6

Understanding Penalties in the Context of the Adoption Process

6.1 INTRODUCTION

Sanctions, designed not only to punish entities for their anti-competitive practices but also to deter them from engaging in similar practices in the future, are central to competition enforcement: the majority of competition legislations confer on national competition or other authorities the power to prescribe monetary or behavioural sanctions (or both), and governments as well as the public evaluate the performance of competition or other relevant authorities by reference to their ability to impose strong sanctions and, in case of monetary sanctions, their success in recovering them. The signifcance of sanctions is also evident in India and Pakistan: the Indian and Pakistani competition legislations confer on the CCI and CCP, a range of monetary and non-monetary sanctioning options in respect of findings of anti-competitive agreements and abuses of dominant position, and in the years since they became operational, the CCI and CCP have exercised these powers to varying degrees.

Interestingly, notwithstanding the emphasis particularly on monetary sanctions or penalties in the Indian and Pakistani competition legislations, these are not discussed at any length in the Raghavan Report or the Manes Report that had proposed modern competition regimes for India and Pakistan respectively in the first place.[1] This means that the penal provisions in the Indian and Pakistani competition legislations have been introduced without any discussion with the stakeholders. It also means that the scheme and language of the penal provisions is more in alignment with the foreign models on which they are based rather than the

[1] Report of the High Level Committee on Competition Policy & Law 2000 ('the Raghavan Report') <https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf> accessed 13 September 2021; Eric David Manes, 'A Framework for a New Competition Policy and Law: Pakistan' (The International Bank for Reconstruction and Development 2007) ('the Manes Report').

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exigencies of the contexts for which these are intended. The compatibility and legitimacy deficit resulting from introducing penal provisions without consultation with domestic stakeholders has affected not only the way in which the CCI and CCP have exercised their penalising powers but also the quantum of penalties they have succeeded in recovering. Even more interestingly, it appears that the penal strategies adopted by the CCI and the CCP further clarify the links between the adoption and implementation stages of competition legislation in the two countries. This chapter traces the evolution of the CCI and CCP's penal strategies and argues that the processes through which India and Pakistan adopted their respective competition legislations have a twofold impact on the penal strateiges: first, the *direct* impact which stems from the extent of compatibility and legitimacy generated for the Indian and Pakistani competition legislations through the adoption process, and second, the *indirect* impact which is linked to the adoption process lays the groundwork for the establishment of the competition enforcement infrastructure envisaged in the two competition legislations.

This chapter explores these issues as follows: Section 6.2 explores the manner in which the adoption processes in India and Pakistan are likely to impact the penal strategies of the CCI and the CCP at the implementation stage; Section 6.3 evaluates the *direct* impact of the adoption process by reviewing the penalties that the CCI and CCP have imposed over the years and understanding their connection with the compatibility and legitimacy generated for these legislations through the adoption process; Section 6.4 examines the *indirect* impact by examining the steps that the Indian and Pakistani governments have taken towards establishing the competition enforcement infrastructure envisaged in the Indian and Pakistani competition legislations, and the impact of this infrastructure on the CCI and CCP's exercise of their penalising powers; Section 6.5 examines possible approaches for strengthening the penal strategies of the CCI and CCP and, therefore, competition enforcement in India and Pakistan.

6.2 ADOPTION PROCESS AND PENALTIES: UNDERSTANDING THE TWO-PRONGED IMPACT

The processes through which India and Pakistan adopted their modern competition legislation differed not only in the dominant mechanisms through which the transfer took place but also in the nature and range of institutions engaged by the countries for the purpose. This section re-visits the Indian and Pakistani adoption processes and examines the ways in which the unique combination of mechanisms and institutions engaged by the two countries in adopting their respective competition legislations are likely to impact the CCI and CCP's penal strategies.

India had adopted the Indian Act through *socialisation* and had engaged bottom-up, participatory, and inclusive institutions from all three branches of the Indian state in both the deliberation and the enactment phases. These included the

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Raghavan Committee which had been established by the executive to consider and recommend the parameters of the proposed competition legislation, standing committees of the Indian parliament that had informed the initial enactment of the Indian Act in 2002 and its amendment in 2007, and the Supreme Court of India. Each of these institutions had the capacity to aggregate and evaluate information from stakeholders across the country and to adapt the proposed competition legislation in light of this information. Consequently, India was able to 'Indianise' its competition legislation and thereby to enhance its compatibility with and legitimacy in the Indian context. In contrast, Pakistan had adopted its competition legislations through *coercion* by the WTO and the World Bank and with limited domestic participation: although the World Bank team that had led the deliberations included representatives from Pakistan, it only held two or three public consultations over a brief six-month period and commissioned a Brussels-based law firm to draft the Pakistani competition legislation. Consequently, Pakistan was not able to generate a broad-based understanding of and acceptance for the competition legislation and the legislation remained more aligned with its international antecedents than with Pakistan's context and priorities.[2]

In influencing the compatibility and legitimacy quotient of the adopted competition legislations, the adoption processes in both India and Pakistan have *directly* impacted the penal strategies of the CCI and CCP. However, this correlation is neither simple nor binary and must be explored with care. Indeed, the data suggests that the somewhat higher compatibility and legitimacy of the legislation, as in India, does not automatically translate into an aggressive penal strategy, and the relatively limited compatibility and legitimacy of the Pakistani legislation does not necessarily lead to weak and hesitant competition enforcement. Further, the adoption processes in both countries have also *indirectly* impact the penal strategies of the CCI and CCP by the extent to which these have succeeded in laying the groundwork for the establishment of the competition enforcement systems envisaged in the adopted legislations: while the legitimacy of the competition legislation in India appears to have been conducive to the establishment and operation of the competition enforcement system, the relatively weaker legitimacy in Pakistan has obstructed the setting up and the functioning of its competition enforcement system. In both cases the establishment or otherwise of competition enforcement systems has further impacted the penal strategies adopted by the CCI and the CCP.

6.3 DIRECT IMPACT: CCI AND CCP'S APPROACH TOWARDS PENALTIES IN THEIR ORDERS

Imposing penalties is one among several sanctioning options available to the CCI and CCP under the Indian and Pakistani competition legislations, and in exercising

[2] The adoption processes for both India and Pakistan have been discussed at length in Chapter 2.

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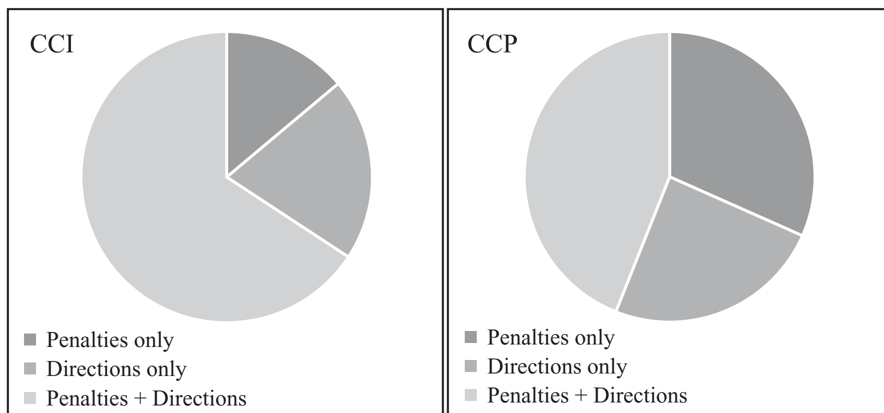

FIGURE 6.1. Penal strategies as per orders of the CCI (2009–20) and the CCP (2008–20)

their powers in this regard both the CCI and the CCP have considrable discretion to fix the quantum within the scheme of the penal provisions of their respective legislations. In terms of section 27(b) of the Indian Act, the CCI may impose a penalty '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',[3] while under the Pakistani Act[4] the CCP may impose a penalty in an 'amount not exceeding seventy-five million rupees or an amount not exceeding ten percent of the annual turnover of the undertaking'.[5]

In the years they have been operational, both the CCI and CCP have made extensive use of their powers to impose penalties in respect of anti-competitive practices (which include anti-competitive agreements and abuses of dominance). However, while the CCI has almost always combined penalties with behavioural directions, even if simply directing the relevant parties to cease and desist from their anti-competiitve behaviour, the CCP has imposed penalties in isolation almost as much it has combined them with directions (Figure 6.1).

A closer look at these orders reveals that in the eighty-five orders in which the CCI imposed penalties, it imposed a lump sum penalty only in two orders, both issued in its first year of its operations.[6] In the remaining eighty-three orders, the CCI

[3] Indian Act section 27(b) and proviso. In respect of cartels the CCI may impose a penalty 'of up to three times of its profit for each year of the continuance of such agreement or ten percent of its turnover for each year of the continuance of such agreement, whichever is higher'.

[4] The 2007, 2009, and 2010 Ordinances preceding the Pakistani Act also contained the same provisions.

[5] Pakistani Act section 38(2)(a).

[6] See *FICCI v United Producers/Distributors Forum & others* Case 1/2009 decided 25.5.2011 ('*Producers and Distributors Forum* case') and *Uniglobe Mod Travels Pvt Limited v Travel Agents Federation of India & others* Case 3/2009 decided 04.10.2011 ('*Travel Agents Federation of India* case').

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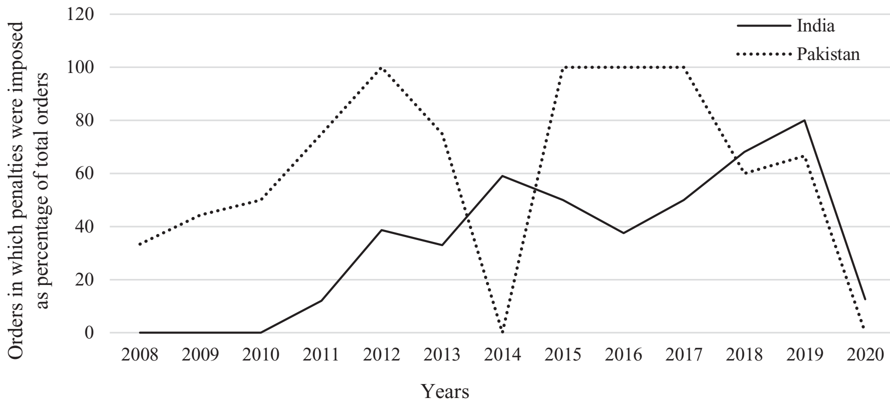

FIGURE 6.2. Evolution of CCI and CCP's penalising strategies

expressed penalties as a percentage (ranging from 2 per cent to 10 per cent) of the average turnover (in case of companies) or average income or receipts (in case of associations and natural persons) calculated usually for three preceding years.[7] From 2018 onwards, the CCI refined its penal formula calculating penalties as a percentage of *relevant* turnover or income. In the majority of its orders, the CCI justified the rate at which it fixed the penalty by linking it to the severity of the infringement. In stark contrast, the CCP expressed its penalties as lump sums in all but six of its orders, in which it stipulated these as a percentage of the turnover[8] and did not justify the quantum of penalties whether expressed as percentages of turnover or as lump sums in any of its orders. Overall, it appears that until 2018 the CCP imposed penalties in a greater proportion of its orders than the CCI, however, after 2018, the CCI and CCP imposed penalties in a comparable number of orders (Figure 6.2).[9]

The divergence in the CCI and CCP's approaches towards imposing penalties may be directly traced to the processes through which India and Pakistan had adopted their respective competition legislations and the compatibility and legitimacy generated in the course of adoption. In India, the engagement of a wide range of institutions in the deliberation and the enactment phases not only allowed the competition legislation to be adapted for the Indian context, but also for Indian

[7] Only very rarely the CCI imposed penalties at a rate lower than 2 per cent or as a multiple of net profits.

[8] Even in these instances the CCP relied on turnovers for one or two years only. See for instance *All Pakistan Cement Manufacturers Association* case File 4/2/ Sec 4/CCP/2008 decided 27.08.2009; *Jamshoro Joint Venture Limited and LPG Association of Pakistan* case File 3/ LPG/DIR(INV)/M&TA/CCP/2009 decided 14.12.2009; *Pakistan Poultry Association* File CCP/Cartels/04/2010 decided 16.08.2010; *Urea Manufacturers* F No 01/UREA/C&TA/CCP/ 2010 decided 29.03.2013; *LDI Operators* case File 5(114)/Reg/ADG-SCP/LHC/CCP/13 decided 30.04.2013; *Pakistan Flour Mills Association* F No 89/PFMA/C &TA/CCP/2016 decided 13.12.2019.

[9] This is with the exception of 2014 in which the CCP did not issue any enforcement orders.

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stakeholders to become aware of and understand the rationale and import of the legislation (even if not specifically of the penal provisions). The engagement of the judiciary particularly, bolstered the compatibility of the legislation with India's pre-existing legal system and provided it with an important stamp of domestic legitimacy. Further, the fact that even before the CCI was made fully operational India had allowed a skeletal version of the CCI to engage in competition advocacy not only helped a wide range of stakeholders to become familiar with the Act but also helped the CCI to develop an understanding of the response its proposed enforcement actions were likely to receive. As a result of these efforts when the CCI was finally constituted and operationalised in 2009, it was more aware of and attuned with the domestic context and enjoyed a reasonable degree of legitimacy in it. However, this alignment with the domestic context it also made the CCI reluctant to pursuing an aggressive penal strategy and thereby to jeopardise the space it had so painstakingly carved for itself in the Indian legal context. In contrast, the introduction of competition legislation in Pakistan through top-down, exclusive institutions, drawn primarily from the executive which did not engage in broad-based discussions with stakeholders, prevented Pakistani stake-holders from understanding the rationale and objectives of the competition legislation and the legislation from acquiring greater compatibility and legitimacy in the country. The CCP that came into being through this process was isolated from the very entities it was mandated to regulate, and was almost entirely aligned with the foreign authorities with which it claimed a relationship. The confidence it gained from its international antecedents allowed the CCP to pursue a some-what aggressive penal strategy in its early enforcement actions and thereby not only to sanction anti-competitive practices but also to leverage to leverage its international legitimacy to gain domestic legitimacy, in Pakistan.

The CCI's relatively conservative approach in imposing sanctions is also partially attributed to *socialisation*, which impressed upon the CCI the need to take local conditions into account in enforcing the Indian Act and therefore to be cautious in imposing penalties. In the deliberation phase, the Raghavan Committee had urged that the authority established to enforce the legislation in India recognise that the Indian economy was transitioning from a controlled to a liberal economy and therefore not be harsh in sanctioning violations as doing so would be detrimental to economic growth in the country. Similarly, the CCP's preference for imposing lump sum rather than pro-rated penalties may at least partly be traced to *coercion*, particularly to the World Bank's emphasis in the deliberation phase on penalties being the most appropriate sanctioning strategy. As to why CCP decided the quantum of penalties without reference to turnover it may be argued that it would have been dififcult to obtain the necessary data in this regard.. However, this seems unlikely given that the majority of the CCP's orders addressed violations by com-panies that are required by law to file and publish their financial reports it appears more likely that the CCP made a conscious decision to disengage penalties from turnover and thereby to expand the scope of its discretion in this regard.

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6.4 INDIRECT IMPACT: THE ROLE OF COMPETITION ENFORCEMENT SYSTEMS

Both the Indian and Pakistani Acts envisage a three-tier competition enforcement system in their respective contexts. At the base of this system are the national competition authorities, the CCI and the CCP, at the second tier are the Indian and Pakistani Tribunals that are mandated to hear appeals from the orders of the CCI and CCP, and at the third and final tier are the Supreme Courts of the two countries. This section examines the indirect impact of the adoption process on the CCI and CCP's penal strategies by first tracing the connection between the adoption process and the establishment of competition enforcement systems in the two countries and then evaluating the role of the competition enforcement systems in shaping the CCI and CCP's penal strategies.

6.4.1 *Establishing the Competition Enforcement Systems in India and Pakistan*

The early engagement of the parliament and the executive in India in the adoption of its competition legislation generated among ts state institutions a greater awareness, understanding, and ownership not only of the contents of the alacrity with which Indian Act but also of the proposed strategy for enforcing it which in turn contributed to the Indian government established and operationalised the Indian Tribunal. Although the impetus for establishing the Tribunal had come from the Supreme Court's decision in the *Brahm Dutt* case,[10] the idea of establishing it had been presented to the Supreme Court by the government itself in the form of an undertaking in which it had committed to amend the Indian Act to segregate the CCI's regulatory and judicial functions. The government had also drafted the relevant provisions of the 2007 Amendment Act and the legislature had enacted it after appropriate deliberations. It was in pursuance of these provisions that the executive established the Indian Tribunal almost immediately after operationalising the CCI.[11] On 20 May 2009, the government appointed a former Judge of Supreme Court, Dr Justice Arijit Pasayat, as the Tribunal's first chairperson and for the next eight years, except for a brief period of under one year in which the Tribunal had a chairperson but no members, the Tribunal regularly heard and decided appeals from final and interim orders of the CCI.

In 2017 the Indian government and the legislature further amended the Indian Act to replace the specialist Indian Tribunal by the NCLAT which had been constituted in 2016 exclusively to hear appeals from orders under the Companies Act 2013 and the Insolvency and Bankruptcy Code 2016.[12] Interestingly, the government

[10] *Brahm Dutt v Union of India* (2005) 2 Supreme Court Cases 431.
[11] Notification SO1240 (E) dated 15.05.2009.
[12] NCLAT had been established in pursuance of Companies Act 2013 section 410.

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introduced this amendment to the Indian Act through a Finance Act[13] which is intended to 'give effect to the financial proposals of the Central Government' rather than to substantively amend legislation and may be passed by the legislature only after summary scrutiny. In introducing an amendment to the Indian Act in this manner, the government was not only able to move swiftly in changing in the competition enforcement system in the country, but also completely avoided the obligation of providing reasons for the proposed change and its impact on the effectiveness of competition enforcement in the country.[14] The significance of this change notwithstanding, it does not detract from the Indian Tribunal's early role in developing and clarifying the provisions of the Indian Act and in shaping the trajectory of competition enforcement in India. At the time of writing it was too early to say whether the NCLAT would follow in its footsteps or chart a trajectory of its own which reflects its broader corporate expertise.

The engagement of the legislature and the executive in establishing the Pakistani Tribunal is rather different. The 2007 and 2009 Ordinances, both of which had been promulgated by executive orders without the engagement of the legislature, did not provide for a Pakistani Tribunal. In terms of both these Ordinances, appeals from orders passed by a single member or authorised officer of the CCP, were to lie to the CCP's internal appellate bench, while appeals from all other orders of the CCP and those of its internal appellate bench lay to the Supreme Court.[15] The competition enforcement system prescribed in these Ordinances was challenged in various petitions before the courts, and even though the Supreme Court did not finally decide any of these petitions, the grounds on which the competition enforcement system was challenged are generally accepted to be correct[16] and perhaps it is because of this critique that the government amended the competition enforcement system in the 2010 Ordinance, so that appeals from tinterim and final orders, passed by more than one CCP member or by its internal appellate bench, were to lie first to the high courts, rather than directly to the Supreme Court and the orders of the high courts were to be appealed to the Supreme Court.[17]

[13] Indian Finance Act 2017 section 171.

[14] Indian Constitution Article 109.

[15] 2007 and 2009 Ordinances sections 41 and 42. Although some appeals were filed before the Supreme Court during this period, none of these were finally decided most likely due to the endemic delay at the Supreme Court along with the uncertain status of competition legislation. One example is the appeal filed before the Supreme Court by the Institute of Chartered Accountants of Pakistan (CA 274/2009 (*Institute of Chartered Accountants of Pakistan v Competition Commission of Pakistan*) against the order of the CCP's Appellate Bench dated 11.03.2009 by which it had dismissed ICAP's appeal against the CCP's single-member order dated 28.11.2008 (File No 3/Sec-4/CCP/08 *The Institute of Chartered Accountants of Pakistan*). While the Supreme Court admitted ICAP's appeal by its order dated 19.03.2009 and restrained the CCP from enforcing its final order it did not finally decide the appeal.

[16] Under the Pakistani Constitution Article 185, the Supreme Court does not have the jurisdiction to hear appeals directly from orders of a regulatory body without an intervening appeal before a tribunal or high court.

[17] 2010 Ordinance section 42.

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The idea of the Pakistani Tribunal was first introduced through the Pakistani Act which replaced the 2010 Ordinance. In terms of the Act, appeals from orders issued by more than one of CCP's officers or members, were to lie to the specialist Pakistani Tribunal, and appeals from the orders of the Tribunal to the Supreme Court.[18] Interestingly, the provisions relating to the Tribunal were the only new provisions in the Act, which was otherwise substantially the same as the Ordinances that had preceded it which suggests that the Pakistani executive and the legislature did not reflect on the substantive provisions of the Pakistani Act and did not displace the effect of the original *coercion*. It may be argued that the legislature was reluctant to interfere with the substantive provisions of the competition law as these had gained a degree of domestic acceptance and legitimacy in the nearly three years that it had been in force, largely due to the aggressive CCP's penal strategy in this period however, it may equally be argued that this reluctance was due to the powers of persuasion of the multilateral agencies that had introduced the law in the country in the first place.

This lack of meaningful engagement on the part of the executive and the legislature even in the enactment of the Pakistani Act meant that the executive neither fully appreciated the need for competition enforcement in the country nor its responsibility to facilitate enforcement by establishing the Tribunal. Consequently, even though the Pakistani Act – and thereby the provisions for establishing the Tribunal – came into force in October 2010, the government appointed its first member and chairman on in July 2011,[19] and allowed a further year to elapse before appointing the Tribunal's technical members.[20] In April 2013 after functioning for only about five months and deciding only one appeal,[21] the operation of the Tribunal was brought to a halt due to one of its members resigning and the other retiring after reaching the age of superannuation. The Pakistani government took another two years to reconstitute the Tribunal by appointing two new members.[22] Consequently, it was nearly five years after the enactment of the Pakistani Act that the Tribunal finally had quorum to make rules for its conduct and proceedings and thereby to properly re-commence operations (Figures 6.3 and 6.4).[23]

The Indian and Pakistani Tribunals, once established and operationalised, formed a critical first step in activating the competition enforcement systems in the two countries, and generating a dialogue and a feedback loop between the different tiers of the system. This feedback loop was significant in that it was expected not only help rationalise the CCI and CCP's penal strategies and to contribute to the recovery of

[18] Pakistani Act section 43. Under the Pakistani Constitution Articles 175(2) and 212(3), appeals from orders of specialist tribunals may only lie to the Supreme Court directly if authorised by statute.

[19] Notification No F15(1)/2010-AV dated 27.07.2011.

[20] Notification No F21(1)/2011-Admn-III dated 29.05.2012.

[21] See Box 6.3.

[22] These appointments were made vide Pakistani government notifications dated 10.04.2015, 28.05.2015, and 22.01.2016.

[23] Competition Appellate Tribunal Rules 2015 made by SRO 749(1)/2015 dated 31.07.2015.

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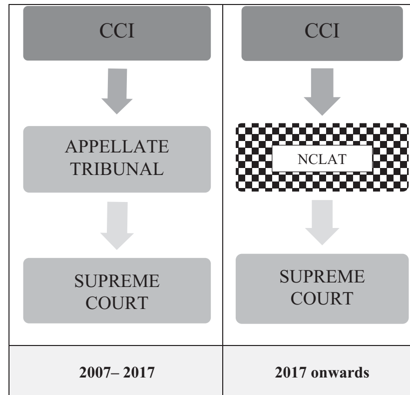

FIGURE 6.3. Evolution of competition enforcement system in India

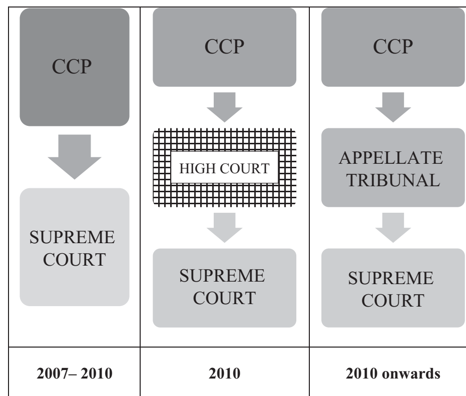

FIGURE 6.4. Evolution of competition enforcement system in Pakistan

penalties imposed by them, but also to develop competition jurisprudence in the two countries and thereby to facilitate the steady integration of the adopted competition legislations into their pre-existing legal systems.

6.4.2 *Tribunals and the Recovery of Penalties*

For the CCI and CCP to be effective in bringing about pro-competitive reform in their respective countries it is important that they are able to recover the penalties they impose.[24] Under law, both the CCI and CCP are required to deposit their

[24] This analysis does not make any assessment of the appropriateness of the quantum of penalties imposed by the CCI or CCP in any of the cases.

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recovered penalties to their respective national exchequers: in terms of section 47 of the Indian Act all penalties realised by the CCI are to be credited to the Consolidated Fund of India and in terms of section 40(8) of the Pakistani Act all penalties and fines recovered by the CCP are to be credited to the Public Accounts of the Federation.[25] On a narrow view of enforcement, a well-functioning Tribunal which in hearing appeals from orders of the first-tier enforcement authorities restrains them from recovering the penalties imposed by them, may be seen as an obstacle in successful competition enforcement. However, a more holistic perspective, suggests that while the operation of the Tribunal may delay the recovery, its ability to review the orders of the first-tier authorities helps refine the rationale of first-tier authority's penalising decisions and thereby strengthens its penal strategy which over time leads to more effective enforcement.

In India, where a large number of orders of the CCI are appealed to the Tribunal, the Tribunal's response has varied according to the facts of the case. In certain cases the Tribunal has upheld the CCI's final orders and dismissed the appeal(s)[26] while in others it has allowed the appeal, set aside the CCI's order, and quashed the penalty.[27] In some of its orders the Tribunal has upheld the CCI's order but revised the amount of penalty imposed by it,[28] whereas in others still, it has remanded the

[25] This provision was not present in the 2007 Ordinance in terms of which the penalties were required to be paid into the Commission Fund.

[26] For example, see orders of the Tribunal in *Travel Agents Association of India v Uniglobe Mod Travels (P) Ltd & others* Appeal 24/2011 and *IATA Agents Association of India v Uniglobe Mod Travels (P) Ltd & others* Appeal 8/2012 both dated 10.07.2013; *Nandu Ahuja, Sunil Arjan Lulla, Jyoti Deshpande v CCI & another* Appeals 11/2013, 12/2013, 13/2013 dated 17.01.2014; *Nandu Ahuja, Sunil Arjan Lulla, Jyoti Deshpande v CCI & another* Appeals 1/2012, 2/2012, 3/2012 dated 05.08.2013; *Film Distributors Association (Kerala) v CCI and others* Appeal 61/2015 dated 03.07.2015; *Jose C Mundadan v CCI and others* Appeal 55/2015 dated 17.08.2015; *Jose C Mundadan v CCI and others* Appeal 56/2015 dated 27.04.2016; *Coal India Limited and another v CCI and others* Appeal 80/2014 dated 09.12.2016; *Kerala Film Exhibitors Association and another v CCI and others* Appeal 100/2015 dated 04.02.2016.

[27] For instance, the Tribunal allowed the following appeals against the CCI's orders: *Telugu Film Chamber of Commerce v Cinergy Independent Film Service Pvt Ltd and others* Appeal 15/2013 decided 14.10.2015; *All India Organization of Chemists & Druggists (AIOCD) and others v CCI and others* Appeals 21/2013, 6/2014, and 7/2014 decided 09.12.2016; *Tamil Nadu Film Exhibitors Association v CCI and another* Appeal 14/2014 decided 28.04.2015; *Dr LH Hiranandani Hospital v CCI and another* Appeal 19/2014 decided 18.12.2015; *Indian Jute Mills Association v CCI and others* Appeals 73/2014, 77/2014, 78/2014, 83/2014, 84/2014, 85/2014, 86/2014, 87/2014, 88/2014 and 8/2015, 9/2015, 10/2015, 11/2015, 12/2015, 13/2015, 14/2015 and 15/2015 decided 01.07.2016; *Alkem Laboratories Limited v CCI and other* 9/2016, 14/2016 and 15/2016 decided 10.05.2016; *Director, Karak Pharmaceuticals Pvt Ltd v CCI and others* Appeal 42/2014 decided 07.12.2015; *Shib Sankar Nag Sarkar and another v CCI and others* Appeal 34/2014 decided 10.05.2016; *Bengal Chemist & Druggists Association and others v CCI and another* Appeal 37/2014 decided 10.05.2016.

[28] For instance, the Tribunal reduced the penalty by 10 per cent in *Gulf Oil Corporation Ltd v Competition Commission of India & others* Appeals 82/2012, 83/2012, 84/2012, 85/2012, 86/2012, 87/2012, 88/2012, 89/2012 and 90/2012 decided 18.04.2013; modified the penalty from 5 per cent to 3 per cent of the turnover in *MDD Medical Systems India Private Limited v CCI and others* Appeals 93/2012, 94/2012 and 95/2012 decided 25.02.2013; affirmed the order but revised the penalties in *Excel*

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matter to the CCI for re-hearing.[29] Occasionally, appellants before the Tribunal have voluntarily withdrawn their appeals to directly approach the CCI,[30] while at times the Tribunal has dismissed appeals on technicalities.[31] In at least one instance, in which even though the Tribunal did not agree with the CCI's justification for imposing the penalty, it chose not to interfere with the CCI's order on the basis that the amounts involved were insignificant.[32]

Interestingly, the impact of the Tribunal's operation is not immediately evident in the quantum of penalties realised by the CCI. As per the CCI's Annual Report 2018-19, from the commencement of its operations until 31 March 2019 the CCI had imposed penalties in 177 cases in the cumulative sum of Indian rupees 13,881 crore (or INR 138,810,000,000.00 or Indian rupees one hundred and thirty-nine billion, eight hundred and million only). However, until 2019 the CCI had only realised penalties in the sum of Indian rupees 126.92 crore (INR 1,269,200,000.00 or Indian rupees one billion, two hundred and sixty-nine million, two hundred thousand only) and had refunded Indian rupees 66.53 crores (INR 665,300,000.00 or Indian rupees six hundred and sixty-five

Crop Care Limited v CCI & others Appeals 79/2012, 80/2012 and 81/2012 decided 29.10.2013; revised the penalty from 10 per cent to 1 per cent in *Bengal Chemist & Druggists Association and others v CCI and another* Appeal 37/2014 decided 10.05.2016; and reduced the penalty from 2 per cent to 1 per cent in *National Insurance Company Ltd v CCI* Appeals 94/2015, 95/2015, 96/2015 and 97/2015 decided 09.12.2016.

[29] For instance, the first respondent appealed the CCI's order in *Vijay Gupta v Paper Merchants Association Delhi & others* (Case 7/2010) and the Tribunal by its order dated 29.08.2011 remanded the matter to the CCI which issued a supplementary order on 10.01.2013; in an appeal from the CCI's order in *Belaire Owners' Association v DLF Limited HUDA & others* (Case 19/2010) the Tribunal by its order dated 29.03.2012 directed the CCI to order modification of the agreements between DLF and apartment owners; by its order dated 20.12.2013 in *International Cylinder (Pvt) Ltd v CCI* Appeals 21/2012 to 65/2012 decided 20.12.2013 directed the CCI to re-hear the case on the issue of penalty. When the CCI passed a further order which was also appealed in *ECP Industries Ltd v CCI* Appeal 47/2015 and the Tribunal by its order dated 01.03.2016 once again directed the CCI to re-hear the matter on penalty; and by its order dated 09.12.2016 in *Toyota Kirloskar Motor Private Limited v CCI and others* Appeals 60/2014, 61/2014 and 62/2014 revised the criteria for penalties and remanded the case to the CCI for re-calculation of the quantum of penalties.

[30] For instance, see the Tribunal's order dated 10.01.2013 in *Kansan News Pvt Ltd v Fastway Transmissions Pvt Ltd & others* Appeal 137/2012.

[31] For instance, the Tribunal dismissed nine Appeals against the CCI's order dated 16.02.2012 in *Sunshine Pictures Private Limited v Eros International Media Limited v Central Circuit Cine Association Indore & others* (Cases 52 & 56/2010) for non-payment of court fees. The parties filed a further appeal, *Film Distribution Association, Kerala v Eros International Media Ltd & others* (68/2012); the Tribunal refused an interim injunction and then by its order dated 03.01.2013 dismissed the appeal for parties' failure to comply with the Tribunal's direction to deposit the amount of the penalty while the appeals were being heard.

[32] The Tribunal took this view in appeals filed against the CCI's order dated *Reliance Big Entertainment Limited v Karnataka Film Chamber of Commerce* (Cases no 25, 41, 45, 47, 48, 50, 58, 69/2010).

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million, three hundred thousand only). This means that from 2009 until 2019 the CCI had recovered a mere 0.91 per cent of the total penalties imposed by it and had refunded 52 per cent of the recovered amount, leaving its total recovered amount at approximately 0.45 per cent of total penalties imposed.[33] This somewhat bleak picture suggests that at the very least the activation of the competition enforcement system delayed (if not entirely stalled) rather than facilitating the recovery of penalties.

However, limiting recoveries is not the only impact of the operation of the Indian Tribunal as the Tribunal's orders have also played an important role in rationalising the CCI's penal strategies, particularly its methodology for fixing the quantum of penalties. For instance, by its order in *Excel Crop Care Limited v CCI & others*[34] the Tribunal reduced the penalty of 9 per cent of the average of three years turnover of each of the contravening entities (as imposed by the CCI)to one-tenth of the amount on the basis that the CCI had not only failed to provide a justification for fixing the penalty at 9 per cent but had also arbitrarily selected the base turnover.[35] Similarly, in its order in *Toyota Kirloskar Motor Private Limited v CCI and others*[36] the Tribunal revised the criteria applied by the CCI for determining the quantum of the penalty imposed and required the CCI to re-calculate it on the basis of 'relevant' turnover. The Tribunal also noted that it was not in favour of heavy penalties and recommended that the CCI approach penalties in the spirit of a 'transitory reform process'.[37] In certain other cases, the Tribunal quashed the penalty imposed by the CCI on the grounds that it had en imposed without providing the respondent an opportunity of being heard in violation of the principles of natural justice.[38] Of these orders, the Tribunal's order in the *Excel Crop Care* appeal[39] is of particular significance, not only because it was challenged before the Supreme Court by both the appellants and the CCI and therefore represents the analysis of all three tiers of India's competition enforcement system, but more so because it has formed the basis for the CCI's calculations of penalties in almost all subsequent cases.

[33] CCI's Annual Report 2018–19 Table D1.
[34] Appeals 79/2012, 80/2012 and 81/2012 decided 29.10.2013 brought against the CCI's order in *Re Aluminum Phosphide Tablets Manufacturers* Suo Motu Case 2/2011 dated 23.04.2012.
[35] n.34 paras 43–70, particularly para 69.
[36] Appeals 60/2014, 61/2014, and 62/2014 decided 09.12.2016 brought against the CCI's order in *Shri Shamsher Kataria v Honda Siel Cars India Limited & others* Case 3/2011 decided 25.08.2014.
[37] ibid paras 167–68.
[38] Order of Tribunal in *President All Kerala Chemists and Druggists and another v CCI and others* Appeals 5/2016 dated 10.05.2016 para 34.
[39] n.34.

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Box 6.1 The decision of the Indian Supreme Court in the *Excel Crop Care* appeal

Background

In its final order in the *suo motu* case of *Aluminium Phosphide Tablets Manufacturers* the CCI had found Excel Crop Care Limited, Sandhya Organics Chemicals (Pvt) Limited, and United Phosphorus Limited to have engaged in collusive bidding and had penalised each of them in a sum equal to 9 per cent of their average turnovers for the three preceding years.[40]

Appeal to the Tribunal

All three companies appealed the CCI's order before the Indian Tribunal and the Tribunal, by its joint order,[41] affirmed the CCI's decision to the extent that in jointly boycotting the 2011 tender[42] and in quoting identical prices in tenders over several years[43] the companies had acted in pursuance of a 'common design'[44] and had thereby contravened the provisions of the Indian Act.[45] However, in respect of the quantum of the penalty the Tribunal found that the CCI had not provided any 'discussion whatsoever nor any justification' for the penalty of 9 per cent on average of three years' turnover.[46] The Tribunal therefore directed the CCI to re-calculate the penalties[47] by following the steps provided in the Indian Act,[48] and after taking into account all relevant factors.[49] Both the CCI and the appellants challenged the order of the Tribunal before the Supreme Court of India.

The Supreme Court Order[50]

The Supreme Court decided both appeals through a single order dated 8 May 2017 in which it confirmed that the CCI was within its rights to hold an inquiry into the bid rigging,[51] and that the DG had the power to investigate the boycott of the 2011 tender.[52] The Supreme Court also fully endorsed the Tribunal's analysis and findings.[53]

On the issue of the reduction of penalties, the Supreme Court held that the core question was 'whether penalty under Section 27(b) of the Act has to be on "total/entire

[40] *Re Aluminium Phosphide Tablets Manufacturers* Suo motu Case no. 2/2011 decided 29.10.2013.
[41] n.34.
[42] ibid para 36 pp 34–35; para 40 p 37.
[43] ibid pp 34, 37.
[44] ibid pp 35, 37.
[45] ibid para 41.
[46] ibid para 43.
[47] ibid para 67.
[48] ibid paras 51–52.
[49] ibid para 63.
[50] *Excel Crop Care Limited v CCI* 2017 8 SCC 47.
[51] ibid para 34.
[52] ibid para 36.
[53] ibid para 50.

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turnover" of the company covering all the products or if it is relatable to "relevant turnover", viz., relating to the product in question in respect whereof provisions of the Act are contravened'.[54] The Supreme Court noted that section 27 itself did not clarify this issue,[55] however, after a detailed discussion in which it also referred to foreign jurisprudence, the Supreme Court concluded that 'adopting the criteria of "relevant turnover" for calculating the penalty will be more in tune with the ethos of the Act and the legal principles which surround matters pertaining to imposition of penalties'.[56] The Supreme Court, therefore, declared that it did not 'find any error in the approach of the order of the COMPAT [the Tribunal] interpreting Section 27 (b)'.[57]

As regards the CCI's arguments that penalties were designed to act as deterrents 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 and emphasised the importance of the doctrine of proportionality, which it stated was based on equality and rationality and was a 'constitutionally protected right, which can be traced to Article 14 as well as Article 21 of the Constitution.'[58]

The various iterations of the Pakistani competition legislation, the lack of certainty regarding its legal status, and the Pakistani government's ambivalence towards establishing and maintaining the competition enforcement system, meant that prior to the legislation being amended to provide for the Pakistani Tribunal, parties aggrieved by the CCP's orders could either challenge these before the CCP's internal appellate bench (this option was available only to orders passed by single members or authorised officers of the CCP) or to bring appeals directly to the Supreme Court.[59] In this period, therefore, nearly all the CCP's penalty-imposing orders were challenged before the general courts on constitutional grounds rather than appealed on their merits before the appellate bench or the Supreme Court. One of the first such petitions was brought against the CCP's final order in the *APCMA* case.[60] Although the *APCMA* case had provoked considerable litigation while it was still pending before the CCP,[61] the matter appeared to have been

[54] ibid para 56.
[55] ibid para 71.
[56] ibid para 74.
[57] ibid.
[58] ibid.
[59] See n.15 and 17 and text thereto.
[60] *In the matter of Show Cause Notices issued All Pakistan Cement Manufacturers Association and its Member Undertakings* F. No. 4/2/ Sec 4/CCP/200UU8 decided 27.08.2009 ('the APCMA case').
[61] See Preface for details.

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resolved when the courts allowed the CCP to issue a final order in the matter. However, just as the CCP announced its final order the Lahore High Court once again restrained it from taking any adverse action against the defendants, thereby not only preventing the CCP from enforcing its order and from realising the penalties from the defendants, but also keeping it embroiled in constitutional battles and thereby diverting its already limited resources from competition enforcement to fighting for its legal survival.[62]

The petitions in the *APCMA* case gave rise to other petitions against many of the CCP's final orders. The majority of these petitions argued that that the CCP had not been properly and constitutionally constituted and lacked the quorum required to pass the final order. These petitions also alleged that the orders passed by the CCP were not in accordance with the competition legislation in force in the country; that the CCP had passed the orders with *mala fide* intent and by exercising powers beyond its jurisdiction;[63] the competition legislation could not be applied to agreements entered into before its coming into force;[64] and that certain actions of the CCP were tantamount to judicial review of subordinate legislation and, therefore, contrary to the law.[65] Some petitions also urged that the CCP's orders were contrary to government policy in the sector to which these referred and, therefore, exposed the petitioners to possible adverse governmental action,[66] and that the CCP had not fully appreciated the facts in arriving at its conclusions.[67] Barring a few petitions decided on technical grounds,[68] the general courts most often simply admitted these petitions and restrained the CCP from recovering penalties by enforcing the orders it had already passed without addressing the considerable constitutional and jurisdictional issues that these raised.[69]

[62] ibid, Lahore High Court's order dated 31.08.2009.

[63] Including petitions filed before the Islamabad High Court by *Wateen Telecom Limited* Writ Petitions (WP 1134/2011) and *Defence Housing Authority Lahore* (WP 1465/2011) and before the Lahore High Court by *Allied Bank Limited* (WP 21290/2012).

[64] Including petition filed before the Sindh High Court by *Engro Vopak Terminal Limited* (CP D-2491/2011).

[65] Including petition filed before the Lahore High Court by *Institute of Chartered Accountants* (WP 4412/2013).

[66] Including petition filed before the Sindh High Court by *Pakistan Ship's Agents Association* (CP D-2494/2011).

[67] Including petitions filed before the Lahore High Court by GCC *Approved Medical Centres* (WP 20280/2012). The LHC's order in this petition was subsequently relied upon by petitioners in *Canal View Diagnostic Centre* (WP 20729/2012), *GCC Approved Medical Diagnostic Centre & others* (WP 20729/2102), and *Urgent Medical Diagnostic Centre & others* (WP 21106/2012) and was used as a basis of further injunctions granted by the LHC by its order dated 04.01.2013.

[68] For instance, petitions filed by the APCMA before the Islamabad High Court and by Attock Cement Limited before the Sindh High Court were both dismissed on technical grounds.

[69] On 26.10.2020, eleven years after the petitions were first filed before it, the Lahore High Court by its order in *LPG Association of Pakistan v. Federation of Pakistan* W.P. No. 9518 of 2009 finally decided ninety-three petitions in sectors as diverse as accountancy, automobiles,

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Given that the petitions challenging the final orders of the CCP had been filed due to an absence of an independent and authoritative appellate forum rather than in response to genuine constitutional concerns, the number of petitions before the general courts was expected to decline once the Pakistani Tribunal had been established. However, the uncertain start of the Tribunal in 2013 meant that the practice of filing petitions in lieu of appeals lingered until 2015 when the Tribunal was finally made operational. In the next few years the Tribunal decided approximately sixteen appeals: dismissing two appeals on technical grounds;[70] deciding eight in favour of the CCP[71] and six against it.[72] In at least two instances, parties aggrieved by the Tribunal's orders[73] filed appeals before the Pakistani Supreme Court whilst the CCP challenged all orders in which the Tribunal had found against it. Unfortunately, however, beyond this period there is very little information regarding appeals filed before the Tribunal or its decisions in respect of these appeals. Also, at the time of writing the Supreme Court was yet to decide any of the appeals filed from orders of the Tribunal.

The government's hesitation and delay in establishing the Pakistani Tribunal and the consequent diversion of matters to the general courts in their

cement, dairy, developers, education, fertiliser, healthcare, food, oil and refineries, paints, power, real estate, sugar, and telecom. Shortly after, the Islamabad High Court also disposed of a petition by its order dated 16.09.2021 in *Islamabad Feeds (Private) Limited and others v Federation of Pakistan*. However, both these orders are presently under appeal before the Pakistani Supreme Court.

[70] For instance, the Tribunal dismissed *Nauman Anwar Butt v DHL* Appeal 2/2016 by order dated 21.12.2016 and *University of South Asia v CCP* Appeal No. 10/2016 by order dated 28.09.2016.

[71] The Tribunal's orders in favour of the CCP include its orders in *Tara Crop Sciences (Pvt) Limited v CCP and other* Appeal 2/2015 decided 30.11.2016; *Al- Rahim Foods (Pvt) Limited v CCP and others* Appeal 3/2016 decided 25.01.2017; *HASCOL Petroleum Ltd v CCP and others* Appeal 7/2016 decided 21.12.2016; *Pakistan Poultry Association v CCP* Appeal 9/2016 decided 28.09.2016; *Saleem Habib Godial v CCP* Appeal 1/2016 decided 29.03.2017; *Toyota Sahara Motors v CCP* Appeal 1/2016 decided 29.03.2017; *Bahria Town (Pvt) Limited v CCP* Appeal 3/2017 decided 10.05.2017; *PTCL v CCP* Appeal 4/2017 decided 10.05.2017.

[72] The Tribunal passed orders against the CCP in *1-Link Guarantee Ltd and others v CCP and others* Appeal 1-26/2012 decided 20.03.2013 (*1-Link* order); *Reckitt Benckiser Pakistan Ltd v CCP* decided 26.11.2015; *Al- Rahim Foods (Pvt) Limited v CCP and others* Appeal 3/2016 decided 25.01.2017; *Synthetic Fibre Development v CCP* Appeal 12/2016 decided 07.06.2017; *Institute of Business Management v CCP* Appeal 5/2016 decided 07.06.2017; *WAH Engineering College v CCP* Appeal 6/2016 decided 07.06.2017; and *University of Faisalabad v CCP* Appeal 4/2016 decided 07.06.2017.

[73] Orders of the Tribunal in *Tara Crop Sciences (Pvt) Limited v CCP and other* Appeal 2/2015 and *Pakistan Poultry Association v CCP* Appeal 9/2016 were appealed to the Supreme Court by the aggrieved parties. Both the CCP and the appellant appealed the order of the Tribunal in *Al-Rahim Foods (Pvt) Limited v CCP* Appeal No. 3/2016.

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constitutional jurisdiction has played a large role in the CCP's inability to recover penalties. At the time of writing despite the orders of the Lahore and Islamabad High Courts the CCP had still not commenced recovery proceedings in pursuance of its enforcement ordrs, most likely because it is waiting for the decision of the Supreme Court in respect of these petitions.[74] This means that the only penalties the CCP has recovered to date are those paid voluntarily by the parties. The CCP's sense of helplessness and frustration in not being able to recover penalties is evident from the CCP chairperson's messages in its Annual Reports 2013 and 2014. In the 2013 Annual Report, the chairperson noted that although the CCP had imposed penalties in the sum of PKR Rs 25 billion, it had not been able to realise any of these. The chairperson had therefore called upon the government to operationalise the Tribunal and had requested the courts to at least offer the CCP an opportunity of being heard before granting *ex parte* injunctions restraining it from recovering penalties.[75] Similarly, in the 2014 Annual Report, the chairman noted that over 300 petitions filed against its orders were still pending before the courts, and once again called on the government to operationalise the Tribunal.[76] Interestingly, this gridlock between the CCP and the government finds no reference in the CCP's Annual Reports after 2014, which together with its reduced competition enforcement actions and an increase in orders passed in respect of deceptive marketing practices suggests a shift in the CCP's enforcement priorities and its increased focus on advocacy.

In addition to obstructing the CCP from realising the penalties it had imposed, the government's failure to operationalise the competition enforcement system also meant that the CCP received no support from the second- and third-tier competition enforcement authorities in rationalising and strengthening its penal strategy. With the Pakistani Tribunal having been fully functional since 2015 and the high courts finally deciding some of the petitions filed before them, there is reason to hope that all tiers of the competition enforcement system may gradually engage with each other. However, this hope is not without the lingering fear that the government's initial delay in setting up the competition enforcement system may have irrevocably damaged not only the CCP's confidence for strong enforcement actions but also its legitimacy which in turn may have caused it to redirect its attention towards other less controversial directions (such as competition advocacy), at the cost of meaningful competition enforcement in the country.[77]

[74] n.69.

[75] Annual Report 2013, chairperson's message.

[76] Annual Report 2014, chairman's message.

[77] Even a cursory review of the CCP's Annual Reports 2015, 2016, and 2017 reveals that the number of orders in respect of deceptive marketing practices far exceed any other orders passed

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6.4.3 *Beyond Penalties: Competition Enforcement Systems and Competition Jurisprudence*

Once an appellate tribunal is functional it does much more than simply ruling on the appropriateness of the penalties imposed by the first-tier competition enforcement authorities. For instance, from the earliest days of its operations, the Indian Tribunal received appeals from the CCI's interim and final orders on a range of procedural and substantive issues and through its orders either clarified the CCI's processes and operations,[78] or provided a basis for the matter to be escalated to the Supreme Court, which sitting in its competition jurisdiction was able to guide both the CCI and the Tribunal in these matters.

The instances in which matters were escalated to the Supreme Court have proved particularly significant for competition enforcement. In engaging the first-, third-, and final-tier competition authorities the final orders in these matters have not only tested and strengthened the competition enforcement system but have also facilitated the integration of competition principles in the country's pre-existing legal system. An important example in this regard is the Indian Supreme Court's decision in the *SAIL* case which clarified procedures for the CCI and for the Indian Tribunal in several important respects.[79]

by the CCP in these years. Even in the few competition cases that the CCP has decided it has imposed penalties only in the *Pakistan Automobile Manufacturers Authorized Dealers Association & Member Undertakings* File 1/101/PAMADA/C & TA/CCP/2013 decided 10.04.2015; *Pakistan Poultry Association* File 42/PPA/C & TA/CCP/2015 decided 29.02.2016; and *Pakistan Engineering Council* File 2(32)/Comp Cell/CCP/2015 decided 20.04.2016. In all these orders the CCP neither clarified the basis on which it had fixed the quantum of penalty nor the correlation between the quantum and either the turnover of these entities or the enormity of their contraventions.

[78] For instance, the All India Organisation of Chemists and Druggists Association appealed the CCI's interim order in *Santuka Associates Pvt Ltd Cuttack v All India Organization of Chemists and Druggists* Case 20/2011 in terms of which it had been fined for failing to provide information to the DG without a reasonable explanation. By its order dated 27.04.2015 the Tribunal ruled on the issue of the CCI's orders being signed by members who were not present at the hearing and on the period for which the CCI may penalise for failure to comply with orders of the DG. Similarly, deciding an appeal against the CCI's interim order in *Financial Software and Systems Pvt Limited v ACI Worldwide Solutions Private Limited and others* Case 52/2013 in terms of which the CCI had granted interim relief to the complainant and had issued a restraining order against the defendants, the Tribunal by its order dated 06.05.2014 allowed the appeal and directed the DG to complete the investigation expeditiously and the CCI to pass a final order within the time stipulated in the order.

[79] *Competition Commission of India v Steel Authority of India Limited* (2010) 10 SCC 744.

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Box 6.2 The decision of the Indian Supreme Court in the *SAIL case*

Background

In October 2009 the CCI initiated proceedings against the Steel Authority of India Limited (SAIL) upon receipt of an 'information' or complaint from Jindal Steel and Power Limited (Jindal), which alleged that SAIL had abused its dominant position in the relevant market by entering into an exclusive agreement with Indian Railways for the supply of rails. By an interim order dated 10 November 2009 the CCI sought comments from SAIL. However, rather than providing its comments within the stipulated time, SAIL sought a six-week extension from the CCI. By its order dated 8 December 2009 the CCI denied SAIL's request for extension and directed the DG to investigate the allegations against SAIL and SAIL to supply its comments to the DG in the course of this investigation.[80]

Appeal to the Tribunal

SAIL appealed the CCI's order dated 8 December 2009 before the Indian Tribunal and on 11 January 2010 the Tribunal issued an interim order restraining the DG from continuing with its investigation against SAIL. When it received this order, the CCI sought permission from the Tribunal to join the proceedings on the basis that its order of 8 December 2009 was merely a direction for investigation and therefore not appealable before the Tribunal. On 15 February 2010 the Tribunal dismissed the CCI's request to join the proceedings[81] and rejected its contention that an appeal could not be brought against its direction to the DG.[82] On the question of whether the CCI had allowed SAIL sufficient time to file its comments, the Tribunal held that while the CCI was not under an obligation to invite comments from the defendants,[83] once it had done so, it could not 'abandon the opportunity granted midway'.[84] Therefore, the Tribunal directed the CCI to re-hear SAIL's application for extension of time and to provide reasons for its decision not only in this instance but in all future orders.[85] Throughout its order the Tribunal supported its arguments and conclusions with references to earlier decisions of the Indian superior courts.

The Decision of the Supreme Court

The CCI appealed the order of the Tribunal before the Indian Supreme Court,[86] and on 9 September 2010 the Supreme Court issued a detailed order which clarified

[80] *Steel Authority of India Limited v Jindal Steel & Power Limited* Appeal 1/2009 decided 15.02.2010 para 2.
[81] ibid para 29.
[82] ibid para 18.
[83] ibid para 34.
[84] ibid.
[85] ibid para 37.
[86] See n.79.

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several important procedural points both for the CCI and the Tribunal. The Supreme Court disagreed with the Tribunal both on the question of the maintainability of the appeal and the issue of joining the CCI as a party to the appeal. In respect of maintainability, the Supreme Court held that the orders stating CCI's prima facie view or its directions to the DG were not appealable and confirmed that appeals could only be filed in respect of orders listed in section 53(A)(1)(a) of the Indian Act On the issue of joining the CCI in the proceedings the Supreme Court held that the CCI is a necessary and proper party to all proceedings that may be brought before the Tribunal against its orders or actions.[87] The Supreme Court also noted that although the CCI had no statutory obligation to issue a notice or grant a hearing to the defendants before referring a case for investigation, it was incumbent upon it to record its reasons for such referral. The Supreme Court further held that it was also incumbent upon the CCI and the DG to conclude all investigations and inquiries expeditiously so as not to adversely affect the parties to the proceedings. The Supreme Court also clarified that it was permissible for the CCI to issue an interim order during an inquiry or investigation provided that such an order was in compliance with section 33 of the Indian Act. The Supreme Court also required that the CCI issue a final order within sixty days of issuing an interim order.[88] The Supreme Court, as the Tribunal before it, drew upon Indian authorities and invoked norms of due process prevalent in the Indian legal system in arriving at its conclusions in respect of each of these issues.

On the other side of the border in Pakistan neither the Pakistani Tribunal nor the Supreme Court were able to support the CCP in its performance or in developing competition jurisprudence in the country, not becuase they were reluctant to do so but largely due to the government's failure to establish the Tribunal and thereby to operationalise the competition enforcement system in Pakistan. According to the Law and Justice Commission of Pakistan Report 2015, when the Tribunal commenced operations in early 2015 there were forty-nine appeals pending before it. During that year, five new appeals were instituted while only one appeal was decided, therefore, at the end of 2015 fifty-three appeals remained pending before the Tribunal.[89] Further, according to a news report published in August 2017, the Tribunal had disposed of forty-four out of ninety-five appeals pending before it against orders of the CCP.[90] The news report also clarified that appeals against orders of the CCP that had previously been filed before the Supreme Court had also

[87] ibid pp 8–9.
[88] ibid.
[89] National Judicial (Policy Making) Committee 'Administrative Tribunals and Special Courts Annual Report 2015' (c) Law and Justice Commission of Pakistan, chapter 16.
[90] 'Tribunal takes up 95 appeals for reviewing CCP orders' <https://fp.brecorder.com/2017/08/20170830213730/> accessed 5 September 2020.

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been transferred to the Tribunal.[91] Unfortunately, however, there is limited information about the operations of the Tribunal: the Tribunal neither maintains an official website nor publishes its statistics and the few of its orders that are available in the public domain, including those that have been reported in Pakistani law journals, are in respect of deceptive marketing practices rather than anti-competitive matters.[92] In the one reported order against a final order of the CCP in respect of anti-competitive agreements, the Tribunal appears to have accepted and endorsed the CCP's findings without any evaluation or analysis.[93]

Although some of the orders of the Pakistani Tribunal have been appealed before the Supreme Court,[94] and have raised some very important issues that, if decided, would have not only clarified the substantive provisions of the Pakistani Act but also the norms of procedure required to be followed by the CCP,[95] the Supreme Court has yet to decide any of these.[96] An important example in this regard is the CCP's appeal to the Supreme Court against the Tribunal's decision in the *1-Link* case[97] which remains undecided even after nearly ten years.

Box 6.3 The incomplete story of the Pakistani *1-Link case*

The Case before the CCP

This matter proceeded from an allegation that several Pakistani banks had engaged in price-fixing contrary to section 4 of the Pakistani Act by fixing charges for a range of services, including ATM cash withdrawals, Utility Bills Payment Services (UBPS), and Interbank Fund Transfers (IBFT). In deciding this matter the CCP, relied upon a US precedent which fit the facts of the case,[98] and 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'[99] (ie agreements for UBPS

[91] Under the 2007 and 2009 Ordinances except for certain appeals that lay to its internal appellate bench, appeals from orders of the CCP lay directly to the Supreme Court.

[92] Orders of the Pakistani Tribunal in respect of deceptive marketing practices include *Raja Asir Munir and another v DHL Pakistan (Pvt) Limited and 2 others* 2018 C L D 725; *Colgate Palmolive (Pakistan) Limited v CCP and another* 2019 C L D 254; *Ghulam Fareed and 8 others v CCP and another* 2019 C L D 279; *Pakistan State Oil Limited v CCP* 2019 C L D 538; *Engro Foods (Pvt) Ltd and 2 others v CCP* 2019 C L D 981.

[93] *Pakistan Poultry Association v CCP* 2018 C L D 759 para 9.

[94] See for instance appeals referred to in n.73 none of which have been decided to date.

[95] For instance, *Competition Commission of Pakistan v NIB Bank* CA 551/2013 (the *1-Link* appeal).

[96] In Pakistan the reluctance of the Supreme Court to engage with competition appeals is generally attributed to the endemic delay in Pakistani courts, however, the fact that it engaged more with general matters than with competition matters suggests that it did not prioritise competition matters. See Chapter 7 for more on this.

[97] See *1-Link* order n.72.

[98] *In re 1-Link Guarantee Ltd* File 1/24/ATM Charges/C&TA/CCP/2011 decided 28.06.2012, para 63.

[99] ibid para 62.

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and IBFT) which it stated 'may be considered under a rule of reason' and may be eligible for an exemption under section 5 (read with section 9),[100] and other 'horizontal price fixing agreements' (ie for ATM cash withdrawal)[101] which it found to have 'the object of preventing, restricting and reducing competition' and, therefore, were not eligible to be considered for an exemption.[102]

Appeal Before the Pakistani Tribunal

Aggrieved by the CCP's order, the banks appealed to the Pakistani Tribunal to re-examine whether 1-Link and the banks in its network had violated section 4 of the Pakistani Act in entering into the range of agreements addressed in the CCP's order. The banks also argued that in the event that the Tribunal found evidence of a cartel, may consider whether there were any mitigating circumstances that could 'make it reasonable to condone the cartelisation'.[103] Rather than engaging with the core issue brought before it, the Tribunal noted that the 'rigid application of competition law causes more harm than good'[104] and that a lenient and flexible application of the competition legislation did not mean that the 'CCP should compromise when a violation of the Act has occurred or that cartelisation by way of price fixing should be spared just because the collusive conduct is *de minimus* in either scope or effect'.[105] The Tribunal then set aside the order of the CCP on consideration of the 'broad and real context' in which it operated.[106] In stating these views, the Tribunal did not engage with the reasoning detailed in the CCP's order and did not consider any precedents, whether of the CCP, of foreign competition authorities, or of the Pakistani courts.

CCP Goes to the Supreme Court

The CCP appealed the Tribunal's order to the Pakistani Supreme Court. It argued that the Tribunal's judgment was contrary to the settled law on the subject; that the Tribunal had ignored the evidence on record and had misinterpreted the express provisions of the Pakistani Act in relation to price-fixing agreements; and that the Tribunal was not justified in setting aside the CCP's order which was not only well-reasoned but also had been passed in accordance with the norms of due process and the requirements of the Act. On this basis the CCP asked the Supreme Court to set aside the Tribunal's order, however, the Supreme Court is yet to decide this appeal.

[100] ibid.
[101] ibid para 91.
[102] ibid.
[103] *1-Link* order n.72 para 8.
[104] ibid.
[105] ibid para 9.
[106] ibid paras 15, 18.

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6.5 ADOPTION PROCESSES, PENAL STRATEGIES AND COMPETITION ENFORCEMENT

The mechanisms and institutions through which India and Pakistan adopted their competition legislations and the compatibility and legitimacy generated for these legislations in the adoption process due to the unique interplay of mechanisms and institutions pre-existing in each country, directly impacted the early penal strategies adopted by the CCI and CCP. Interestingly, the comparatively greater compatibility and legitimacy of the Indian Act rather than enabling the CCI to pursue an aggressive penal strategy, made it more cautious, perhaps due to its need for maintaining and safeguarding the space it had so painstakingly carved out for itself in the course of adoption. Conversely, the somewhat weaker compatibility and legitimacy of the Pakistani competition legislation set the CCP free of the need to negotiate its space with other elements pre-existing in the Pakistani legal system and allowed it to pursue an aggressive penal strategy and to chart a course that it perceived to be in alignment with its international antecedents. This aggressive penal strategy in turn helped the CCP leverage its international legitimacy to gain a foothold in the Pakistani context.

Notwithstanding the importance of the *direct* impact of the adoption process on the CCI and CCP's penal strategies, it is its *indirect* impact that is of greater though less observed significance. This indirect impact stems from the extent to which the different branches of the Indian or Pakistani state engaged with each other in the course of adoption either generally or specifically in introducing the provisions for the Tribunals in their competition legislations which in turn affected the support they provided in the establishment of the Tribunals and thereby activating the competition enforcement systems in their respective contexts.

A functioning competition enforcement system brings important benefits: it has the potential to support the first-tier competition authorities in developing a more rational approach towards penalties and in enforcement more generally. This is likely to reduce the chances of these orders being challenged simply on the basis of the quantum of penalties, or if these are challenged for these to be resolved more expeditiously. A well-functioning competition enforcement system also engages the successive tiers competition authorities and brings the competition enforcement system into internal alignment which further faciitates their interaction with each other. Most importantly, as competition principles interpreted and applied in the orders of first-tier competition authorities are evaluated at each successive stage of the competition enforcement system first by competition specialists and generalist judges at the Tribunal and second by generalist judges well-versed in the norms of the country's pre-existing legal system, these orders not only allow the competition law to become more compatible with and gain greater legitimacy in the country, but also to steadily integrate into its pre-existing legal system. It is also likely that these orders succeed in bringing forth a more competitive economy.

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The point that particularly bears emphasising is that the low percentages of penalties realised by the CCI and CCP are not in themselves meaningful or accurate indicators of the progress of competition enforcement in India and Pakistan, and that it is important to evaluate these recoveries against the development of competition jurisprudence in the countries and the manner and extent to which all tiers of the competition enforcement systems have engaged with each other in the process.

In the case of India, even in matters where the CCI has not realised penalties so far, it has commenced an important conversation with the Indian Tribunal and the Indian Supreme Court and has rationalised its penal strategies in light of the feedback and guidance provided by either or both of them. Conversely, the CCP has been deprived of these benefits: not only is the Pakistani Tribunal still in the early stages of its operation and has made no comment about the penalties imposed by the CCP but also the Pakistani Supreme Court is yet to decide any competition appeals filed before it and to render its opinion in this regard. Therefore, while in India the disadvantage of limited recoveries is offset by the strengthening of India's competition enforcement system, there is no such corresponding development in Pakistan. Going forward, it is likely that the interaction between the CCI, the Indian Tribunal, and the Supreme Court as inter-connected segments of the Indian competition enforcement system will contribute to the overall development of competition jurisprudence in the country, the enhancement of the compatibility and legitimacy of the adopted competition legislation. This in turn will escalate the pace at which competition principles integrate into and become part of the Indian legal context and bolster the extent to which the competition legislation is understood, utilised, and applied in the country to foster a competition culture and ultimately a more competitive economy. On the other hand, the erratic, superficial, and limited engagement between the CCP, the Pakistani Tribunal, and the Pakistani Supreme Court suggests that Pakistan has still some way to go before its adopted competition legislation is fully recognised and utilised as a legitimate and essential legal instrument and in the creation of a competitive economy.

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