**[DRAFT CHAPTER]****Comparing the Concepts of ‘Agreement’ & ‘Relevant Market’ in India and Pakistan**

## INTRODUCTION

As I have discussed in Chapters 3 and 4, the process through which the both India and Pakistan adopted their respective modern competition law statutes (respectively, ‘**the Indian Competition Act**’ and ‘**the Pakistani Competition Act**’ and collectively ‘**Transplanted Competition Laws**’) has a direct as well as indirect impact on the implementation trajectory of the Transplanted Competition Laws in the country. The direct impact arises from the manner in which the adoption strategy shapes the structure, mandate and composition of the institutions of competition implementation in India and Pakistan (hereinafter collectively ‘**Implementing Institutions**’) and, thereby, the decisions of these Implementing Institutions. The indirect impact lies in the extent to which the adoption strategy confers legitimacy on the Transplanted Competition Laws, which in turn determines the interaction between the Implementing Institutions and those pre-existing in the country (hereinafter ‘**the General Courts**’) that indirectly charts the course along which the Transplanted Competition Laws are implemented.

The analysis in Chapters 3 and 4 suggested two important conclusions: Firstly, that a country like India that adopts a primary adoption strategy of socialization (albeit with shades of emulation and regulatory competition) prefers its intrinsic judgment in arriving at its decisions over judicial pronouncements, whether domestic or international, whilst a country, like Pakistan, which employs a primary diffusion strategy of coercion and contractualization relies more extensively on judgments generally and on foreign judgments particularly, in the course of its decision-making. Secondly, I noted that the Transplanted Competition Law a country such as India whose primary adoption strategy had been one of socialization, enjoyed a higher degree of perceived legitimacy and therefore a lower degree of intervention from the General Courts, both in terms of the number and nature of challenges filed as compared to a country like Pakistan whose dominant adoption strategy was one of contractualization and coercion.

A question that remains unanswered even after this analysis, however, is whether or not the adoption strategy of a country has an impact on competition concepts embedded in the Transplanted Competition Laws? In this chapter I aim to address this question by examining two key competition concepts which are broadly similar in the Transplanted Competition Laws: The first of these is ‘agreement’—the existence of which must be established for the any finding of anti-competitive and prohibited agreements in terms of the Indian and Pakistani Competition Acts respectively<sup>1</sup> and the second is ‘relevant market’ which forms the basis of any analysis of a potential abuse of dominant position.<sup>2</sup> The choice of these concepts is also significant because

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<sup>1</sup> Section 3 of the Indian Competition Act and section 4 of the Pakistani Competition Act.

<sup>2</sup> Section 4 of the Indian Competition Act and section 3 of the Pakistani Competition Act.

they are independent of each other (to the extent that the Commission's finding in respect of one has no influence whatsoever on the other) and, therefore, offer a wider insight into the mind of the Commission than would be possible with concepts that were cumulative, in that the finding of the Commission for one were to build into the finding of the other. I examine the contours of these concepts as detailed in a select number of cases as well as the procedure through which each country arrives at its determination in this regard.<sup>3</sup> I focus, in particular, on whether the two Commissions relied on judicial, particularly foreign precedents in interpreting these concepts or preferred a literal, factual, common-sensical approach as well as the extent to which broader policy considerations fed their analysis. I also note whether dissenting opinion had a role in developing an understanding of these concepts in either jurisdiction.

#### UNDERSTANDING THE DECISION-MAKING PROCESS IN INDIA AND PAKISTAN

A comparison of the content of decisions of Indian and Pakistani Commissions is more meaningful if they follow a similar process in arriving at their decisions. In the following paragraphs I focus only on the procedure employed by the two Commissions with respect to cases of anti-competitive agreements (which refers to both anti-competitive agreements and prohibited agreements in terms of sections 3 and 4 of the Indian and Pakistani Competition Acts respectively) and abuse of dominant position.<sup>4</sup>

Competition matters relating to anti-competitive agreements and abuse of dominant position, may be initiated before either Commission in one of the following three ways: (i) when the Commission takes *suo motu* notice of a suspected violation;<sup>5</sup> (ii) when the Commission receives a complaint from a person, a consumer or a trade association;<sup>6</sup> or (iii) when the government refers a matter to the Commission.<sup>7</sup>

Irrespective of the manner in which a matter arrives before the Commission, the Indian Commission first forms a *prima facie* view as to whether or not there is a case to be investigated.<sup>8</sup> If after the examining the information or other material before it, the Commission comes to the conclusion that there is no *prima facie* case, it closes the matter without hearing either the informant or the parties alleged to be in contravention of the Indian Competition Act.<sup>9</sup> If, however, the Commission comes to

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<sup>3</sup> For the process of case selection see section 3.2.

<sup>4</sup> Although there is a likelihood of merger review cases also becoming contested in either jurisdiction, I do not consider that procedure here, simply because there is not sufficient data for comparison given that the merger control provisions in India were only brought into force in 2011 and even after that the Commission has either approved mergers on the basis of information filed by the parties or dismissed them on technicalities.

<sup>5</sup> Section 19(1) of the Indian Competition Act; Section 30 of the Pakistani Competition Act read with Regulation 16 of the Pakistan Competition Commission (General Enforcement) Regulations, 2007 (**Pakistan Regulations**).

<sup>6</sup> Section 19(1)(a) of the Indian Competition Act; Section 30 of the Pakistani Competition Act read with Regulation 17 of the Pakistani Regulations.

<sup>7</sup> Section 19(1)(b) of the Indian Competition Act; Section 30 of the Pakistani Competition Act read with Regulation 17 of the Pakistani Regulations.

<sup>8</sup> Section 26(1) of the Indian Competition Act.

<sup>9</sup> Section 26(2) of the Indian Competition Act.

the conclusion that there is a *prima facie* case, it refers the matter to the Director General ('DG')<sup>10</sup> for investigation. Whilst the Pakistani Commission also forms a *prima facie* about a case, there does not appear to be any legal requirement for it to record it formally unless it is acting on the basis of a complaint<sup>11</sup> when it is incumbent upon it to form a *prima facie* view before ordering an investigation. In cases in which it has taken *suo motu* notice or those which have been referred to it by the government, it may proceed directly to the investigation stage unless it believes it already has sufficient material in respect of the alleged contravention.<sup>12</sup>

After receipt of the report from the DG, and irrespective of whether or not the DG finds that the parties named therein are in contravention of the Indian Competition Act, the Indian Commission may provide a copy of the report to the parties concerned and invite their comments or objections thereon.<sup>13</sup> In the event that the DG has found that there is no contravention, and if, after examining the comments and objections of the parties, the Commission comes to the same conclusion, it may close the matter.<sup>14</sup> If, it does not come to the same conclusion, it may order further enquiry into the matter or may itself proceed with the matter.<sup>15</sup> Similarly, if the DG finds that there is a contravention of the law, the Commission may either order further inquiry or proceed with the matter and pass an order as it deems fit.<sup>16</sup> In the event that the Commission forms the view that a penalty may be imposed it may issue a show cause notice to the parties concerned and provide them an appropriate opportunity of hearing before imposing such penalty.<sup>17</sup>

The procedure of the Pakistani Commission is somewhat simpler at this stage: After receipt of the investigation report from its investigation wing<sup>18</sup> or if it is of the view that there is sufficient material available to it to proceed without an investigation, the Commission issues a show cause notice to the parties allegedly in contravention of the provisions of the Pakistani Competition Act.<sup>19</sup> The impugned parties are then invited to submit a response in writing and/or appear before the Commission in person, through their legal or other authorized representatives. The Commission passes an order after the hearing or *ex parte* if the parties choose not to submit to the Commission's jurisdiction. At the end of this process, the Commission also takes the decision whether or not to impose a penalty or give directions rather than instituting a fresh show cause notice for the purpose.<sup>20</sup>

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<sup>10</sup> Defined in section 2(g) and appointed by the government under section 16(1). Director General's duty to investigate stipulated in section 41.

<sup>11</sup> Regulation 17(2) of the Pakistani Regulations.

<sup>12</sup> Regulation 22 of the Pakistani Regulations.

<sup>13</sup> Sections 26(4), 26(5) and 26(8) of the Indian Competition Act.

<sup>14</sup> Section 26(6) of the Indian Competition Act.

<sup>15</sup> Section 26(7) of the Indian Competition Act.

<sup>16</sup> Sections 26(8) and 27 of the Indian Competition Act.

<sup>17</sup> Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ('**the Indian Regulations**').

<sup>18</sup> The Pakistani Competition Act does not provide for the appointment of a Director General Investigations.

<sup>19</sup> Section 30 of the Pakistani Competition Act read with Regulation 22 of the Pakistani Regulations.

<sup>20</sup> *Ibid.*

The important commonality that is evident from this delineation of the procedure of the Indian and Pakistani Commissions is that they both adopt a quasi-judicial approach in their decision-making wherein the impugned parties are allowed to plead their case before the Commission on facts as well as the law. This renders the decisions of the Commission procedurally at par with each other. An important difference in the operations of the two Commission is, however, that whilst the Indian Commission sends the investigation report to parties and allows them an opportunity of hearing even in cases in which the report has not found a contravention of the Indian Competition Act,<sup>21</sup> the Pakistani Commission issues a show cause notice and thereby allows an opportunity of hearing only in cases where it finds a *prima facie* contravention. Whilst the Pakistani procedure may have the advantage of imposing a lesser burden on the Commission's resources in terms of the number of hearings it has to hold, it also means that there is a smaller pool of cases to draw upon for the purpose of this analysis. The number of cases available for this analysis is further affected by the fact that in most of its decisions, the Indian Commission seems to simultaneously consider violations of provisions relating to anti-competitive agreements and abuse of dominant position in its decisions. This may partly attributable to the fact that the majority of cases before the Indian Commission have been initiated on the basis of a complaint. The Pakistani Commission on the other hand appears to make a judgment as to the nature of the contravention at the time of issuing the show cause notice, a factor which may in part be attributed to the fact that the majority of the cases before the Pakistani Commission begin by the Commission taking *suo motu* notice of a possible contravention of the Pakistani Competition Act.

#### THE CONCEPT OF 'AGREEMENT' IN INDIA AND PAKISTAN

##### Relevant Statutory Provisions in the Indian and Pakistani Competition Acts

The definition of 'agreement' provided in the Indian and Pakistani Competition Acts respectively often forms the starting point of discussions regarding the concept of 'agreement' in the decisions of the Indian and Pakistani Commissions. As I will demonstrate in the following paragraphs, the definition of 'agreement' as well as the related concepts of anti-competitive and prohibited agreements in the two statutes are sufficiently similar to provide a sound basis for comparison.

In terms of the Indian Competition Act, agreement includes any arrangement or understanding or action in concert, (i) whether or not such arrangement, understanding or action is formal or in writing; or (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.<sup>22</sup> The definition provided in the Pakistani Competition Act, though more succinctly drafted, conveys almost exactly the same sense: an agreement includes any arrangement, understanding or practice, whether or not it is in writing or intended to be legally enforceable.<sup>23</sup>

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<sup>21</sup> Section 26(6) of the Indian Competition Act. Cr text to fn. 20.

<sup>22</sup> Section 2(b) of the Indian Competition Act.

<sup>23</sup> Section 2(1)(b) of the Pakistani Competition Act.

The concept of agreement forms the fundamental ingredient of the statutory offence of anti-competitive agreements in India<sup>24</sup> and prohibited agreements in Pakistan.<sup>25</sup> Section 3(1) of the Indian Competition Act prohibits anti-competitive agreements stipulating that no enterprise<sup>26</sup> or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. Section 3(2) declares that any agreement entered into in contravention of this provision shall be void whereas section 3(3) provides a list of agreements which may be presumed to have an appreciable adverse effect on competition for the purposes of section 3(1).<sup>27</sup> Section 3(4) provides a list of agreements amongst enterprises or persons at different stages or levels of the production chain in different markets in respect of production, supply, distribution, storage, sale or price of trade in goods or provision of services and stipulates that such an agreement would be deemed to be in contravention of section 3(1) if it causes or is likely to cause appreciable adverse effect on competition in India.<sup>28</sup> Section 3(5) provides a list of exemptions from the operation of section 3.<sup>29</sup>

Similarly, section 4(1) of the Pakistani Competition Act prohibits undertakings<sup>30</sup> or association of undertakings from entering into any agreement or, in the case of an association of undertakings, making a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5.<sup>31</sup> Section 4(2) provides a non-exhaustive list of the types of agreements that may be prohibited under the Act.<sup>32</sup>

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<sup>24</sup> Section 3 of the Indian Competition Act.

<sup>25</sup> Section 4 of the Pakistani Competition Act.

<sup>26</sup> The term 'enterprise' is defined in section 2(h) of the Indian Competition Act and is comparable with the term 'undertaking' in section 2(1)(q) of the Pakistani Competition Act.

<sup>27</sup> These include agreements which directly or indirectly determine purchase or sale prices, limit or control production, supply, markets, technical development, investment or provision of services, share the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers etc., directly or indirectly result in bid rigging or collusive bidding. However, any agreements entered into by way of joint ventures, if such agreements increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services are excluded for these purposes.

<sup>28</sup> Including tie-in arrangements, exclusive supply agreements, exclusive distribution agreements and agreements for refusal to deal and resale price maintenance.

<sup>29</sup> Including agreements imposing reasonable conditions for protecting copyrights, patents, trademarks, designs and other intellectual property rights as well as export agreements.

<sup>30</sup> Cross reference fn 26.

<sup>31</sup> The Indian Competition Act does not provide the Indian Commission parallel powers of exempting individual agreements from the application of section 3 of the Indian Competition Act.

<sup>32</sup> This includes agreements for (a) fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any service; (b) dividing or sharing of markets for the goods or services, whether by territories, by volume of sales or purchases, by type of goods or services sold or by any other means; (c) fixing or setting the quantity of production, distribution or sale with regard to any goods or means of providing any services; (d) limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of any service; (e) collusive tendering or bidding for sale, purchase or procurement of any goods or service; (f) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage; and (g) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such

However, unlike section 3 of the Indian Competition Act, this section does not distinguish between the types of agreements that may be *presumed* to have the object or effect of preventing, restricting or reducing competition from those for which such object or effect must be demonstrated by evidence. Section 4(3) declares that any agreement entered into in contravention of section 4(1), shall be void.

*Types of cases in which the Commissions have considered 'agreements'*

The Indian Commission has considered the concept of agreement in respect of horizontal as well as vertical agreements.<sup>33</sup> The most notable amongst the horizontal agreements are 'agreements' entered into by associations (more often associations of enterprises rather than associations of persons) and 'agreements' for bid-rigging. The vertical agreements considered by the Commission include tying-in and exclusive supply 'agreements'.

Whilst there are a sufficient number of decisions of the Pakistani Commission in respect of horizontal agreements, particularly those entered into by associations of undertakings and for the purpose of bid-rigging, in which the Commission has considered and discussed the concept of 'agreement', that is not the case for vertical agreements of tying-in and exclusive supply agreements. The limited consideration of 'agreement' in respect of tying-in may in large part be attributable to the fact that unlike the Indian Competition Act which expressly lists 'tying-in' as a type of anti-competitive agreement in section 3(4) of the Indian Competition Act, the Pakistani Competition Act identifies it as an instance of an abuse of dominant position. Whilst this does not preclude the Pakistani Commission from treating tying-in as a prohibited agreement, as indeed it does in *Takaful Pakistan Limited and Travel Agents Association of Pakistan*,<sup>34</sup> it may explain the relatively few cases on this particular market abuse. Further, the near absence of exclusive supply cases in the Pakistani context may be attributable to the parties concerned preferring to invoke the jurisdiction of the Commission to grant exemption under section 5 of the Pakistani Competition Act rather than facing the Commission sitting in its adjudicatory capacity.<sup>35</sup> As I have stated earlier, there is no parallel provision in the Indian Competition Act.<sup>36</sup>

Given this situation, a meaningful comparison of the concept of 'agreement' in the two jurisdictions is possible only with reference to the concept as interpreted by the Commissions with reference to horizontal agreements (including agreements of associations and bid-rigging). Within this category of cases, I have selected those in

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contracts.

<sup>33</sup> In pursuance of sections 3(3) and 3(4) of the Indian Competition Act respectively.

<sup>34</sup> File No. 9/M(A&R)/CAA-TAAP/CCP/2007 Order dated 29.01.2010.

<sup>35</sup> The Pakistani Commission addressed exclusive agreements in the case of *Murree Brewery Company Limited v. SIZA Foods Limited* (File No. 03 /Sec-3/CCP/08) Order dated 24.04.09. However, in this case the Commission treated exclusive agreements as refusal to deal and potential abuse of dominant position and asked SIZA Foods Limited merely to review its strategy in this regard. The Commission adopted a similar approach towards exclusive agreements in *Tetra Pak Pakistan Limited* (FILE NO. NO. 02/DIR(INV)/TETRA PAK/CCP/08) Order dated 13.08.2010 and in *Indus Motors Company Limited* (F. NO: 1(45)/IM/C&TA/CCP/2012) Order dated 08.11.2013.

<sup>36</sup> Cross reference text to fn. 31.

which the Commissions have expressly discussed and dilated upon the concept of ‘agreement’.

*The Evolution of an ‘Agreement’ in the decisions of the Indian Commission*

AGREEMENTS OF ASSOCIATIONS

The Indian Commission first considered the concept of ‘agreement’ in the case of *Neeraj Malhotra v. Deutsche Bank and others*.<sup>37</sup> The informant in this case had alleged that at least four<sup>38</sup> banks operating in India had entered into an anti-competitive agreement and had also abused their dominant position by levying pre-payment charges on early repayment of home finance loans. The Commission held that for an agreement to exist, there has to be an act in the nature of an arrangement, understanding or action in concert, including existence of an identifiable practice or decision taken by an association of enterprises or persons and that such conscious and congruous act must be associated to a point in time. In this particular case, the Commission concluded that there was no agreement as the actions of the impugned banks could not be associated to a single point in time because all impugned banks had not attended the meeting of the Indian Banking Association (‘IBA’) in which the matter had been discussed, either because they were not members of the IBA or simply not present at the meeting. The Commission further noted that even all banks that had attended the IBA meeting had not levied the charges as discussed in the meeting and, therefore, the discussions at the meeting could not be deemed to be ‘an agreement’.

The Commission had arrived at its conclusion as to whether or not an agreement existed through a literal interpretation of the relevant statutory provisions, evaluation of the facts and appreciation of oral and written evidence. Interestingly, more than legal precedents, the Commission’s decision had also been heavily informed by India’s macro-economic policy considerations. In fact the only international case cited by the Commission in this regard was on the requirement of providing clear cogent proof of an infringement by the party alleging it,<sup>39</sup> rather than on the meaning of the term itself.

Two members passing dissenting orders in this case, were, however, of the view that there was in fact an agreement between the banks. One member<sup>40</sup>, in particular, emphasized that an agreement does not have to be formally executed or explicit and can be inferred from intention and objectives of the parties. Further, by reference to World Bank/OECD Glossaries (for definition of agreement), judgments of the Indian Supreme Court on takeover matters (for understanding ‘acting in concert’) and UK case law (on restrictive trade agreements), he came to the view that physical participation of conspirators or members of cartel need not be proved to establish common intention and that all conspirators need not implement the decision

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<sup>37</sup> Case No. 5 of 2009 Order dated 02.12.10, Paragraph 17. Hereinafter ‘*the Neeraj Malhotra case*’.

<sup>38</sup> The Commission had later joined other banks as well as the Indian Banking Association (IBA) to the proceedings taking the total number of impugned parties to sixteen (16).

<sup>39</sup> Para 17.10 Cr. Fn. 37.

<sup>40</sup> Dissenting order by Member P N Parashar, Paragraphs 69 to 76.

simultaneously. Interestingly, however, his discussion was also couched in public policy considerations, albeit from a consumer welfare perspective.

The Commission further elaborated the concept of ‘agreement’ in relation to associations in the case of *FICCI Multiplex Association of India v. United Producers/Distributors Forum & Others*.<sup>41</sup> In this case FICCI, an association of multiplex cinemas in India, had complained to the Commission that United Producers/Distributors Forum (UPDF), vide a notice dated 27.03.2009, had instructed all producers, whether or not they were its members, not to release any new films to members of FICCI until a new, more onerous, revenue sharing ratio was agreed upon with them. UPDF had also warned transgressors of penal action. After examining the investigation report and hearing such parties as chose to enter a response to and appear before the Commission, the Commission came to the view that UPDF’s joint stand (as reflected in its letter) towards FICCI members was an agreement for limiting or controlling production and price-fixing and, therefore, fell within the purview of anti-competitive agreements.<sup>42</sup> Once again the Commission’s view in this regard was based on a literal interpretation of the relevant statutory provisions and an appreciation of the evidence before it rather than on judicial precedents whether domestic or international.

The Commission revisited these concepts in the matter of *Uniglobe Mod Travels (Pvt.) Ltd v. Travel Agents Federation of India & Others*.<sup>43</sup> In this case the Travel Agents Federation of India (TAFI) and certain other travel agents’ associations had given a joint call for the boycott of certain international airlines because they had shifted from a commission based structure to a transaction fee structure. The informant Uniglobe, was a member of these trade associations but had not participated in the boycott, for which it had been expelled from TAFI’s membership. At first it approached the General Courts but then withdrew the matter and filed a complaint before the Commission.

Policy concerns figured heavily in the mind of the Commission as it considered this matter. In particular, it made the observation almost at the very outset of its decision that ‘Trade associations and their activities often go beyond the limits of facilitation required by members and therefore require scrutiny by competition authorities.’<sup>44</sup> It proceeded to cite examples from Canada and the EU as well as from the Swedish Competition Authority to support its observation. The Commission also cited a number of international and domestic precedents<sup>45</sup> for ‘better appreciation of different perspectives and principles’<sup>46</sup>. Interestingly, however, even as it cited these cases, the Commission was quick to assert its autonomy by observing that it was citing these

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<sup>41</sup> Case no. 1 of 2009 Order dated 25.05.2011 Paragraph 23.

<sup>42</sup> The Commission then went on to consider whether or not the agreement fell within any of the possible exceptions to anti-competitive agreements particularly joint venture efficiencies, collective bargaining and copyrights and rejected all three. Whilst it was driven by economic and policy considerations in deciding in respect of the first two, it referred extensively to Indian and international precedents to establish circumstances in which copyrights may be excepted from the purview of anti-competitive agreements.

<sup>43</sup> Case No. 3 of 2009, Order dated 04.10.2011, Paragraphs nos. 27-28, 58, 59, 60, 67 and 68.

<sup>44</sup> Paragraph 27, 28 Ibid.

<sup>45</sup> It cited 4 US cases, at least 10 EU cases and two cases of the erstwhile Indian Monopoly Control Authority.

<sup>46</sup> Paragraph 59 Cross reference fn 43.

‘being fully cognizant of the fact that our law may be different in important aspects and such case law can only be of some help in the initial period of development of our jurisprudence without being applicable as such in cases before us.’<sup>47</sup> The Commission did not cite any specific cases in the actual analysis of whether or not an agreement existed and only referred to these cases generally. Its analysis was once again based on literal interpretation and factual reasoning when it held that in case of trade associations, comprising members which are themselves enterprises, liability may be twofold: the association may be liable for a decision for price-fixing, limiting the output of members or allocating the market amongst members, while additionally the constituent members may be held liable for similar actions arising from an agreement or concerted practice between them. A dissenting order given by two members whilst traversing much of the same ground as covered in the order of the Commission regarding the definition of agreement, emphasized the Commission’s competing policy consideration of safeguarding ‘the common man and consumer’<sup>48</sup> and clarified that ‘a collective boycott organized between competing undertakings in order to place pressure on another competitor or supplier is a form of output limitation’ and therefore an agreement prohibited under the Indian Competition Act.<sup>49</sup>

In its 2012 decision in eight related matters clubbed with *Reliance Big Entertainment Limited v. Karnataka Film Chamber of Commerce & Others*<sup>50</sup> the Commission

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<sup>47</sup> Ibid.

<sup>48</sup> Prasad and Tayal at paragraph 1.8

<sup>49</sup> Prasad and Tayal at paragraph 35.2, 36.1 and 36.3. In dismissing the collective bargaining plea, the dissenting order further clarified the concept rightfully belongs to employer/employee relationships and does not encompass the collective or group boycott as manifest in the present case. The order also noted the absence of any pro-competitive justifications, which would allow the ‘agreement’ to boycott to remain outside the bounds of section 3 of the Indian Competition Act.

<sup>50</sup> Case No. 25 of 2010. Order dated 16.02.2012. Related cases disposed of vide the same order: 41 of 201, 45 of 2010, 47 of 2010, 48 of 2010, 50 of 2010 and 58 & 60 of 2010. The Commission also cited and relied upon this decision in Cases No. 17 of 2011, *Mrs. Manju Tharad v. Eastern India Motion Picture Association* Order dated 24.04.2012; No. 9 of 2011, *UTV Software Communications Limited v. Motion Pictures Association Delhi* Order dated 08.05.2012 and in Case No. 71 of 2011 *Shri Ashtavinayak Cine Vision Limited v. PVR Picture Limited & Others* Order dated 08.05.2013. Further, the Commission followed the reasoning of this order in MRTP C-127/2009/DGIR4/28 *Varca Druggist & Chemist & Ors. V. Chemists and Druggists Association, Goa* Order dated 11.06.2012 and in Case No. C-87/2009/DGIR *Vedant Bio Sciences v Chemists & Druggists Association of Baroda*, Order dated 05.09.2012 without actually citing the original order. Member Prasad recorded his dissent in the same terms in both these cases. In the same vein, in Case No. 7 of 2010 *Vijay Gupta v. Paper Merchant Association & Others* Order dated 10.01.2013, the Commission held that the bye laws of an association that place restrictions on its members may be deemed to be in contravention of section 3 of the Act. This reasoning was also reflected in Case No. 20 of 2011 *Santuka Associates Pvt. Limited v. All India Organization of Chemists Druggists & Others* Order dated 19.02.2010, with the difference that the Commission focused on ‘practice’ rather than ‘agreement’. Member Prasad recorded his well-rehearsed dissent in this regard. The Commission reproduced its understanding in this regard verbatim in Case No. 41 of 2011 *Sandhya Drug Agency v Assam Drug Dealers Association and Others* Order 09.12.13, Paragraph 19.3. Mr. Prasad who had historically recorded his dissent in this regard had retired on 28.02.2013 (CCI Annual Report 2012-2013) and therefore no dissent was recorded on this issue. In Case No. 30 of 2011, *Peeveear Medical Agencies, Kerala v. All India Organization of Chemists and Druggists and Others*. The Commission referred to and followed *Varca* and *Santuka* (referred to above) to arrive at the same conclusion as to what it meant by an agreement. Order dated 09.12.2013, Paragraph 14.12.7. Also in *Suo moto Case No. 02 of 2012* *Suo moto Case No. 02 of 2012, Re: Bengal Chemist and Druggist Association* and Ref. Case No. 01 of 2013 *Reference Case No. 01 of 2013 filed under section 19(1)(b) of the Competition Act, 2002 by Dr. Chintamani Ghosh, Director, Directorate of Drugs* Orders dated 11.03.2014. Interestingly, however in Case No. 11.2.2014 *Re Manufacturers of*

appeared to expand the scope of an agreement to memorandum and articles of association of companies. The impugned parties in these cases were associations that had either incorporated themselves as companies or registered as co-operative societies. The Commission held that these associations were liable for contravention of section 3 of the Indian Competition Act because their constituent members had violated these provisions and the memorandum and articles of association were evidence of their ‘collective intent,’<sup>51</sup> thereby effectively saying that an agreement to form an association could itself be subject to scrutiny under section 3. This view, however, was not founded on legal precedents or even a rigorous and incisive analysis of the relevant provisions, which were simply reproduced verbatim in the order. A dissenting member, however, arrived at an entirely contrary conclusion in this regard, maintaining that once a person or an enterprise subscribes to the shares of a company or becomes a member of a society then the resulting entity is a different body from an association and therefore cannot be held liable.<sup>52</sup> In his view it was not the initial agreement form the association, which was problematic, but a subsequent agreement that was likely to have an anti-competitive effect that was required to be investigated. The analysis of the dissenting member, like that of the Commission before him, appeared to be based on common sense rather than legal analysis. It is also interesting to note that neither the Commission nor the dissenting member referred to cases of associations that they had decided in the preceding years.

Later in the same year the Commission, deciding the case of *Builders Association of India v. Cement Manufacturers’ Association & others*,<sup>53</sup> expressed the view that an agreement need not be formal or expressed for the purposes of sections 2 and 3 of the Indian Competition Act, but the common intent may be inferred from circumstantial evidence.<sup>54</sup> The Commission also cited international precedents in support of its arguments.<sup>55</sup> When impugned parties reminded the Commission of its decision in the *Neeraj Malhotra case*<sup>56</sup> in which it had required an express agreement from the banks, the Commission merely stated that it had decided the *Neeraj Malhotra case* on the basis of ‘detailed market analysis’ and had ‘concluded that the competitive construct of the relevant market [did] not cause any concern for competition...’ This did not mean, however, that the same circumstantial evidence would always lead to a finding of collusion: Earlier in the same year, in a *suo motu* case *Re Domestic Airlines*<sup>57</sup>, the Commission had held that circumstantial evidence of price parallelism was not sufficient to prove a case of collusion and had attempted to demonstrate that fares had

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*Abstract Cement Products* Order dated 11.2.2014, where the informant had alleged that the impugned parties had a cartel in the ‘garb of an association’ the Commission instead of identifying the association constituting agreement as the offending agreement, preferred to follow the route of identifying ‘practice’.

<sup>51</sup> Para 6.16 Ibid.

<sup>52</sup> Prasad Paragraph 10.

<sup>53</sup> Case 29 of 2010, Order dated 20.06.2012, Paragraph 6.5. The Commission also followed this case in disposing of RTPE 52 of 2006 *In re Alleged Cartelization by Cement Manufacturers* Order dated 30.07.2012.

<sup>54</sup> Earlier in 2012, the Commission had expressed this view in bid-rigging cases but this was the first time it stated this in respect of cartels.

<sup>55</sup> Including Brazilian and Canadian cases as well as an OECD report.

<sup>56</sup> Cr text to fn 37.

<sup>57</sup> Case No. 2 of 2010, Order dated 10.01.2012. Member Prasad had recorded a dissenting order in this regard.

moved together due to market dynamics rather than concerted action<sup>58</sup>. The Commission was once again reminded of the *Neeraj Malhotra case* in *All India Tyre Dealers Federation v. Tyre Manufacturers*<sup>59</sup> when it clarified its position by stating ‘It is no doubt true that as held by the Commission [that] an agreement must be established unequivocally. That however is not to suggest that an agreement can be established only through direct evidence...circumstantial evidence is of no less value than direct evidence as the law makes no distinction between the two.’

#### BID-RIGGING

The Commission took up its first case of bid-rigging in 2011 when, acting on its own initiative, it instituted proceedings against the Liquefied Petroleum Gas (LPG) Cylinders Association in the case of *Re suo-motu case against LPG cylinder manufacturers*.<sup>60</sup> In examining whether or not the respondents had engaged in bid-rigging, the Commission explained that the ‘common thread [in different forms of illegal anti-competitive bidding] is that they involve some kind of agreement or informal arrangement among bidders which limits competition.’ It further stated that such an ‘agreement need not be in writing nor necessarily...be legally enforceable and an arrangement or understanding is as good as a formal written agreement [and that] existence of circumstantial evidence that tends to exclude the possibility of independent action would be sufficient to give rise to inference of agreement.’ Interestingly, however, the Commission did not overtly rely on legal precedents to state its position, making reference only to Adam Smith and OECD Guidelines. The only case it cited in support of its views was a judgment by Lord Denning. It distinguished most other cases cited by the impugned parties, stating in particular, that foreign judgments were not directly applicable to it due to the differences in the ‘legal structure of competition regime’ of India and other countries.<sup>61</sup>

In 2012, in the case of *A Foundation for Common Cause and People Awareness v. PES Installations Pvt. Limited & others*<sup>62</sup> the Commission further elucidated the concept of agreement in the context of bid rigging. In a rare unanimous order, the Commission stated that ‘cartelization and bid-rigging are form of conspiracies’ and the existence of such conspiracies are to be inferred from the circumstances. In order to determine whether or not there was such a conspiracy in the case before it, the

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<sup>58</sup> The Commission also followed this reasoning in Ref Case No. 1 of 2011, Order dated 11.01.2012. Member Prasad once again recorded his dissent in terms similar to those expressed in Case No. 2 of 2012. The Commission also appeared to follow this line of reasoning in MRTP Case No. 161 of 2008 *Re Glass Manufacturers of India* Order dated 24.01.2012 holding once again that mere price parallelism does not support a finding of cartelization because it may be attributed to market based factors. Commission also held that the alleged members of the cartel had been suffering losses made it less likely that they were operating as a cartel. This seems to be at odds with a statement that the Commission made in MRTP Case RTPE No. 20 of 2008 *All India Tyre Dealers Federation v. Tyre Manufacturers* Order dated 16.01.2013 in which it stated at paragraph 302, that ‘parallel behavior in prices...may become a basis for finding contravention or otherwise of the provisions relating to anti-competitive agreement of the Act’.

<sup>59</sup> MRTP Case RTPE No. 20 of 2008, Order dated 16.01.2013, Paragraph 305.

<sup>60</sup> Case No. 3 of 2011, Order dated 24.02.12, Paragraphs 14.2 to 14.9.

<sup>61</sup> Para 14.75 Ibid.

<sup>62</sup> Case No. 43 of 2010, Order dated 16.04.2012, Paragraph 6.2, 6.24, 6.26, 6.28, 6.31 and 6.41. The Commission cited and relied upon this order in case no. 40 of 2010 *Shri Gulshan Varma v. Union of India through Secretary Ministry of Health & Family Welfare & Others*. Order dated 25.04.2012.

Commission drew upon *inter alia* evidence of tentative tender design and specifications, change of terms and conditions at the time of financial evaluation of tenders, tentative cost estimates, commonalities in bid documents and contradictory statements made by the impugned parties. The Commission's analysis in this regard though rigorous was entirely fact based without reference to any legal precedents (even its own) or policy considerations.

In another case of bid rigging later in the same year, *Re Aluminum Phosphide Tablets Manufacturers*<sup>63</sup> the Commission held that it could not examine conduct that had occurred prior to the notification of the relevant provisions of the Indian Competition Act in this regard. However, the Commission proceeded to infer common intent and coordinated conduct on the part of the remaining parties on the basis of circumstantial evidence of same prices even though the bidders were situated in different parts of the country and submission of identical bids. To support its conclusions in this regard the Commission also relied on US and Indian case law, however, it did not refer to any of its own cases.

The Commission continued to rely on circumstantial evidence for bid rigging. In the case of *Shri B P Khare, Principal Chief Engineer, South Eastern Railway, Kolkata. v M/s Orissa Concrete and Allied Industries Ltd. & Ors*<sup>64</sup> the Commission defined its approach very clearly stating that for the purposes of section 2(b) and 3 of the Act, 'an agreement includes any arrangement or understanding or action in concert whether or not formal or in writing'. The understanding may be tacit and includes situations where the parties act on the basis of 'a nod or a wink...[In cases such as these] the Commission has to find sufficiency of evidence on the basis of benchmark of 'preponderance of probabilities'.<sup>65</sup>

#### *The concept of 'Agreement' through the eyes of the Pakistani Commission*

#### AGREEMENTS OF ASSOCIATIONS

The Pakistani Commission, acting through a single member, considered the concept of 'agreement' in its very first case *Re Pakistan Banking Association & Others*.<sup>66</sup> In this case the Pakistan Banking Association (PBA), a private limited company comprising 49 member banks, had issued an advertisement on behalf of its members, announcing the launch of an Enhanced Savings Account (ESA), in pursuance of which its member banks would be imposing dissimilar conditions on their depositors as to minimum deposits and interest payable. The Commission took *suo motu* notice of this advertisement on the grounds that the ESA was a prohibited agreement within the meaning of section 4 of the Pakistan Competition Act. The PBA's first defence was that it had acted with the blessing of the State Bank of Pakistan, the apex

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<sup>63</sup> *Suo motu* case 2 of 2011, order dated 23.04.2012.

<sup>64</sup> Case No. 5 of 2011, Order dated 21.02.2013, Paragraph 32.

<sup>65</sup> The Commission reiterated its position in Reference Case No. 1 of 2012 *DGS&D, Ministry of Commerce, Govt. of India v Puja Enterprises & Others*, Order dated 06.08.2013 and in *Suo motu* case 3 of 2012 *Alleged cartelization in the matter of supply of spares to Diesel Loco Modernization Works, Indian Railways, Patiala, Punjab v M/s Stone India Limited & Others* Order dated 05.02.2014, RTPE 09 of 2008 *Re Alleged cartelization by steel producers, Order dated 09.01.2014* without actually referring to, or citing its earlier decision.

<sup>66</sup> File No. 2.sec-4/CCP/07 Order dated 10.04.2008.

regulator of the Banking sector in Pakistan. However, the Commission was neither sympathetic to PBA's assertion nor inclined to examine the banking sector as a whole or to taking into account any broader policy considerations regarding the development and growth of banking in Pakistan. Even as the Commission proceeded with the case, it deplored what it called an attempt on the part of PBA to 'draw a picture of conflicting regulatory approaches' and iterated its commitment to examining competition matters only and respecting the mandate of other regulators.<sup>67</sup>

On the specific issue of interpreting 'an agreement' the Commission started by drawing upon ordinary dictionary meanings of the word and held that the 'advertisement...reflects a declared understanding reached between the members of PBA and also an arrangement forced upon customers. Where such arrangement is acted upon, it would also constitute practice carried on by the banks adopting such decision. There cannot be a more formal version of acting in a cartel like behavior.'<sup>68</sup> The Commission further stated that cartel formation 'does not always pertain to raising the price of product or services to a level higher than the one prevailing under normal competitive conditions...[It] is established where price is fixed, regardless whether it is raised, lowered or even rendered stagnant... establishing an actual adverse effect on customers is [not] essential...' In interpreting this concept, the Commission specifically asserted that the Pakistani provisions on prohibited agreements was modeled on the 'Article 81 of the EU Treaty'<sup>69</sup> and drew extensive support from the practice of EU and US Competition authorities in arriving at its conclusion in this regard.<sup>70</sup>

The Commission further refined the concept of 'agreement' in the case of *The Institute of Chartered Accountants of Pakistan (ICAP)*.<sup>71</sup> Interestingly, however, even before it embarked upon its analysis of the concept, the Commission started expressly cited the pedigree of the relevant provisions of the Pakistani Competition Act, stating that 'Section 4 of the Competition Ordinance is similar to Article 81 of the Treaty of Rome which is part of the EC Competition Laws and is in congruity with section 1 of the Sherman Anti-trust Act of the United States.' The Commission then proceeded to frame the scope of analysis of agreements (such as the one ICAP had allegedly entered into) with reference to EU and US competition principles, as enunciated in Article 81 itself or, in the case of US, in jurisprudence developed under the Sherman Act. The Commission also cited US and EU case law, as well as cases from other 'mature competition law regimes'<sup>72</sup> on the specific issue of whether or not professional bodies such as ICAP could impose a minimum fee. Consequently,

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<sup>67</sup> Para 40, *Ibid.*

<sup>68</sup> Para 46, *Ibid.*

<sup>69</sup> Para 48, *Ibid.* The Commission continued to assert the pedigree of its provisions in almost all cases that followed. It was only in the *Amin Brothers Engineering et al (PESCO Tender case)* that it finally asserted some independence stating in relation to the *per se* rule that 'Pakistan had the opportunity to benefit from both the U.S and the E.U at the time when the Act was created. The choice of object/effect over the *per se*/rule of reason, however, cannot be attributed to a preference of one term over the other. This similarity with the E.U law does not mean that Pakistan must only look at E.U case law and principles when looking for persuasive case law. We have over time developed our own jurisprudence and are not bound by any particular international jurisprudence.' Para 28 File No. 13/PESCO/CMTA/CCP/2010 Order dated 13.05.2011.

<sup>70</sup> Both generally and with reference to specific cases.

<sup>71</sup> File No. 03/Sec-4/CCP/08 Order dated 4.12.2008.

<sup>72</sup> Para 13, *Ibid.* In particular, the Commission referred to 2 US, 1 EU and 1 Canadian case.

instead of focusing on and interpreting the specific provisions of the Pakistani Competition Act regarding the definition of ‘agreement’, the Commission proceeded directly to analysis of section 4 and referred to foreign judicial precedents to establish that prescribing a minimum fee was tantamount to price fixing and therefore in contravention of the Act. The Commission also did not cite any policy considerations (other than those expressed in foreign precedents) or carry out an analysis of the work of Chartered Accountants as practiced in Pakistan or the view taken by other regulators in this regard (ICAP had in particular referred to Securities and Exchange Commission of Pakistan and the State Bank of Pakistan). Consequently, the concept of ‘agreement’ remained at the point it was at in the PBA case.<sup>73</sup>

The Commission adopted a similar approach when the issue of whether or not there was agreement was specifically raised in the matter of *Karachi Stock Exchange (Guarantee) Ltd, Lahore Stock Exchange (Guarantee) Ltd, Islamabad Stock Exchange (Guarantee) Ltd*.<sup>74</sup> Instead of explaining and interpreting the term, the Commission simply held that the decision of the stock exchanges to impose a floor on the price of securities ‘may be classified as an arrangement between them and their separate members/brokers not to make offers for securities below a certain price’. Quoting *Romeo & Juliet*<sup>75</sup> the Commission made the important declaration that it was more interested in detecting what it deemed to be offending conduct rather than legal categorization of such conduct. The remainder of the Commission’s analysis in this regard (particularly regarding situations in which an agreement may be deemed to have an anti-competitive object) was carried out within the framework of EU and US precedents with little or no reference either to the peculiarities of the Pakistani capital markets or the possibility of conflicting regulatory perspectives given that the capital market came within the regulatory prerogative of the Securities and Exchange Commission in this regard.

In 2009, the Commission took *suo motu* notice of cartelization in the Pakistani Cement industry in the case of *All Pakistan Cement Manufacturer’s Association and its Member Undertakings (APCMA)*.<sup>76</sup> Unlike its previous section 4 cases, which were all decided by a single member, this case was heard and decided by a two-member bench, comprising a high powered team of the then Chairman and Member

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<sup>73</sup> The Commission reiterated its commitment to EU and US precedents in File No. 06/Sec-3/CCP/08 All Pakistan Akhbar Farosh Federation, All Pakistan News Papers Society (APNS) and 13 other members/conveners Order dated 23.04.2009 in which it held that a the decision of APNS to fix the minimum price of Newspapers is a “decision of association of undertakings” is a prohibited agreement within the meaning of section 4(1) of the Ordinance (Para 36). The Commission relied extensively and exclusively on US and EU precedents in the remainder of its analysis. The Commission also applied the same reasoning in Pakistan Vanaspati Manufacturers Association FILE NO. 1(15)/PVMA-ISB/C&TA/CCP/2011) Order dated 30.06.2011. It reiterated and expanded the scope of ‘decision’ in In the Matter of show cause notice issued to Institute of Chartered Accountants of Pakistan (ICAP) Order F. NO: 1(52)/ICAP/C&TA/CCP/2012 Order dated 10.01.2013.

<sup>74</sup> File No. 1/Dir(Inv) KSE/CCP/08 Order dated 10.03.2009.

<sup>75</sup> Para 40, Ibid.

<sup>76</sup> F.No.4/2/Sec.4/CCP/2008 Order dated 27.08.2009. The Commission reiterated its definition of agreement in this case in Pakistan Jute Mills Association & its Member Mills FILE NO. CCP/CARTELS/03/2010 Order dated 03.02.2011 and to the ICAP case (Cross Reference fn. 71) with regard to the meaning of ‘decision’ as used in the definition of prohibited agreements in section 4 of the Act. However, the Commission referred to further international precedents (including Article 85(1) of the EU Treaty) to provide a more elaborate understanding of the term.

legal of the Commission. Although the Commission had initiated proceedings on the basis of a news item published on the behest of the APCMA, it had also discovered a written market sharing and price fixing agreement in the course of its investigations. Responding to the objections of the impugned parties that the agreement did not fall within the ambit of section 4 and had in any event not been implemented, the Commission referred extensively to the PBA case to outline the concept of an agreement and to EU law to identify the types of agreements that may fall within section 4. It held that any action by an association that reflects an understanding between its members, when acted upon by a member constitutes an agreement. It further clarified, by reference to EU precedents, that by being a member of an association, an undertaking is deemed to have accepted its constitution and to have empowered the association to undertake obligations on its behalf. Consequently even where it has not expressly approved an anti-competitive agreement concluded by the association but has not expressly opposed it, it may be held to have acquiesced to the agreement. Unusually for the Pakistani Commission, in arriving at a decision in this matter, it appears to have been impressed by the long history of cartelization in the cement industry in Pakistan as well as internationally.

Regarding the types of agreements and activities an association may validly engage in, the Commission stated in the case of *Pakistan Poultry Association*<sup>77</sup> that associations are meant for the general representation of the sector they represent and should not be concerned with the individual financial well being of its members. Taking business related decisions, especially regarding price, production, marketing etc. does not fall within the domain of associations and if the latter engage in such decision making, they stand in violation of Section 4 of the Ordinance.

#### BID-RIGGING

The Commission took up bid rigging for the first time in the *Dredging Companies case*<sup>78</sup> in which it issued show cause notices to four Chinese companies *inter alia* for colluding in the bidding process for a dredging project launched by the Karachi Port Trust. The Commission was of the view that one party had submitted a 'cover bid' for the project so that the project may be awarded to the other, lower bidder. Prior to embarking upon its commercial analysis the Commission refined the concept of an agreement with reference to two EU cases, stating that 'an 'agreement' may consist not only in an isolated act but also in a series of acts and a course of conduct. It further stated that conduct may also amount to a concerted practice where the parties knowingly (but not explicitly) adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour. It referred to yet another EU case to establish that the Commission may refer to indirect, circumstantial evidence for identifying such concerted practice. The remainder of the Commission's analysis regarding the type of bidding practices that may contravene the provisions of section 4 was carried out almost entirely with reference to international judicial precedents<sup>79</sup> with little or no reference to industry specific practices in Pakistan.

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<sup>77</sup> File No: CCP/CARTELS/04/2010 Order dated 16.08.2010.

<sup>78</sup> FILE NO. 3(17)/L.O/CCP/2009 Order dated 23.07.2010.

<sup>79</sup> Including Germany, South Africa, Singapore, Italy in addition to EU, US and OECD.

The Commission once again examined the issue of bid-rigging two years later in *Amin Brothers Engineering et al (PESCO Tender Case)*.<sup>80</sup> In deciding this case, the Commission emphasized its commitment to checking bid rigging in the public sector by highlighting that it routinely monitored information related to public sector tenders through its 'bid rigging detection programme'. It also suggested that it was coming of age as far as its reliance on foreign jurisprudence was concerned,<sup>81</sup> but proceeded once again to address the arguments raised by the counsel for the impugned parties with reference to EU and US jurisprudence.<sup>82</sup> In respect of whether or not there was a collusive agreement between the parties to the tender, the Commission held that collusion existed because the impugned parties had entered into a joint venture collusively bid for a tender (in fact one party had submitted a cover bid) which could not be justified on grounds of efficiency or on the basis of the argument that the parties did not have the individual capacity to meet the requirements of the tender. Interestingly, the Commission did not refer to foreign or any legal precedents in arriving at this conclusion. It appears that once it had sufficiently framed the scope of its enquiry within the bounds prescribed by international competition jurisprudence it felt free to rely on its own deductive reasoning and analysis of facts in deciding the case.

### Comparing the Indian and Pakistani Concept of 'Agreement'

The Indian and Pakistani concept of 'agreement' may be compared at the substantive as well as the procedural level.

#### SUBSTANCE

As far as associations of enterprises are concerned both the Indian and the Pakistani Commission hold them responsible for the conduct of their members.<sup>83</sup> However, whilst the Pakistani Commission is very clear in identifying anti-competitive agreements entered into by associations as well as in understanding of the role of associations and members<sup>84</sup> the Indian Commission is less so. In fact in a number of cases the Indian Commission has held that the agreement to form an association, i.e. the memorandum of articles of association of the association, is an anti-competitive agreement in itself rather than identifying the specific action of the association that it finds to be in contravention of the Indian Competition Act.<sup>85</sup>

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<sup>80</sup> File No. 13/PESCO/CMTA/CCP/2010 Order dated 13.05.2011. Paras 35 and 48 in particular.

<sup>81</sup> Cr fn. 69.

<sup>82</sup> It did so particularly in relation to the issue that it need not define the relevant market in cases of prohibited agreements.

<sup>83</sup> For India note in particular *Reliance Big Entertainment case* CR fn 50 and the text thereto and for Pakistan, the *APCMA/Cement case* CR text to fn 76.

<sup>84</sup> It has held that any action by an association that reflects an understanding between its members, when acted upon by a member constitutes an agreement and that by being a member of an association, an undertaking is deemed to have accepted its constitution and to have empowered the association to undertake obligations on its behalf. Consequently even where it has not expressly approved an anti-competitive agreement concluded by the association but has not expressly opposed it, it may be deemed to have acceded to the agreement [The *APCMA/Cement case* CR text to fn 76].

<sup>85</sup> *Reliance Big Entertainment case* CR fn 50 and the text thereto.

The Commissions of both countries appear to agree that a decision of an association issued in the form of a letter constitutes an agreement.<sup>86</sup> However, while the letters constituting agreements in India were boycott letters, the letters in the Pakistani context were in the nature of price-fixing letters. Further whilst the Indian letters threatened and undertook penal action for such members of the association who failed or refused to comply, there is no evidence in the relevant decisions of the Pakistani Commission of threatened or actual penal action on the part of associations.

Both the Indian and Pakistani Commissions also agree, especially in the context of bid-rigging that an agreement does not have to be formal or express but may be inferred from circumstances.<sup>87</sup> In the Indian context the *Neeraj Malhotra case*<sup>88</sup> with its emphasis on a formal agreement that has also been acted upon, appears to present an exception to this view. However, in its more recent judgments<sup>89</sup> the Indian Commission has held that the judgment in the *Neeraj Malhotra case* was specific to the particular context. On the contrary, there is perfect unanimity in the Pakistani views expressed by the Pakistani Commission on this issue.

#### PROCEDURE

Interestingly, the considerable similarities in substance between the concepts of 'agreement' developed by the Indian and Pakistani Commissions appear to exist despite the overtly different procedure through which the two Commissions have arrived at their decisions in this regard. The three most obvious dissimilarities between the procedures adopted by the two Commissions are as follows:

Whilst the Indian Commission has considered the concept largely in response to complaints filed before it, the Pakistani Commission has done so on its own initiative, in exercise of its *suo motu* jurisdiction.

Further, whilst the Indian Commission has expressly distanced itself from foreign competition jurisprudence the Pakistani Commission has proudly claimed its foreign heritage. Consequently, whilst the Indian Commission has cited a limited number of foreign precedents primarily in support of its arguments, the Pakistani Commission has set up its analytical structure within the bounds prescribed by more mature competition jurisdictions. It is perhaps a corollary of this approach, that broader national and sectoral policy considerations have figured more heavily in the decision-making of the Indian Commission, whilst the Pakistani Commission has adopted a more 'pure' competition law approach.

Finally, whilst the Indian Commission appears to have constituted a full bench for adjudication in these matters and thereby its decisions were either taken unanimously

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<sup>86</sup> For India please note *FICCI case* CR text to fn 41 and *Uniglobe case* CR text to fn 43. For Pakistan please note *PBA case* CR text to fn 66, *ICAP case* CR text to fn 71 and *Karachi Stock Exchange et al case* CR text to fn 74.

<sup>87</sup> For India please note *Builders Association/Cement case* CR text to fn 53, *India Tyre case* CR text to fn 59, *Foundation for Common Cause Case* CR text to fn 62, *Aluminum Phosphide Tablets case* CR text to fn 63 and *Orissa Concrete Case* CR text to fn 64. For Pakistan please note *PBA case* CR text to fn 66, *ICAP case* CR text to fn 71, *Karachi Stock Exchange et al case* CR text to fn 74, *Dredging Companies case* CR text to fn 78 and *PESCO Tender case* CR text to fn 80.

<sup>88</sup> CR text to fn 37.

<sup>89</sup> *Builders Association/Cement case* CR text to fn 53.

or by a majority, the decisions of the Pakistani Commission have even been taken by a single member or two members sitting together. Further, whilst Indian members appeared to have no hesitation in recording their dissenting notes in respect of orders of the Commission, there is no evidence or record of any dissent in respect of the Pakistani Commission.

#### THE CONCEPT OF 'RELEVANT MARKET'

The concept of 'relevant market', in both the Indian and the Pakistani Competition Acts, is fundamental to a finding of abuse of dominant position. The Indian Competition Act defines this concept as 'the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.'<sup>90</sup> The Act further defines the relevant geographic market as 'a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in neighbouring areas'<sup>91</sup> and the relevant product market as 'a market comprising all those products or services which are regarded as interchangeable or substitutable by the customer, by reason of characteristics of the products or services, their prices and intended use.'<sup>92</sup> Further, sections 19(6) and 19(7) of the Act stipulate the factors that the Indian Commission must have regard to in determining the relevant geographic and product market respectively.<sup>93</sup>

The Pakistani Competition Act defines 'relevant market' along very similar lines as 'the market which shall be determined by the Commission with reference to a product market and a geographic market and a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products' characteristics, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those areas.'<sup>94</sup>

In both Acts, this concept of relevant market provides the context in which an enterprise (in terms of the Indian Competition Act) or undertaking (in terms of the Pakistani Competition Act) may be deemed to have a 'dominant position' in that market. 'Dominant position' is defined in section 4(1) of the Indian Competition Act as a position of strength, enjoyed by an enterprise, in the relevant market, in India,

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<sup>90</sup> Section 2(r) of the Indian Competition Act.

<sup>91</sup> Section 2(s) of the Indian Competition Act.

<sup>92</sup> Section 2(t) of the Indian Competition Act.

<sup>93</sup> In terms of section 19(6), the Commission, whilst determining the "relevant geographic market", is required to take into consideration (a) regulatory trade barriers; (b) local specification requirements; (c) national procurement policies; (d) adequate distribution facilities; (e) transport costs; (f) language; (g) consumer preferences; (h) need for secure or regular supplies or rapid after-sales services. In terms of section 19(7) whilst determining the "relevant product market" the Commission is required to take into consideration the following: (a) physical characteristics or end-use of goods; (b) price of goods or service; (c) consumer preferences; (d) exclusion of in-house production; (e) existence of specialised producers; (f) classification of industrial products.

<sup>94</sup> Section 2(1)(k) of the Pakistani Competition Act.

which enables it to (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour. In terms of section 2(1)(e) of the Pakistani Competition Act, one or more undertakings have a dominant position if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent. The only difference between the Indian and Pakistani position in this regard is that the Pakistani Competition Act stipulates a presumption of dominance, which the Indian Competition Act does not. These definitions of relevant market (and its components) and dominant position form a fundamental ingredient of the competition offence of abuse of dominant position as detailed in sections 4 and 3 of the Indian and Pakistani Competition Acts respectively.

*Types of cases in which the Commissions have considered 'relevant market'*

Whilst both the Indian and Pakistani Commissions have, on several occasions, been at pains to assert that delineation of 'relevant market' is not necessary for the purposes of identifying anti-competitive or prohibited agreements, they have nevertheless considered the question in several of their decisions in respect of such agreements, quite often in response to objections raised by the impugned parties. For the purpose of this analysis, however, I examine the concept of 'relevant market' as discussed and delineated by the two Commissions in cases in which they have addressed the competition offence of abuse of dominant position. My underlying assumption in this regard being that the Commissions are more likely to dilate fully on the issue when it forms an essential ingredient of the offence they are considering than when they are merely responding to objections in order to dismiss them.

*'Relevant market' in decisions of the Indian Commission*

Although the Indian Commission started investigating cases of potential abuse of dominant position almost immediately after becoming operational in 2010, it carried out its first detailed analysis of 'relevant market' in 2011 in *Shri Neeraj Malhotra v. North Delhi Power Limited & Others*<sup>95</sup> with reference to whether or not three electricity distribution companies operating in Delhi were abusing their dominant position. Before embarking on its analysis, the Commission surveyed the history and scope of the electricity sector, particularly the role of electricity distribution companies, and did so with reference to the legislation organizing and regulating the sector. After establishing the context in this manner, the Commission emphasized that 'the determination of relevant market [was] the first step in assessing dominance in a market or industry' and proceeded to reiterate the definitions of relevant market, relevant product market and relevant geographic market provided in the Indian Competition Act as well as the stipulated criteria for determining these markets. In actually determining the relevant market, however, the Commission (as well as dissenting members Prasad and Parashar) relied exclusively on the concept of substitutability to come to the conclusion that electricity was a unique product, which could not be substituted by any other. Although neither the Commission nor the

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<sup>95</sup> Case No. 6 of 2009 Order dated 11.05.2011, Paragraph 14.

dissenting members applied any tests or relied on any judicial precedents in this regard, they agreed that the relevant product market was the market for distribution and supply of electricity whereas the relevant geographic market was the area of operation of the distribution companies.<sup>96</sup>

It was in the case of *MCX Stock Exchange Ltd. & Others v. National Stock Exchange of India & Others*<sup>97</sup>, however, that the Commission laid down its approach towards addressing the question of ‘relevant market’. Specifically, it stated that the Commission did not have to resort to any arbitrariness in delineating ‘relevant market’ because the Indian Competition Act ‘not only gives a formula definition of relevant market but also specifies factors which have to be considered while determining that market’. It further identified three indicators of relevant markets: (a) the view of policy makers in respect of that market. In this case it considered a report prepared by the Reserve Bank of India and the Securities and Exchange Board of India; (b) the history and evolution of the sector. In this case it traced the history and development of capital markets in India; and (c) the market in which the complaining enterprise operates on the basis that ‘competition concerns which may arise for any enterprise would be in respect of the market in which it is operating and not in context of a market that does not concern its operations.’ The Commission further emphasized that it considered it ‘rather unnecessary to dive into technical tests such as SSNIP’ which were in anyway used with caution in international jurisdictions.<sup>98</sup> In respect of distinguishing between the words ‘interchangeable’ and ‘substitutable’ it stated its intention of avoiding legal semantics, which it considered ‘neither necessary nor useful for a competition authority’. Reiterating its intention to be guided by the express and clear wording of the Indian Competition Act, it stated that ‘this Commission does not have to resort to arcane reasoning or esoteric logic to delineate the relevant market. It is an accepted principle of law that where a plain reading of the provisions suffices there is no need to take recourse to interpretations and surmises’. The Commission reflected this approach in all subsequent decisions regarding relevant market taking particular care to delineate the relevant product and geographic markets before arriving at a conclusion in this regard. Additionally, the Commission considered the policy framework and regulatory structure of the sector in which it sought to locate the relevant market as well as its historical evolution where it considered it relevant and necessary to do so.<sup>99</sup> I discuss some of these decisions at length in the following paragraphs.

The Commission’s approach was particularly evident in the case of *Jindal Steel & Power Ltd v. Steel Authority of India Ltd*<sup>100</sup> in which Jindal Steel & Power Ltd. (JSPL) had alleged that the Steel Authority of India Ltd. (SAIL) had abused its

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<sup>96</sup> The Commission adopted a similar approach in Case No. 10 of 2010 *Pankaj Gas Cylinders Limited v. Indian Oil Corporation Ltd.* Order dated 22.06.2011, Paragraph 11.

<sup>97</sup> Case No. 13 of 2009, Order dated 23.06.2011 Paragraph 10.

<sup>98</sup> It referred particularly to US Horizontal Merger Guidelines 2010 and EU Notice 1997 as well as the US Cellophane case.

<sup>99</sup> *Shri Neeraj Malhotra v. North Delhi Power Ltd & others* cr fn 95, *MCX Stock Exchange Ltd. & Others v. National Stock Exchange of India & others* cr fn 97, *Prints India v. Springer India Pvt. Ltd & others* cr fn 105, *Dhanraj Pillay and others v. Hockey India* (Case No. 73 of 2011) Order dated 31.5.2013 and *Shri Surinder Singh Barmi v. Board of Cricket Control in India* Case No. 61 of 2010 Order dated 8.2.2013 are some examples in this regard.

<sup>100</sup> Case No. 11 of 2009, Order dated 20.12.2011. Paragraphs 111-116.

dominant position by entering into an exclusive supply arrangement with Indian Railways (IR) which had foreclosed a substantial part of the relevant market and denied market access to JSPL. The Commission defined the relevant market for SAIL only after tracing the history and regulatory structure of the Indian railway industry and then with reference to the relevant provisions in the Indian Competition Act. It concluded in this regard that the relevant product market was of rails compliant with the specifications of the Research Designs & Standards Organization 1957 established under the Ministry of Railways. It further held that ‘demand side substitution is the determining factor in drawing the contours of the relevant product’ and made a general reference to studies in steel industry that showed that there was little switching to structural. In arriving at this conclusion the Commission had implicitly endorsed the application by the DG of the SSNIP test in determining supply side substitutability,<sup>101</sup> although it refrained from expressly doing so. The Commission had further held the relevant geographic market to be India and stated that ‘imports and exports are part of the competitive pressure.’ Whilst both dissenting notes in respect of this matter had agreed with the contours of the relevant market as determined by the Commission, one of them<sup>102</sup> had disagreed with the process through which the Commission had arrived at its conclusion. In particular he stated that in respect of the relevant product market it was ‘not necessary to consider supply side substitutability’ and that the Commission should have referred to the factors listed in section 19(7) e.g. physical characteristics, end-use, IR’s preference as consumer. Similarly in respect of relevant geographic market he was of the view that the Commission should have referred to the factors listed in section 19(6) e.g. regulatory trade barriers, local specification requirements, preference of IR and the procurement policy of the government of India. In response to the findings of the DG who had suggested a sellers market for the SAIL (the seller) and a buyers market for IR (the buyer),<sup>103</sup> he emphasized that the buyer and seller exist and operate in the same market and a bifurcation of the relevant market into a buyer’s and seller’s market was not appropriate.<sup>104</sup>

The Commission further examined the concept of substitutability, with reference to delineating the relevant product market, in *GKB Hi Tech Lenses (Pvt.) Ltd. v. Transitions Optical India (Pvt.) Ltd.*<sup>105</sup> The Commission emphasized the necessity of ‘assessment of consumer behaviour’ in determining whether ‘two distinct products used for similar purposes’ such as Glass Photocromatic Lenses (GPL) and Plastic Photocromatic Lenses (PPL) were substitutable and, therefore, belonged to the same market. In the absence of formal surveys and eschewing technical tests and references to international precedents and best practices,<sup>106</sup> the Commission relied ‘on the

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<sup>101</sup> As stated in paragraph 18 of the Order, the DG had applied the SSNIP test to conclude that a small but significant non-transitory increase in price would not make the consumers switch to heavy structurals.

<sup>102</sup> Tayal, paragraphs 10.1 to 10.4.

<sup>103</sup> Paragraph 18 of the main order.

<sup>104</sup> The Commission had made a similar observation earlier in the year in the case of *Explosives Manufacturers Welfare Association v. Coal India Limited & its officers* (Case No. 4 of 2010 Order dated 26.07.2011, Paragraph 8.1): ‘any relevant market cannot be separated into market for sellers and market for buyers since both sellers and buyers are integral part of market.’ The dissenting opinion recorded in this case agreed with this definition of the relevant market (Prasad, Paragraph 18).

<sup>105</sup> Case No. 01. Of 2010, Order dated 16.05.2012, Paragraph 5.3

<sup>106</sup> In a dissenting note, Tayal arrives at the same conclusion as the Commission with respect to

appreciation of the fact that Indian consumers are universally acknowledged as being generally price sensitive' to hold that price considerations were given precedence in defining the relevant market'. However, it referred to 'behavioral economics' to suggest that 'price differences do not act as a competitive constraint' as the perception of higher quality of PPL may not be in proportion to the differences in price which would mean that consumers may not switch to GPL even if PPL prices were to increase further.

The Commission carried out a very nuanced consideration of substitutability in *Kapoor Glass Pvt. Ltd. v. Schott Glass India Pvt. Ltd.*<sup>107</sup> holding that in order to determine the relevant product market it was imperative to consider sub-categories within the broader market [in this case of borosilicate glass tubes] in order to appreciate the competitive interplay between the various colours and quality variants of the products particularly given that the prices of these variants were different. In the absence of historical price data the Commission was unable to differentiate between quality variants. However, it drew distinctions between color variants on the basis of end use of the product. In delineating the relevant geographic market, the Commission took into consideration the fact that the Indian market for the relevant products is characteristically different from the global market in terms of demand patterns, market structure. There were two dissenting opinions in this matter, however, both agreed with the Commission in respect of market definition.

Two sectors that recurrently came up for consideration before the Commission in relation to complaints of abuse of dominant position were the property development sector and the coal-mining sector. Complaints in relation to the property development sector centered on property developers abusing their dominant position *vis a vis* their customers i.e. property owners, by imposing 'arbitrary, unfair and unreasonable conditions'.<sup>108</sup> In defining the relevant product market, the Commission relied on

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relevant market by referring to and citing EU cases in which price differential was used to determine relevant market. The Commission makes no express reference to EU case law in its own decision. Similarly, in *Arshiya Rail Infrastructure Ltd. v. Ministry of Railway & another* Cases nos. 64 of 2010, 2 of 2011, 12 of 2011 Order dated 14.08.2012, the Commission distinguished EU case law to delineate a relevant market wider than the DG had suggested. Similarly, in delineating the relevant product market in *Kansan News Pvt. Ltd. v. Fastway Transmission Pvt. Ltd.* (Case No. 36 of 2011 Order dated 3.7.2012, Paragraph 6.2.9) the Commission relied on product characteristics and avoided the SSNIP test on the basis of the argument that it 'would not materially affect the determination of relevant market.' However, in *Prints India v. Springer India (Pvt.) Ltd. & Others* Case no. 16 of 2010, Order dated 3.7.2012 the Commission referred to and endorsed EU precedents in determining the relevant market. The reasons put forward by it in this regard were, (a) that the industry it was examining in the case (publishing industry) was dynamic and undergoing substantial change not only in India but also all over the world and it was, therefore, appropriate to examine the manner in which international jurisdiction had dealt with the industry, and (b) that the case it referred to and cited dealt directly with the publishing industry. In *Dhanraj Pillay and others v. Hockey India* (Case No. 73 of 2011 Order dated 31.5.2013, Paragraph 10.9.14) and *Shri Surinder Singh Barmi v. Board of Cricket Control in India* (Case No. 61 of 2010 Order dated 8.2.2013, Paragraph 8.36) the Commission actually 'applied' the SSNIP test even though it did not have historic price data available to it, to conclude that consumers would not substitute a field hockey or cricket event respectively for another even if there were a 5-10% price rise in the price of that event.

<sup>107</sup> Case No. 64 of 2010 Order dated 29.03.2012. Paragraph 9.1.

<sup>108</sup> *Belair Owner's Association v. DLF Limited* Case No. 19 of 2011 Order dated 12.08.2011. Paragraphs 12.30 and 12.36. Similar cases include *Magnolia Flat Owners Association & Others v. DLF Universal Limited & Others* Case No. 67 of 2010 Order dated 3.1.2012; *DLF Park Place Residents v. DLF Limited* Cases Nos. 18, 24, 30, 31, 32, 33, 34 & 35 of 2010 Order dated 10.1.2013

substitutability and product characteristics holding that ‘residential accommodation for Lower Income Group (LIG), Middle Income Group (MIG) and Higher Income Group (HIG) are standard descriptions adopted by several public sector builders...apart from physical attributes, these categorizations take into account the income or expenditure levels of the customer base...[and] create a distinctively identifiable unit that is not substitutable in an economic sense...a small but significant non-transitional increase in price of a unit in one category (termed SSNIP test often applied in abuse of dominance cases) would not make the customer shift to another category.’ The Commission defined the relevant geographic market as the area of Gurgaon<sup>109</sup> citing its unique characteristics, namely ‘proximity to Delhi, proximity to airports and a distinct brand image as a destination for upwardly mobile families’ as well as the fact that ‘condition of competition for the services provided by competitors’ were homogeneous and could be distinguished from the conditions prevailing in neighbouring areas. When another party cited this decision in *South City Group Housing Apartment Owners Association v. Larsen & Toubro Ltd. & Shri Dinesh P. Ranka*<sup>110</sup> to suggest that the Commission had limited the relevant market to a single project the Commission clarified its position by stating that the ‘Commission is of the view that...the relevant product and relevant geographic market cannot be restricted to one particular project unless there are compelling reasons to do so. While defining the relevant product and relevant geographic market it is necessary to take into account the prevailing competitive forces in the market by considering the factors enumerated under s.19(6) and 19(7) of the Act...[as well as] any regulatory or trade barriers which limit or restrict these services to any specific geographical area.’

In several cases regarding the coal industry,<sup>111</sup> the Commission was faced particularly with the issue of defining the relevant geographic market for coal mining companies which according to the complaint against them had abused their dominant position *vis a vis* power generation companies that required coal as an essential raw material. The DG had suggested that the relevant market was the market for production and supply of non-coking coal for thermal power generation in India. However, the coal mining companies objected to this delineation stating that the relevant market for the purpose of this case should be supply of coal globally. They further argued that ‘since there is no case of abuse...made out, it is not necessary for the Commission to go into the question of relevant market...the same would be in line with the Commission’s own prior decisional practice/European Commission’s notice on defining relevant market and the jurisprudence set out by regulators in other jurisdictions...’ [Emphasis added].

In responding to these assertions, the Commission outright and with reference to the cases cited by the coal mining companies, dismissed the claim that it had foregone defining the relevant market in any of its cases irrespective of whether or not there was a finding of abuse. It reiterated the scheme of the Indian Competition Act and the necessity of defining the relevant market (with its distinct components of relevant product and relevant geographic market) before considering dominance and abuse of

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and *Dinesh Trehan v. DLF Ltd.* Case No. 46 of 2012 Order dated 1.7.2013.

<sup>109</sup> A suburb of New Delhi, India.

<sup>110</sup> Case No. 49 of 2011 Order dated 23.10.2013 Paragraph 11.5.6.

<sup>111</sup> *Maharashtra State Power Generation Company Ltd. v. Mahanadi Coalfields Ltd. & another, Maharashtra State Power Generation Company Ltd. v. Western Coalfields Ltd. & another, Gujarat State Electricity Corporation Ltd. v. South Eastern Coalfields Ltd. & another* Cases Nos. 3, 11 and 59 of 2012 Order dated 9.12.2013, Paragraphs 57-60.

dominance. Interestingly, however, the Commission made no comment to the reference to the European Commission's notice or practice in other jurisdictions, suggesting once again, thereby that it preferred to be guided by the express provisions of the Indian Competition Act rather than foreign precedent and practices irrespective of their pedigree. Regarding the respondents' specific assertion that the relevant market should be the market for supply of coal globally, the commission stated with reference also to the explanation provided in section 4 of the Indian Competition Act, that a global market would not meet the pre-condition of homogeneous conditions of competition throughout and, therefore, had to be rejected.<sup>112</sup>

### 'Relevant Market' from the perspective of the Pakistani Commission

The Pakistani Commission's first abuse of dominant position case was in the matter of *Bahria University*.<sup>113</sup> The Commission had taken notice of a news item and issued a show cause notice to Bahria University regarding its practice of making it mandatory for all incoming students to buy laptops imported by the University. At the very outset, the Commission identified the abuse as 'tying-in' and proceeded with its analysis in accordance with the manner in which 'mature competition law regimes' such as the US and EU interpreted and examined this abuse. The Commission also referred to several internationally renowned texts<sup>114</sup> to set up its framework of analysis in this regard. Undertaking its delineation of relevant market within this framework, the Commission identified the relevant product market as 'the provision of educational services at undergraduate and graduate levels in the disciplines of Business Management, Engineering and IT.' The Commission did not, however, explicitly state the factors it had taken into consideration or the criteria it had applied in arriving at this conclusion. The Commission also did not carry out a separate analysis of the relevant geographic market, citing EU precedents in support of its contention that 'for taking cognizance [of abuse of dominant position] it is sufficient that Bahria University enjoys dominant position in the geographic area of one of its campuses.'<sup>115</sup>

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<sup>112</sup> The Commission cited or referred to this order in respect of the delineation of relevant market in several decisions, including in the connected cases of *Madhya Pradesh Power Generating Company Ltd. v. South Eastern Coalfields & another*, *Madhya Pradesh Power Generating Company Ltd. v. South Eastern Coalfields & another*, *West Bengal Power Development Corporation Ltd. v. Coal India Ltd & others*, *Sponge Iron Manufacturers Association v. Coal India Ltd & others*. Cases Nos. 5, 7, 37 and 44 of 2013 Order dated 15.4.2014; *Sai Wardha Power Company Ltd. v. Western Coalfields Ltd. & another* Case No. 88 of 2013 Order dated 27.10.2014 and *Shri Bijay Podder v. Coal India Ltd. and its subsidiaries* Case No. 59 of 2013 Order dated 27.10.2014.

<sup>113</sup> File No. 05/Sec-3/CCP/08 Order dated 24.7.2008, Paragraph 15.

<sup>114</sup> E.g. Sullivan and Grimes (2006 ed.) and Elhague and Gerardin (2007 ed.).

<sup>115</sup> The Commission adopted a similarly cursory approach towards market delineation in *Murree Brewery Company Ltd. v. SIZA Foods (Pvt.) Ltd.* (File No. 03 /Sec-3/CCP/08) Order dated 24.4.2009, *Trading Corporation of Pakistan (Pvt.) Ltd.* (FILE NO. 3(31)/D.D (L)/TCP/CCP/2010) Order dated 12.2.2010 and *Cinepax Ltd.* (File No: 07/CINEPAX/CMTA/CCP/10 Order dated 28.3.2011) albeit without any reference to international precedents or texts. While the Commission made some references to a relevant product market in *Cinepax Ltd.* it may be argued that the Commission's somewhat perfunctory approach may be attributed to the fact that the respondents in these cases had adopted a conciliatory approach towards the Commission and willingly submitted to its jurisdiction and accepted its suggestions. However, such an argument is diluted by the fact that the Commission displayed a similar approach in two cases of abuse of dominant position against the national carrier, *Pakistan International Airlines (PIA)* [File No. 05/Dir(M & TA)/Hajj/CCP/09 Order dated 20.09.2009

In 2009 the Commission took up an abuse of dominance complaint filed by the Islamabad Stock Exchange (ISE) against *Karachi Stock Exchange (Guarantee) Ltd.*<sup>116</sup>. The question before the Commission was whether the Karachi Stock Exchange (KSE) was abusing its dominant position by refusing to share its trading platform with ISE and the Lahore Stock Exchange (LSE).<sup>117</sup> The Commission accepted at the outset that the ‘concept of “relevant market” is central to any determination regarding an allegation of abuse of dominant position... comprising of a product and geographic market...’ The Commission then identified specific factors that it was required to take into consideration whilst delineating the relevant product market, stating, with reference to the provisions of the Pakistani Competition Act, that the ‘product must be interchangeable or substitutable by the consumers by reason of the product characteristics and prices and the intended use.’ [Emphasis added]. In respect of the relevant geographic market, the Commission elaborated only to the extent that ‘the geographical area comprises of the area in which the undertaking are [sic] involved in the supply of products or services.’ On this basis, the Commission arrived at the conclusion that the securities traded on the three stock exchanges were the ‘product’ and because there was ‘no territorial barrier or prohibition on trading in the securities listed at the three stock exchanges... for all intents and purposes, the whole of Pakistan is one “geographic market” for the “product” i.e. commonly listed securities on all exchanges.’ Although the Commission referred to one EU case in arriving at this conclusion it did not employ any technical tests in doing so. It also did not undertake a holistic review of the market structure or regulatory architecture of stock exchanges in Pakistan save to the extent of distinguishing its own regulatory function from that of Securities and Exchange Commission of Pakistan, which in its capacity as the apex regulator of capital markets in Pakistan had objected to the proceedings before the Commission.<sup>118</sup>

The Commission further highlighted and applied the statutory criteria for delineating the relevant market in *Jamshoro Joint Venture Ltd & Liquefied Petroleum Gas*

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and File No. 14/DIR (M&TA)/PIA/CCP/09 Order dated 8.12.2009] in which the approach of the respondent parties was not quite as conciliatory. In delineating the relevant market in the first of these cases, the Commission focused on the relevant product market whereas in the second case it outlined both the relevant product and geographic market. The Commission neither explicitly stated the criteria on the basis of which it had arrived at this conclusion in the two cases nor the process it had employed in this regard. In both, the relevant market was identified more by way of a declaration before the Commission proceeded with the analysis of the abuse it had identified in its show cause notice. It is interesting to note, however, that although the Commission found PIA guilty in the Haj case, it chose to take a lenient view and in that PIA itself agreed to implement the suggestions of the Commission in the discriminatory cancellation charges case. This trend of not expressly defining the relevant market in the order appears to have persisted as is evident from *Indus Motor Company Limited* (F. NO: 1(45)/IM/C&TA/CCP/2012) Order dated 8.11.2013.

<sup>116</sup> File No. 12/ISE/Sec.3/CCP/2007 Order dated 29.5.2009, Paragraphs 44, 53, 54 and 60.

<sup>117</sup> ISE, KSE and LSE are the three stock exchanges operating in Pakistan. Although LSE was not party to the complaint filed by ISE, the Commission had sought its views in the course of the proceedings.

<sup>118</sup> The Commission reflected a similar approach in *Pakistan Steel Mill* (File No. 3/DIR (M&TA)/PSM/CCP/09) Order dated 22.3.2010. In delineating the relevant market the Commission focused more particularly on the relevant product market, considering product characteristics, price (albeit without any reference to data) and intended use. In respect of relevant geographic market, the analysis of the Commission was somewhat more perfunctory as it stated only that ‘As Pakistan Steel Mills is the sole provider of...billets in Pakistan and has the capacity to supply all over the country, the relevant geographic market is the entire country’ (Paragraphs 13-23).

*Association of Pakistan*<sup>119</sup> whilst determining whether these entities had abused their dominant position by charging premiums and third party commission from marketing companies. In respect of the relevant product market the Commission considered substitutability (with natural gas) with reference to price of the product (albeit without any reference to historical or other price data) and its intended use (it is unclear from the language of the Commission's decision whether the intended use was with reference to natural gas or other fuel as well). For determining the relevant geographic market the Commission relied on the criterion of homogeneous conditions of competition, explaining that 'two areas have homogeneous conditions of competition as long as regulation, availability and pricing of the product in the two areas is such that consumers from region A can buy ...from region B and vice versa without incurring significant differences in price.' On the basis of this analysis, the Commission concluded that the relevant market was the 'production and supply of LPG in Pakistan'.<sup>120</sup>

The Commission's most comprehensive discussion on the delineation of relevant market came in the fourth year of its operation in *Engro Vopak Terminal Ltd.*<sup>121</sup> The principle issue in this case was whether Engro Vopak Terminal Ltd (EVTL) enjoyed a monopoly in the handling and storage of certain chemicals by virtue of its concession agreement with Port Qasim Authority (PQA) and whether it was abusing this position by charging exorbitant prices for handling and storage facilities and related services. In the course of the hearing the responding parties EVTL and PQA had raised the issue that the relevant geographic market as delineated in the enquiry report was incorrect and that ports in geographic proximity to each other should be considered part of the same market. The Commission responded to this argument by citing the relevant provisions of the Pakistani Competition Act. It explained that 'determination of the relevant market depends on the availability of substitutable services for customers i.e. whether there is a cross-elasticity of demand...[this] interchangeability is gauged by how different from one another are the offered services in character or use, how far customers will go to substitute one for another. For interchangeability only those substitute facilities or services will be considered which are substantially fungible. Similarly, which area is significantly important to be considered where undertakings involved in supply of handling and storage services face homogenous conditions in competing with each other.' The Commission then proceeded to evaluate the facilities at ports in the geographic vicinity of Port Qasim,

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<sup>119</sup> NO. 3/LPG/DIR(INV)/M&TA/CCP/2009 Order dated 14.12.2009 Paragraphs 107-110.

<sup>120</sup> The Commission applied the same criteria of determining the relevant geographic market in *Engro Chemicals Pakistan Limited, Fauji Fertilizer Company Ltd. and Dawood Hercules Chemical Ltd.* File No. 3(25)/Dir(Law)/Urea/CCP/09 Order dated 23.7.2010 Paragraphs 15-19 and in *Urea Manufacturers (F. NO: 01/UREA/C&TA/CCP/2010)* Order dated 29.3.2013 (Paragraphs 275-280). However, its analysis of the relevant product market was based almost entirely on substitutability (drawn from a sector study carried out by the Commission itself) without express reference to price data and end use of the fertilizer. In the latter case (*Urea Manufacturers*) the Commission when asked to consider the additional question of whether or not the relevant market should also take into account the imports made by the Government of Pakistan, did so within the analytical framework of the Guidelines of the Office of Fair Trading UK for determining situations in which a public body should be considered an undertaking with respect to anti-competitive behaviour as set out in the UK and EU Law (Paragraphs 280-285).

<sup>121</sup> File No. 08/REG/COMP/LOTTE PAK/CCP/10 Order dated 29.6.2011 (Paragraphs 18-34).

the impact on customers of the concession agreement entered into between EVTL and PQA, customer choice, supply substitutability and demand substitutability. The Commission referred to and cited European Commission's Notice on the Definition of the Relevant Market for the purposes of Community Competition Law in support of its arguments.

Comparing the Indian and Pakistani Concept of 'relevant market'

As with the concept of 'agreement' the interpretation of the concept of 'relevant market' by the Indian and Pakistani Commission may be compared for both substance and process.

SUBSTANCE

The delineation of relevant market in the decisions of the Indian and Pakistani Commissions, strongly suggests that a relevant market is case specific: Not only does its parameters vary according to the sector but also according to the nature of abuse being investigated. Consequently, what I compare in this section is not the actual delineation of relevant market but the criteria adopted by the Commissions in arriving at their conclusions in this regard.

Both Commissions agree, and reiterate repeatedly in their decisions particularly with reference to the statutory definition of the concept, that a delineation of relevant market must include an evaluation of the relevant product market as well as the relevant geographic market. The Indian Commission considered substitutability to be the single most important factor in determining the relevant market<sup>122</sup> and took into account product characteristics (including those of sub-categories of products),<sup>123</sup> end use of the product and sub-products by the customer and customer behaviour generally<sup>124</sup> and the perceived price sensitivity of the Indian customer.<sup>125</sup> Substitutability was a key consideration also for the Pakistani Commission in defining the relevant product market<sup>126</sup> and very like the Indian Commission it also relied on product characteristics,<sup>127</sup> price<sup>128</sup> and intended use<sup>129</sup> of the product to determine its substitutability.

In considering the relevant geographic market the Indian Commission took into account factors such as areas of operation of the companies alleged to be abusing their dominant position,<sup>130</sup> exports and imports of the product,<sup>131</sup> the regulatory and trade barriers, if any, in respect of the product in different geographical areas<sup>132</sup> and the

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<sup>122</sup> Cross reference, in particular, text to fns 95, 97, 100, 105 and 108.

<sup>123</sup> Cross reference text to fns 100 and 108.

<sup>124</sup> Cross reference text to fns 105,107 and 108.

<sup>125</sup> Ibid.

<sup>126</sup> Cross reference text to fns 116, 119 and 121.

<sup>127</sup> Cross reference text to fn 116.

<sup>128</sup> Cross reference text to fns 116 and 119.

<sup>129</sup> Ibid.

<sup>130</sup> Cross reference text to fn 95.

<sup>131</sup> Cross reference text to fn 100.

<sup>132</sup> Cross reference text to fn 108.

conditions of competition in these areas.<sup>133</sup> The position of the Pakistani Commission was not much different in this regard. Some of the factors cited in its decisions in determining the relevant geographic market include area in which the undertakings are involved in the supply of goods and services,<sup>134</sup> existence of territorial barriers to trading<sup>135</sup> and homogeneous conditions of competition.<sup>136</sup>

#### PROCEDURE

Whilst the substance of the concept of ‘relevant market’ as applied by the Indian and Pakistani Commissions is closer to each other than the concept of ‘agreement’ discussed hereinabove there are still considerable dissimilarities in the procedure through which each Commission arrived at its specific relevant market in the cases before it. Some of these are as follows:

Whilst the Indian Commission examines the relevant market consistently, methodically and at length in each case of abuse of dominant position that it takes up, irrespective of whether or not it returns a finding of abuse, the Pakistani Commission is more eclectic in this regard. The Pakistani Commission’s examination of relevant market is at times imbalanced (in that it focuses more on relevant product market whilst assuming the relevant geographic market) and even cursory particularly in cases in which the impugned parties have adopted a conciliatory attitude or where the Commission inclined to take a lenient view.

Also, the Indian Commission has expressly adopted a contextual approach towards ascertaining the relevant market and examines the market structure, regulatory architecture and policy objectives of the sector before delineating the relevant market. The Pakistani Commission appears to abstain from such a contextual approach and enters into the debate purely from a competition law standpoint.

The Indian Commission is very adamant in its views about following the express and clear wording of the Indian Competition Act rather than referring to foreign guidelines and judicial precedents. However, the Indian Commission does refer, on more than one occasion, to the SSNIP test in determining the relevant product market and makes projections about what its results are likely to be. It states that it cannot actually apply the test, is due to lack of historic price data. The Pakistani Commission makes absolutely no claims about delineating the relevant market only within the bounds of the relevant provisions of the Pakistani Competition Act. In fact, in more than one case the Pakistani Commission establishes the framework for reviewing abuse of dominant position and the relevant market for that purpose by reference to EU or UK Guidelines as well as EU case law. The Pakistani Commission, however, does not make an express reference to the SSNIP test in any of its decisions nor does it appear to imply that it is relying on an analysis similar to that required for the purposes of the SSNIP test.

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<sup>133</sup> Cross reference text to fns 108 and 111.

<sup>134</sup> Cross reference text to fn 116.

<sup>135</sup> Ibid.

<sup>136</sup> Cross reference text to fns 116 and 119.

It is also interesting to consider that some of the differences between the procedure adopted by the Indian and Pakistani Commission in their respective evaluation of 'agreement' were not as apparent or robust in their evaluation of 'relevant market':

The number of cases of abuse of dominant position that the Commissions took notice of on the basis of complaints received versus those in which it acted out of its own initiative was somewhat more balanced between the two Commissions primarily due to the fact of a greater number of complaints filed before and taken notice of the by the Pakistani Commission in this regard.

Whilst the Indian Commission continued to constitute full benches for cases of abuse of dominant position (primarily due to the fact that the Indian Commission quite often examined the same set of facts for anti-competitive agreements and abuse of dominant position) and whilst members of the Indian Commission continued to record their dissent, there was practically no dissent on the issue of delineating the relevant market. The Pakistani Commission on the other hand constituted larger benches (comprising two or three members) than for reviewing prohibited agreements. Once again, however, there was no recorded dissent in respect of decisions of the Pakistani Commission.

**Indian Competition Law Sections for Anti-competitive Agreements**

DEFINITION OF 'AGREEMENT'

Section 2(b)

'agreement' includes 'any arrangement or understanding or action in concert, (i) whether or not such arrangement, understanding or action is formal or in writing; or (ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.'

DEFINITION OF 'ENTERPRISE'

Section 2(h)

(h) "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

Explanation.—For the purposes of this clause,—

- (a) "activity" includes profession or occupation;
- (b) "article" includes a new article and "service" includes a new service;
- (c) "unit" or "division", in relation to an enterprise, includes—
  - (i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;
  - (ii) any branch or office established for the provision of any service;

DEFINITION OF 'PERSON'

Section 2(l)

- (l) "person" includes—
  - (i) an individual;
  - (ii) a Hindu undivided family;

- (iii) a company;
- (iv) a firm;
- (v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India;
- (vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);
- (vii) any body corporate incorporated by or under the laws of a country outside India;
- (viii) a co-operative society registered under any law relating to cooperative societies;
- (ix) a local authority;
- (x) every artificial juridical person, not falling within any of the preceding sub-clauses;

#### ANTI-COMPETITIVE AGREEMENTS

3(1) *'No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.*

3(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.

3(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

- (a) directly or indirectly determines purchase or sale prices;
- (b) limits or controls production, supply, markets, technical development, investment or provision of services;
- (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
- (d) directly or indirectly results in bid rigging or collusive bidding,

shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

Explanation.—For the purposes of this sub-section, "bid rigging" means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

3(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—

- (a) tie-in arrangement;
- (b) exclusive supply agreement;
- (c) exclusive distribution agreement;
- (d) refusal to deal;
- (e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation.—For the purposes of this sub-section,—

- (a) "tie-in arrangement" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;
- (b) "exclusive supply agreement" includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;
- (c) "exclusive distribution agreement" includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;
- (d) "refusal to deal" includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;
- (e) "resale price maintenance" includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(5) Nothing contained in this section shall restrict—

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—

(a) the Copyright Act, 1957 (14 of 1957);

(b) the Patents Act, 1970 (39 of 1970);

(c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) the Designs Act, 2000 (16 of 2000);

(f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

(ii) the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

INQUIRY INTO CERTAIN AGREEMENTS AND DOMINANT POSITION OF  
ENTERPRISE

19(3) The Commission shall, while determining whether an agreement has an appreciable adverse effect on competition under section 3, have due regard to all or any of the following factors, namely:—

(a) creation of barriers to new entrants in the market;

(b) driving existing competitors out of the market;

(c) foreclosure of competition by hindering entry into the market;

(d) accrual of benefits to consumers;

(e) improvements in production or distribution of goods or provision of services;

(f) promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

**Pakistani Competition Law Sections for Anti-competitive Agreements**

DEFINITION OF ‘AGREEMENT’

Section 2(1)(b)

an agreement ‘includes any arrangement, understanding or practice, whether or not it is in writing or intended to be legally enforceable.’

PROHIBITED AGREEMENTS

4(1) No undertaking or association of undertakings shall enter into any agreement or in the case of association of undertakings, shall make a decision in respect of the production, supply, distribution, acquisition of goods or control of goods or the provision or provision or services which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5.

4(2) Such agreements include but are not limited to—

(a) fixing the purchase or selling price or imposing of any other restrictive trading conditions with regard to the sale or distribution of any goods o f the provision of any service;

(b) dividing or sharing of markets for the goods or services, whether by territories, by volume of sales or purchases, by type of goods or services sold or by any other means;

(c) fixing or setting the quantity of production, distribution or sale with regard to any goods or the manner or means of providing any services;

(d) limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of any services; or

(e) collusive tendering or bidding for sale, purchase or procurement of any goods or service.

(f) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage; and

(g) making the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

4(3) Any agreement entered into in contravention of the provision in sub-section (1) shall be void.

INDIVIDUAL EXEMPTIONS

5(1) The Commission may grant an exemption from section 4 with respect to a particular practice or agreement, if a request for an exemption has been made to it by a party to the agreement or practice and the agreement is one to which section 9 applies.

#### BLOCK EXEMPTION (RELEVANT PORTION ONLY)

7(1) If agreements which fall within a particular category of agreements are, in the opinion of the Commission, likely to be agreements to which section 9 applies, the Commission may make a block exemption order giving exemption to such agreements.

#### THE CRITERIA FOR INDIVIDUAL AND BLOCK EXEMPTIONS

9(1) The Commission may grant individual or block exemption in respect of agreement which substantially contributes to:

- (a) improving production or distribution
  - (b) promoting technical or economic progress, while allowing consumers fair share of the resulting benefit; or
  - (c) the benefits of that clearly outweigh the adverse effect of absence or lessening of competition.
- (2) the onus of claiming an exemption under this Act shall lie on the undertaking seeking exemption.

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 Appeal 23 OF 2011. Order 19.05.2014

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 Appeal 10/2015. Order 01.07.2016

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Appeal 18/2014. Order 06.05.2014

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Appeal 128/12. Order 11.12.2015

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Appeal 14/2016. Order 10.05.2016

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Appeal 32/2012. Order 20.12.2013

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Appeal 93/2012 , 25-Feb-13

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Appeal 30/2013. Order 02.04.2014

*Ministry of Tourism v. CCI & others*  
Appeal 80/2015. Order 16.07.2015

*Mittal Auto Sales & Services & Anr. v. CCI & others*  
Appeal 06/2010. Order 19.05.2011

*Mittal Auto Sales & Services & Anr. v. CCI & others*  
Appeal 06/2010. Order 19.05.2011

*Modern Radios v. Shri Haneef Ahmed and others*  
UTPE No. 417 of 1997. Order 06.11.2015

*Mohan Dharmashi Madhvi v. CCI & others*  
Appeal 50/2015. Order 07.04.2015

*Mohanadurai Chithambaram, v. CCI & others*  
Appeal 75/2012. Order 20.02.2013

*Mohd. Ekram Khan & Sons v. Nasir Enam Khan and others*  
UTPE No.193/2008 CA 196/2008. Order 19.10.2016

*Mohd. Ekram Khan & Sons and others v. Mahindra and Mahindra Limited & others,*  
UTPE No.193/2008 CA 196/2008. Order 22.02.2016

*Moran Plantation Pvt. Ltd. v. CCI & others*  
Appeal 39/2014. Order 16.07.2014

*Motion Pictures Association v. CCI & others*  
Appeal 102/2012. Order 17.05.2013

*Motion Pictures Association & Ors v. CCI & others*  
Appeal 19/2010. Order 28.07.2011

*Motion Pictures Association v. CCI & others*  
Appeal 69/2012. Order 17.05.2013

*Motion Pictures Association, Delhi v. CCI & others*  
Appeal 73/2012. Order 17.05.2013

*Motion Pictures Association, Delhi, v. CCI & others*  
Appeal 97/2012. Order 17.05.2013

*Mourya Udyog Ltd. v. CCI & others*  
Appeal 41/2012. Order 20.12.2013

*Mr. A. A. Wilson v. CCI & others*  
Appeal -- /2012. Order 16.01.2013

*Mr. A. A. Wilson v. CCI & others*  
Appeal --/2012. Order 16.01.2013

*Mr. A. A. Wilson v. CCI & others*  
Appeal ---/2012. Order 16.01.2013

*Mr. A.Ganesh v. Competition Commission of India*  
Appeal 66/2015. Order 08.07.2015

*Mr. A.Ganesh v. Competition Commission of India*  
Appeal 65/2015. Order 08.07.2015

*Mr. A.Ganesh v. Competition Commission of India*  
Appeal 67/2015. Order 08.07.2015

*Mr. A.Ganesh v. Competition Commission of India*  
Appeal 68/2015. Order 08.07.2015

*Mr. A.Ganesh v. Competition Commission of India*  
Appeal 69/2015. Order 08.07.2015

*Mr. Ajit Bhardwaj v. DLF Universal Limited and others*  
UTPE no. 07/2004 ca. 24/2008. Order 24.12.2016

*Mr. Jose C. Mundadan v. CCI & others*  
Appeal ---/2012. Order 16.01.2013

*Mr. Jose C. Mundadan v. CCI & others*  
Appeal -- /2012. Order 16.01.2013

*Mr. K.G. Ramesh v. CCI & others*  
Appeal /2012. Order 16.01.2013

*Mr. K.G. Ramesh v. CCI & others*  
Appeal /2012. Order 16.01.2013

*Mr. K.Manju v. Competition Commission of India*  
Appeal 70/2015, 08-Jul-15

*Mr. K.Manju v. Competition Commission of India*  
Appeal 71/2015. Order 08.07.2015

*Mr. K.Manju v. Competition Commission of India*  
Appeal 72/2015. Order 08.07.2015

*Mr. K.Manju v. Competition Commission of India*  
Appeal 73/2015. Order 08.07.2015

*Mr. K.Manju v. Competition Commission of India*  
Appeal 74/2015. Order 08.07.2015

*Mr. R. N. Grover v. GST Corporation, Rawal Apartments (P) Ltd. & others*  
RTPE 176/2000 and CA 682/2000. Order 07.08.2015

*Mr. R. Paneerselvam v. CCI & others*  
Appeal 05/2013. Order 11.07.2013

*Mr. Rajiv Nayar v. DLF Universal Limited*  
UTPE 56 /1998. Order 20.05.2015

*Mr. Ranjit Vig and others v. D.L.F. Universal Limited*  
UTPE 404 /1997. Order 20.05.2015

*Mr. Sameer Agarwal v. CCI & others*  
Appeal 73/2016 I.A. Nos. 173 & 175/2016. Order 21.12.2016

*Mr. Swapan Kumar Karak v. CCI & others*  
Appeal 42/2014. Order 07.12.2015

*Mr. Tam Tam Pedda Guruva Reddy & others v Ashok Leyland Ltd. and others*  
UTPE 81/2001. Order 07.11.2016

*Mr. V.C. George v. CCI & others*  
Appeal /2012. Order 16.01.2013

*Mr. V.C. George v. CCI & others*  
Appeal /2012. Order 16.01.2013

*Mr. Vimal Chandok and others v. Bright Star Hotel Pvt. Ltd. & others*  
RTPE No. 38/2000 C.A. No. 563/2000. Order 26.05.2015

*Mr. Vineet Arya and others v. CCI & others*  
Appeal 24/2016. Order 12.04.2016

*Mrs. Belarani Bhattacharyya v. CCI & others*  
Appeal 16/2011. Order 20.10.2011

*Mrs. Neena Dikshit Thomas and others v. Mrs. Ravindera Sabharwal and others*  
RTPE 135/1996 Contempt No. 02/2007. Order 12.05.2015

*Mrs. Parbati Devi & another v. Mssrs. Swatantra Land & Finance Private Limited,*  
UTPE No. 34/1997. Order 02.08.2016

*Mrs. Sanyogita Goyal v. CCI & others*  
Appeal 39/2016. Order 19.08.2016

*Ms. Geeta Kapoor v. CCI & others*  
Appeal 41/2016. Order 29.08.2016

*Muthoot Mercantile Limited v. CCI*  
Appeal 48/2015. Order 06.04.2015

*N. Sanjeeva Rao & another v. CCI & others*  
Appeal 31/2013. Order 09.01.2014

*Nagole Auto Drivers Welfare Association v. CCI & others*  
Appeal 35/2014. Order 14.07.2014

*Nandu Ahuja v. CCI & others*  
Appeal 01/2012. Order 05.08.2013

*Nandu Ahuja v. CCI & others*  
Appeal 11/2011. Order 17.01.2014

*Narendra & Company v. Competition Commission of India*  
Appeal 89/2015. Order 10.05.2016

*Narendra Explosive Ltd v. Competition Commission of India*  
Appeal 88/2015. Order 10.05.2016

*Narottam Singh and Others v. Vashisthe Builders and Engineers (P) Ltd.*  
UTPE 36/2009 CA 68/2009. Order 02.02.2015

*National Insurance Company Ltd v. Competition Commission of India*  
Appeal 94/2015. Order 09.12.2016

*New India Assurance Company Ltd v. Competition Commission of India*  
Appeal 95/2015. Order 09.12.2016

*Next Tenders (India) Private Limited v. CCI & others*  
Appeal 12/2013. Order 12.11.2013

*Nissan Motor India Private Limited v. Competition Commission of India & others*  
Appeal 62/2014. Order 09.12.2016

*Nitin Radheshyam Agarwal v. CCI & others*  
Appeal 108/2015. Order 14.12.2015

*North East Petroleum Dealers Association Competition Commission of India, v. CCI & others*  
Appeal 51/2014. Order 26.11.2015

*North India Wires Ltd. v. CCI & others*  
Appeal 38/2012. Order 20.12.2013

*Northern India Motion Pictures Association v. CCI & others*  
Appeal 71/2012. Order 17.05.2013

*Northern India Motion Pictures Association v. CCI & others*  
Appeal 96/2012. Order 17.05.2013

*Oberoi Cars Private Limited v. CCI & others*  
Appeal 71/2016. Order 21.12.2016

*OHM Value Services Limited v. CCI & others*  
Appeal 49/2015. Order 31.03.2015

*Om Containers v. CCI & others*  
Appeal 48/2012. Order 20.12.2013

*Om Datt Sharma v. CCI & others*  
Appeal 55/2014. Order 02.02.2015

*OMID Engineering (P) Ltd. v. CCI & others*  
Appeal 23/2012. Order 20.12.2013

*Oriental Insurance Company Ltd v. CCI & others*  
Appeal 97/2015. Order 09.12.2016

*Owners & Occupants Welfare Association v. CCI & others*  
Appeal 117/2012. Order 03.04.2014

*P. Tex Builders (P) Ltd. v. CCI & others*  
Appeal 6/2012. Order 29.08.2012

*Pan India Infra Projects Private Limited v. Competition Commission of India*  
Appeal 31/2014. Order 30.03.2015

*Paper Merchant Association v. CCI & others*  
Appeal 13/2013. Order 16.05.2013

*Paper Merchants Association v. CCI & others*  
Appeal 41/2014. Order 16.07.2014

*Pawan Kumar Aggarwal v. CCI & others*  
Appeal 18/2011. Order 03.05.2012

*People Interactive (I) Private Limited v. Bharat Matrimony.Com Private Limited,*  
UTPE 10/2007. Order 31.08.2015

*Pes Installations Pvt. Ltd v. CCI & others*  
Appeal 94/2012. Order 25.02.2013

*PES Installations Pvt. Ltd. v. CCI & others*  
Appeal 99/2012. Order 14.03.2013

*Pharma Care Foundation v. CCI & others*  
Appeal 20/2013. Order 30.07.2013

*Piramal Enterprises Limited v. Competition Commission of India*  
Appeal 37/2016. Order 16.11.2016

*Pitambra Books Pvt. Ltd. v. CCI & others*  
Appeal 14/2012. Order 21.11.2012

*Preet Footwears v. CCI & others*  
Appeal 39/2013. Order 12.04.2016

*Prem Prakash v. CCI & others*  
Appeal 51/2015. Order 16.04.2015

*Prem Prakash v. CCI & others*  
Appeal 51/2015. Order 17.02.2016

*Puja Enterprises BastiBawa Khelrrough v. CCI & others*  
Appeal 08/2014. Order 12.04.2016

*Quadrant EPP Surlon India Ltd. v. CCI & others*  
Appeal 26/2013. Order 25.09.2013

*Quoprro Global Services Pvt. Ltd. & Cox & Kings India Ltd. v. CCI*  
Appeal 18/2010. Order 28.09.2011

*R. Narayansamy Naid v. CCI & others*  
Appeal 139/2012. Order 11.07.2013

*R.M.Cylinders (P) Ltd. v. CCI & others*  
Appeal 28/2012. Order 20.12.2013

*R.S. Industries v. CCI & others*  
Appeal 43/2013. Order 12.04.2016

*R.V. Ram Gopal v. CCI & others*  
Appeal 114/2012. Order 13.03.2013

*Radhey Shyam Poddar v. CCI & others*  
Appeal 14/2015 & I.A. No.33/2015. Order 01.07.2016

*Radhika Kapur and Others v. DLF Universal Limited*  
UTPE No. 206/1998. Order 14.07.2015

*Raghavendra Gupta Fort William Jute Mills Division v. CCI & others*  
Appeal 76/2014. Order 01.07.2016

*Raghavendra Singh v. CCI & others*  
Appeal 23/2016. Order 28.03.2016

*Raghubir Mertia, Aura Real Estate Private Limited v. CCI & others*  
Appeal 30/2016. Order 26.04.2016

*Rajasthan Cylinders & Containers (P) Ltd. v. CCI & others*  
Appeal 59/2012. Order 20.12.2013

*Rajat Verma, Haryana Public Works (B&R) Department State of Haryana  
Superintending Engineer v. Competition Commission of India*  
Appeal 45/2015. Order 16.02.2016

*Rajinder Nath Mahendru v. Pushpa Builders Ltd.*  
RTPE No.287/1995 C.A. No. 76/2006. Order 05.10.2015

*Rajkumar Dyeing & Printing Works Private Limited v. CCI & others*  
Appeal 38/2013. Order 12.04.2016

*Rangi International Pvt. Ltd. v. NOVA SCOTIA BANK and others*  
UTPE No.192/2008. Order 27.01.2016

*Ravinder Kaur Sethi v. CCI & others*  
Appeal 75/2015. Order 09.08.2016

*Ravindra Kumar Poddar v. CCI & others*  
Appeal 15/2015. Order 01.07.2016

*Regenesi Industries Pvt. Ltd. & another v. CCI & others*  
Appeal 88/2012. Order 18.04.2013

*Rooster Info Private Limited v. CCI & others*  
Appeal 76/2015. Order 13.07.2015

*S.K. Bhattacharya Indian Jute Mills Association v. CCI & others*  
Appeal 77/2014. Order 01.07.2016

*S.M. Cylinders (P) Ltd. v. CCI & others*  
Appeal 24/2012. Order 20.12.2013

*S.S. Rubbers v. CCI & others*  
Appeal 40/2013. Order 12.04.2016

*Sahuwala Cylinders (P) Ltd. v. CCI & others*  
Appeal 58/2012. Order 20.12.2013

*Sandhya Organic Chemicals (P) Limited v. CCI & others*  
Appeal 80/2012. Order 29.10.2013

*Sanjay Goel v. CCI & others*  
Appeal 44/2015. Order 27.02.2015

*Sanjay Goel v. CCI & others*  
Appeal 84/2015. Order 31.07.2015

*Sanjay Kajaria v. CCI & others*  
Appeal 75/2014. Order 01.07.2016

*Sanofi Pasteur India Private Limited v. CCI & others*  
Appeal 86/2015. Order 08.11.2016

*Sanwar Mal Agarwal v. CCI & others*  
Appeal 01/2010. Order 12.05.2011

*Sarthak Industries Ltd. v. CCI & others*  
Appeal 10/2014. Order 27.03.2014

*Sarthak Industries Pvt. Ltd. v. CCI & others*  
Appeal 52/2012. Order 20.12.2013

*Saurabh Bhargawa v. CCI & others*  
Appeal 03/2014. Order 17.02.2014

*Savitri Leasing & Finance Ltd. v. CCI & others*  
Appeal 04/2012. Order 30.04.2013

*Schott Glass India Pvt. Ltd v. CCI & others*  
Appeal 91/2012. Order 02.04.2014

*SCM Soilfert Limited, Deepak Fertilizers and Petrochemicals v. CCI & others*  
Appeal 59/2015. Order 30.08.2016

*Sh. Anil Gambhir v. CCI & others*

Appeal 32/2013. Order 24.10.2013  
*Shahi Exports Pvt. Ltd. v. CCI & others*  
Appeal 18/2013. Order 10.05.2013  
*Sharad Jatia Mssrs. Hoogly Infrastructure Pvt. Ltd. v. CCI & others*  
Appeal 85/2014. Order 01.07.2016  
*Sharad Kumar Jhunjhunwala & others v. CCI & others*  
Appeal 01/2016. Order 11.01.2016  
*Sheth & Co v. CCI & others*  
Appeal 34/2014. Order 10.05.2016  
*Shiva Rubber Industries v. v. CCI & others*  
Appeal.41/2013. Order 12.04.2016  
*Shree Cement Limited v. CCI & others*  
Appeal 121/2012. Order 11.12.2015  
*Shri A.K. Gupta, Vice President v. CCI & others*  
Appeal 24/2014. Order 30.10.2015  
*Shri A.K. Jain, 'Abhinandan Farm', PalamVihar v. CCI & others*  
Appeal 07 /2013. Order 16.04.2015  
*Shri Ashwini Garg, Treasurer v. CCI & others*  
Appeal 28/2014. Order 30.10.2015  
*Shri CA Sreeram Musthy v. CCI & others*  
Appeal 53/2014. Order 13.10.2014  
*Shri Chaman Lal Kakkar, President v. CCI & others*  
Appeal 27/2014. Order 30.10.2015  
*Shri G.D. Bangur v. CCI & others*  
Appeal 87/2014. Order 01.07.2016  
*Shri Gurpreet Singh v. CCI & others*  
Appeal 22/2014. Order 30.10.2015  
*Shri H.C. Gupta, Vice President v. CCI & others*  
Appeal 23/2014. Order 30.10.2015  
*Shri Lalit Badhwar v. DLF Universal Ltd.*  
UTPE 402 /1997. Order 20.05.2015  
*Shri M.M. Pande and others v. Bank of India,*  
UTPE 195/1997, 24-Sep-15  
*Shri Manish Singh v. CCI & others*  
Appeal 18/2012. Order 03.05.2012  
*Shri R.S. Bakshi v. CCI & others*  
Appeal 26/2014. Order 30.10.2015  
*Shri Ram Cylinders Ltd. v. CCI & others*  
Appeal 40/2012. Order 20.12.2013  
*Shri Shakti Cylinders (P) Ltd. v. CCI & others*  
Appeal 51/2012. Order 20.12.2013  
*Shri Shyam Lal Kakkar, Secretary v. CCI & others*  
Appeal 25/2014. Order 30.10.2015  
*Shri Sunil Bansal & others v. CCI & others*  
Appeal 21/2016. Order 28.09.2016  
*Shri Surendra Prasad v. CCI & others*  
Appeal 43/2014. Order 15.09.2015  
*Shubham Sanitary Wares v. CCI & others*  
Appeal 32/2014. Order 07.07.2014  
*Shubham Sanitary wares v. CCI & others*

Appeal 19/2016. Order 29.11.2016  
*Silapuri Colonizer Pvt. Ltd. v. CCI & others*  
Appeal 14/2013. Order 09.05.2013  
*Singhania and Partners LLP v. CCI & others*  
Appeal 17/2011. Order 09.02.2012  
*Singhvi Cylinders (P) Ltd. v. CCI & others*  
Appeal 30/2012. Order 20.12.2013  
*SKN Industries Ltd v. Competition Commission of India*  
Appeal 57/2015. Order 01.03.2016  
*SKN Industries Ltd. v. Competition Commission of India & Others*  
Appeal 33/2012. Order 20.12.2013  
*Skoda Auto India Private Limited v. Competition Commission of India*  
Appeal 69/2014. Order 18.12.2014  
*Smt. Achla Chatterjee v. Ghaziabad Development Authority*  
UTPE No. 72/2005 MA No. 03/2015. Order 09.03.2015  
*Smt. Bharati Devi Koppole v. Skipper Builders Pvt. Ltd. and another*  
UTPE No. 158/1995. Order 28.09.2015  
*Smt. Ritu Dublsh v. New Okhla Industrial Development Authority,*  
UTPE 08/2007. Order 20.08.2015  
*Solar Industries India Ltd. v. CCI & others*  
Appeal 84/2012. Order 18.04.2013  
*South City Group Housing Apartment v. CCI & others*  
Appeal 09/2014. Order 01.04.2014  
*South Gujarat Textile Processor Association v. CCI & others*  
Appeal 16/2012. Order 31.10.2013  
*Spice Jet Limited v. CCI & others*  
Appeal 08/2016. Order 18.04.2016  
*Sponge Iron Manufacturers Association v. CCI & others*  
Appeal 70/2014. Order 17.05.2016  
*Sri D.C. Baheti v. CCI & others*  
Appeal 88/2014. Order 01.07.2016  
*Steel Authority of India Limited v. CCI & others*  
Appeal 03/2010. Order 18.10.2010  
*Steel Authority of India Limited v. CCI & others*  
Appeal 1/2009. Order 15.02.2010  
*Stone India Limited v. CCI & others*  
Appeal 20/2014. Order 18.12.2015  
*Sumit Sahni v. CCI & others*  
Appeal 16/2014. Order 02.05.2014  
*Sunil Arjan Lulla v. CCI & others*  
Appeal 02/2012. Order 05.08.2013  
*Sunil Arjan Lulla v. CCI & others*  
Appeal 12/2011. Order 17.01.2014  
*Sunrays Engineers (P) Ltd. v. CCI & others*  
Appeal 63/2012. Order 20.12.2013  
*Super Industries v. CCI & others*  
Appeal 50/2012. Order 20.12.2013  
*Supreme Tecnofabs (P) Ltd. v. CCI & others*  
Appeal 42/2012. Order 20.12.2013  
*Surat Singh Virk v. FIIT Jee Limited,*

RTPE No. 13/2004. Order 05.02.2015  
*Surya Scooters Private Limited v. Greaves Cotton & Company Limited & others*  
 UTPE No. 113/1992 CA 207/1992. Order 14.09.2015  
*Surya Shakti Vessela (P) Ltd. v. CCI & others*  
 Appeal 34/2012. Order 20.12.2013  
*T.K. Haridas v. CCI & others*  
 Appeal 15/2016. Order 10.05.2016  
*Talent India Academy Limited v. FIIT Jee Limited*  
 RTPE No. 15/2004. Order 05.02.2015  
*Tamil Nadu Film Exhibitors Association v. CCI & others*  
 Appeal 14/2014. Order 28.04.2015  
*Tavoy Apparels Limited & others v. CCI & others*  
 Appeal 29/2014. Order 26.10.2015  
*TDI Fun Republic Shop Owner Welfare Association v. CCI & others*  
 Appeal 52/2014. Order 05.02.2015  
*TDI Fun Republic Shops Owners' Welfare Association v. CCI & others*  
 Appeal 52/2014. Order 01.09.2015  
*Technology Products v. CCI & others*  
 Appeal 13/2012. Order 05.09.2013  
*Tee Kay Metels (P) Ltd. v. CCI & others*  
 Appeal 62/2012. Order 20.12.2013  
*Telewings Communications Services Pvt. Ltd. v. CCI & others*  
 Appeal 138/2012. Order 03.01.2013  
*The Air Cargo Agents Association of India v. CCI & others*  
 Appeal 24/2013. Order 25.03.2014  
*The Air Cargo Agents Association of India v. CCI & others*  
 Appeal 98/2015. Order 15.11.2016  
*The Board of Control for Cricket in India v. CCI & others*  
 Appeal 17/2013. Order 23.02.2015  
*The Director General (I&R) v. Bharti Airtel Limited and others*  
 RTPE 20/2007. Order 09.03.2015  
*The India Cements Ltd. v. CCI & others*  
 Appeal 134/12. Order 11.12.2015  
*The India Cements Ltd. v. CCI & others*  
 Appeal 106/12. Order 11.12.2015  
*The Malwa Industrial & Marketing Ferti-Chem Cooperative Society Ltd. v. CCI & others*  
 Appeal 25/2015. Order 30.04.2015  
*The National Stock Exchange of India Ltd. v. CCI & others*  
 Appeal 15/2011. Order 05.08.2014  
*The Ramco Cements Limited v. CCI & others*  
 Appeal 123/12. Order 11.12.2015  
*The Ramco Cements Limited v. CCI & others*  
 Appeal 111/12. Order 11.12.2015  
*The Registrar of Restrictive Trade Agreements v. The Director General of (Investigation and Registration) (CCI)* RTPE No.52/1984. Order 28.09.2015  
*Thomas Cook (India) Limited & others v. CCI & others*  
 Appeal 48/2014. Order 26.08.2015  
*Tirupati Cylinders Ltd. v. CCI & others*  
 Appeal 26/2012. Order 20.12.2013  
*Tirupati Footwear Private Limited. v. CCI & others*

Appeal 36/2013. Order 12.04.2016  
*Tirupati LPG Industries Ltd. v. CCI & others*  
 Appeal 25/2012. Order 20.12.2013  
*Toyota Kirloskar Motor Private Limited v. CCI & others*  
 Appeal 60/2014. Order 09.12.2016  
*TPM Consultants Pvt. Ltd Ms. Kavita Gupta v. Competition Commission of India,*  
 Appeal 35/2016. Order 04.07.2016  
*Travel Agents Association of India v. CCI & others*  
 Appeal 22/2010. Order 17.03.2011  
*Travel Agents Association of India v. CCI & others*  
 Appeal 22/2010. Order 17.03.2011  
*Travel Agents Association of India v. CCI & others*  
 Appeal 21/2010. Order 26.09.2011  
*Travel Agents Association of India & others v. CCI & others*  
 Appeal 24/2011. Order 10.07.2013  
*Tushar Kanti Dhingra v. CCI & others*  
 Appeal 28/2013. Order 28.10.2013  
*UPSE Securities Ltd. v. CCI & others*  
 Appeal 22/2013. Order 28.11.2013  
*Ultra Tech Cement Limited v. CCI & others*  
 Appeal 126/12. Order 11.12.2015  
*Ultra Tech Cement Limited v. CCI & others*  
 Appeal 104/12. Order 11.12.2015  
*Uma Agriculture Tractors v. Mahindra and Mahindra Limited*  
 UTPE 81/2007 CA 39/2007. Order 27.07.2015  
*Union of India v. CCI & others*  
 RTPE 147/1992. Order 29.07.2016  
*United India Insurance Company Ltd. v. Competition Commission of India*  
 Appeal 96/2015. Order 09.12.2016  
*United Phosphorous Limited v. CCI & others*  
 Appeal 81/2012. Order 29.10.2013  
*Universal Cylinders (P) Ltd. v. CCI & others*  
 Appeal 49/2012. Order 20.12.2013  
*V.Senthil Nathan v. Competition Commission of India*  
 Appeal 05/2014. Order 21.04.2014  
*VE Commercial Vehicles Ltd. v. CCI & others*  
 Appeal 19/2011. Order 07.05.2012  
*Veekay Enterprises v. Competition Commission of India*  
 Appeal 103/2015. Order 10.05.2016  
*Vidhya Cylinders (P) Ltd. v. CCI & others*  
 Appeal 60/2012. Order 20.12.2013  
*Vimal Singh Rajput v. CCI & others*  
 Appeal 27/2016. Order 25.05.2016  
*Volkswagen India Private Limited v. CCI & others*  
 Appeal 68/2014. Order 18.12.2014  
*Win Medicare Ltd. v. Reckitt Benckiser India Ltd.*  
 UTPE No.43/2001. Order 19.03.2015  
*Wing Cdr. (Retd.) Dr. Biswanath Prasad Singh and others v. CCI & others*  
 Appeal 63/2014. Order 01.03.2016

*Wing Commander (Retd.) S.K. Pur and others v. Messers Swatantra Land & Finance Private Limited and others*  
UTPE No. 33/1995. Order 02.08.2016

Orders of the High Courts

*Amir Khan Productions (Pvt.) Limited v. Union of India*  
WP 358/2010 Bombay High Court 18.08.2010

*Arun Kumar Bajoria v. Competition Commission of India and another*  
WP (C) 2471/2016 Delhi High Court 21.03.2016

*DLF Home Developers Limited v. Competition Commission of India & another*  
WP 6361 and 4362/2014 Delhi High Court 10.10.2014

*Google Inc. & others v. Competition Commission of India and another*  
WP 7084/2014 Delhi High Court 27.04.2015

*Gujarat Guardian Limited v. Competition Commission of India and others*  
WP 7766/2010 Delhi High Court 23.11.2010

*Hyundai Motor India Limited v. The Competition Commission of India & others*  
WPs 31808, 31809/2012 & 26986/2014 Madras High Court 04.02.2015

*Interglobe Aviation Limited v. Secretary Competition Commission of India*  
WP 6805/2010 decided by Delhi High Court on 06.10.2010

*Kingfisher Airlines Limited & another v Competition Commission Of India & others,*  
WP 1785/2009 decided by Bombay High Court 31.03.2010

*Pran Mehra v. Competition Commission Of India & another*  
WP 6258, 6259 & 6669/2014 Delhi High Court 26.02.2015

*Telefonaktiebolaget LM Ericsson v. Competition Commission of India & others*  
WP 1006/2014 Delhi High Court 16.04.2016

Competition Commission of India

Section 27 Orders

*A Foundation for Common Cause and People Awareness v. PES Installations Private Limited*  
Case no 43/2010 decided 16.04.2012

*Aluminum Phosphide Tablets Manufacturers*  
Suo Motu Case no. 02/2011 decided 23.04.2012

*Arora Medical Hall Ferozpur v. Chemists & Druggists Association Ferozpur*  
Case no. 60/2012 decided 05.02.2014

*Atos Wordline India (Pvt) Limited v. Verifone India Sales Pvt. Limited*  
Case no. 56/2012 decided 10.04.2015

*Belaire Owners Association v. DLF Limited*  
Case no. 19/2010 decided 12.08.2011

*Bengal Chemists & Druggists Association*  
Suo Motu Case no. 02/2011; Reference Case no. 01/2013 decided 11.03.2014

*Bio Med Private Limited v. Union of India*  
Case no. 26/2013 04.06.2015

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Case no. 29/2010 decided 20.06.2012

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Case no. 29/2010 decided 31.08.2016

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Suo Motu Case no. 02/2014 decided 10.07.2015

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Case no. 62/2012 decided 23.12.2014

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Suo Motu Case no. 05/2013 decided 27.10.2014

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Case no. 16/2014 decided 08.09.2015

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Case no. 46/2012 decided 01.07.2013

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Case no. 30/2013 decided 17.11.2015

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Case no. 71/2012 decided 03.07.2014

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Case no. 01/2009 decided 25.05.2011

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Case no. 08/2014 decided 16.02.2015

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Reference Case no. 06/2011 decided 16.04.2012

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Case no. 40/2012 decided 25.04.2012

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Case no. 61/2012 decided 16.02.2015

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Case no. 38/2011 decided 31.10.2014

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Case no. 36/2011 decided 03.07.2012

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Case no. 22/2010 decided 29.03.2012

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Case no. 45/2012 decided 23.06.2015

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Suo Motu Case no. 03/2011 decided 24.02.2012

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Suo Motu Case no. 03/2011 decided 06.08.2014

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Case no. 67/2010 decided 31.10.2012 and 10.01.2013

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Cases no. 03/2012, 11/2012 and 59/2012 decided 09.12.2013

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Case no. 17/2011 decided 24.04.2012

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Case no. 71/2013 decided 28.07.2016

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Case no. 13/2009 decided 23.06.2011

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Case no. 55/2010 decided 14.11.2011

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Reference Case no. 05/2011 decided 21.02.2013

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Case no. 28/2014 decided 01.12.2015

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Case no. 32/2013 decided 23.12.2014

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Reference Case no. 01/2012 decided 06.08.2013

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Case no. 39/2012 decided 05.02.2014

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Case no. 78/2012 decided 29.01.2015

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Case no. 88/2013 decided 27.10.2014

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Case no. 41/2011 decided 09.12.2013

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Suo Motu Case no. 04/2013 decided 10.06.2015

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MRTP Case no. 52/2006 decided 31.08.2016

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Case no. 43/2013 decided 04.02.2015

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Case no. 71/2011 decided 08.05.2013  
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Case no. 59/2013 decided 27.10.2014  
*Shri Ghanshyam Das Vij v. Bajaj Corp Limited*  
Case no. 68/2013 decided 12.01.2015  
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Case no. 59/2011 decided 03.02.2015  
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Case no. 03/2011 decided 25.08.2014  
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Case no. 03/2011 decided 27.07.2015  
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Case no. 61/2010 decided 08.02.2013  
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Reference Cases no. 05/2013 and 07/2013 decided 15.04.2014  
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Case no. 44/2013 decided 15.04.2014  
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Suo Motu Case no. 03/2012 decided 05.02.2014  
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Case no. 42/2012 decided 21.01.2015  
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Case no. 13/2013 decided 10.04.2015  
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Case no. 09/2008 decided 17.11.2011  
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Case no. 07/2009 decided 24.03.2011  
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Case no. 37/2013 decided 15.04.2014  
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Case no. 03/2009 decided 04.10.2011  
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Case no. 09/2011 decided 08.05.2012  
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Case no. 127/2009 decided 11.06.2012

#### Section 26(6) Orders

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Reference Case no. 01/2011 decided 11.01.2012  
*All India Tyre Dealers Federation v. Tyre Manufacturers*  
Case no. 20/2008 decided 16.01.2013  
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Case no. 12/2012 decided 19.09.2013  
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Case no. 06/2010 decided 11.01.2012  
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Cases no. 64/2010, 12/2011, 02/2011 decided 14.08.2012

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Case no. 42/2013 decided 12.05.2015

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Case no. 02/2009 decided 24.03.2011

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Case no. 73/2011 decided 31.05.2013

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Case no. 18/2009 decided 29.12.2010

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Suo Motu Cases no. 02/2010 and 05/2009 decided 10.01.2012

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Case no. 23/2010 decided 10.08.2011

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Case no. 48/2011, 16.01.2014

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Case no. 04/2010, 26.07.2011

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MRTP Case no. 03/2008 decided 02.12.2010

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Case no. 37/2011 decided 03.01.2013

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Case no. 01/2010 decided 16.05.2012

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MRTP Case no. 161/2008 decided 24.01.2012

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Case no. 51/2011 decided 24.10.2013

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Case no. 08/2009, 30.08.2011

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Case no 11/2009 decided 20.12.2011

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Case no. 15/2010 decided 12.05.2011

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Case no. 04/2009 decided 09.01.2012

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Case no. 04/2009 decided 11.08.2011

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Case no. 65/2013 decided 02.12.2014

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Case no. 13/2011, 23.04.2012

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Suo Motu Case no. 01/2012 decided 11.02.2014

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Case no. 28/2010, 23.05.2011

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MRTP Case no. 45/2005 decided 31.05.2011

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MRTP Case no. 19/2008 decided 31.05.2011

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Case no.05.2009 decided 02.12.2010

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Suo Motu Case no. 01/2011 decided 10.04.2012

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Case no.03/2010 decided 07.10.2011

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Case no. 10/2010 decided 22.06.2011

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Case no. 20/2010 decided 14.06.2011

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Case no. 35/2009 decided 24.08.2010

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Case no. 70/2012 decided 25.02.2016

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Case no. 16/2010 decided 03.07.2012

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Case no. 11./2010 decided 16.12.2010

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Case no. 63/2013 decided 27.10.2015

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Case no. 01/28 decided 09.05.2012

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Case no. 20/2013 decided 23.04.2015

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Case no. 66/2011 dated 16.04.2013

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MRTP Cases no. 2/28, 6/28, 11/28, 12/28, 13/28 and 15/28 decided 07.06.2011

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Case no. 31/2008 decided 06.04.2011

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Cases no. 7/28, 25/28, 9/28 and 10/28 decided 31.05.2011  
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 Case no. 60/2011 decided 10.04.2012  
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 Case no. 06/2009 decided 11.05.2011  
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 Case no. 17/2010 decided 23.05.2011  
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 Case no. 14/2011 decided 31.01.2012  
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 Cases no. 100/2013, 49/2014, 89/2014 decided 10.08.2015  
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 Case no. 24/2014 decided 04.01.2016  
*Shri Sonam Sharma v. Apple Inc. USA*  
 Case no. 24/2011 decided 19.03.2013  
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 Case no. 15/2009 decided 22.03.2011  
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 Case no. 08/2014 decided 21.09.2016  
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 Case no. 31/2011 dated 21.03.2013  
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 Case no. 49/2011 decided 23.10.2013  
*Re Sugar Mills*  
 Suo Motu Case no. 01/2010 decided 30.11.2011  
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 Cases no. 72/2011, 16/2012, 34/2012, 53/2012 and 45/2013 decided  
 26.01.2015  
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 Case no. 79/2012 decided 04.06.2015  
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 Case no. 33/2014 decided 05.05.2016

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*ADG LDI (Pvt.) Limited v. Brain Telecommunication Limited*  
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 29.03.2013  
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 CP 521, 522, 523, 524 and 525/2010 Supreme Court of Pakistan 14.10.2010

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 CP 1694/2009 Supreme Court of Pakistan 16.09.2009

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 CP 1065, 1066 and 1067/2010 Supreme Court of Pakistan 10.05.2012

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 CP 1938, 1939/2011, 1988, 1989/2011, 2008, 2009/2011 Supreme Court of  
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 (PLD 2015 SC 6)

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 (2013 SCMR 1205)

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 (PLD 1998 SC 1445)

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*Sindh High Court Bar Association v. The Federation of Pakistan*  
 (PLD 2009 SC 879)

*Syed Zafar Ali Shah v. General Parvez Musharraf, Chief Executive and others*  
 (PLD 2000 SC 869)

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Misc Appeal 71 /2010 Sindh High Court 25.02.2011

Misc Appeal 69 /2010 Sindh High Court 01.04.2011

WP 3530/2010 Lahore High Court 23.02.2010

WP 27488/2011 Lahore High Court 08.12.2011

*AB Ampere Pvt. Limited v. Federation of Pakistan and others*  
 WP 23640/2011 Lahore High Court 21.10.2011

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 CP D 164/2010 Sindh High Court 20.01.2010

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 WP 21290/2012 Lahore High Court 07.09.2012

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 WP 13499/2011 Lahore High Court 16.06.2011

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 WP 15624/2009 Lahore High Court 11.08.2009

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 WP 15640/2009 Lahore High Court 11.08.2009

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 WP 15622/2009 Lahore High Court 11.08.2009

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WP 20729/2012 Lahore High Court 04.01.2012

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WP 15631/2009 Lahore High Court 11.08.2009

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Misc Appeal 20/2010 Sindh High Court 18.08.2010

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WP 1176/2010 Lahore High Court 21.01.2010

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WP 13496/2011 Lahore High Court 16.06.2011

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WP 15670/2009 Lahore High Court 11.08.2009

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WP 15623/2009 Lahore High Court 11.08.2009

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WP 15630/2009 Lahore High Court 11.08.2009

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WP 1465/2011 Islamabad High Court 01.12.2011

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Misc Appeal 17/2010 Sindh High Court 01.10.2010

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CP D 2491/2011 Sindh High Court 21.07.2011

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WP 543/2011 Islamabad High Court

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WP 15629/2009 Lahore High Court 11.08.2009

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WP 15619/2009 Lahore High Court 11.08.2009

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WP 21105/2012 Lahore High Court 04.01.2012

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WP 20280/2012 Lahore High Court 13.08.2012

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WP 1175/2010 Lahore High Court 21.01.2010

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WP 4412/2013 Lahore High Court 25.02.2013

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Misc Appeal 23/10 Sindh High Court 28.09.2010

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CCA 2/2010 Lahore High Court 11.02.2010

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WP 15493/2009 Lahore High Court 05.08.2009

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CP 786/2008 Sindh High Court 02.05.2008, 05.06.2008

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WP 15668/2009 Lahore High Court 11.08.2009

*Lafarge Cement v. Federation of Pakistan*  
 WP 15620/2009 Lahore High Court 11.08.2009

*LPGAP v. Federation of Pakistan & others*  
 WP 9518/2009 Lahore High Court 18.05.2009, 05.08.2009 and 02.09.2009

*Lucky Cement v. Federation of Pakistan*  
 WP 15637/2009 Lahore High Court 11.08.2009

*M R Electric v. Federation of Pakistan*  
 WP 13497/2011 Lahore High Court 16.06.2011

*Maple Leaf Cement v. Federation of Pakistan*  
 WP 15618/2009 Lahore High Court 11.08.2009

*Mirpurkhas Sugar Mills and others v. Federation of Pakistan and others*  
 CP D 110/2010 Sindh High Court 14.01.2010

*Mustehkam Cement v. Federation of Pakistan*  
 WP 15624/2009 Lahore High Court 11.08.2009

*National Sugar Mills v. Federation of Pakistan*  
 WP 2654/2010 Lahore High Court 11.02.2010

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 WP 13500/2011 Lahore High Court 16.06.2011

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 WP 938/2008 Sindh High Court 07.11.2008

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 WP 23743 Lahore High Court 25.10.2011

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 Misc Appeal 66/2010 Sindh High Court 18.04.2011

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 CP D 2494/2011 Sindh High Court 15.07.2011

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 CP D 149/2010 Sindh High Court 19.01.2010

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 CP D 196/2010 Sindh High Court 26.01.2010

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 WP 2556/2010 Lahore High Court 11.02.2010

*Pioneer Cement v. Federation of Pakistan*  
 WP 15616/2009 Lahore High Court 11.08.2009, 24.08.2009, 31.08.2009

*Sakrand Sugar Mills v. Federation of Pakistan and others*  
 CP D 360/2010 Sindh High Court 12.02.2010

*Shahtaj Sugar Mills v. Federation of Pakistan*  
 WP 1122/2010 Lahore High Court 21.01.2010

*Shakarganj Sugar Mills v. Federation of Pakistan*  
 WP 2761/2010 Lahore High Court 12.02.2010

*Sheikhoo Sugar Mills v. Federation of Pakistan*  
 WP 1173/2010 Lahore High Court 21.01.2010

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 WP 3530/2010 Lahore High Court 23.02.2010

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 WP 22575 Lahore High Court 12.10.2011

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 WP 13498/2011 Lahore High Court 16.06.2011

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 WP 21106/2012 Lahore High Court 04.01.2012

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WP 1134/2011 Islamabad High Court 14.04.2011  
*Wateen Telecom Limited & others v. Competition Commission of Pakistan*  
Suit 271/2013 Sindh High Court 09.03.2013

*Orders of the Competition Appellate Tribunal of Pakistan*

*I-Link Guarantee Ltd and others v. CCP and others*  
Appeal 1-26/2012 decided 20.03.2013  
*Al- Rahim Foods (Pvt.) Limited v. CCP and others*  
Appeal 3/2016 decided 25.01.2017  
*Bahria Town (Pvt.) Limited v. CCP*  
Appeal 3/2017 decided 10.05.2017  
*HASCOL Petroleum Ltd v. CCP and others*  
Appeal 7/2016 decided 21.12.2016  
*Institute of Business Management v. CCP*  
Appeal 5/2016 decided 07.06.2017  
*Nauman Anwar Butt v. DHL*  
Appeal 2/2016 decided 21.12.2016  
*Pakistan Poultry Association v. CCP*  
Appeal 9/2016 decided 28.09.2016  
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Appeal 4/2017 decided 10.05.2017  
*Reckitt Benckiser Pakistan Ltd v. CCP*  
26.11.2015  
*Saleem Habib Godial v. CCP*  
Appeal 1/2016 decided 29.03.2017  
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Appeal 12/2016 decided 07.06.2017  
*Tara Crop Sciences (Pvt.) Limited v. CCP and other*  
Appeal 2/2015 decided 30.11.2016  
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Appeal 1/2016 decided 29.03.2017  
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Appeal 4/2016 decided 07.06.2017  
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Appeal No. 10/2016 decided 28.09.2016  
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Appeal 6/2016 decided 07.06.2017

*Competition Commission of Pakistan*

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