

The Asia-Pacific Antitrust Review



2013

Published by Global Competition Review
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Chairperson of the Competition Commission of Pakistan

The enactment of a state-of-the-art competition law – the Competition Act 2010 (the Act) – is in itself a stepping-stone towards achieving economic efficiency and creating a level playing field for healthy competition. This law, primarily based on the Treaty of Rome, has been tailored to take into account indigenous socio-economic realities. The law is, on all counts, in accord with international best practices and conforms to the recommendations of the Organisation for Economic Co-operation and Development (OECD) and other international bodies.

The genesis of the Competition Commission of Pakistan

Pakistani competition law has an intriguing history. Originally promulgated as a Presidential Ordinance in 2007, it had to go through a ratification process before Parliament, which entailed repeated temporary re-promulgations and even a suspension period of about 45 days, until it was enacted as an Act of Parliament in 2010. The Competition Commission of Pakistan (CCP), since its very inception, has had to face multiple challenges. From acute financial constraints to an increasing backlog of cases pending before the courts, particularly at a time when the country faces unprecedented economic and political exigencies, we have faced continuing challenges. As budget allocations trickle in – much below the required need – the CCP continues to struggle for financial independence and autonomy by pursuing its statutorily assured share of 3 per cent of the fees and charges from five other regulatory bodies.

Despite unfavourable odds, a dedicated team at the CCP continues to strive hard to effectively pursue its mandate, and in the process, this young agency is proud to have received national and international recognition. In 2012 it became the first regulatory agency from South Asia to be nominated for Global Competition Review's coveted enforcement award for Agency of the Year – Asia Pacific, Middle East and Africa. The CCP was placed on a shortlist of four, from a total of 42 regional competition agencies.

The CCP has also been included in rankings for *Global Competition Review: Rating Enforcement*, where it has earned a 'fair' rating for the last two years and has been described as 'impressively consistent'. In addition, upon request from the CCP, the agency is currently undergoing a peer review conducted by the United Nations Conference on Trade and Development (UNCTAD).

The growing challenges

In its formative years, our competition agency has had more than the usual share of organisational, administrative and financial challenges. The earliest and perhaps biggest challenge was the transition of the competition law from a temporary to a permanent status on the statute book. The newly established CCP also had to overcome the rather unusual challenge of being perceived favourably: the government keeps on setting up sector regulators without any positive impact on economic regulation, and the fact that our predecessor regulatory body, the Monopoly Control Authority, was widely perceived as a slumbering regulator added to the magnitude of the

task. It is now widely admitted that not only has the CCP made a successful transition but has also established itself as a prominent economic regulator.

To many, the 'real' or 'true' test of the effectiveness of our agency's actions and decisions lies in the eventual endorsement of actions by the courts. While there are cogent reasons for maintaining that this is not the only test, its importance cannot be underestimated. Whether the CCP's decisions are upheld, varied or set aside by courts, judicial appreciation of issues resolved by the CCP will have a significant impact in carving out the direction that competition law and policy will take in Pakistan. The sooner pending battles are concluded by the courts the better it will be for the CCP, the businesses and the consumers – for whose eventual benefit the CCP strives to administer the law. In this respect, it is critical for the CCP to persuasively present its case before the courts in the 200 or so pending cases before the superior courts. This task becomes particularly daunting when powerful lobbies and vested interests continue to bombard us with a litany of cases across Pakistan, questioning the CCP's regulatory mandate. The protracted and cumbersome litigation procedures, the dearth of competition law expertise within the legal community and our continuing financial constraints make it increasingly difficult to cope with these challenges.

The CCP's effective advocacy has yielded a positive outcome in this regard. The much-awaited Competition Appellate Tribunal (CAT) has recently been constituted and put into operation. This is expected to reduce the caseload on the courts and also enable a faster resolution of appellate proceedings. With the CAT beginning to hear cases, the CCP anticipates fresh impetus to more effective enforcement for the overall benefit of the economy, the business community and the multi-layered category of consumers across the country. Unsurprisingly, the establishment of the CAT and the validity of its constitution has also been challenged before the courts by various undertakings against whom the CCP has taken action. Until these questions of constitutional competence are favourably settled, competition regulation will continue to face challenges as it strives towards its target. Be that as it may, the CCP has not shied away from the mandate entrusted to it, and it continues to vigorously identify and curb anti-competitive practices within the public as well as the private sector.

Change in culture

The first five years of the CCP offer thought-provoking indicators of effectiveness for competition agencies of developing countries. Anti-competitive practices in this part of the world have become the norm, rather than an exception. And we face powerful lobbies, vested interests, parochial instincts, deep-rooted biases – ignorance that is customary for a mindset committed to the status quo and resistant to change. Therefore, it has been critical for an agency like ours to not only do what is necessary but to do it without fear or favour – acting firmly, yet fairly and consistently so that the impact is evident and sustainable. The CCP has endeavoured not to allow the

its role to be undermined; at the same time, it has been conscious that such an agency must ultimately be respected for its professionalism rather than feared for its powers.

When the CCP conducted its first search and inspection at the offices of the All Pakistan Cement Manufacturers Association (APCMA) in 2008, it had to invoke powers of ‘forcible entry’ granted by law, bringing strong criticism from the APCMA. It was alleged that such action had sent a negative signal to the business community, and that it had demoralised businesses and shattered their confidence in the regulatory framework. The action was termed ‘hostile’ and ‘high-handed’, compelling the APCMA to initiate protests and complaints towards all levels of government.

In the first two-and-a-half years, only four searches were conducted by our agency; in the last two-and-a-half years, however, there have been 14 searches. What is remarkable is not that the number of searches has significantly increased but that the undertakings searched have not resisted; instead they have shown willingness and cooperation, and have provided access to their records. This is obviously due to the credentials established by the CCP through its enforcement actions and the widespread advocacy aimed at enhancing a wider understanding of the competition regime and its economic benefits. Also, the extent of our searches and inspections has widened, from the offices of associations to public and private undertakings. Interestingly, the last 14 searches have included three conducted in the cement sector, which were met without resistance or the need to invoke powers of forcible entry.

In a few instances, even the CCP has had to struggle in conducting inspections and impounding documents, such as in the case of the Pakistan Electrical Power Equipments Manufacturers Association (PEMA) and two of its members. The CCP, while maintaining its stand, engaged the undertakings in dialogue and was able to secure the participation required to complete the inquiry and conclude its findings. The PEMA inquiry unearthed major collusive activities in multiple product markets – including energy meters, power distribution transformers, switchgears and LT current transformers – over the last 10 years. Show-cause notice was issued to 23 undertakings, which led to the filing of the first leniency application by a renowned multinational company (MNC) operating in the transformers and switchgears market. The MNC was granted complete immunity upon its representations and corroborations through filing of 233 documents evidencing anti-competitive practices. This case is rightly labelled a landmark decision and is viewed as one of the high-profile successes of the CCP. It is expected that litigation initiated by the remaining parties will meet a resolute and decisive response in light of the evidence brought on record due to the invocation of the leniency provisions.

Grant of leniency¹ – ‘a regulatory breakthrough’

Considering that, at the time, there were 150 cases pending in various courts, the fact that an undertaking preferred to invoke leniency (whereby the company acknowledged it had colluded in a cartel of power distribution equipment suppliers) not only reflects the confidence placed in the agency but also helps to establish the CCP’s writ which has been under attack since inception. This was indeed ‘a regulatory breakthrough’, as the media termed the leniency decision; ‘a phenomenal achievement that literally marks a historic moment in the antitrust arena of Pakistan’.² The following is an excerpt from our decision which highlights the importance of the leniency programme for an agency in its formative phase:

The leniency programme is of even greater significance in the developing regimes where competition laws are in their formative phase or where competition authorities may still be struggling to establish their writ. Notwithstanding [the fact] that cartelisation has increasingly been found as the norm in Pakistan, recognition of this ‘supreme evil’ under competition law appears to be the biggest challenge to counter...

It is nothing but sensible to encourage insiders to bring evidence which not only makes the evidence more decisive but also gives an insight into the relevant sector, industry or market, thereby giving more data, useful information and – most importantly – details of the cartel’s working and operating practices.

It is indeed true that ‘the better cartels are understood the more effective we can be in designing policy against them’. One must recognise that, apart from creating a deterrent for cartels and anti-competitive practices, the role of competition law enforcement agency is to bring about corrective behaviour. A cartel raises numerous questions. How prices are agreed upon? How are market quotas decided? What modalities are adopted in reaching such agreements? What business practices exist as the norm? Is there any front runner or party coercing other undertakings to take part in the prohibited activities? What role (if any) do the procurement agencies play? What legal loopholes exist in the system? These are all questions that can be resolved in the process of leniency.

We must not, however, undermine the value of enhanced deterrence for other cartel participants that would result from the granting of leniency, which is equally important in order to ensure businesses’ compliance with the law.

Not only does leniency strengthen the adjudicatory authorities in terms of evidentiary value, it is also time and cost-effective. Considering the time spent and involved in the detection, prosecution and penalisation of cartels, and the costs incurred in pursuing them, leniency is indeed a valuable tool for saving time and costs, and thus enhancing the effectiveness of the enforcement. Furthermore, in our view it also serves the public interest by not only unveiling but also establishing the existence of a cartel, and in addition it pre-empt any possible abuse of process by making technical objections to thwarting the interests of justice...

Owing to its economic impact, estimated at 25 to 30 per cent of Pakistan’s GDP, public procurement has remained one of the CCP’s key areas of attention. Leniency application was a pivotal CCP development as it pertained to collusion in the procurement of transformers and switchgears. However, in a totally unexpected development the CCP, as an outcome of this decision, now faces the additional challenge of explaining to various agencies, such as the National Accountability Bureau and Transparency International, the difference between ‘corrupt practices’ and ‘collusive practices’. If the boundaries are not duly demarcated, rationalised and understood, it may deter or act as an impediment for future leniency applicants – thus rendering one of the most effective cartel-busting tools redundant. One must not forget that, if cartelisation is a virus, then leniency is the antivirus. It not only detects and eliminates but also prevents future harm and exposure. Therefore, access to this investigative tool is most critical while fighting against cartels.

Sector regulators – a conflict or a turf war

The CCP’s position regarding the sector-specific regulators also witnessed interesting twists and turns. Consistent with its legislative mandate, and also consistent with contemporary best practices, the

CCP role is confined to enhancing economic efficiency by acting as a bulwark against anti-competitive practices in all sectors of the economy. In this regard, it is no ordinary feat that, since the CCP's establishment, the federal government has not exempted any sector or class of undertakings from the operation of the law. Section 54 of the Act envisages exemption of any undertaking or class of undertakings from the application of the Competition Act, or any provision thereof, for such period as may be specified by the government via notification. The grounds given for invoking this provision include that which is 'in the interest of security of the state' or 'public interest', which arguably have very broad parameters. Initially, the State Bank of Pakistan (SBP) urged the government to consider 'in the interest of banking and the general public' so as to exempt it from the application of competition law. SBP resisted actions (such as issued notices) against banks and refused to acknowledge their context. However, the CCP firmly defended its position and eventually prevailed. It maintained that granting the banking sector exemptions from the application of competition law would not be in sync with recognised practices and may well be regarded as counter-productive. The CCP asserted that such exemption would defeat the very object of the law – 'to provide for free competition in all spheres of commercial and economic activity', with 'the banking sector being the jugular vein of all commercial and economic activity'. Paying heed to such retrogressive suggestions could have nullified the initiative to promote competition in the economy.

The CCP did not wish for history to repeat itself and render the competition law ineffective, as happened in the case of its predecessor legislation the Monopoly Restrictive Trade Practices (Control and Prevention), Ordinance 1970, which by law exempted activities or functions of undertakings regulated by certain sector-specific regulatory authorities. Subsequently, we have instances where the SBP itself required the banks to comply with the directions in relation to the matter pertaining to deceptive marketing under section 10 of the Act. The CCP also had participation at the level of the SBP's deputy governor in the Competition Consultative Group (CCG) meeting. The CCG comprises about 15 to 20 participants drawn primarily from sector-specific regulators, relevant private-sector professional bodies and academics. This forum meets periodically to consider any concerns and suggestions, and to get informal feedback and guidance for the CCP's ongoing activities and proposed initiatives. Despite initial reluctance by some of the regulators, the CCG has been achieved participation from significant sector-specific regulators, including the Securities and Exchange Commission of Pakistan, the Oil and Gas Regulatory Authority and the Pakistan Electronic Media Regulatory Authority, as well as the Civil Aviation Authority.

An erroneous impression of conflicting regulatory approaches is regularly asserted in the courts. It is fair to expect that, in due course, this too will be settled favourably in view of the abundance of relevant precedents. It must be appreciated that laws can exist side by side without conflict – and it should not be viewed as a tussle between special and general law. Determination requires application of the relevant law.

Other effectiveness indicators

Increasing acceptance of the CCP's status as a key player in economic regulation – and of the fact that it is playing its part fairly and effectively – has been demonstrated by instances such as:

- the Honourable Lahore High Court entrusting the CCP with the task of preparing a preliminary report on the Hajj quota allocations by the Ministry of Religious Affairs;
- academia responding positively to the CCP's initiative to introduce competition law as an elective subject;
- ministries and government departments referring matters for advice and scrutiny on competition aspects;
- new regional competition agencies such as Afghanistan and Bangladesh appearing keen to seek the CCP's support;
- cases being filed by petitioners based on the CCP's policy notes, such as the case filed against the establishment of the International Clearing House (ICH), where 14 long-distance international operators were allowed, with the approval of Ministry of Information Technology (MoIT) and Pakistan Telecommunication Authority, to form a consortium for setting up a gateway for termination of incoming international traffic, involving price fixing and quota fixing; and
- the CCP's endorsement by the Honourable Court (at the interim stage) in some of its cases.

With the accelerated pace of enforcement, the issuance of policy notes from time to time, the targeted advocacy and the agency's conscious efforts to become internally robust, the CCP's emerging role is difficult to understate. With its growing challenges and given financial constraints, the CCP's emergence as an effective law enforcement agency at a national level, and the recognition it has achieved in the global competition arena, have perhaps made the agency's task more demanding – but the CCP and its team remain undeterred and are committed to delivering a performance compatible with the highest standards of regulatory governance.

Notes

- 1 http://www.cc.gov.pk/images/Downloads/leniency_application_filed_by_ms_siemens_engineering.pdf.
- 2 <http://www.brecorder.com/br-research/44:miscellaneous/2411:ccps-regulatory-breakthrough/?date=2012-04-05>.

About the Authors



Rahat Kaunain Hassan

Chairperson of the Competition Commission of Pakistan

Ms Rahat Kaunain Hassan has been the chairperson of the Competition Commission of Pakistan since 26 July 2010. Under her leadership, the Commission gained international repute for achieving substantive progress in competition law enforcement in a short space of time. Previously, Ms Hassan served the Commission as a member (Legal and Office of Fair Trading) from its establishment in November 2007. At present the legal and corporate affairs departments are overseen by her as the relevant member.

Ms Hassan received her LLM degree from King's College London, having focused her academic work on the law of international finance and international business transactions.

In 2001, Ms Hassan was appointed general counsel/executive director of the Securities and Exchange Commission of Pakistan (SECP). Soon after the conclusion of her tenure at SECP, Ms Hassan established her own law firm, handling civil and commercial litigation and regulatory work. However, her commitment to public service resulted in her accepting the nomination as member of the Competition Commission of Pakistan in November 2007. As member, she was instrumental in the establishment of the Office of Fair Trading within the Commission. She has authored numerous position papers, guidelines and policy notes on important issues of competition law and policy. Moreover, she has co-authored most of the seminal Orders passed by the Commission, including those that resulted in breaking the most pernicious cartels.

A working mother of four children, Ms Hassan has been a high achiever in her field, and in recognition of her commitment to the public service, she received the prestigious Women of Achievement Award in 2010. She has also been nominated for the Sitara-e-Imtiaz award.



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ISSN: 1743-7989