Competition Policies of EU and Pakistan and their Effectiveness in Preventing Anti-Competition Practices

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Abstract

This paper discusses the role of competition policy in the EU and Pakistan. It will specifically focus on the Competition Policies of the European Union and Pakistan, analysing how effective these regulatory authorities are in preventing anti-competition practices. It will be argued that both policies aim at achieving similar goals and have created institutional bodies with ample regulatory powers, which include investigating transactions and imposing fines. Nevertheless, differences can be seen in implementation levels and in the way appeals can be made against the decision of the regulatory bodies. It will be maintained that a more stringent implementation of competition laws in Pakistan may create more consumer protection and favour new business start-ups.

Introduction

The recent purchase of Careem by Uber for more than three billion US dollars[1] has raised concerns over the creation of a monopoly in the Middle East and Pakistan's raid hailing business.[2] The merger has brought to the fore the need for effective competition policies in the country. Competition policy can basically be defined as consisting of governmental policy that promotes or maintains the level of competition within commercial markets and includes governmental measures that directly affect the behaviour of companies and institutions and the structure of the said markets. The merger comes at a time where more and more pressure is made on Pakistan to 'improve the local business scene'[3] by institutional funding agencies like the International Monetary Fund (IMF), as a condition to being eligible for loans.[4]

In the context of the aforementioned developments, competition has been traditionally seen with suspicion in the financial and commercial sector, and for significantly long period of time, the both sectors have witnessed limitations being placed in the application of competition policy. In the last two decades, the said development has

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[1] Heather Somerville *et al.*, Uber buys rival Careem in $3.1 billion deal to dominate ride-hailing in Middle East, *Reuters* (26 March 2019) <https://www.reuters.com/article/us-careem-m-a-uber/uber-buys-rival-careem-in-3-1-billion-deal-to-dominate-ride-hailing-in-middle-east-idUSKCN1R70IM>

[2] Alaa Haggag, Imminent Uber-Careem merger to come at the expense of consumers, *Mada Masr* (3 November 2018) <https://madamasr.com/en/2018/11/03/feature/economy/imminent-uber-careem-merger-to-come-at-the-expense-of-consumers/>;

[3] Monitoring Report, Pakistan about to strike $12 bn IMF loan deal, *The News International* (3 March 2019) <https://www.thenews.com.pk/print/439237-pakistan-about-to-strike-12-bn-imf-loan-deal>

[4] Khaleeq Kiani, IMF Bailout Package Agreed upon in Writing: Asad, *The Dawn* (16 April 2019) <https://www.dawn. com/news/1476396>

rather been reversed and a Competition Policy has been applied much more effectively. The current situation, however, reopens the question of what is the role of competition policies in the commercial sector.

This paper discusses the role of competition policy in the EU and Pakistan. The primary focus is on the application of competition policy for the purpose of regulating anti-competition practices. It will specifically discuss the Competition Policy of European Union and Pakistan, and how effective these regulatory authorities are in preventing anti-competition practices.

A. Competition laws in the European Union

Professors Haris and Horspool point out that the European Union Competition Policy is one of the original policy areas of the EC Treaty (1957)[5] whose twofold purpose was protecting consumers and promoting economic efficiency.[6]

Articles 101 and 102 of the Treaty on the Functioning of European Union (TFEU)[7] consist of the rules that apply to regulated companies.[8] Practically, the competition policy of the European Union is designed to achieve effective competition, not ideal competition. Article 101 TFEU regulates anti-competitive behaviour within a wide range of situations and has been applied in the context

[5] Treaty of Rome, 25 March 1957
[6] Siri Harris, Margot Horspool. and Andrea Biondi., EU Law, University of London International Programme Study Guide (2018) 174.
[7] Treaty of Lisbon, 13 December 2007
[8] Harris S. (n 6) 174

of what the European Union is trying to achieve.[9] However in Article 101, EU's objectives are uncertain. There are two main points which need to be considered. The major view is that only considerations of consumer interests are relevant there.[10] However, this position is arguably incorrect as other Member State and European Union public policy goals should also be considered in its purview.[11] If this argument is correct then it could have a profound effect on the outcome of cases[12] as well on the modernisation process within the commercial sector as a whole.

Under EU law, cartels are banned by the provisions of Article 101 TFEU. It clarifies the targets of competition law using the terms 'agreement between undertakings'. This, as explained by the ECJ in *Hoefner v Macroton*, affects approximately anyone 'affianced in an economic action',[13] but bars both workers, who are by means of their 'very nature the opposite of the self-regulating exercise of an economic or industrial action',[14] and public facilities based on 'unity' for a 'public reason'.[15]

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[9] European Parliament's Factsheets on the European Union, Competition Policy <http://www.europarl.europa.eu /factsheets/en/sheet/82/competitio-policy>

[10] European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (2010) <http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf>

[11] Chris Townley, Article 101 TFEU and Public Policy (Oxford: Hart Publishing) (2009)

[12] *GlaxoSmithKline Services v Commission and Others*, (Joined Cases C-501/06 P and others) [2006] ECR II-2969. In this case the ECJ seemed to lean in favour of policy, stating that actual harm to consumer needs not be proven for the competition policy to apply.

[13] *Hoefner v Macroton GmbH* [1991] ECR I-1979

[14] *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-05751

[15] *FENIN v. Commission* [2006] ECR I-6295

'Undertakings' must then have formed an agreement or come to a conclusion: as per Advocate General Reischl in *Albany*,[16] agreement should not be distinguished from a concerted practice because they are only convenient labels. Any type of dealing or contact between parties could be considered illegal agreement. Whilst in the case of *Consten and Grundig v Commission*[17] it was argued that Competition Policy should apply only to agreements between companies operating at the same level in the chain of production or distribution i.e. horizontal agreements. The European Court of Justice saw no reason to place limits on its scope in this way and held that it also applies in regards to 'vertical agreements'. So now this includes, both, horizontal and vertical agreements, efficiently prohibiting the procedure of cartels in the European Union. Article 101 has been interpreted extensively to comprise both unofficial agreements and concerted practices where companies tend to elevate or lower prices at the identical point without physically agreeing to do so. On the other hand, an unintentional raise in prices will not in itself confirm a concerted practice;[18] there should also be verification that the parties concerned were aware that their activities may come up against the common operations of competition within the general market. As far as agreements are concerned, the meagre anticompetitive effect is adequate to formulate it as illegal even if the parties were uninformed and unaware of it or it had no such object.

Whereas, Article 102 of the TFEU is designed to prevent undertakings that hold a dominating position in a market from violating that position. Its mainstay function is the regulation of

[16] *Heintz van Landewyck SARL and others v Commission of the European Communities* [1980] ECR I-3125
[17] [1966] ECR 299
[18] Martin Ris, *The European Community Rules on Competition: The Concerted Practices Doctrine*, 13 Boston College International and Comparative Law Review (1990) 465-481

monopolies, which limit competition in private business and generate worse conclusions for consumers and the public. It is the second main term in competition law of TFEU. The text of Article 102 provides the following:

'(1) Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

(2) Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making 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.'[19]

If we take the example of unfair purchase or selling prices under Article 102(2) (a), it may be complicated to prove that at what point a dominant firm's price becomes exploitative. However, Article 102(2)(b) consists of limiting production, market or technical development to the prejudice of consumers, which is also considered as an abuse by a dominant undertaking. For this scenario the *Porto di*

[19] Article 102 TFEU

Genova case[20] should be considered, where a shipping port refused to raise expenditure and update the new technology. That could limit the production of cargo which the consumers can use. The scenario of refusal to supply can also be seen in the case of *Microsoft v Commission*,[21] where Microsoft refused to supply information of Windows 2000 to the consumers which was a huge hurdle in their day to day work. Microsoft was found to have abused its position and was fined 497 million euros. Finally, Microsoft's claim that the refusal to supply was justified by the need to protect its incentives to innovate was rejected.

Now a question may arise regarding how effectively the law set out by European Union is in preventing anti-competition practices. In particular, it is appropriate to examine whether strict application of competition policy has successfully minimised anti-competition practices. Firstly, the objectives of the Competition Policy can be attained through the setting up of Competition Regulatory Authorities. This was done progressively in all EU Member states: National Competition Authorities (NCAs) already exist in all or most Member states of the EU. Furthermore, Regulation 1/2003 empowered NCAs to apply EU competition policy, investigate breaches, and hand out penalties.[22]

[20] *Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889
[21] [2007] ECR II-3601
[22] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty

B. Competition Policies in Pakistan

The other jurisdiction in discussion, regarding the application of Competition Policies to prevent anti-competitive practices, is the Islamic Republic of Pakistan. Pakistan has enacted specific legislation to prevent anti-competition practices, the Competition Act (CA 2010)[23] which lays also down the underlying principles of policy. The Act states that the it aims at:

'mak[ing] provisions to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviour and to provide for the establishment of the Competition Commission of Pakistan to maintain and enhance competition.'[24]

Since its inception, various regulations and rules have been framed by the Competition Commission of Pakistan (CCP).[25] An example is the Merger Regulation[26] that is most relevant to the recent Uber-Careem merger which was mentioned at the outset of this article. Private and public obstruction to competition is urged by the Act to achieve maximization of customer and manufacturer interests in an active manner. Competition policy do provide for investigating powers to the CCP and this is believed to be capable of sustaining an environment which promotes anti-competitive activities by companies and prevents exploitation of market control by dominant firms.

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[23] Competition Act (Act XIX of 2010)
[24] CA 2010 (n 23) Preamble
[25] Competition Commission of Pakistan, Official Website, Rules: <https://www.cc.gov.pk/index.php?option=comcontent&view=article&id=16&Itemid=119&lang=en>; Regulations: <https://www.cc.gov.pk/index.php?option=com_content&view=article&id=17&Itemid=120&lang=en>
[26] Competition (Merger Control) Regulations (2016)

For example, the CCP has used its powers to place a Rs. 25 million fine on ICAP for violating Section 4 of the Competition Act 2010. Further, the CCP has effectively imposed policies to prevent anti-competitive practices in order to protect competition rather than the competitors. CCP imposed Rs. 4.5 million penalties on 5 local courier services provider for using the trademark of DHL Pakistan Ltd, which was held to be false, misleading and in violation of section 10 of the Competition Act 2010, which regulates marketing practices. The violations were dealt with in the same as they are dealt in the EU, and they resulted in ending paying huge fines as mentioned above.

Essential considerations regarding competition policy can only be systematically analysed after determining their factual impact on the operative economic markets.[27] Competition rules are a salient factor in stabilizing the economic markets from abuse and dominance. Markets contain mergers and international mergers so basically without effective competition rules economic markets are vulnerable to abuse and corrupt practices. Pakistan has greatly benefitted from rules such as the Competition (Merger Control) Regulations 2016[28] Competition policy rules do not run by a strait jacket formula and have to be designed in accordance with the relevant features of a specific market. It may be argued that if European Union competition rules had been mechanically incorporated into Pakistan it might not have served the purpose of helping internal market development and fostering consumer welfare. The reason is that market structure was totally different. But the steps taken have been carefully measured: keeping in mind the fact that even the local market in gradually changing, the Competition law in place has been developed taking

[27] Economic Advisory Group on Competition Policy, An economic approach to Article 82 (July 2005) <http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf>

[28] In each merger/de-merger approval of CCP is mandatorily required by the courts/SECP (unless exempted under law).

inspiration from US law as well as EU law. Furthermore, the CCP while performing its quasi-judicial functions has placed reliance on legal precedents from US and EU commercial law. One good example of this is the case *Reckitt Benckiser Pakistan v Messrs Johnson and Son Pakistan* filed before the Competition Commission of Pakistan, where the provisions of CA 2010 were applied to the local context after considering its specific characteristics.[29] This is the most desirable approach that can be adopted by the CCP in order to ensure that investments in Pakistan are not discouraged.[30]

A major ground for ineffective application of anti-competition regulations is the duration of litigation against the orders issued by CCP using its powers under the CA 2010. Several of these cases have been pending before the High Courts since several years, wherein inquiries and show-cause notices have been stayed.

C. Comparison between EU and Pakistan's competition policies

If we compare the policy statements of the EU Treaty and CA 2010, it can be said that the two competition policies pursue similar goals. Both aim at eliminating unfair anti-competition practices with the aim of protecting consumers and increasing market efficiency.[31] However, when the application and implementation of policy in

[29] 2012 CLD 783.
[30] Ajit Singh, *Competition, Corporate Governance and Selection in Emerging Markets*, 113 Economic Journal (2003) 443–64.
[31] Harris S. (n. 6) *ibid*, and CA 2010 (n. 24) *ibid*.

Pakistan and EU are be compared it can be said that although the CCP imposes fine on companies using US and EU precedents, as shown in the way the DHL case mentioned above was decided, the long delays in consequent court litigation prove somehow detrimental to achieving the envisaged results.

Conclusion

It has been shown that there exists similarity in the goals competition policies of Pakistan and EU intend to achieve. The regulatory framework in Pakistan has improved greatly since the CA 2010 and the subsequent creation of CCP. There remain obstacles to effective application of policies some of which are to be blamed more on slow administration of justice (case delay) rather than on specific flaws in the anti-competition norms. In the wake of the merger between Uber and Careem, the question remains open as to whether any step on behalf of the regulatory authorities of Pakistan may prove effective in preventing the ride-hailing sector to be controlled by a monopoly.

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