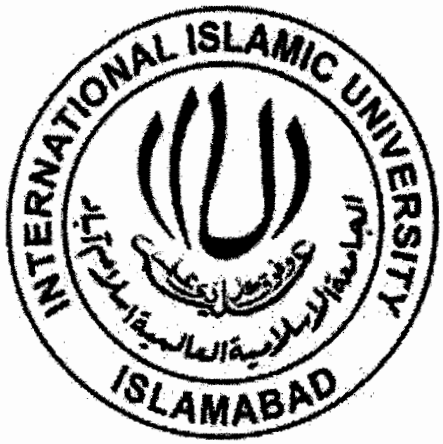

DEVELOPING BROADER OBJECTIVES OF COMPETITION LAWS IN PAKISTAN:

A Comparative Study Of Pakistani And European Competition Laws

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By

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146-SF/LLM-CL/F06

A thesis submitted in partial fulfillment of the requirements of the degree of

Masters in Corporate Law

May 2011

Accession No THL9630

MS

349.495491
NAD

Comparative Study

DATA ENTERED

19/2/13

INTERNATIONAL ISLAMIC UNIVERSITY ISLAMABAD

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ACKNOWLEDGMENTS

First I would like to thank my husband who has inspired me and guided me in selecting Competition law as the topic of my research. I would like to thank him for helping me in the process of completion of this dissertation. While I was writing my thesis, I learned many things from him regarding tips for research and key points to be followed for making a good research paper. It was all his support that enabled me and encouraged me to stay committed for this task. I am grateful to him for his superhuman patience in checking and finally proof reading the whole manuscript for me. Without his motivation I could not imagine to complete my thesis. I would like to thank my dear brother Mr. Nadeem Malik and Mr. Zubair Malik who always taught me lessons for how to stay consistent and focused in whatever I do in my life. Their support was always there with me during my studies. They are the ultimate father figures. I also want to thank my teachers who were always there to support me in every problem that I faced during collecting the material for the said topic. I would also like to thank my friends in IIUI who have always believed in me and encouraged me to do better and better.

For my parents

LIST OF ABBREVIATIONS

CCP	Competition Commission of Pakistan
CFI	Court of First Instance
EC	European Commission
ECJ	European Court of Justice
EU	European Union
FDI	Foreign Direct Investment
IPO	Intellectual Property Organization
IPR	Intellectual Property Rights
MCA	Monopoly Control Authority
MRTPO	Monopolies and Restrictive Trade Practices Ordinance
OECD	Organization for Economic Cooperation and Development
UNCTAD	United Nations Cooperation for Trade and Development
TEC	Treaty Establishing European Community
TFEU	Treaty on the Functioning of European Community
TRIPS	Treaty on Trade Related Aspects of Intellectual Property rights

ABSTRACT

Competition law has, in the modern world of trade, acquired an important place of its own. It has a unique standing, as it plays an important role in the development of any country's economic system. Its role is not only confined towards the economic development of a nation, but it also provides opportunities for the development of a society through enhancement of consumer welfare. Thus, competition law proves to be beneficial both for the social and economic progression of a nation. Needless to say, that, to date, more than hundred countries have enacted competition laws. Starting from the Roman legislators, who initially introduced new tariff system to stabilize the prices of goods, or in the 17th and 18th centuries, when Europe, while expanding its trade all over the world, put restrictions on cartelization, monopolies and concerted trade practices, until today, competition regime has gained a lot of importance through this entire time.

EU (European Union) is the world's biggest market today. It consists of 27 member states. All are signatories to the Treaty of Rome which is now known as EC Treaty (Treaty of European Commission). EC Treaty deals with a number of issues, like, companies, international trade, competition and intellectual property, to name a few. More than a hundred countries have enacted competition laws that are basically an adoption from the Treaty of Rome. Of them, how many countries are successfully implementing the law is a big question, but, for developing countries, like Pakistan, it is certainly facing a lot of challenges. Pakistan is a country with a weak and unstable economy. Consumer interests are not very well taken care of. Since the time of its birth, it has continuously fallen prey to the corrupt governments, feudal influences and dishonest leaders. Resultantly, it has never been able to progress in terms of economy, trade or social wellbeing.

Pakistan enacted its first competition regime in 1970 with the name of Monopolies and Restrictive Trade Practices Act 1970. MRTPO and the Monopoly Control Authority were felt to be inadequate in playing their respective regulatory roles. After a very long time, Competition Ordinance 2007 was enforced. Latest competition regime, Competition Act 2010, is a restatement of Competition Ordinance 2007 with few changes. Competition enactments in Pakistan have been basically adopted from the Treaty of Rome. But the fact is, they could not meet the standards of the European Union laws, which have made the European Union one strong Single Market, where the consumers are offered great opportunities to make transactions easily throughout the EU. Pakistani competition laws have totally failed in fulfilling the expectations of those market actors who have been facing harms due to anti-competitive practices performed by other market players. Consumers' interests have not been prioritized. Economy of the country is weakened with every passing day. Thus, in order to make Pakistan a socioeconomically welfare state, implementing a competition regime with a wider perspective can definitely bring a change.

This thesis consists of four chapters with the addition of a concluding fifth chapter. The first chapter briefly gives an introduction to what exactly the term competition means. It also describes the possible objectives of competition law and policy. The second chapter is a detailed insight into the history and the rise of competition laws in the Europe. The third chapter gives the history of competition laws in Pakistan. The fourth chapter is basically a comparison of European and Pakistani competition laws. The chapter also gives suggestions to consider the possibilities of implementing competition laws with a broader perspective. Last but not the least, there is a conclusion in the fifth chapter that offers some reforms and recommendations.

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CHAPTER ONE: INTRODUCTION

INTRODUCTION

Fair competition is an essential component of a viable free market economy. Through this tool, unscrupulous and restrictive trade practices that are harmful both to the economy, and to the consumer, have been kept in check to decades, perhaps centuries now. In one form or another, a notion of competition law has always been present in reasonably developed economic systems.

Although the modern history of competition starts from the United States and its anit-trust laws of the late nineteenth and early twentieth century, the use of competition laws by the European Union, (formerly the European Communities) has been a significant event in the twentieth and twenty first centuries. The use of competition law by the EU has not simply been restricted to its core economic aims, or even the socio-economic aims that are usually mentioned. Instead, competition law has been effectively used as a tool to strengthen the political and social union of the EU. This has been done by ensuring that competition law stands in the way of those who hinder movement of goods, capital and people. These freedoms were recognized very early on as being fundamental to the long-term survival and viability of the Union, much in the same way that these freedoms were also recognized to have a similar effect in early American Supreme Court jurisprudence.

In Pakistan, after some half-baked attempts, finally a concerted effort to use competition law effectively is under place. The torrent stated with the 2007 Competition Ordinance, which has now matured into the Competition Act 2010. Yet, the situation of Pakistan's economy and the threats to its political and social stability are before us. The purpose of this thesis is to look at European and Pakistani jurisprudence on competition, and then to see if the similarities or

differences can aid/hinder the use of competition laws to achieve aims broader than the strict economic aims of competition laws. The present chapter looks at the background of the subject matter. The second and the third deal with European and Pakistan competition laws respectively. The fourth chapter, in its comparative analysis, looks at how the laws have been used to advance these broader objectives, and finally, chapter five presents some conclusions and recommendations.

1. COMPETITION

Competition means rivalry. It is an act to acquire some monetary benefits or to win a reward. It is a struggle to stay on the top. In the business world, competition is taken as a struggle to lead business in the market place. Thus, competition is a kind of behavior that is adopted by firms playing in the market. The UK Competition Commission has described Competition as "a process of rivalry between firms...seeking to win customers' business over time"[1]

According to Barron's Business Dictionary[2], Competition is defined as "Rivalry in the market place where goods and services will be bought from those who, in the view of the buyers "the most of the money". Hence, Competition will reward those producers who have behaved in the most efficient way.

According to another, more general definition, "Competition in market-based economies refers to a situation in which firms or sellers independently strive for buyers' patronage in order to

[1] See Merger References: Competition Commission Guidelines (June 2003, CC 2), para 1.20 and the companion Market Investigation References: Competition Commission guidelines (June2003, CC 3), para 1.16, available at www.competition-commission.org.uk.

[2] Jack P. Friedman, *Dictionary of Business Terms*, (3rd ed Barron's Educational Series)

achieve a particular business objective, for example, profits, sales, or market share."[3] An UNCTAD publication gives another interpretation to competition, as "Nadia the object fostered and protected by competition policy and law"[4]. Furthermore, some prerequisites[5] are also mentioned for the process of competition to run smoothly. These are: -

i. Freedom of entry and exit in the market.

ii. Freedom of trade and contract.

iii. An efficient monetary system.

iv. Prohibition of restrictive business practices.

v. Transparency of the market

Fair competition occupies a central place in the neo-classical economic theory. When several commercial bodies in a market are in competition with one another, they become efficient in providing greater choice of products and services to the consumers at a cost that is affordable to them. Competition gives firms incentives to come up with newer products. It gives opportunities for market players to promote efficient allocation of resources, enhances consumer welfare, and maximizes dynamic efficiency through technological advancements and innovations. This situation is favorable for a competitive market where the market is free from any distortion. However, under normal conditions, an ideally competitive market or a market with perfect competition is impossible to occur. The reason is that firms usually exploit the market by conducting activities to gain or enhance their market power. They want to lead the market by either dominating it by restricting other market players to enter the market, or by limiting

[3] A Framework for the Design & Implementation of Competition Law & Policy (The World Bank, Washington & OECD Paris 1999) *available at* rru.worldbank.org/Documents/PapersLinks/2427.pdf [accessed on 13 April 2011], 32

[4] W Lachmann 'The Development Dimension of Competition Law & Policy [1999] UNCTAD Series on Issues in Competition Law & Policy. 21 *available at* r0.unctad.org/en/subsites/cpolicy/docs/cpdevdimension.pdf [accessed on 15 December 2010]

[5] *Ibid*, 49

competition by creating barriers to business. In this way, perfect competition turns into imperfect competition, which is highly detrimental to the consumer interests. To deal with imperfect competition, there is a need for implementation of an effective competition law that would combat market failures, enhance competition, improve consumer welfare with using improvement and innovative techniques to establish a better, and a more competitive market where healthy competition motivates the firms to do better and better every day.

1.1.1 Perfect Competition

A market is said to have perfect competition or pure competition, when it meets five standards mentioned as follows:[6]

i. When all firms are selling identical products.

ii. When all firms are price takers.

iii. When all firms have relatively small market share.

iv. When buyers have complete knowledge of the nature of the product being sold and the price they are charging.

v. The market is characterized by freedom of entry and exit.

Perfect competition is thus explained as a market structure where these above-mentioned conditions are fulfilled. In practice though, it is observed that it is quite unlikely for a market to have perfect competition. Therefore, it is taken only as a benchmark to compare market structures and practices. It is nearly impossible to meet all five standards to make perfect market therefore; it is taken only as a model market structure that should be adopted by the business entities playing in the market. Instead of perfect competition, today, most of the economists are

[6] Definition taken from http://www.investopedia.com/terms/p/perfectcompetition.asp [accessed on 13 March 2011]

of the view that if perfect competition cannot be attained, a reasonable situation can be aspired, through which the best competitive arrangement can be attained.[7]

Firms use incentives to exploit the market and gain market power. Exploiting the market includes actions performed by the firms, such as keeping control over prices of the commodities, creating barriers to trade, making collusions with other market entities to fix prices, limiting production of goods, and abusing dominant position by creating monopolies. These are indications of when perfect competition turns into an imperfect competition. Imperfect competition has direct impact on economic as well consumer interests.

1.1.2. Advantages of a Perfect Competition

To put it simply, perfect competition is beneficial for economic welfare as well as consumer welfare. It offers lower costs of commodities, improved products, wider choices and enhanced efficiency. These benefits can never be gained in a market where imperfect competition is prevailing. Some of the benefits are discussed as follows:

- **Efficient Allocation of Resources**

Allocative efficiency means distribution of economic resources in such a way that, when a consumer buys a product, the net gain he gets is the maximum. The prices of the products are easily within a consumer's purchasing power. In a perfectly competitive market, economic resources are allocated efficiently between the consumers. The consumers can buy goods and services according to their need and pay the price according to their affordability.[8]

- **Productive Efficiency**

In economics, Productive efficiency refers to a situation where under perfect competition; goods and services are produced at the lowest possible cost. The producer cannot sell commodities

[7] Richard Whish, *Competition Law*, (6th Ed, Oxford University Press) 16
[8] *Ibid*

unreasonably above their cost. Consequently, to the consumer's advantage, prices never rise above the cost.

- **Dynamic Efficiency**

Dynamic efficiency in a perfect market is related to innovation, development and advancement in producing newer products. Producers strive to make improved products. New products, which are better than previous products in the market, attract most of the consumers. New technological research techniques are used to introduce such goods in the market. This is the dynamic effect of competition in market that stimulates technological research and development.[9]

1.1.3. Imperfect Competition

A market has imperfect competition as a result of various factors that lead to market failure. Cartels, Mergers, Monopolies and Oligopolies, are all results of market failure. Conditions that help cause imperfect competition include;[10]

i. Restricted flow of information on costs and prices;

ii. near monopoly power of some suppliers;

iii. collusion among sellers to keep prices high; and

iv. discrimination by sellers among buyers on the basis of their buying power.

Having discussed the distinction between perfect and imperfect competition, the fact becomes crystal clear that a perfect market is advantageous for the economy of any country as well as for the consumers. On the other hand imperfect market creates troubles both for the market players as well as the consumers. As observed, competitive markets deliver better results than

[9] *Ibid*

[10] http://www.businessdictionary.com/definition/imperfect-competition.html [accessed on 20 March 2010]

monopolistic markets with an optimum level of satisfaction for the consumers.[11] In an imperfect market the impact is worse for the consumers. They are the ones who happen to be most vulnerable in way that their interests are directly affected as a result of inefficient activities of monopolistic firms in the market.

1.1.4. Competition Law and Policy

The process of competition is important to maintain a healthy rivalry between firms. Since competition promotes efficiencies in the market, for a free and open market, competition holds prime importance. The importance of competition has been stated as follows: -

> 'Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organization of production.[12]

In response to growing business and trade activities worldwide, and the consequential need to have a viable competition regime to protect the interests of everyone involved, more than a hundred countries in the world have now introduced competition laws and policies. Competition law provides a legal framework for the market players to efficiently conduct competitive activities in the market. Competition policy is defined as "those government measures that directly affect the behavior of enterprises and the structure of industry."[13] It is further said that competition policy is a subset of competition, and competition law is a subset of competition policy.[14] For the development of an economic system, it is vital to implement a well-designed competition policy, and then, to formulate a legal framework, or a set of rules (competition law)

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[11] See speech by John Vickers 'Competition for Consumers' 21 February 2002, available at http://www.oft.gov.uk/shared_oft/speeches/spe0102.pdf

[12] UK government White Paper *Productivity and Enterprise* (Cm. 5233, July 2001)

[13] R.S Khemani and Mark A. Dutz, (1996) 'The Instruments of Competition Policy and their relevance for Economic Policy' PSD Occasional paper no. 26, World Bank, 9

[14] http://www.circ.in.pdf [accessed on 20 February 2011]

which would monitor various monopolistic activities of the market players, so as to provide a workable competitive environment for the firms in the market. An effective domestic competition law has a very positive impact on the economy of a state, in such a way that, if the domestic market is effective as well as efficient, it helps in gaining trust in the international market. Resultantly, foreign investors are attracted and encouraged to invest in the domestic market. They participate in the economic activities in a domestic market, thus, doing a great deal in improving the economy of a state.

1.2. APPROACHES TOWARDS COMPETITION POLICY

1.2.1 Economic or Social Approach?

Two principal approaches have been attributed to the competition policy,[15] the economic approach and the noneconomic approach. Two entirely different approaches have been given to the competition policy. One relates to the efficiency side of the policy and the other is based purely on public interest. More clearly speaking, competition law is an enormous field where not only economic analysis has been placed at the core foundation but it has a wider range of components in it like political and social components. It has been stated in an essay by Richard Hofstadter, that the possibilities of implementing competition law are as follows: -

> The first were economic; the classical model of competition confirmed the belief that the maximum of economic efficiency would be produced by competition ...The second class of goal was political; the antitrust principle was intended to block private accumulations of power and protect democratic government. The third was social and moral; the competitive process was believed to be kind of disciplinary machinery for the development of character, and the competitiveness of the people—the fundamental stimulus to national morale—was believed to be in need of protection.[16]

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[15] *Supra* 3, 19

[16] *As cited by* Okeoghene Odudu 'Editorial- Competition: Efficiency & Other Things' The Competition Law Review Vol. 6 Issue 1 1-4, 2

1.2.2. Economic Approach of Competition Policy

Since the commencement of competition laws and policy in several countries, it has been argued that the sole purpose of competition policy is to maximize economic efficiency.[17] That would imply that competition policy has no role in protecting sociopolitical values of an economic state. Those arguing in favor of economic objective as the only purpose of competition law are of the view that only economic efficiency should be made the principle goal of the competition law. Only then it will be able to restrict lobbying by vested interests.[18] If social and political concerns are attributed to competition law, they will contradict with the pure economic aim of competition law. As a result, certain imbalances will be created and they would adversely affect competition in the longer run. This result would be in violation of the basic aim of competition law, which is the protection of the process of competition and not the competitors. Multiple aims would open the doors for lobbying by vested interests and would hamper competition and also the application of competition law.[19] It would therefore, according to this theory, be more appropriate for states to formulate separate policies for separate goals.

1.2.3. Social and Political Approach of Competition Policy

On the other hand, there is another argument stating that competition policy operates in a wider context, according to which, it not only governs the economic growth of a country but also administers many sociopolitical aspects of a society. According to this viewpoint, competition policy is based on multiple values that are neither easily quantifiable nor reducible to a single

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[17] *Supra* 3, 11

[18] R Shyam Khemani, 'Competition Policy & Economic Development' Policy Options (October 1997) 23, 25

[19] *Ibid*, 26

economic objective.[20] These multiple values relate to the society's interests such as its culture, wishes, and its history.[21] These values cannot be ignored while enforcing competition policy and law. Today, in many countries, competition law has multiple goals, which under the head of 'public interest' encompasses fairness, regional development, and pluralism or diffusion of economic power through the promotion of small and medium size business.[22] In USA, Canada and Italy, Mexico and Colombia economic efficiency has been given prime importance regarding competition policy. On the other hand, some other countries like India, France and UK; multiple objectives are attributed to the competition law.

Viewing both arguments above, it seems that competition law should not be restricted only with the economic efficiency objective. Competition law should operate in a wider context, which means that the competition policy framework should be furnished with a wider goal of achieving economic efficiency, as well as sociopolitical necessities such as fairness and equity. Consumer welfare, (since it as has always been discussed under the context of the competition policy) also comes under the social and political aspect of the competition policy. This means competition should not be confined to the economic efficiency goal of competition, but it has a wider perspective of catering to society's wishes, its history and culture which cannot be ignored by competition law. It has been stated that:

> Consumer welfare is concerned with efficient transactions and cost-savings but it is also directed at social aspects of the market such as the safety and health of consumers. Consumer welfare is an economic concept with relevant socio-political and legal implications.[23]

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[20] *Ibid*, 24

[21] *Ibid*

[22] *Ibid*

[23] KJ Cseres 'The Controversies of Consumer Welfare Standard' The Competition Law Review Vol. 3 Issue 2 121-173, 121

Thus it is evident that competition law is a regime that enfolds within it the economic as well as social and political characteristics. Success of competition law and policy will therefore be gauged by how well served all three of these aspects are, under one roof of a well-designed competition law.

1.3. OBJECTIVES OF COMPETITION LAW AND POLICY

Maintenance of economic efficiency and enhancement of consumer welfare are the commonest objectives of competition law and policy. By taking the process of attainment of economic efficiency as the main goal of competition law, it means to attain allocative, dynamic and productive efficiency in the market through lowest production cost, technological advancement and innovation.

UNCTAD Model Law on Competition states that main objectives of a national competition law and policy should be as follows: -

> [T]o control or eliminate restrictive business practices or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.[24]

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[24] 'UNCTAD Model Law on Competition' UNCTAD Series on Issues in Competition Law & Policy (2000), TD/RBP/CONF.5/7

Some other objectives have been described in the UN set of Multilaterally Agreed Principles and Rules for the Control of Anticompetitive Practices. These are;

- to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries.
- to attain greater efficiency in international trade and development, particularly that of developing countries, in accordance with national aims of economic and social development and existing economic structures, such as through i) the creation, encouragement and protection of competition; ii) control of the concentration of capital and/or economic power; iii) encouragement of innovation;
- to protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries;
- to eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries;

There are other affiliated objectives of competition law and policy like free access to markets, freedom of trade and freedom of choice. In Germany, freedom of individual action is viewed as the economic equivalent of a democratic constitutional system.[25] In France competition policy is taken as a source of securing economic freedom.[26] In several industrial countries, the objectives ascribed to competition policy are; greater access and openness of the market mainly by reduction of unnecessary trade barriers through deregulation, privatization, tariff reduction and removing of quotas and licenses. It is important here to note that a country willing to enact competition laws should clearly state the goals and purposes of enacting the law. This seems to be more important for the developing countries and they must clearly state the goals of the competition policy and law, which they seek to achieve. This would make the implementation of the law easier. As mentioned above, some countries like United States of America, New Zealand, Mexico, Colombia, and Canada have distinctly stated 'economic efficiency' as the major goal for enacting competition law, while some other countries like UK, India and France have identified multiple purposes for the enactment of completion law.

1.3.1. Broader Objectives and Goals of Competition Law

In addition to the fundamental goals of promoting market efficiency, as discussed above, competition law has many other social goals other than the one and only economic goal. These may include social, employment, industrial, environmental, regional policy, development of minority entrepreneurship, cultural development, servicing of rural regions. These goals can be effectively achieved only when competition law and policy are implemented with a broader

- to provide a set of Multilaterally Agreed Equitable Principles and Rules for the control of restrictive business practices for adoption at the international level an thereby to facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels.

[25] *Supra* 3, 22

[26] *Ibid*

perspective. It is being said, if the social objectives are served prominently under competition laws, some may argue that the prime aim of economic efficiency will be sacrificed and vice versa. It has to be realized though that the process of competition in market cannot be achieved by taking up only one goal of economic efficiency and ignoring and setting aside social goals. A better solution can be sought if the competition regime is improved to such a broad and effective level that both economic and social purposes are achieved successfully, and without detriment to each other.

Laws are made to protect the rights of all humans. In that respect, an improvement in the basic life standard of all humans is the main function of competition law. Competition law covers many social aspects of a society. Some of the social objectives of competition law may include following components;

1.3.2. Economic & Social Freedom

In the European Union's Single Market, the principle of Four Freedoms is very popular. The said principle has helped a lot in bringing about unhindered movement of people, capital, services and goods around the Member States of the EU. The Free movement principle has given new opportunities for all stakeholders, primarily the consumers, but also to the business actors, and members of the civil society. A more integrated market brings social welfare in a country. In a developing country like Pakistan the free movement principle can bring a positive change in the process of economic development. It will only become possible though through harmonization of laws in all provinces of the country. In this way a single national market can be created, which will also make all the provinces politically and socially close to each other. Greater chances of successful business activities will pave the way for economically strengthening the country. People from all provinces will have a greater chance to interact with each other and this will

bring about greater social harmony. As far as the business activities are concerned, the free movement principle, if followed properly, can bring enormous change. Free trade under the said principle of freedom of movement of goods can bring variety of goods from all provinces within the reach of every consumer in the market and this will ultimately result in enhanced trade within the country.

1.3.3. Consumer Protection:

Consumer protection laws are all about the welfare of the consumer. Competition law in many countries is the secondary law, complementing the main consumer protection laws in bringing about a fair deal for consumers and providing him with his due right, since this has been recognized as an essential part of promoting social welfare in a country. Competition law provides full rights to the consumers through promoting efficiency in the market. Promoting efficiency means to allocate resources in the most efficient way, or 'optimum allocation of resources". Through this, the available resources are utilized more efficiently and without any wastage, and maximum benefit derived from them. To achieve this goal, the principle of fairness must be followed. Consumers will be able to get maximum benefit when products are supplied, distributed, and services are provided following the rules of allocative efficiency and fairness.

1.3.4. Innovation and Intellectual Property Rights

An open market promotes innovation. Where a market is imperfect and fragmented, firms cannot make innovations. A common objective of competition law and Intellectual property law is to promote innovate ideas to introduce newer and better goods to the consumers. For that purpose, an open market policy is the need of the hour. That again will stimulate competition and consequently promote social welfare in the society. An imperfect market is harmful for the consumer interests at the first place. When a market is not competitive, innovativeness is harmed

and the ultimate result is that the consumers get goods that are not of good quality and do not meet the satisfactory standard of the consumer. Thus, a competitive market is essential for promoting innovations and new developments regarding goods and services to be provided to the consumers in the market.

1.4. CONCLUSION

The broader objectives of competition laws need to be implemented in today's modern market. To spread economic and social welfare, maximum benefit must be taken by implementing the law in broader perspective. Competition law is dynamic in nature as it protects the economic and social institutions of the society without harming any one of them. For a developing country like Pakistan, where competition laws are highly influenced by the European Union competition laws, a change is needed in framing the policy and legal regime that covers both economic and social policies. As a prelude to the discussion in the coming pages of this dissertation, Article 4 of The Treaty on the Functioning of the European Union (TFEU)[27] is quoted here, which clearly enshrines this dual role of the competitions laws and policy, and states:[28]

> **Article 4**
>
> 1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
>
> 2. Shared competence between the Union and the Member States applies in the following
>
> Principal areas:
> (a) internal market;
> (b) social policy, for the aspects defined in this Treaty;
> (c) economic, social and territorial cohesion;

[27] TFEU was formerly known as Treaty Establishing European Community (TEC). The treaty was amended by Treaty of Lisbon that came into force on 01-12-2009

[28] Treaty on the Functioning of European Union, Article 4

(d) agriculture and fisheries, excluding the conservation of marine biological resources;
(e) environment;
(f) consumer protection;
(g) transport;
(h) trans-European networks;
(i) energy;
(j) area of freedom, security and justice;
(k) common safety concerns in public health matters, for the aspects defined in this Treaty.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

The article above is clear in explaining the purposes and objectives of EU law, as it aims to create harmonization among the economic, social policies and other policies within EU. Harmonization among different policies in EU provides opportunities for the Member States to integrate and compete in a more healthy and competitive environment. In this way, the EU law plays a significant role in the economic development of the region as well as in protecting the social needs of its large number of consumers in the Single Market of the EU. The need of the hour is that a similar harmonization effort should take place in Pakistan, between the various economic and social policies, with competitions laws used as a vehicle of integration, in the same fashion as it has been done in the European Union.

CHAPTER 2: EUROPEAN COMPETITION LAW*

2.1. Background of European Competition Laws

Economic efficiency and Consumer welfare have proved to be the top goals to be achieved by major governments in the world history. For this purpose, many attempts have been made to formulate regulations for the competitive markets to maintain fair trade and consumer welfare through economic efficiency and efficient allocation of resources. Consequently, many countries now have modern competition and anti-trust laws. This shows the significance of the fact that there could be no possibility of economic efficiency without a viable competition law regime.

The emergence and development of competition laws throughout the world have a long history. Records show that primary efforts to control unfair trade and dominant markets were once made by the Roman legislators. Roman emperors and Monarchs used tariffs to stabilize the prices of goods. An example of Roman competition law of that time is *Lex Julia de Annona,*[1] which was enforced by the Roman government. Death penalty was imposed on those who violated the tariff system introduced in that law, concealed the goods through cartelization or caused fluctuations in prices of the goods of everyday use of the consumers. Following that, another important milestone in the history of competition laws was the promulgation of a Constitution by Emperor Zeno of the Eastern Roman Empire in 483 AD. This legislation, which is said to have influenced laws made as late as the Florentine Municipal Laws of 1322 to 1325[2] provided for punishing monopolies and trade combinations

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* This chapter was written before the Treaty of Lisbon came into force on 01-12-2009. This EC Treaty has been since renamed Treaty on the Functioning of the European Union, while Articles 81 and 82 of the treaty, have been renumbered as Articles 101 and 102.

[1] DV Cowen 'A Survey of the Law Relating to the Control of Monopoly in South Africa' The South African Journal of Economics, June 1950 121, 121

[2] Richard Wilberforce, Alan Campbell and Neil Elles *The Law of Restrictive Practices and Monopolies* (2nd edition,

by confiscation of property, as well as exile for the offenders. All kinds of trade combinations and joint actions of monopolies were controlled under this law[3].

There was a marked increase in the volume of international trade throughout the Middle Ages. The increasing transactions among different nations of the world resultantly gave birth to 'The Law of Merchant', which is profoundly known as *lex mercatoria.* It is defined as: "A system of customary law that developed in Europe during the middle ages and regulated the dealings of mariners and merchants in all commercial countries until the 17th century"[4]. Unfair and restrictive trade practices, which fall under the ambit of competition laws in most countries these days, were, to varying degrees controlled and regulated by *lex mercatoria* in various European countries throughout the middle ages. Another instance in the development of competition law from the Middle Ages comes from the times of King Henry III of England in the enactment of an Act to fix the prices of bread and ale.[5] Then in 1349, King Edward III passed the Statute of Labourers[6] and under this law, wages were fixed for the artificers and workmen. Also, under the law, foodstuff could not be sold, but at reasonable prices and a merchant who sold overpriced goods was enjoined to make reparations by paying the aggrieved party double of what they had received. An earlier condemnation of cartelization also comes from the time of Edward III when one of his statutes outlawed trade combinations, in the following terms:

> ...we have ordained and established, that no merchant or other shall make Confederacy, Conspiracy, Coin, Imagination, or Murmur, or Evil Device in any point that may turn to Impeachment, Disturbance, Defeating or Decay of the said Staples, or of anything that to them pertaineth, or may pertain.[7]

London: Sweet and Maxwell 1966) 21

[3] *Ibid*, 22

[4] Black's Law Dictionary (9th edition Thomson West 2006) 966

[5] 51 & 52 Hen. 3, Stat . 1 (UK Legislation)

[6] 23.Edw.3. (UK Legislation)

[7] 27 Edw. 3 Stat. 2, c.25 (UK Legislation)

Rapid growth in the business sector was witnessed in Europe in the very beginning of 16th century. Gradually, overseas trade started changing the economy of Europe into an internationalized market economy. Wealth was flowing in from different economies. A new system of industrial monopolies licences was introduced in the era of Queen Elizabeth I. Despite of many assurances given by the Queen, the system fell prey to severe abuse, rather, it was used merely to preserve privileges, encouraging nothing new in the way of innovation and manufacture.[8] Subsequently, in 1623, the Parliament of England passed the Statute of Monopolies, the major part of which excluded patent rights from prohibitions and guilds. Then afterwards, from the times of King Charles I till the time of King Charles II, monopolies continued and were considered to be a major source of raising revenues.[9]

In the modern era, the starting point of the discussion, and the most important events in the history of competition laws were the enactment of two laws by Congress, the Sherman Act of 1890 and the Clayton Act of 1914. These laws have laid the foundation of theory and practice and modern competition laws. In the United States, competition laws are generally known as anti-trust laws. This is because of the fact that, at that time, American corporations created huge monopolies through family trusts, thus concealing the dominant position of their business arrangements.

2.2 European Community Competition Law:

1957 was an important year in the development of European Union Competition laws. The contemporary account of European competition law begins in the aftermath of the 2nd World War.[10] It was the time when there arose a desire for political cooperation in Europe. In 1948 the Brussels Treaty entered into by France, UK, and the three Benelux countries (Belgium,

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[8] William Searle Holdsworth, *A History of English Law (9 Volumes)* (3rd ed Sweet & Maxwell) Vol. 4, 346.

[9] *Supra* 2, 18

[10] Paul Craig and Grainne *de* Burca, *EU Law; Text Cases & Materials,* (4th ed Oxford University Press) 3

Netherlands, and Luxemburg). The Brussels Treaty was preceded by The North Atlantic Treaty organization (NATO), which was signed in 1949. A strong support for the European co-operation gave birth to European Coal and Steel Community (ECSC), which was created in April 1951. This proves that a lot had been happening in the way of forwarding a prosperous and positive relationship among the EU countries at that time. With an idea to further develop this bond, six countries (Belgium, Netherlands, Luxemburg, France, Italy and Germany) met at Messina in June 1955. The most important proposals were made for a general common market and a European Atomic Energy Authority. The idea behind a common market was for trade between member states to be tariff free within the common market zone. As a result of the Messina Conference, the abovementioned six countries signed the Treaty of Rome on March 1957. The Treaty is also known as Treaty of the European Community. The EC Treaty the economic and social foundation of EU law, which provides the basic principles of European competition Law. Since its existence, it has grown into European Union of nearly half billion citizens. The Treaty came into force on 1rst January 1958 and the common market more strictly became the European Economic Community (EEC) where trade by member states within the EEC was free of tariffs.[11]

2.3. Basic Principles & Objectives of EC Competition Laws

The primary objectives of the 1957 Treaty of Rome have been as stated as follows: -

> [T]o establish a common market, to approximate the economic policies of the member states, to promote harmonious development of economic activities throughout the Community, to increase stability and raise the standard of living, and to promote closer relations between the member states. Barriers to trade were to be abolished and a common customs tariff was to be set up, undistorted competition was to be ensured, national economic and monetary policies were to be progressively co-ordinated, and fiscal and social policies

[11] For further details about the background and events leading to the formation of the European Union, see *ibid*, 6-13

gradually harmonized. There was to be no temporal limit on the existence of the Treaty.[12]

2.3.1. Free Trade

Since the development of competition law, in the past 50 years, many objectives have been attributed to this area like, economic efficiency, maximization of consumer welfare, best allocation of resources, preventing business restraints etc. There has been another area, which is equally significant in relation with the objectives of competition law, particularly in the context of the European Union. That area, which has been the core objective of EC competition law, is to facilitate the creation of a single market through free trade (trade liberalization) and market integration (open-market). This possible objective is achieved through maintenance of the competition process, in other words, by promoting free competition. In the process of promoting free competition, unreasonable restraints on trade are removed. In this regard, the competition law prohibits tariffs, quotas and the like which can adversely affect market competition. Thus, it can easily be said with regard to the objectives of competition policy and law that these are essentially the same as those of trade liberalization because free trade relates to the promotion of economic efficiency and consumer welfare. More precisely, competition policy and trade policy complement each other and ensure competitive opportunities for the world market.

2.3.2. Concept of Single Market in EU

A single market or a common market in the context of the EU has been defined as: "A market that establishes free trade in goods and services, sets common external tariffs among members and also allows for the free mobility of capital and labour across countries."[13] A single market therefore is a kind of trading block which consists of a customs union with common policies on product regulation, and freedom of movement of the factors of

[12] *Supra* 10, 6

[13] Steven M Suranovic, *International Trade Theory & Policy* (http://internationalecon.com/Trade/Tch110/T110-2.php)

production and of enterprise. The ultimate goal of such a market is therefore to allow the movement of capital and goods within the market in the same fashion as it is within a country. In other words, it allows free movement of goods, free movement of capital, free movement of services and free movement of persons. This single market is a free trade area where the member states have an arrangement between them that they agree to remove all customs duties, quotas on trade and restrictions on movement between them. The EC law plays an important role through two basic techniques in attaining this common market. Firstly, it prohibits the national rules of the member states that hinder cross-border trade. Secondly, it prevents unnecessary trade barriers through encouraging positive integration within the common market. Both of these techniques, as we will see later, are enforced through competition law.

2.4. The Four Freedoms

The four fundamental freedoms of European common market are freedom of movement of goods, capital, services and persons. The existence of this common market is not possible without these four freedoms.

- **Free movement of goods:** The single market of the EU is very much dependant on competition for the free movement of goods. Free movement of goods in the EU means the creation of a customs union, which provides for the elimination of customs duties between Member states. Through the EC laws, the Member states have removed custom barriers between themselves and introduced a common customs policy towards other countries. This customs policy, which is free of unnecessary barriers, ensures suitable conditions for market competitiveness by removing all restrictions of fiscal nature possibly capable of creating obstacles for the free movement of goods within the common market.

- **Free movement of Capital:** For the proper functioning of common market in the EU, the EC Treaty prohibits any restrictions on capital movements. Capital within the EU can be transferred easily from one country to another. Monetary transactions are carried out in *Euro* and are considered as domestic payments bearing domestic transfer cost.
- **Free movement of Services:** The EC Treaty prohibits all restrictions on the provision of services within the EU Member states, whenever there is a cross-border element present. The situation arises where the provider is established in one state and the services are supplied in another state or the recipient is established in one state and has travelled to receive services in another Member state. However, it is important to note here that freedom to provide services under the EU law, entails carrying out of an economic activity for a temporary period in a Member state where the provider or the recipient is not established.
- **Free movement of Persons:** Free movement of persons is the fourth fundamental freedom of EC law. It deals with free movement of employed persons (workers), self-employed persons, those employed by companies and European citizens.

2.5. EU Competition Law

2.5.1. The EC Treaty

There are more than 100 different systems of competition laws in the world today. Most of them are based on the EC Treaty (Treaty of Rome). The Rome Treaty of 1957 established what is now known as the European Community[14]. The Amsterdam Treaty of 1997 renumbered the Rome Treaty and it consists of 314 Articles.[15] The Treaty dealt with a

[14] Richard Whish, *Competition Law*, (6th Ed, 2008, Oxford University Press) 49

[15] *Ibid*

number of issues like companies, Intellectual Property, Competition, international trade etc. The document itself is considered to be a complex manuscript which consolidates principles, rules and regulations to govern the common market of EC, for a sole purpose, to increase market efficiency, maximizing consumer welfare and to achieve the optimal allocation of resources.[16] It offers free trade, removes and eliminates all forms of obstacles to the free movement of goods, services, persons and capital.[17] Through this Law, a free trade zone is established which encourages and promotes competition within the European Community.

2.6. Competition Law and EC Treaty

EC competition law is contained in Chapter I of Part III of the EC treaty, which consists of Articles 81 to 89. To better understand the principles contained in the treaty with regards to competition, it is necessary to read those provisions, along with the provisions covering the general principles of the EC. For instance, on the establishment of a common market, Article 2 of the Treaty says:

> The Community shall have as its task, by establishing a common market and an economic and monetary union and by the common policies or activities referred to in Article 3 and 4, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among the Member States.[18]

Article 3 of the Treaty requires the Community to take certain actions to be taken so as to achieve the task laid down in Article 2. To this end, paragraph (g) of Article 3(1) specifies "a system ensuring that competition in the internal market is not distorted."[19] Moreover, Article

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[16] *Supra* 10, 950

[17] *Supra* 14, 49

[18] Treaty of Rome (as amended by subsequent treaties), Article 2

[19] *Ibid*, Article 3

4 emphasizes that the activities of the Member States and the Community shall be conducted in accordance with the principle of an open market economy with free competition. Article 81, from Chapter 1, Part III, prohibits agreements, decisions by associations of undertakings and concerted practices that have as their object or effect the restriction of competition, although this prohibition may be declared inapplicable where the conditions in Article 81(3) are satisfied. Article 82 prohibits the abuse by an undertaking or undertakings of a dominant position. Obligations are imposed on the Member States in relation to the Treaty generally and the competition rules specifically under Article 86(1), while Article 86(2) explains the application of the competition rules to public undertakings and private undertakings to which a Member State entrusts particular responsibilities. Articles 87 to 89 prohibit state aid to undertakings by Member States, which might distort competition in the common market.

2.6.1. Article 81

The principal provisions of the Treaty, which deal with competition are Articles 81 and 82. Article 81 covers anti-competitive agreements, and is considered to be the main equipment or tool to control anti-competitive behaviour by cartels. Article 81(1) prohibits such agreements, decisions by associations of undertakings and concerted practices that restrict competition. The text of Article 81 is as follows: -

Article 81

1. The following shall be prohibited as incompatible with the common market;

   all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

   a- Directly or indirectly fix purchase or selling prices or any other trading conditions;
   b- Limit or control production, markets, technical development, or investment;
   c- Share markets or sources of supply;
   d- Apply dissimilar conditions equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

e- Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

1. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
2. The provisions of paragraph 1 may, however, be declared inapplicable in the case of;

- Any agreement or category of agreements between undertakings;
- Any decisions or category of decisions by associations of undertakings;
- Any concerted practice or category of concerted practices;

Which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

a- Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

b- Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

The term 'undertaking', is not defined by the EC Treaty. However, the term has been defined by ECJ in a famous case named *Hofner and Elser v. Macroton GmbH:* "The term 'undertaking' covers any entity engaged in an economic activity regardless of its legal status and the way in which it is financed.[20]" This includes corporations, partnerships, individuals, trade associations, the liberal professions, state-owned corporations, and co-operatives.[21] Adding into this definition, ECJ in *Pavlov*[22] case said: "It has also been consistently held that any activity consisting in offering goods or services on a given market is an economic activity." It is to be noted here that any corporation that is not engaged in any economic activity so as to offer goods or services in a given market are not taken as 'Undertaking'. For instance, bodies entrusted with the management of statutory health insurance and old-age insurance schemes are not considered undertakings for the purposes of competition law.[23] State-owned corporations can be taken as undertakings when they operate in a commercial

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[20] Case C-41/90 *Hofner and Elser v. Macroton GmbH* [1991] ECR I-1979, para .21

[21] *Supra* 14, 91

[22] Cases C-180/98 etc [2000] ECR I-6451, [2001] 4 CMLR 30, para 75.

[23] *Supra* 10, 953

context.[24] Collective agreements concluded by organizations representing management and labour are not covered under the term 'undertakings' for the purposes of Article 81.[25] Here it is also important to note that such firms, which are legally distinct, will be treated as a single unit because of the close economic link between them. For instance, an agreement made between a parent and subsidiary, where they are considered to be a single economic entity.[26]

Agreements, Decisions, and Concerted Practices:

Agreements

All such contracts that are legally enforceable fall in the ambit of an agreement. Thus all such agreements that prevent or restrict competition in a market are encompassed under Article 81 of the EC Treaty. A question arises though, where firms or corporations hold agreements, which are less formal or are not *in stricto senso* legally binding. A good example is that of the *Quinine Cartel*[27] case in which few firms agreed to fix prices and divide the market in quinine. They made an informal agreement on that. The ECJ's approach on that was that informal agreements could be caught under Article 81. Furthermore an elaborate meaning of an 'agreement' was given by the Commission, ECJ and CFI in another famous case, the *Polypropylene*[28] case. In this case a number of firms in a petrochemical industry held an agreement to form a cartel. It was a single oral agreement and there were no sanctions for breach of this agreement. Above all it was not a legally binding agreement. It was held that an agreement did exist among those firms. Also, an agreement existed if the parties reached a consensus on a plan, which limited, or was likely to limit, their commercial freedom by determining the lines of their mutual action or abstention from action in the market. In this

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[24] *Supra* 14, 84-86

[25] Case C-67/96 *Albany International BV v. Stichting Bedrijfspesnioenfonds Textielindustrie* [1999] ECR I-5751

[26] *Supra* 10, 953.

[27] Cases 41, 44 and 45/69 ACF *Chemiefarma NV v. Commission* [1970] ECR 661.

[28] Case T-7/89 SA *Hercules Chemicals NV v. Commission* [1999] ECR II-1711, para 262-264

regard, the CFI upheld the decision of the Commission that the firms' pattern of conduct was in pursuit of a single economic aim, the distortion of the market.

Decisions

When independent undertakings coordinate to make a cartel, this coordination may lead to a trade association. It has been held that such a constitution of a trade association is itself a decision.[29]

Concerted Practices

Concerted Practice refers to such a conduct by the undertakings, which is neither an agreement nor a decision but still it amounts to an infringement under Article 81. Such a conduct does not need to be planned or jotted down on a paper as a contract, agreement or decision. However, the simple factum of practical cooperation among undertakings, or an informal agreement between firms can be referred to as a concerted practice. Concerted practices were, for the first time discussed in a famous *Dyestuffs*[30] case (*ICI v. Commission*). ECJ, upholding the decision of the Commission, said that the object of bringing concerted practice within Article 81 was to prohibit: "A form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition."[31]

In another famous case, the *Sugar Cartel* case (*Suiker Unie v. Commission)*[32] the ECJ elaborated that:

> [A]ny direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct

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[29] *National Sulphuric Acid Association* OJ [1980] L 260/24, [1980] 3 CMLR 429.

[30] Cases 48/69 etc [1972] ECR 619, [1972] CMLR557.

[31] [1972] ECR 619 ECR 619, [1972] CMLR557, para 64.

[32] Cases 40/73 etc [1975] ECR 1663, [1976] 1 CMLR 295.

which they themselves have decided to adopt or contemplate adopting on the market.[33]

Thus these two very important cases explain the correct meaning and its applicability under Article 81.

Article 81(1) The Object or Effect of Preventing, Restricting or Distorting Competition:

An agreement, to be addressed under Article 81(1) must have the object or effect of preventing, restricting or distorting competition. Such an agreement is considered to be void and unenforceable unless it satisfies the criteria set under 81(3). This may include horizontal agreements as well as vertical agreements. Some of the agreements have been categorized as having as their object the prevention, restriction or distortion of competition. For instance, agreements of price fixing, market sharing agreements, and agreements of controlling outlets etc. have all been held to fall in this category since they all have the object of preventing, restricting and distorting competition.

2.6.2. Article 82

Article 82 is very rightly considered to be an important companion of Article 81. Where Article 81 is applied when agreements, decisions and concerted practices that are harmful to competition, Article 82 is concerned with those dominant firms which act in an abusive manner. Article 82 of the EC Treaty provides;

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:
> a- Directly or indirectly imposing unfair purchase or selling prices or 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.

[33] [1975] ECR 1663, p 1942, [1976] 1 CMLR 295, 425.

The basic objective of Article 82 is to control the market power, whether by a single firm or a number of firms.

2.7. The Institutions

There are five principal institutions, which are mentioned in **Article 7** of the EC Treaty. These institutions are designed to carry out the working of the European Community. These are named as; *the Council, the Commission, the European Parliament, the Court of Auditors and the Court of Justice.*[34] Of these organs, the Commission, and the Court of Justice are directly involved in the enforcement of competition laws in the EU.

2.7.1 Council of European Union

Council of European Union is the highest legislative body of the European Community. It is also referred to as the Council of Ministers.[35] The Council has no direct role to play in the competition policy of the EU, but it comprises of several compositions that are dealing with numerous matters concerning Competition, such as Home affairs, Consumer affairs, Agriculture, Employment, and Education etc. Under Article 83 and Article 308 of the EC Treaty, certain powers are conferred upon the Council, through which it has adopted several major pieces of legislation, including the Merger Regulation of 2004. It has also delegated special powers to the Commission under the regulations to enforce the competition rules in the Treaty, particularly Regulation 17 of 1962, which is now replaced by the Modernization Regulation of 2004.

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[34] Treaty Establishing a Constitution of Europe [2004] OJ C310/1.

[35] The Council renamed itself as the Council of European Union in 1993 (OJ [1993] L 281/18).

2.7.2 European Commission

The term 'Commission' connotes both the College of Commissioners and the permanent Brussels bureaucracy, which staffs the Commission services.[36] Commission plays vital role in the implementation of competition policy within the EU. It has the responsibility of fact-finding, taking action against infringements of the law, imposing penalties, adopting block exemption regulations, conducting sectoral inquiries, investigating mergers and state aids, and for developing policy and legislative initiatives.[37] In the international scenario, the Commission is also involved in cooperating with competition authorities in other countries such as the US, Japan and Canada. It is significant to note here that out of the 27 Commissioners working in the Commission, one takes special responsibility for competition matters. For this special responsibility, he enjoys a high public profile.[38] This Commissioner has an exclusive power to take certain decisions for Competition without the involvement of other Commissioners. Under Article 214(1) EC Treaty, the Commissioners of the European Commission hold their office for a term of five years, which is renewable.

2.7.3 Court of First Instance

The Court of First Instance (CFI) was established in 1988. The underlying cause for the creation of CFI was to lessen the burden of the European Court of Justice (ECJ). Before the amendments, which were introduced by the Treaty of Nice, the CFI only enjoyed a secondary organizational status. Now, following these amendments, under Article 220 of EC Treaty, CFI has the same status as the ECJ, and it performs the same function of ensuring the observation of law in the implementation and interpretation of the Treaty. A minor difference

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[36] N. Nugent, *The European Commission* (Palgrave, 2001); D. Dimitrakopoulos, *The Changing European Commission,* (Manchester University Press, 2004).

[37] *Supra* 14, 53.

[38] *Ibid*

between the two is that the CFI comprises of *at least* one judge per Member State, while there is only one judge per Member State in ECJ.

There is an appeal to the ECJ within two months from the date of the CFI's decision.[39] This appeal can only be on a question of law, and not on a question of fact.

3.7.4 European Court of Justice

Article 221-225a of EC Treaty describes the composition of the ECJ. According to Article 221, there shall be one judge per Member State. The appointment of all judges is required by Article 223 to be 'by common accord of the Governments of the Member States'. Article 222 of the EC Treaty provides that eight Advocates Generals will assist the ECJ. The number of the AGs can be increased by unanimous decision of the Council. Article 223 requires the AG or the judge of the ECJ to be 'persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are *jurisconsults* of recognized competence'. As mentioned earlier, the ECJ hears appeals from the CFI on points of law only. So far, the role of the ECJ remains central with broad jurisdiction within the EU legal system.

[39] Council Dec.1999/291[1999] OJ L114/52.

CHAPTER NO. 3: COMPETITION LAWS OF PAKISTAN, *PAST & PRESENT*

This chapter aims at presenting an overview of competitions laws in Pakistan. To this extent, the chapter aims to have a look at the basic features in Pakistan law that support the doctrine of competition, as well as the circumstances that lead to the first enactment of competition laws in Pakistan in the early seventies. An analysis will be made of the features and performance of those laws, leading up to the year 2007, when an effort was made to modernize the laws, and bring them into conformity with the needs of the day. From there on, a couple of other attempts lead us to the present situation, whereby the governing law at present in Pakistan is the Competition Act 2010, although it must be said that the present laws trace their ancestry to the 2007 Ordinance, and the guiding principles set out in that Ordinance have, to a large extent, been retained by the 2010 Act.

A few weeks before the promulgation of the 2007 Ordinance, the incoming Chairman of the Competition Commission of Pakistan, Khalid Mirza stated[1] that the new law would be based primarily on the model adopted in the EC laws dealing with competition. The present chapter would thus provide, in conjunction with the previous chapter, some insight as to the similarities, structurally and legally, that exist between the two laws, and this will perhaps help us to explain if the two sets of laws share, or should share more than a superficial similarity. Finally, this chapter will also contain a brief analytical look at the performance of the 'modern' competition regime in Pakistan.

3.1. Evolution & History of Competition Laws in Pakistan

In a developing country like Pakistan, the need for a competition regime came up as a result of the development of private corporate sector in early sixties. Weak Government policies that concentrated at encouraging capital formation in the private sector, like industrial credit,

[1] KA Mirza& FK Daudpota 'Competition in Pakistan: The New Regime' (2007) Competition Law Insight, 63

industrial licensing, and monetary concessions resulted in undue concentration of economic power in very few hands. Resultantly, there were just a handful of families that dominated industrial, banking, commercial, and insurance activities in the country.

A now famous (or infamous) study by the renowned economist Dr. Mahbubul Haq postulated that in Pakistan, a large majority of the wealth was concentrated in the hands of twenty-two large inter-connected families.[2] These families controlled 66% of the industrial assets and 87% of the banking and insurance assets of the country. Another study showed that 60 industrial groups controlled 61% of all private industrial assets and 44% of all private industrial sales in Pakistan during the sixties.[3] The study by Papanek[4] stated that during the fifties, out of 3000firms in Pakistan, only 24 of them controlled almost 50% of the private industrial assets; seven industrial families controlled 25% of all industrial assets while 15 families owned 75% of shares in banks and insurance companies. In 1968, 43 families owned 49% of all the enlisted companies on the Karachi Stock Exchange (KSE), controlling 53% of the total assets.[5]

As a result of rapid growth of monopolistic situations, cartels, undue concentration of economic power, and restrictive trade practices in the country, the Government of Pakistan established an Anti-Cartel Laws Study Group in 1963.Announcement for the establishment of this study group was made by the then Finance Minister in his budget speech for the fiscal year 1963-64. This group submitted its first report in 1964. The Anti-Cartel Laws Study

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[2] Haq, Mahbubul *'The Poverty Curtain: Choices for the Third World'* Columbia University Press, New York, 1974. This study gave rise to a number of political slogans against the Ayub government, and the famous verses by the poet Habib Jalib, who wrote;
Baees gharanay hain abad
Baqi sab ke sab nashad
Sadar Ayub Zindabad
Translation: Twenty-two families are thriving; and all of the rest are dejected, long live President Ayub.

[3] Papanek, GF *'Pakistan's Development: Social Goals and Private Incentives'* Harvard University Press, Cambridge, Massachusstes, 1967, 166-169

[4] *Ibid*

[5] White, L *'Industrial Concentration and Economic Power in Pakistan'* Princeton University Press, New Jersey, 1974, 44-50

Group was given the task of examining the policies and measures that were advisable and effective in preventing anti-competitive practices in the country. The findings of the study group showed harmful growth of monopolies, cartels, and restrictive trade practices in the country.[6]

As a result of these findings, the Government of Pakistan published a draft anti-monopoly and anti-cartel law in the Gazette of Pakistan (Extraordinary) on 28-06-1969 for comments and suggestions by the public. On 26-02 70 the Monopolies and Restrictive Trade Practices Ordinance was enacted and it came into force on 17-08-1971. Section 8 of the Ordinance established the Monopoly Control Authority, the body authorised to enforce the laws, and the Authority came into existence on the day as when the Ordinance came into force.

Another significant event in the following years was the adoption of the new Constitution of Pakistan on 14-08-1973. A few of the provisions of the new Constitution also forcefully supported competition laws. Article 18 of the Constitution states:[7]

> **Freedom of trade, business or profession**
> **18.** Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon lawful profession or occupation, and to conduct any lawful trade or business:
> Provided that nothing in this Article shall prevent-
> (b) the regulation of trade, commerce or industry in the interest of free competition therein;

The article is rather self-explanatory, and stipulates that the state has the right to regulate any trade, commerce or industry, in order to protect free competition. Another provision of the constitution that has been described by some as enshrining the ideals of free competition is Article 38(a), which charges the state to prevent "the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest." It has been argued that the term 'general interest', though not defined in the constitution should be

[6]Joeseph Wilson 'At the Crossroads: Making Competition Law Effective in Pakistan' Northwester Journal of International Law & Business (2006) Volume 26 565, 567

[7]Constitution of the Islamic Republic of Pakistan, Article 38(a)

taken to mean consumer welfare, one of the primary aims of competition laws.[8] The combined effect of these two Articles, with the recently adopted MRTPO, was to firmly root competition, at least as an ideal, in Pakistani jurisprudence, although these ideals were to suffer some serious setbacks as a result of the nationalization policy of the centre-left government, which came into power after the 1971 breakup of the country.

3.1.1. Monopolies and Restrictive Trade Practices Ordinance (MRTPO) 1970

The main thrust, in light of the historical circumstances that lead to the adoption of the MRTPO, was to reduce the concentration of wealth that, at least in the public's imagination, had become rife in the sixties. The preamble of the Ordinance set out these objectives as follows:[9]

> [T]he prevention of undue concentration of economic power in the hands of individuals and their families, the sharing of benefits of industrial development by the general public, the elimination of largely family oriented attitudes of entrepreneurs and the subsequent establishment of professional management in control of enterprises then managed and controlled by the big business family groups.

3.1.2. Offences under the MRTPO

3.1.2.1. Undue Concentration of Economic Power

Although the MRTPO did not define what undue concentration of economic power was, section 4 listed the situation, which would be considered so. The first situation is where an individual controlled more than a 50% share in a public or private company, and where the total value of the assets of that company was not less than one hundred and fifty million rupees. In these circumstances, the MCA was authorized to change the total value of assets an individual was permitted to hold in a company from time to time. Section 4 prohibited dealing between 'associated undertakings' where the effect of the deal was a benefit to the

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[8] *Ibid*, 568

[9] Monopolies & Restrictive Trade Practices (Control & Prevention) Ordinance 1970 (Published in the Gazette of Pakistan, Extraordinary, 26-02-1970, preamble

owners or shareholders of one undertaking, to the detriment of the owners or shareholders of the other undertaking. Associated undertakings were defined in Section 2(b) as ones where the same individual had a minimum 30% controlling interest in two undertakings, or where the undertakings where under common managements, control, or if one was a subsidiary of the other.

The second part of section 4 dealt with issues in relation to the concentration of economic power and its effects on the general public, and authorized the MCA to take action when it found such concentrations. These actions included compelling certain privately held companies into public limited companies, compelling companies to offer their stocks to the public, or a government controlled investment body, such as the National Investment Trust (NIT), or to specify the conditions under which 'associated undertakings' could deal with each other.[10]

3.1.2.2. Unreasonable Monopoly Power

Section 5 of the MRTPO dealt with monopoly power, and in effect, acted as a check against the formation of a monopoly through a merger. Section 5 prohibits agreements between two parties which results in them becoming 'associated undertakings', if the new undertaking will control an aggregate third of the market share with respect to production, supply, and distribution of goods and services. There is nothing in the section though that regulates the actions of a single undertaking that has a third or more of a similar share in the market.[11] Section 5(1)(b) goes on to prohibit the acquisition partly, or wholly of an undertaking, where the effect of such an acquisition would be to create a monopoly, or 'substantial lessen competition.[12] Section 5(2) went on to detail certain exceptions to the anti-merger provisions

[10] *Ibid*, §12 (a)
[11] *Ibid*, § 5(1)(a)

[12] A monopoly is defined in §2(g) of the MRTPO as "the ability of one of more sellers in a market to set non-competitive prices or restrict output without losing a substantial share of the market or to exclude others from any

and made exceptions for mergers where the result was technical progress or innovation, or where the merger produced a national firm that would increase the exports of the country. The undertakings that were merging had to prove though that the efficiencies could not have been achieved through more pro-competition means and that the benefits in these cases outweighed the negative effects on the state of competition.

The provision on mergers was seen by some to be rather out of touch with the needs, especially as not requirement of a pre-merger notice was set out in the Ordinance[13]. The only requirement, under Section 16 was that a firm that had a 20% or greater share in the market needed to be registered with the MCA, and anyone could, under Section 10(d) seek the opinion of the MCA regarding their merger, and its compatibility with the MRTPO. Otherwise, there was nothing as such that would prevent someone coming out of the blue, and acquiring at once an undertaking that would enable the buyer to overnight acquire a monopoly in the market. This can be viewed as a major flaw in the anti-monopoly regime of the MRTPO. Further criticisms of the regime have pointed out that the MRTPO and the MCA (Computation of Market Share) Rules 1996 are too simplistic in their calculation of market shares, and are too simplistic. Additionally, the Ordinance and the rules define markets geographically, and fail to take into account the product market side of market share.[14]

3.1.2.3. Unreasonably Restrictive Trade Practices

The next category of offences under the MRTPO is listed in Section 2(n), whereby "a trade practice which has, or may have the effect of unreasonably preventing or otherwise lessening

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part of the market." The term 'substantially lessen competition' has not been defined by the Ordinance, or subsequent case law.

[13] *Supra* 6, 572
[14] *Ibid*, 574

competition in any manner" is prohibited. Section 6 goes on to provide a list of practices, which are deemed to be unreasonably restrictive in nature. These include the following: - [15]

- Price Fixing[16]
- Market Division, i.e. an agreement not to compete with each other, either in certain geographic locations or within certain classes of customers, or an agreement not to produce or sell certain types of products.
- Limiting output; this is considered illegal because it reduces the supply of the product or service, while at the same time, increasing its price.
- Limiting technical development or investment.
- Boycott; this may be done by using market power for acts like cutting off a competitors supply, or customer base.
- Tying arrangements, or tie-ins[17], whereby the availability of one item (the tying item) is conditional upon the buyer purchasing another item (the tied item), or upon agreeing not to purchase the tied item from the seller's competitor.[18]

Section 6(2) allows certain exceptions to the prohibition on such types of agreements by following a pattern similar to Section 5(2) as stated above. Under Section 12(c), wherever the MCA believes that such practices are being carried out, it may require such practices to by modified, or terminated, or may require the person, or undertaking concerned to take action in order to restore competition in the production, distribution, or sale of any goods or services.

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[15] *Supra* 9, § 6(1)(a)

[16] A price fixing agreement is deemed to exist, if the aim of such an agreement in a horizontal level between competitors is to raise, depress, fix, peg, or stabilize the price of a commodity. See *United States v Socony-Vacuum Oil Company* [1940] 310 US 150, 223

[17] *Supra* 9, § 6(1)(c)

[18] *Supra* 6, 576

3.1.2.4. Other Circumstances

Section 7 of the MRTPO acted as a residual clause, enabling the MCA to declare circumstances and conditions under which 'undue concentration of economic power', or 'unreasonable monopoly power' would be considered in existence, and trade practices which are deemed 'unreasonably restrictive', in addition to the circumstances prescribed in Sections 4-6.

3.1.3. Exemptions from the Application of MRTPO

Certain undertakings and activities have been exempted from the application of the MRTPO by virtue of Section 25. These include the following: -

i. an undertaking owned by the federal or provincial government;
ii. an undertaking owned by a corporate body established by the government or whose Chief Executive is appointed by or with the approval of the federal or provincial government;
iii. anything done by a person or an undertaking in pursuance of any order by the federal or provincial government;
iv. anything done by a "trade union" or its members for carrying out its purpose;
v. activities of certain industries which are regulated by industry specific regulators.[19]

The first three parts of Section 25 dealt with state actions, and almost all competition regimes have had similar exemptions put into place.[20] The problems arise though when government undertakings are in direct competitions with private undertakings in the same business or service area, and if the state enterprises are given in exemption in those actions, the effect is the undermining of the purpose of the competition regime.

3.1.4. The Monopoly Control Authority

The enforcement of the MRTPO was to take place though the Monopoly Control Authority (MCA), which was found under Section 8 of the Ordinance. The functions of the authority

[19] Examples of industry specific regulators include National Electric Power Regulatory Authority (NEPRA); Pakistan Electronic Media Regulatory Authority (PEMRA); and Oil and Gas Regulatory Authority (OGRA).

[20] The US Supreme Court accepted the "state action" exemption to anti-trust laws in *Parker v. Brown* The Supreme Court, 1977 Term, 92 Harv. L. Rev. 1, 277 [1978]

were set out under Section 10 whereby the authority was given "legislative, quasi-judicial, investigative and administrative powers".[21]

Under Section 10, the MCA was charged with registration of individuals and undertakings, to conduct inquiries into practices, market conditions, and growths of monopolies, to give advice to persons or undertakings in matters pertaining to the MRTPO, and to recommend actions to the government to further the purposes of the MRTPO. For this purpose, the MCA was empowered to make its own rules under Section 24, and to summon information from any person or undertaking under Section 15. For the purpose of summoning and compelling attendance of witnesses, receiving evidence, requisitioning evidence, and issuing commissions for inspection of evidence and witnesses, Section 15 vested the powers of a Civil Court under the Civil Procedure Code in the MCA. The authority could initiate actions *suo moto* or upon reference from the Federal government. For violations of its order, it was empowered to issue a fine not exceeding one hundred thousand rupees, while for offences of a continuing nature, the authority could issue a fine of ten thousand rupees per day from the day of the offence occurring.

Appeal against an order issued by the MRTPO lay before the High Court. Section 20 of the Ordinance set out the grounds of appeal as follows: -

i. that it is contrary to law or some usage having force of law;
ii. that it has failed to determine some material issue of law or usage having the force of law;
iii. that there has been a substantial error or defect in following the procedure provided in the MRTPO which may possibly have produced error of defect in the order upon merits.

3.1.5. Performance Review of the MRTPO

As mentioned already, soon after the promulgation of the MRTPO, the Economic Reform Order to 1972 came into effect, drastically decreasing the scope of application of the MRTPO. During the early seventies, the government pursued a policy of nationalization

[21] *Supra* 6, 581

whereby almost all heavy industry was nationalized and a Board of Industrial Management was set up to oversee the functioning of 32 large undertakings. This being a government body was, by virtue of Section 25, exempt from the application of the MRTPO. The MRTPO's focus during these years was to diversify the shared equity in undertakings, which did not meet the total value of assets threshold set by the MRTPO, and many of these were converted into public companies.[22]

With the domestic sector largely being outside the reach of the MRTPO, foreign undertakings were also all but removed from its ambit by virtue of the Foreign Private Investment (Promotion & Protection) Act 1976 (FPIA). The act was promulgated to assuage fears of the private foreign investors after the government's takeover of the domestic industrial setups. The Act provided protection to all foreign investment in industrial undertakings set up after 01-09-1954.[23] The combined effect of nationalization and the FPIA was that basically no undertaking was left under the coverage of the MRTPO.

A further setback occurred when in 1981, the Securities and Exchange Authority was merged with the CLA to form a new body called the Corporate Law Authority. This authority's primary function was the enforcement of company's law, and thus the enforcement of competition laws was virtually ignored. In 1994 though, the CLA was once again broken up and the autonomous status of the MCA was restored. Despite this, the practices of the past 23 years had meant that competition law, in theory or practice, had never gained a foothold in Pakistani law or economics, and there was open examples of practices that fell against the MRTPO. Joseph Wilson lists two principal reasons for this. The first is related to defects and lacunae in the substantive provisions of the MRTPO. These include the Ordinance's inability to catch single undertaking monopoly situations, government monopolies, the lack of

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[22] 'Competition Regime in Pakistan: Waiting for a Shakeup' (2002) CUTS Centre for International Trade, *available at* www.cuts-international.org/pakistan-report.pdf , § 5.1

[23] Foreign Private Investment (Promotion & Protection) Act No. XLII of 1976, § 1(3)

separation between the investigation, prosecution and adjudication, lack of compensation for those who suffer from violations, the maximum fine being a meagre sum, and the Ordinance not requiring pre-merger notifications. The second reason was, according to Wilson, the weak institutional capacity of the MCA. The MCA was never built up as a serious institution, and contained almost no experts on competition law or theory. It was seen as somewhat of a punishments posting for government officials, and thus never had a productive working environment.[24] In addition, the MCA chronically understaffed, with the working strength being less than half of the sanctioned strength at times. Furthermore, there were never any positions for key jobs such as price-monitoring, research and consumer advocacy.

All these factors combined meant that the MRTPO was never able to effectively implement competition laws in Pakistan. An idea of its effectiveness can be gauged from the fact that in the 24 years of its operation till 2005, the total number of monopoly cases, for instance, that it had investigated was 8. The number of cases where cartels were investigated was 4. Although in its latter years, the MCA made some attempts to break up well known cartels, it was felt that the legal and institutional framework and the MRTPO and the MCA were simply insufficient to provide adequate solutions to the problems, and thus the move occurred towards a competition law that was more in tune with the times, and could afford workable solutions to the competition related problems being faced by the economy.

3.2. Present Competition Law of Pakistan

The competition laws presently in force in Pakistan in the Competition Act 2010. The Act is a restatement, with minor changes, of the Competition Ordinances of 2007, 2009 and 2010, all of which lapsed due to their constitutional time period lapsing, or due to a judgment of the Supreme Court of Pakistan. Since the substantive law in all of these Ordinances and the Act

[24] *Supra* 6, 584-585

are more or less the same, the following passages will discuss briefly each of these Ordinances, with the substantive law and case law being discussed in detail with the 2010 Act.

3.2.1. Competition Ordinance 2007

With the economy of Pakistan starting a transition towards a market economy in the late eighties, it had started to be increasingly felt that that the MRTPO and the MCA were inadequate in providing the competition law regulatory role that was required of them, and since the late nineties, the argument was being consistently made for reform. No real action was forthcoming though, and the first real breakthrough in the reform process was when the World Bank was approached by the Pakistani government in 2005 for technical assistance to formulate a modern competition law structure for Pakistan.[25] The new competition law was enacted in the form of the Competition Ordinance 2007[26], before finally taking permanent form as the Competition Act 2010.

The Competition Ordinance 2007 was promulgated on 02-10-2007.[27] It repealed the MRTPO, dissolved the MCA, and replaced it with the Competition Commission of Pakistan (CCP), which was established on 12-11-2007 with five members including the Chairman of the Commission. Mr Khalid Aziz was appointed to the post of first Chairman of the CCP.

On 03-11-07, General Pervez Musharraf declared emergency rule and promulgated a Provisional Constitutional Order (PCO) of 2007. Clause 5(1) & (2) of the PCO exempted all Ordinances in force at the time of the promulgation of the PCO from lapse due to the expiry of the Article 89(2) duration. The Competition Ordinance was included in this list. Although

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[25] The World Bank, 'A Framework for New Competition Law and Policy: Pakistan' [2007], iii

[26] Competition Ordinance (LII of 2007), Published in the Gazette of Pakistan, Extraordinary, 02-10-2007

[27] Under Article 89 of the Constitution of Pakistan, The President can promulgate an Ordinance, if (1) the Senate or the National Assembly are not in session; and (2) the President is satisfied that circumstances exist which render it necessary for him to take immediate action. Unless ratified by the Parliament or extended b y the President, an Ordinance lapses after the passage of 120 days.

the PCO was initially upheld by a Musharraf packed Supreme Court in February 2008[28], after the restoration of the judiciary, a 14-member bench of the Supreme Court in the *Sindh High Court Bar Association v. Federation of Pakistan* case took up the matter of the legality of the PCO.[29] The Court in its judgment declared that the PCO was unconstitutional and that all the Ordinances, (including the Competition Ordinance 2007) in force at the time, were to be placed before the respective legislatures (Federal or Provincial) for approval. Federal Ordinances were given a period of 4 months, from 31-07-2009, in which they were to be presented before and approved by the Parliament, otherwise they would stand repealed. The Ordinance was thus tabled as a bill before the National Assembly in 2009, but the National Assembly was prorogued on 16-11-2009, before the bill could be debated upon.

3.2.2. Competition Ordinance 2009

As mentioned already, the Competition Ordinance 2007 was going to lapse on 28-11-2009, if not approved by the Parliament. Since the session of the National Assembly was adjourned before that, immediate action was needed to preserve the legal status of the CCP and Competition Laws. The President therefore promulgated the Competition Ordinance 2009[30] to fill this lacuna. The Ordinance came into effect retrospectively, from 02-10-2007, thus giving legal cover to all actions and decisions made by the CCP in pursuance of Competition Ordinance 2007. The Competition Bill was simultaneously tabled before the National Assembly, where it was passed on 27-01-2010, and was then presented before the Senate on 24-02-2010. The bill, however, failed to pass from the Senate within the 120-day limit of expiry of an Ordinance, and thus, before the new law could come into effect, the Competiton Ordinance 2009 lapsed on 26-03-2010.

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[28] *Tikka Iqbal Muhammad Khan & others v. General Pervez Musharraf* PLD 2008 SC 178

[29] PLD 2009 SC 879

[30] Ordinance No. XLVI of 2009, Gazette of Pakistan, Extraordinary, 26-11-2009

3.2.3. Competition Ordinance 2010

Once again, the maintain legal cover over the Competition Laws and the CCP until an Act of Parliament could be passed, the President promulgated the Competition Ordinance 2010[31] on 18-04-2010. This meant, however, that for 22 days, the CCP was without any legal status.

The Competition Bill, which was pending before the Senate's Standing Committee on Finance approved the bill on 05-05-2010, with two suggestions for amendment.

1. The Committee suggested that the funds collected by the CCP through imposition of fines and penalties should become a part of the Government's consolidated fund, and should be removed from the control of the CCP.
2. The Committee also suggested that instead of appeals against the CCP decisions going to the Provincial High Courts, A 'Competition Appellate Tribunal' should be set up to hear the appeals, from which the final appeal should go to the Supreme Court of Pakistan.

The CCP members, who were especially outraged at the proposal to take away the control of the Commission fund from them, were not too keen on these proposed amendments. The Bill, however, was once again not passed within the 120-day life of the 2010 Ordinance, which lapsed on 17-08-2010, and leaving the CCP without any legal cover once again.

3.2.4. Competition Act 2010

The Parliament finally passed the Competition Act 2010 on 6-10-2010, and it received Presidential assent on 13-10-2010,[32] thus ending a 57-day period of limbo for the CCP. The substantive legal provisions of the 2007, 2009 and 2010 Ordinances were almost the same, along with the Competition Act 2010. The following sections will therefore discuss these provisions in the context of the 2010 Act, with the structure, provisions, and other aspects discussed in detail below.

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[31] Ordinance No. VI of 2010, Gazette of Pakistan, Extraordinary, 18-04-2010
[32] Act No. XIX of 2010, Gazette of Pakistan, Extraordinary, 13-10-2010

The preamble of the Act sets out the objectives of the act as: "Act act to provide for free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviour"[33] A quick glance at the preamble of the MRTPO[34] shows the drastically different philosophical and jurisprudential approach that is at play in the 2010 Act. While the MRTPO was mainly concerned with prevention undue concentration of wealth, economic efficiency, and more importantly, consumer protection has been set out as a fundamental objective of the 2010 Act. As already mentioned,[35] at the time of the promulgation of the 2007 Ordinance, the incoming Chairman made a statement to the effect that the 2007 Ordinance (and hence the 2010 Act) draws their inspiration from EC Competition Law jurisprudence. This emphasis on the non-economic objective of competition law, when compared with the MRTPO, is nothing short of a paradigm shift.

3.2.4.1. Substantive Provisions

Section 2(q) of the Act states that the Act applies to all undertakings, whether government or private, and to all matter that may distort competition in Pakistan. Section 3 of the Act prohibits abuse of dominant position[36], while Section 4 restricts agreements, which have the

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[33] *Ibid, preamble*

[34] *Supra* 9

[35] *Supra* 1

[36] *Supra* 32, § 3

3. Abuse of Dominant Position. –(1) No person shall abuse dominant position.

(2) An abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which present, restrict, reduce, or distort competition in the relevant market.

(3) The expression "practices" referred to in sub section 2 shall include, but not limited to –

(a) limiting production, sales and unreasonable increases in price or other unfair trading conditions;

(b) price discrimination by charging different prices for the same goods or services from different customers in the absence of objective justifications that may justify different prices;

(c) tie-ins, where the sale of goods or service is made conditional on the purchase of other goods or services;

(d) making conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature of according to their commercial usage, have no connection with the subject of the contracts;

aim or effect of preventing, restricting, or reducing competition[37]. Section 10 prohibits deceptive marketing practices.[38] Section 11 contains the mode through which mergers are to be approved by the CCP. The CCP is authorised to disallow mergers under Section 11 if the result of one is substantial lessening of competition by creating or strengthening of a dominant position in the relevant market. The method in which these provisions of

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(e) applying dissimilar condition to equivalent transactions on other parties, placing them at a competitive disadvantage;
(f) predatory pricing driving competitors out of a market, prevent new entry, and monopolize the market;
(g) boycotting or excluding any other undertaking from production, distribution or sale of any goods or the provision of any service; or
(h) refusing to deal.

[37] *Ibid*, § 4

4. Prohibited Agreement.-(1) No undertaking or association or undertakings shall enter into any agreement or, in the case of an association of undertakings, shall make a decision in respect of the production, supply distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition with the relevant market unless exempted under Section 5.

(2) Such agreements include, but are not limited to-
(a) Fixing the purchase or selling price, or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any service'
(b) dividing or sharing of markets for the goods or services, whether by territories, by volume of sales or purchase, by type of goods or services sold or by any other means;
(c) Fixing or setting the quantity of production, distribution or sale with regards to any goods or the manner or means of providing any services;
(d) limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of any service; or
(e) collusive tendering or bidding for sale, purchase or procurement or any goods or service.
(f) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage; and
(g) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligation which, by their nature or according to commercial usage, have no connection with the subject of such contracts

(3) Any agreement entered into in contravention of the provision in sub section (1) shall be void.

[38] *Ibid*, § 10

10. Deceptive marketing practices.-(1) No undertaking shall enter into deceptive marketing practices.

(2) The deceptive marketing practices shall be deemed to have been resorted to or continued if an Undertaking resorts to-
(a) the distribution of sale or misleading information that is capable of harming the business interests of another undertaking;
(b) the distribution of false of misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods;
(c) false or misleading comparison of goods in the process of advertising; or
(d) fraudulent use of another's trademark, firm name, or product labeling or packaging.

substantive law are set out is reminiscent of the EC law model contained in Articles 81 & 82 of the EC Treaty.[39]

3.2.4.2 Penalties under the Competition Act 2010

Sections 31-38 of the Act contain the remedial and penal powers given to the CCP. Primarily, the CCP is authorized to fine a maximum amount of seventy five million rupees on a fixed amount basis, or 10% of an undertaking's annual turnover on a turnover basis, for violations of the substantive provisions of the Act.[40] As for the individual offenses under Sections 3, 4, 10 and 11, the Act authorises the following actions: -[41]

1. Abuse of dominant position (Section 3): The CCP can order the undertaking to take necessary action in order to restore competition, and to desist from further undertaking actions with similar effects.
2. Prohibited agreements (Section 4): The CCP may annul the agreement, modify the agreement, or its related practice, and require the undertaking concerned to desist from entering into further such agreements or practices.
3. Deceptive marketing practice (Section 10): The CCP can order action to restore the previous market conditions, require the undertaking to desist from further similar action, and confiscate, destroy or forfeit harmful or hazardous goods.
4. Mergers (Section 11): The CCP can either authorise the merger, and set the conditions of the merger, decide that there are doubts about the compatibility of the merger with the Act and order a second phase review, or prohibit the merger *after* a second phase review.

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[39] Mr. Joseph Wilson, Member of the Competition Commission of Pakistan is of the opinion that this is due to the fact that the World Bank, in drafting the law, acquired technical assistance from the Brussels based firm of Jones Day, who found it easier to work on a model that they were familiar with. Statement by Joseph Wilson (Personal Email correspondence 21-04-2011)

[40] *Supra* 32, § 38

[41] *Ibid*, § 31

Section 38 comprises of two parts. The first part sets out the instances when the fines could be imposed, while the second part details the maximum amounts that can be levied. Thus, Section 38(1) allows for imposition of penalties, if the CCP finds (after a due hearing) that an undertaking has committed any of the following:

1. It is engaged in activity prohibited by the Act.
2. It has failed to comply with an order of the CCP under the Act. Or;
3. It has failed to supply a copy of the agreement, or any other document or information requited by the CCP.
4. It has knowingly furnished false or misleading information to the CCP.
5. It knowingly abuses, interferes with, impedes, imperils or obstructs the process of the CCP in any manner.

As for the fines, the rates set out in Section 38(2) are as follows: -

1. For 'a' contravention of a provision of Chapter II of the Act, a maximum amount of 75 million rupees on a fix basis, or 10% of the annual turnover of the firm, on a turnover basis. The use of a word 'a' means that for a single violation, a fine could be made, and for multiple violations, multiple fines, each to a maximum limit of 75 million rupees could be made.
2. For non-compliance with any order, notice or requisition of the CCP, a maximum amount of 1 million rupees.
3. For continuous violation of the order of the CCP, an additional penalty of 1 million rupees per day for every day after the first such violation.

The CCP has issued a guideline, which details the factors and circumstances that are to be considered in making a decision about the quantum of the fine[42]. The guidelines are only recommendatory in nature though. Relevant factors stipulated in Paragraph 4 of the guidelines are: -

1. Seriousness of the infringement.
2. Duration of the infringement.

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42 192.168.1.200/ccp/images/Downloads/Guidelines%20of%201Imposition%20of%Financial%20Penalties.pdf (CCP Fining Guidelines)

3. Aggravating or mitigating factors.

4. Other relevant factors, such as deterrent value.

3.2.4.3 Merger Provisions under Competition Act 2010

The MRTPO had no provision dealing with the issue of mergers and acquisitions. The 2010 Act has a sophisticated scheme that deals with mergers, which is set out in Section 11 of the Act. Accordingly, no merger is permissible where the result "substantially lessens competition by creating or strengthening a dominant position in the relevant market".[43] In this regard, the aim of the provisions is to stop an undertaking acquiring a position of dominance in the market. Dominance could be exercised either by a single undertaking, or it could be joint/collective in nature.[44] Whatever its form, the purpose of the provision is stop a dominant undertaking from distorting competition. The term dominant position is defined as follows in Section 2(e): -

> 'Dominant position' of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent.

Section 11 sets out a merger clearance regime, whereby when two or more undertakings intend to merge wholly or partly, and meet the pre-merger notification threshold (these thresholds are notified by the CCP), the undertaking(s) will apply for pre-merger clearance of the merger from the CCP.[45] The thresholds are based on the size of the transaction, size of the parties, and percentage of voting rights test.

There are two phases of the review process. The first one starts when a complete application is submitted for clearance before the CCP and the first review has a completion period of 30 days from the date of submission. Afterwards, if the CCP feels that the merger can results in the creation, or the enhancement of a dominant position, it was start the second review phase[46]. In the second review, the parties can raise the defences established in Section 11(1), which can result in a merger being

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[43] *Supra* 32, § 11(1)

[44] The matter of *Acquisition of Wind Telecom S.P.A by Vimpelcom Ltd* (File No. 373/Merger/CCP/2011), 9

[45] Currently, the Competition (Merger Control) Regulations 2007 set out the notifications.

[46] *Supra* 32, § 11(6)

approved, even if it goes beyond the thresholds. The burden of proof in such cases is upon the undertaking seeking approval. These are: -

(a) it contributes substantially to the efficiency of the production or distribution of goods or to the provision of services;
(b) such efficiency could not reasonably have been achieved by a less restrictive means of competition;
(c) the benefits of such efficiency clearly outweigh the adverse effect of the absence or lessening of competition; or
(d) it is the least anti-competitive option for the failing undertaking's assets when one of the undertakings is faced with actual or imminent financial failure.

The measures available to the CCP for mergers are approving, or blocking the merger. This can be done unconditionally or upon satisfaction of certain requirements. Wherever a merger that takes place and it falls above the threshold, the merger can be undone by the CCP, if it had been done without obtaining prior clearance.

3.2.4.4. The Competition Commission Pakistan

Section 12 of the Act established an independent Competition Commission of Pakistan, which is set as a body corporate. As opposed to the MCA, which was mainly seen as a government organ staffed by bureaucrats, mainly technocrats staff the CCP. This addresses the situation mentioned earlier, whereby the MCA had become, over the years, a dumping ground for government officials not considered good enough to work in other government sectors. Under Section 14(4), a maximum of two members of the Commission may be employees of the Federal Government. A Chairman, who acts as a member of the Commission as well, heads the Commission. At present, there are 7 members of the Commission, including the Chairperson.[47] Under the Act, at present, this is the maximum number of members permissible. Section 14(5) sets out the eligibility for appointment as a member of the CCP, and states: "[n]o person shall be recommended for appointment as a member unless that person is known for his integrity, expertise, eminence and experience for not less that ten years in any relevant field including industry, commerce, economics, finance, law, accountancy or public administration." The members and chairman are appointed on a 3-year term, which may be extended until they reach the age of 65.

[47] Information regarding the members of the Commission is available at http://www.cc.gov.pk/index.php?option=com_content&view=article&id=5&Itemid=116 (Website of the Competition Commission of Pakistan, accessed on 22-03-2011)

Under Section 28, the Commission is empowered to initiate proceedings against contravention of the Act, as well as making order in cases of contravention. The CCP is also tasked with conducting studies to promote competition in all sectors of commercial and economic activity, conduct inquiries into the affairs of undertakings in connection with the Act, give advice to undertakings on the consistency of their actions with the Act, and finally, to engage in competition advocacy. The CCP also, under Section 29, is charged with creating awareness, and promoting a competition culture, reviewing policy frameworks and making suggestions to the Federal and Provincial governments about amending the 2010 Act, and any other legislation that impedes competition.

3.2.4.5. Adjudication Process of the CCP

Section 30 of the Act sets down the basic adjudicative process of the CCP. Where the CCP is satisfied at a violation of the Act it can order any of the measures discussed above under Section 31, and issue fines in the pattern discussed already under Section 38. The CCP can investigate a matter *suo moto*, on a reference from the Federal or Provincial Government, or on a complaint by a private party. Whichever undertaking is being investigated, must under Section 30, be issued notices, and given a chance to present its case before the CCP. If a party upon who notices have been served, fails to show up, *ex parte* proceedings can be taken against them.

A single member of the CCP will hear most of the complaints. A two member appellate bench of the CCP, excluding the member against whose order the appeal is being heard, can hear an appeal from the order of a single member.[48] The appellate bench can "confirm, remand, set aside or cancel the impugned order or enhance or reduce the penalty or make such order s it may deem just and equitable in the circumstances of the case."[49] Appeals from the orders of the appellate bench are to be heard before a Competition Appellate Tribunal (CAT) within 30 days. The CAT is to be headed by a retired Supreme Court judge/High Court Chief Justice, and two technical members. The final appeal from the CAT lies before the Supreme Court of Pakistan within 60 days.[50] It is worth noting here that despite

[48] *Supra* 32, § 41 (2)

[49] Rule 22 (Decision of Appeal), The Competition Commission (Appeal) Rules, 2007, S.R.O. 399(I)/2008

[50] *Supra* 32, § 43

the passage of more than 7 months since the Act came into force, the Federal Government has not constituted the CAT, despite Section 43 mandating it to do so within 30 days.

3.2.4.6. Performance Review of the Present Competition Regime

The present competition regime, in force since 2007, was always expected to perform better in practice, as compared to the MRTPO and the MCA. As discussed already, the continuous organizational and legal setbacks suffered by the previous regime, coupled with its aims and objectives, that were centred on a 40 years old economic model, were insufficient, and thus reduced competition laws to a non-existence area of Pakistani jurisprudence.

With the realization that a modern market economy cannot function without a viable competition regime, the present laws address a number of lacunae in the old regime. Mainly, the modification of the objective, from preventing concentration of wealth, to promotion of competition, trade and consumer welfare, shows a move in a progressive direction. The emphasis on consumer welfare is particularly important, and many provisions, such as those dealing with restrictive and deceptive trade practices are a step in enhancing consumer welfare. At the same time, the CCP in taking up matter like the *Proctor & Gamble Order,*[51] the *PIA Hajj Fare Order,*[52] and the *Bahria University Order*[53] has shows a willingness to pursue the wider objectives of competitions laws and policy, an issue which will be discussed in further detail in chapter 4.

Over the past 3 years, the CCP has issued 43 orders and has cleared 170 mergers. Of these, two were cleared with conditions, and out of the two, one has been challenged before the courts. A worrying issue though is that to date, not a single appeal from a CCP order has been decided on merits by the courts. This could be due to a number of factors, but lack of training and awareness on competition law issues could be an important factor, and therefore the CCP must play its role in enhancing awareness and arranging trainings and seminars.

Owing to the system being in its relevant infancy, and a lack of knowledgeable people in this area, criticisms of the system have not been very forthcoming. In some of its actions, the CCP can be seen

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[51] File No. 3(1)/DIR(L)/CCP/2009 (available at www.cc.gov.pk accessed on 12-01-2011)

[52] File No. 05/DIR(M & TA)/Hajj/CCP/09 (available at www.cc.gov.pk accessed on 12-01-2011)

[53] File No. 5/SEC.3/CCP/2008 (available at www.cc.gov.pk accessed on 12-01-2011)

as perhaps acting in a slightly over-zealous fashion. Recently, the CCP imposed a fine of fifty million rupees on the Pakistan Poultry Association for its cartelization of the poultry sector.[54] The fine was criticized as being excessive, especially since the CCP maintains the Commission fund[55] established under the Act and is autonomous in deciding allocations from that fund under Section 20(3). It can be suggested therefore that the members and staff have vested interest in fattening up the fund, since it would directly result in better perks and pays for their members. It was with this conflict of interest in mind that the Senate Standing Committee on Finance[56] has suggested an amendment in the Bill before them, proposing that the money so collected should be deposited with the Federal Government's consolidated fund. Although this amendment was defeated at the National Assembly, and thus did not make it in the final text of the Act, the charge against the CCP of having a conflict of interest when calculating the fines will not go away unless some transparency is given to the process.

There have been other suggestions for reform as well. These mainly pertain to amending the method of appointment as members, to ensure that political appointees are discouraged, as well as increasing and term of members from 3 to 5 years, and restricting their terms to a maximum of 2, in order to ensure freedom from political and financial influences upon members of the Commission.[57]

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[54] *PPA to File Appeal Against Cartel Penalty* (http://benefiq-asia.com/?p=1910 accessed on 22-04-2011)

[55] *Supra* 32, § 20

[56] Please refer to § 2.3 of this chapter.

[57] Personal Email Correspondence with Joseph Wilon, Member, CCP. 13-3-2011

CHAPTER 4: COMPETITION LAW IN A BROADER PERSPECTIVE

4.1. Introduction

As discussed in earlier chapter, the basic function of competition law is to maintain market efficiency through appropriate allocation of resources. When there is fair competition in the market, the greatest benefit is to the consumers of that market. Thus, in that respect, competition law has a deep relationship with consumer protection laws. The reason is that both the laws have same goals and objectives, that is, consumer welfare.

Increased competition is an essential need of the European Union's Single Market. This has to be attained only with the 'free movement principle' established in the EU. This principle is also known as the 'four Freedoms' enshrined in the EC treaty. According to the said principle, there must be no restrictions on free movement of goods, services, capital and people between the Member States of the EU. Having said that, it becomes obvious that competition law has a strong relationship with the free movement principle.

Innovation is another target of competition law and policy. With that aim, competition law requires from the market players to efficiently play in the market by introducing newer, improved and better commodities for the consumers. Consumers, in this way will have more choice between different varieties of goods while the producers will always strive to come up with innovative ideas and show their best in the market. This very conduct of the producers will always help in maintaining a healthy competitive environment. Thus, it proves that there is a symbiotic relationship between competition law and intellectual property rights.

4.2. Relationship between Competition Law and Consumer Protection Law

A consumer may approach the market from any walk of life. He is a person who lands in the market to buy goods and services. Bearing in mind the vulnerability of the consumers to get cheated by the sellers, producers or manufacturers, they have been given consumer protection rights in modern jurisprudence. These rights are protected under specific government regulations in most of the countries to ensure that no unfair practice by the businesses is infringing them. These regulations are commonly referred to as called consumer protection law. Consumer is always a high target of the market forces since it is him that the businesses depend upon. Sometimes the producers/ sellers make their consumer happy by offering him variety of goods and services. Most of the times the same consumer is exploited when behaviors such as anti-competitive practices, monopolistic activities, cartels etc. replace an efficient market (i.e. market having effective competition). Such activities try to disrupt the foundations of a perfect market, consequently affecting the consumer and his rights. That is precisely where competition law comes in to safeguard the rights and interests of the consumers. It is important to mention here that a perfect market is where a consumer is always pampered in terms of availability of goods along with affordability. It is a place where the consumer has knowledge and complete information of the market so that he gets the chance to buy goods of his choice and at a price within his purchasing power.

Competition law plays pivotal role in the promotion of consumer welfare. The law seeks to prevent anti-competitive business practices that tend to harm consumer interests. In that respect competition law and consumer law share the same goal, firstly free trade and secondly, correct information in the market place. Anti-competitive practices exploit consumer interests in many

ways. A weak consumer is not able to buy goods because either the prices are very high or there is no supply of goods. When there is fair competition in the market, the consumers can buy low price goods. They have more choices in selecting better commodities, and therefore it was of no surprise when increased competition was set out as a basic need of the European Union's Single Market.[1]

David Miller, in recent paper has stated: -

> The pure genius of competition policy is that it does not impose on consumers, the goods and services that the Government believes will promote consumers' welfare. The true role of competition policy is to foster an environment in which consumers are empowered to pursue their happiness by guiding merchants to produce affordable goods and services with the quality and variety demanded by them."[2]

This is the spirit of competition law. Its leading principle complies with that of the consumer law, that is, transparency to the extent that the consumer has complete knowledge of the market and a right to choose without being misled or misguided. There is a group of people who place their argument against the fact that consumer welfare and competition law are inter-related. According to them it is not the competition law on which consumer welfare depends upon, but it is the effect of competition law that consumer protection is concerned with. According to this perception, competition law seeks to prevent harm to competition and consumer welfare will as a consequence be maximized. Consumers are the immediate beneficiaries of an efficient market and the ones susceptible to the adverse effects of anti-competitive business practices prevailing in the market. Hence, where consumer law protects consumer rights, competition law promises

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[1] treaty establishing the european community (treaty of rome), as amended by subsequent treaties, article 3(s)

[2] the paper is written by david miller and kevin harriot, competition bureau chief, of the fair trading commission, jamaica. it was written for the csme's *competition and consumer welfare sensitization workshop*, held on march 18, 2010 in st. kitts & nevis. available at http://www.jftc.com/libraries/speeches_and_presentations/institutionalizing_competition_policy_in_the_csme_-_mr_david_miller.sflb.ash [accessed on 25th march 2011]

the promotion of consumer welfare by regulating markets, preventing restrictive trade practices adopted by the market players and maintaining market efficiency with fair competition. Therefore, it would not be an overstatement to say that competition law and consumer protection laws are strongly interlinked and have complete reliance upon each other.

4.2.1. Consumer Protection in the European Union

As the popular saying goes, 'the customer is the king'. This saying emphasized the paramount importance attributed to consumers the world over. 27 nations in the European Union together form a union of almost 500 million citizens. This makes for one of the world's largest blocks of of consumers. The European Union, in line with the aims of the Union set out in Article 3, is committed to improve the life standards of its citizens with every passing day and that is only possible by protecting the consumer rights in general, but specifically by ensuring that consumer interests are embedded in all EU laws and policies. The internal market of EU is the largest market in the world, which effectively increases competitiveness and offers great opportunities for the consumers. For that matter, where the internal market in the EU is central to competition policy area, it also plays a quintessential part of consumer policy. An efficient internal market increases the confidence of the consumers to easily make transactions throughout the EU. Being an important component of competition policy and consumer policy, the internal market strengthens consumer welfare by projecting values such as fairness, transparency and openness.

The main objectives of the European Commission for the consumer policy 2007-2013 are given as follows:[3]

[3] Communication From the Commission to the Council 'The European Parliament and the European economic and Social committee EU Consumer Policy Strategy 2007-2013' COM(2007) 99 Final

1. To empower EU consumers. Putting consumers in the driving seat benefits citizens but also boosts competition significantly. Empowered consumers need real choices, accurate information, market transparency and the confidence that comes from effective protection and solid rights.
2. To enhance EU consumers' welfare in terms of price, choice, quality, diversity, affordability and safety. Consumer welfare is at the heart of well-functioning markets.
3. To protect consumers effectively from the serious risks and threats that they cannot tackle as individuals. A high level of protection against these threats is essential to consumer confidence.

EU consumer policy will achieve these objectives by following five priority areas:

4.2.1.1. By monitoring markets and national consumer policies[4]

According to this priority area, markets will be checked whether they meet the quality standards of the products for the consumers, price, and safety requirements. Compliance of the national consumer policies with effective internal market will also be monitored. The policy makers will make sure that the consumer policy and competition policy, both are contributing in achieving their common goal of enhancement of consumer welfare.

4.2.1.2. Better Consumer protection regulation[5]

For a well-functioning internal market, harmonization is essential in certain issues. This policy area will consider that all member states in the EU are seriously committed to adjust their rules so as to harmonize the internal market within the EU.

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[4] *ibid*, 8

[5] *ibid*, 9

4.2.1.3. Better enforcement and redress[6]

In this policy area the European Commission intends to monitor that the national enforcement regimes are properly functioning and providing prompt redress to the affected consumers.

4.2.1.4. EU's consumers be informed and educated[7]

Consumer policy of EU promises to impart information to its worthy consumers and makes sure that the member states also cooperate and collaborate in keeping their consumers educated and well informed.

4.2.1.5. Putting consumers at the heart of other European policies and regulations[8]

The EU's several policies such as competition, trade and telecommunication policies have a direct impact on its consumers. This policy area is an important one as it makes incumbent on the EU to cater, through their policies, welfare of the consumers and to focus on prioritizing their interests as they enter the market to make certain transactions.

4.3. EC Competition Policies and Consumer Welfare

The European Commission (EC) plays a significant role in controlling and monitoring anti-competitive business practices of the firms in the European Single Market. The Competition policy of the European Union has given a strong and authoritative position to the European Commission in combating monopolistic activities of different firms doing business in the Member States of the EU.[9] Also the EU law empowers national competition authorities of the Member States to enforce EU competition laws in their states. Where the firms have harmed the

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[6] *ibid*, 10
[7] *ibid*, 11

[8] *ibid.* 12

[9] EU Competition Policy and the Consumer' (A consumer guide issued by the European Commission) ec.europa.eu/competition/publications/consumer_en.pdf [accessed on 4th November 2010], 20

consumers of the EU with their anti-competitive business practices, the EC, has fined those firms in its various decisions. In 2001, the EC fined 8 companies that were involved in a huge cartel that afterwards was named *Vitamin Cartel.*[10] The companies including F Hoffmann-La Roche AG and Aventis SA (formerly Rhône-Poulenc) managed to create a cartel by fixing prices, and harmed competition in the vitamin sector. With this cartel, the companies would charge high prices for the goods containing vitamins e.g. medicines, eatables like biscuits, animal food, cereals etc., thus harming the consumers who were not able to purchase these goods because of the fact that the products' price were not in their purchasing power. EC fined all those companies an amount of EUR 800 million for making illegal profit out of that cartel. Likewise, the Commission in 2004 fined Microsoft for abuse of its dominant position in the market for operating systems of the personal computers. At that time, the European Commission found out that Microsoft[11] was holding a 95% share of the market. With a huge percentage of shares in the market, the other companies were unable to compete fairly in the market. This conduct of Microsoft was found out to be an abuse of dominant position and harmful for the competitive environment in the market. The Commission fined Microsoft EUR 497 million.

4.4. Competition law and Free Movement of Goods

The achievement of a single market is yet another goal another objective of competition law. In the European Union, the concept of single market has never been predicated without the establishment of free movement principle. This free movement principle is the basic rule of the functioning of a single market. The 'four freedoms' are the foundations of internal market. These are free movement of persons, services, capital, and above all free movement of goods. Where

[10] Case Comp/e-1/37.512 – *Vitamins* [10.01.03] OJ I 6/1

[11] Case T-201/04 *Microsoft Corp. v Commission of the European Communities*

EU's internal market is discussed, it is impossible to not speak of competition law along with free movement of goods rule. In the EU's single market, competition and free movement of goods are in complete compliance with one another. Where competition law aims to create a harmonized single market, the well-functioning internal market seeks to increase competitiveness with the help of free flow of goods across all the member states in the EU.

4.4.1. Common Market/ EU's Single Market

The internal market is paramount for the economic growth of the EU. The core objective of the European Economic Community, which came into existence on 25th March 1957, was to establish a common market that will offer free movement of goods, services, capital and people. The reason behind this objective and establishing a single market was to promote healthy economic activities within EU member countries, to raise the living standards of the EU citizens and to develop closer relations among all the member states within the EU by offering free flow of goods, capital, services and people. The single market of the EU allows free movement of goods along with other factors of production across the member states to move freely without any barriers.

4.4.2. The Role and Importance of "Free Movement of Goods" in the Internal Market of European Union

Nearly 490 million citizens of the European Union are now able to shop (buy and sell) products within this hugely created Single market. The EU consumer has variety of products from which he can choose the best available option. This only became possible because of free movement of goods within 27 member states of the EU. Goods move freely from one country to another, offering the businesses increased competition and myriad chances to grow in an efficient market place. Since the advent of single European market in 1993, most of the restrictions on free

movement of goods have been removed. In that regard, the legal perspective of the principle of free movement of goods provided in the EC Treaty should be taken account of. The EC Treaty, which is now amended by the Treaty of Lisbon and now named Treaty on the Functioning of the European Union (TFEU), gives provisions on the free movement of goods:

4.4.3. TFEU Provisions on Free movement of Goods

The possible elements that impede the free flow of goods within the member states of the EU include tariffs, quotas, custom duties and taxation. All these elements restrict free movement of goods across the states and also adversely affect consumer interests by limiting choices, and increasing prices, thus, limiting competition in market.

Article 28 (ex Article 23 of the EC Treaty) of the Treaty on the Functioning of the EU stipulates:

> The Union shall comprise a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.

The European Court of Justice in number of cases has discussed the meaning of 'goods' in this particular provision. In Art Treasures case, *Commission v. Italy*[12], the facts were that the Italian Government prohibited the exportation of art treasures (articles of artistic, historic, archaeological or ethnographic nature) and claimed that the art treasures did not constitute "goods". The ECJ defined goods as "products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions." Therefore, art treasures fell within the meaning of "goods" under Article 28 of the TFEU.

[12] Case 7/68 [1968] ECR 423; [1969] CMLR 1

In Region of Wallonia case, *Commission v. Belgium*[13], the facts were that Belgium prohibited the importation of waste and contended that waste did not constitute "goods" if it could not be recycled or reused because they have no commercial value. The ECJ rejected this submission and held that all waste was to be regarded as goods. In *Almelo v. Energiebedriff Ijsselmij*[14] case, the ECJ decided that electricity constituted "goods".

The provision given in Article 28 of the TFEU applies firstly to the free movement of goods from one member state to the other member state. Secondly it applies to movement of goods through transit in one member state and to be sold in another member state or any third country outside European Community. The provision also applies to the re-importation of goods from one member state to another where it was produced. It also applies to parallel imports as well as movement of goods by individuals. In *GB-Inno-BM v. Confederation du Commerce Luxembourgeois*[15] case it was decided by the European Court of Justice that consumers resident in one Member State might travel freely to the territory of another member State to shop under the same conditions as the local population.

Article 29 of the TFEU (ex Article 24 of EC Treaty) explains the concept of Customs Union. The Customs Union comprises of all the member states of the European Union. Article 24 of the EC Treaty explains free movement of goods from a third country by providing:

> Products coming from a third country shall be allowed to move freely in a Member State if the import formalities have been complied with and any customs duties or charges having equivalent effect which are payable have been levied in that Member State, and if they have not benefited from any further duties or charges.

[13] Case C-2/90, ECR 1992, page i-04431.
[14] Case C-393/92 [1994] ECR i-1477
[15] Case C-362/88 [1990] ECR i-00667

According to Article 24, goods from a third country shall be freely moved within the Member States if three conditions are met. First, goods have been passed the import formalities. Secondly, any customs duties or charges on the goods have been paid in import member state. Finally, the goods must not have benefited from any such duties or charges. For example Company X in Italy imports Tuna cans from Thailand and has already paid the common customs duties in Italy. If Company X wants to export these tuna cans to Germany, it will have the freedom to do so without paying any other customs duties because both Italy and Germany are member states of European Union.

According to Article 30 of the TFEU all the Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those, which they already apply in their trade with each other. Article 30 prohibits the introduction of new customs duties or charges having equivalent effect, and equally prohibits the increase of those, which are already in existence. This prohibition applies both to imports and exports. The impact of this Article can be seen in some famous court decisions given by the European Court of Justice. In *Van Gend en Loos* case, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*[16] it was decided by the ECJ that Article 25 EC Treaty had a direct effect and it is incumbent upon the national courts to consider it as a law of the land. It creates individual rights, which national courts should protect. Thus, individuals could invoke Article 25 before the national courts. In *Sociall Fonds voor der Diamantarbeiders v. Brachfeld & Chougol Diamond Co*[17] case, the Belgian authorities imposed a duty on diamonds in order to raise money for Belgian diamond workers. The ECJ held that

[16] Case 26/62, [1963] ECR 1; [1963] CMLR 105
[17] Cases 2 & 3/69. [1969] ECR 211; [1969] CMLR 335

> ...customs duties are prohibited independently of any consideration of the purpose for which they were introduced and the destination of the revenue obtained therefrom. Therefore, the duty came within Article 25 and was prohibited....

4.4.4. Competition Law

The European Union effectively protects its Single Market with a vision to gain optimum benefits through economic integration of its Member States. In that respect, EC Competition law and policy is there to promote competitive economic activities by EU undertakings. Competition law facilitates best goods and services to flow freely between the Member states so as to maximize efficiency in the market place. It is thus evident that competition rules go hand in hand with the Four Freedoms, and particularly, free movement of goods rule.

Article 81 of the EC Treaty (now article 101 of TFEU) prohibits any such collusion, concerted practice or agreement between companies which may restrict competition or affect trade between Member States. In many cases the ECJ has made it clear that a slightest possibility of an effect on trade is enough to put a ban on agreement between undertakings. In *Vereniging van Cementhandelaren v EC Commission*[18], a cement traders case, ECJ held:

> ....An agreement extending over the whole territory of a Member State by its very nature has the effect of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting *domestic* production....

[18] Case 8/72 [1972] ECR 977

Consumer interests are kept well protected in the EU through competition law. In *Ets Consten Sarl and Grundig-Verkaufs Gmbh v EC Commission*[19] the ECJ held that: -

> ...what is particularly important is whether the agreement is capable of constituting a threat, direct or indirect, actual or potential, to the freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the States...

The decision of ECJ clearly explains that competition policy protects the consumer interests and does not want the consumers to suffer from lengthy periods of market fixing before action by the Commission and sanction by the court.

Whereas Article 81 tends to control the behavior of undertakings, which collaborate with each other to influence the market conditions as they wish, Article 82 EC controls such actions of companies that are commercially dominant in the market and are independent in gaining economic advantages.

4.4.5. Relationship between Competition Law and Free Movement of Goods Rule

The competition provisions and free movement of goods rules in the Treaty of Rome perform complementary roles in creating a single European market in goods and as such they inevitably produce certain benefits and advantages for the EU consumer.

When a consumer wants to buy goods and services, he expects that the market is as efficient as possible. If a market is efficient, it is fairly competitive and it is where the best goods and services are able to circulate freely around the community. Powerful market players that offer more competitive goods replace the weak undertakings. The EU consumer is thus able to choose

[19] Case 56 and 58/64 [1966] ECR 299

between wide varieties of quality products. Furthermore, the consumer takes the advantage of being a part of an economically sound society. The free movement of goods rules is designed to guarantee that no such regulations, measures or practices are imposed by the Member States, which would hinder competition and restrict free flow of goods around the Single Market. Together, the competition and free movement systems of law reinforce the economic integrity of the Single Market project and therefore they are indispensable tools of the EU legal system.

The free movement provisions of the Treaty of Rome nicely complement the competition law rules creating a wide-ranging legal framework for the maintenance of the Single Market. As a consequence the European Union consumers' interests are served in the best way by the existing framework. It has been largely suggested that the European Commission and the ECJ quite ambitiously protect the micro-interests of consumers and as a result, the macro-interests of the Single Market are also saved. The wider perspective of the fundamental aims and objectives of the Single Market is that it has created lots of opportunities for its consumers. For instance, increased employment chances, more jobs, and greater chances to gain wealth, and the maximizing of competitiveness on the European and also the global stage.[20]

The free movement of goods rules and the competition rules form primary set of regulations to make the Internal market function effectively. With these rules in hand, the economic and social purposes are achieved to a greater extent in the European Union. Free movement of goods rules form the basic foundation of the European Community. According to these rules, all the Member States are prohibited to create tariff or non-tariff barriers, which may restrict free movement of goods around EU. That is how the EU is turned into a Single market where goods, services,

[20] Walter Fontanini 'The EC Treaty's Free Movement of Goods and Competition' *available at* http://www.walterfontanini.com/?p=48 [accessed on14 march 2011]

capital and persons are free to move from one state to another. To complement these rules, competition laws are there in the EC Treaty that serve the purpose of imposing regulations on acts of the Member States which restrict competition in the Internal Market.

Hence it must not be wrong to say that the free movement of goods rules and the competition rules enjoy a very strong relationship with each other. Together they make a strong foundation for an effective and efficient Internal market where the EU consumers are free to move, shop, do business and enjoy many other benefits of the Single market. Such regulations should also be incorporated in the laws of developing countries like Pakistan so that they also have a chance to develop in terms of trade and international competition. The Competition law of Pakistan is highly influenced from the European Union Law. In that respect, Pakistan should also implement its Competition Law in a wider context as the EU Law has done.

4.5. Competition Law and Intellectual Property Rights in EU

In the European Union, the diversity of competition policy does not end with its relationship with just consumer protection laws and free movement of goods rules. It also shares an interesting relationship with Intellectual property rights. Such is a dynamic nature of competition policy of the EU.

4.5.1. Intellectual Property

'Intellectual property' includes patents, registered and unregistered design, copyrights including computer software, trademarks and analogous rights such as plant breeders' rights.[21] Intellectual property is a property right that can be protected under federal and state law,

[21] Richard Whish, *Competition Law*, (6th ed Oxford University Press) 756.

including copyrightable works, ideas, discoveries, and inventions.[22] The term intellectual property relates to intangible property such as patents, trademarks, copyrights, and trade secrets.

Patent: In the United States of America, a patent is that right which excludes others from making, using or selling the invention throughout the country. In other words, any other person may not make, use or sell the patented invention without the authorization of the patent owner. A patent then, is a limited monopoly granted by the government for the term period of the patent. After the patent expires, anyone may make, use or sell the invention.[23]

Trademark: Trademarks identify the goods of one manufacturer from the goods of others. Trademarks are important business assets because they allow companies to establish their products reputation without having to worry that an inferior product will diminish their reputation or profit by deceiving the consumer. Trademarks include words, names, symbols and logos. The intent of trademark law is to prevent consumer confusion about the origin of a product.[24]

Copyright: A copyright gives the owner the exclusive right to reproduce, distribute, perform, display, or license his work. The owner also receives the exclusive right to produce or license derivatives of his or her work.[25]

4.5.2. Relationship between Competition Law and Intellectual Property Law

Competition law and Intellectual property law share the same objectives of EU free market. Both the laws promote innovation with efficient allocation of resources. A contemporary economist

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[22] http://definitions.uslegal.com/i/intellectual-property [accessed on 1 may 2011]
[23] *ibid*
[24] *ibid*
[25] *ibid*

would opine that competition laws and intellectual property rights laws conflict in certain ways. For example, while exercising a patent right, the patentee may harm the true essence of competition in the market by excluding his patent rivals. But a broad view would show a different finding. This exclusive right of patent is actually promoting innovation and motivating firms to do better in the market and produce better products than the other firm. It is said that, "alike ordinary property rights that promote competition in production by preventing competition in consumption, intellectual property rights are a way (but not the only one) to promote innovation, by restricting some kinds of competition in production".[26]

Intellectual property law confers an exclusive right to the owner to act in a particular way. For instance, a patentee is given a right to enjoy his patented product with a certain authority to restrain others from producing the same goods for a specific time period. UK Patents Act 1977 grants patent right to the owner to prevent others to produce the patent good for a period not less than 20 years.

The European Commission's Guidelines on the application of Article 81 of the EC Treaty to Technology Transfer Agreements (The technology Transfer Guidelines) state that: "Indeed, both bodies of law share the same basic objective of promoting consumer welfare and an efficient allocation of resources. Innovation constitutes an essential and dynamic component of an open and competitive market economy."[27]

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[26] P Aghion, C Harris, P Howitt and J Vickers (2001), 'Competition, Imitation, Growth with Step by Step Innovation', Review of Economic Studies, 68, 467-492, 478

[27] EUROPA (Website of European Union) Summaries of Legislation, *Technology Transfer Agreements.* http://europa.eu/legislation_summaries/competition/firms/126108_en.htm [accessed on 1 January 2011]

Same has been clearly discussed in a document issued by the Department of Justice and the Federal Trade Commission in the USA in April 2007 having title 'Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition', which states that: -[28]

> Over the past several decades, antitrust enforcers and the courts have come to recognize that intellectual property laws and antitrust laws share the same fundamental goals of enhancing consumer welfare and promoting innovation. This recognition signaled a significant shift from the view that prevailed earlier in the twentieth century, when the goals of antitrust and intellectual property law were viewed as incompatible: intellectual property law's grant of exclusivity was seen as creating monopolies that were in tension with antitrust law's attack on monopoly power. Such generalizations are relegated to the past. Modern understanding of these two disciplines is that intellectual property and antitrust laws work in tandem to bring new and better technologies, products, and services to consumers at lower prices.

The European Court of Justice has discussed the synchronization of Competition Law with Intellectual Property rights Law at several occasions. In *Nungesser v. Commission*[29] the ECJ stated that:

> ...[a]n industrial or commercial right, as a legal entity, does not possess those elements of contract or concreted practice referred to in Article 81(1) of the EC Treaty, but the exercise of that right might fall within the ambit of the prohibitions contained in the Treaty if it were to manifest itself as a subject, the means or the consequences of an agreement...

In another case *Ciné Vog v. CODITEL*[30] ECJ stated:

> ...although copyright in a film and the right deriving from it, namely that of exhibiting the film, are not as such subject to the prohibitions contained in Article 81, the exercise of those rights may, none the less, come within the said prohibitions where there are economic or legal circumstances the effect of which is to restrict film distribution to an appreciable degree or to distort competition on the cinematographic market, regard being had to the specific characteristics of that market...

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[28] U.S. Dep't Of Justice & Fed. Trade Comm'n , Antitrust Enforcement And Intellectual Property Rights: Promoting Innovation And Competition (2007). 7

[29] Case 258/1978 [1982] ECR 2015, para 1 of the legal summary.

[30] Case 262/81 [1982] ECR 3381

The above-mentioned cases have proved that Competition rules are in complete compliance with the Intellectual property rights laws. The system of granting intellectual property rights helps in promoting dynamic competition by providing opportunities for undertakings to invest in developing innovative and improved products and processes. On this basis, both legal frameworks play supporting roles for each other in making the Single Market of the EU more successful and biggest market in the world.

4.6. Possibilities of Implementing Competition Laws with a wider perspective: The Case of Pakistan

Having discussed in detail, the success story of competition law in the EU, its effectiveness as regards to its strong coherence with other legal regimes like consumer protection law, intellectual property law and free movement principle, the developing and also the least developed countries should learn a lesson and take initiative to bring a strong competition regime for their region, develop strong competition agencies that will proactively take account of any restrictive business practice done by undertakings to harm the consumer interests.

Pakistan is a country with weak economy. Because of the current situation of the country's economy, the living standards of most of its citizens have dropped drastically. Majority of the citizens are living life, below poverty line. In that respect, Pakistan is facing severe problems in stabilizing their economy. That has consequently created economic and social unrest within the country. Competition is not fair, because of which there has been seen market failure in Pakistan. There is law, but it is not as strong as the law of the EU. To make Pakistan a true welfare state, the interests of the citizens must be taken as highest priority. To attain economic and social wellbeing of the citizens, competition law can play a very significant role. The newly

promulgated Competition Act of 2010 is a good piece of legislation in that regard. Taking a broader vision, it can cater to wider purposes, for example, competition law's application on free movement of goods around and outside the country, consumer protection and intellectual property rights. Through its application in different sectors of the country, like the consumer sector, IP sector (Intellectual property) and trade sector (free movement of goods), some bigger targets and goals can be achieved. Competition law's application in the consumer sector can bring a positive impact in the process of poverty alleviation in the country. The anti-competitive business practices directly affect the consumers in the market by massively hitting the purchasing power of the consumers. This is especially evident from the monopolistic activities of the undertakings in the food sector in Pakistan. Also cartels among the sugar manufacturers and wheat manufacturers in the past have badly affected the consumers' purchasing power due to high prices fixed by them. The only possible option for the government for protecting the consumers is to implement a strong competition regime.

Competition law can also play a significant role in promoting free movement of goods around the country, especially within the provinces. It has been observed that, even where there are regulations for free movement of goods within the provincial governments in Pakistan; there are restrictions on trade being put by the provinces. Goods cannot be easily transferred from one province to the other unlike in the EU Single Market where all goods are free to move from one Member State to the other. Liberalization of trade is the need of the hour in a country like Pakistan. A developing country like Pakistan, in order to increase its wealth and eliminate poverty, must encourage international trade; invite foreign goods, services and capital in the domestic market. For paving way to promote trade liberalization, competition law must play an important role. A strong competition regime will provide trade facilitations across the border and

also around the country among the provinces. This will also be possible if competition law helps in promoting trade liberalization of Pakistan within its provinces (from one province to another) and also in promoting free trade with other countries that are in the country's neighborhood. This will certainly help in stabilizing the economy of the country.

As for the IP sector, a strong competition policy will promote market efficiency through providing opportunities for the market players to produce innovative products. Innovation will enhance market competition. There will be a variety of goods in the market. The consumers will have better options to avail while choosing a product. Resultantly the living standards of citizens will be enhanced. A smart balance between competition policy and IPR policy must be adopted by a developing country like Pakistan. Competition law can also take account of abuse of dominant position by an undertaking while exploiting its exclusive intellectual property right. An improved Competition law can definitely take such measures so as to strengthen market competition, promoting efficiency and raising the living standards of the consumers which are the ultimate goals of the competition law.

The Competition Commission of Pakistan is the authority which implements competition law where redress is required against restrictive business practices, monopolies or market dominance of an undertaking. Until this very institution is not strengthened, markets cannot be regulated properly.

4.6.1. Competition Law and Consumer Sector in Pakistan

In Pakistan, Competition and Consumer issues are dealt by the Competition Commission, which was established under the previously promulgated Competition Ordinance 2007. According to the mandate given to CCP, it provides redress to the deceptive marketing practices and promotes stronger relations between the Commission and the consumer. In its activities up until now, it has

raided different organizations, which were allegedly using dominant position. The Commission has taken bold decisions in the past to eliminate cartelization in the cement and sugar industries. In a recent case named *Cinepax*[31] case, the Competition Commission of Pakistan received a complaint, which alleged a tying of movie tickets with food coupons. According to the complaint, the movie tickets could be bought only with the mandatory purchase of food coupons worth 50 rupees. In response to the complaint, the Commission ordered:

> ...we reckon that if it was just free food sold in the price of the ticket inclusive of food coupon without the bifurcation or bundling, there would have been no violation but since it was sold in the form of a PKR 50 food coupon which customers were obliged to purchase, technically this falls within the purview of tie-in as envisaged under Section 3(3)(c)...

In another case named *Wateen Telecom (Pvt.) Limited & Defence Housing Authority*[32] case, the principle issue was that whether Wateen and DHA have made an agreement for the provision of Telecommunications and media services in the area of DHA in Lahore[33]. The Commission received many complaints that alleged that an exclusivity agreement has been made between Wateen and DHA, because of which, Wateen was the only landline voice service provider in phase 5 of the DHA. The complaints also mentioned that Wateen provided poor quality services and the consumers had no choice but to avail the option instead of switching to any other service provider because of the existing agreement between the two. Upon enquiry, it was discovered that Wateen and DHA had entered into 'Strategic Services Agreement' in the year 2006 according to which DHA would provide Wateen with certain rights and privileges and in return Wateen will provide telecommunication services. The order by the Commission said:

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[31] File no: 07/Cinepax/CMTA/CCP/10

[32] File no. 09/Reg/Comp/CAP/CCP/2010

[33] *Ibid*

> ...in view of the foregoing, it appears to the Commission that the undertaking by entering into an exclusive agreement for such a long time period with WATEEM Telecom has prima facie engaged in practices which has the object or effect of preventing, restricting or reducing competition within the relevant market in violation of sub-section (1) of Section 4 and in particular clause (b) of the sub-section (2) of Section 4 of the Act...

In *Proctor And Gamble Pakistan (Private) Limited (Head & Shoulders Shampoo)*[34] case, P&G, a company famous for making household products, gave advertisements of a shampoo named Head & Shoulders claiming that it is 'World's number 1 anti-dandruff shampoo' and challenging that its frequent use will make the hair '100% dandruff free'. The Competition Commission took *suo moto* notice of the advertisement and asked the company to provide the Commission with necessary information and documents explaining the basis of making such claims. P&G submitted a report of Scientific Test study conducted by them together with a report of Nielson Company of USA that explained that the said claims of 'World's no.1 anti-dandruff shampoo' and '100% dandruff free' are totally true. The Commission was not satisfied by the reports submitted by P&G. The order from the Commission said that the information given in the advertisement is misleading and deceptive for the consumers and also lack reasonable basis. The Commission ordered to stop advertising the product in its current form in the media and also ordered the company to stop using the phrase '100% dandruff free' in their advertisement of the product in future.

4.6.2. Competition Law and Intellectual Property Rights in Pakistan

Intellectual Property is an old concept in International trade. Intellectual Property gained much fame as after it was discussed in detail in a WTO agreement called 'Trade related aspects of intellectual property rights' (TRIPS). TRIPS is the third major agreement of WTO (World Trade

[34] File no. 3(1)/Dir(L)/CCP/2009

Organization), which came into force on 1 January 1995. The countries, which are signatories to the agreements of the WTO, have to abide by the provisions of such agreements. This applies to the developed as well as developing countries. Pakistan is a member of WTO and being a member, Pakistan has formulated various national IP legislations, which are compliant to the TRIPS agreement. The Trade Mark Ordinance, 2001, the Patent Ordinance, 2000 and the Copyright Ordinance, 1962 as amended in 2000 are most prominent in this regard.

The objective of a competition policy is to promote competition and enhance consumer welfare. Similarly, objective of an IP policy is to provide incentives for the market players to produce products with more innovation, creativity, hence providing new, improved and affordable products and services to the consumers.[35] In this respect, the IP regime complements the competition policy by promoting variety of goods to the consumers, thus, enhancing consumer welfare. In Pakistan, the IP issues are dealt by the Intellectual Property Organization of Pakistan (IPO-Pakistan). The IPO was created in 2005 as the focal body to deal with IP issues and to a major extent, to facilitate registration of different intellectual property rights.

Similarly, as mentioned before, the Competition Commission of Pakistan (CCP) was created in 2007 'to provide for free competition in all spheres of commercial and economic activity, to enhance economic efficiency, and to protect consumers from anti- competitive behavior.'[36] The CCP has taken actions against abuse of dominant position by many commercial bodies and cartelization that was adversely affecting market competition.

There are few sections in the Competition Act 2010 that deal directly with IP issues. Section 10 of the Act talks about deceptive marketing practices that are directly relevant to trademarks and

[35] Owais Hassan Shaikh 'Competition Relation Issues in Intellectual Property Rights' *Dawn* (Karachi 17-11-2008)
[36] Competition Act 2010, *preamble*

unfair competition. Other provisions of the Act, such as section that talks about abuse of dominant position and selective subsections of section on prohibited agreements are directly related to IP issues. One famous case dealt with by the Competition Commission is the *Ace Group of Industries*[37] case, in which two companies Bayerische Motoren Werke Aktiengesellschaft (BMW) and M/s H-D Michigan L.L.C (Harley Davidson) lodged complaints against AGI company alleging that they are manufacturing, offering for sale, selling leather jackets having logos of the complainants without their authorization, which was fraudulent and constituted 'deceptive marketing practices' under section 10 of the Competition Act. The Commission ordered:

> ...hence, keeping in view the above legal and factual position, I am of the considered view that, deceptive marketing in terms of Section 10 of the Ordinance has been carried out by AGI and the fraudulent use of the trademark by AGI was very much capable of harming the business interest of the complainants in violation of Section 10(1) read with Section 10 (2)(a) & (d) of the Ordinance...

It has been observed that the provisions mentioned above, do not provide perfect solution for dealing with IP issues, but still have the capacity to provide some redress. The main area, which commonly hits competition, is patents. Patentees enjoy their exclusive rights over others. In several cases because of these patents, monopolies occur. In many cases the companies create patent pools, which are harmful for market competition. Besides patents, there are competition issues, which involve trademarks, copyrights and geographical indications etc.

In a developing country like Pakistan, it is enlightening that both organizations, Intellectual Property Organization (IPO-Pakistan) and Competition Commission of Pakistan (CCP) are functioning very well for the last few years. However, there is always need for improvement in both sectors to develop more congenial relations with one another so that maximum IP/

[37] File no. 3/Reg/COMP/BMW/Sec.10/CCP/09 & File no. 4/Reg/Comp/H.D/Sec.10/CCP/09

Competition issues are tackled in a more effective way, which will not harm but benefit the economic and social interests of the citizens. Thus, improvements must be made on governmental level to make Competition laws more strengthened and effective than before.

4.6.3. Competition Law and Exercise of Free Movement principle in Pakistan:

The 1973 Constitution of Pakistan, Article 18 provides fundamental right for every citizen to conduct any lawful business or trade. That is freedom of citizens to do any lawful business they like. Constitution also provides freedom of trade in any province of the country, which means free movement of goods within the provinces in Pakistan. The provincial governments are prevented by the provisions of the Constitution not to make any law that would hinder free movement of goods from one province to another. Article 151 of the Constitution talks about inter-provincial trade within Pakistan. The provision is reproduced as follows: -

Article 151:

1) Subject to clause 2) trade, commerce and intercourse throughout Pakistan shall be free.

2) [Majlis-e-Shoora (Parliament)] may by law impose such restrictions on the freedom of trade, commerce or intercourse between one Province and another or within any part of Pakistan as may be required in the public interest.

3) A Provincial assembly or a provincial government shall not have power to —

a) make any law, or take any executive action, prohibiting or restricting the entry into, or the export from, the Province of goods of any class or description, or

b) impose a tax which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former goods or which, in the case of goods manufactured or produced outside the Province discriminates between goods manufactured or produced in any area in Pakistan and similar goods manufactured or produced in any other area in Pakistan.

> 4) An Act of A Provincial Assembly which imposes any reasonable restriction in the interest of public health, public order or morality, or for the purpose of protecting animals or plants from disease or preventing or alleviating any serious shortage in the Province of any essential commodity shall not, if it was made with the consent of the President, be invalid.

Article 151 fairly protects free movement of goods throughout the country. Although there are other Provincial regulations, which also ban restrictions on free movement of goods, there are parties that sometimes hinder free transfer of goods from one province to another within the country. To promote free trade among provinces in Pakistan, there is need of implementation of a strong competition law along with harmonization of regulations enforced by all the four provinces of the country regarding free movement of goods, intra-provincial as well as inter-provincial trade. This will enhance domestic trade, promote economic development, and protect consumer rights. An enhanced domestic trade will help Pakistan earn trust in the international market. This will attract a larger amount of FDI in the country. This can provide chances for international market players to conduct pro-competitive activities in the country that will consequently motivate the domestic market players to work more to compete with large enterprises, innovate and upgrade their productivity. Competition Act 2010 of Pakistan is good legislation in this area of promoting competition in the market, but its objectives need to be stated clearly regarding free movements of goods around the country. There is a need to bring competition law of Pakistan to an international standard such as the European Union law so that bigger and broader objectives can be accomplished through this piece of legislation.

CHAPTER NO. 5: CONCLUSION

5.1. Conclusion and Recommendations

A detailed discussion of competition regimes in Pakistan and EU shows that the Pakistani law is highly influenced by the EU law. Pakistani competition law is not as effective as the EU law. Regarding the competition regimes in both regions, it may be observed that EU law has a wider perspective of competition law, be it economic perspective or social perspective. Where economic efficiency remains the prime goal of EU competition law and policy, the social aspect is never ignored such as consumer welfare and public interest. Pakistan is a developing country where there are only few opportunities for market players to grow. Even the consumers' interests are not fully taken care of. The important issue here is first, to work on the economic development of the country. In Pakistan economic stability can be achieved if measures are taken against undue concentration of economic power, monopoly power and restrictive trade practices. Besides there is also need to strengthen those agencies and authorities that are responsible for the implementation of competition law.

The EU legislation gives an authoritative position to the European Commission. Not only EC, but the national authorities of the Member States in the EU are also empowered to implement competition laws of the EU. In EU, competition legislation as well as the competition authorities play significant roles in maintaining the world's most popular Internal Market. This can be made possible in Pakistan if efforts are made and certain measures are taken by the government to strengthen the competition law as well as to strengthen those institutions which are involved in implementing the law. An added effort should be made to create harmony between the provincial governments of Pakistan. Free trade between the provinces should be enhanced. This can be

made possible when there is harmonization of laws of the provinces especially regarding regulations on free movement of goods between the provinces. Free flow of goods within the country will increase the scope of trade domestically which will ultimately enhance competition in the domestic market. A strong domestic market will provide opportunities to participate in the international market, thus, enhancing international competitiveness of the country.

A strong competition regime in Pakistan is also beneficial for the consumers. Consumers in Pakistan are vulnerable. Their rights are often harmed mainly because of the conduct of several undertakings involved in anti-business practices. They charge high prices, depriving them of good quality goods. Competition law is all about enhancing the life standards of a common man. A strong competition legislation in Pakistan will definitely give redress to the consumers who often get exploited in the hands of actors in the market involved in anti-competitive practices.

Some positive steps should also be taken to make other government policies that promote the objectives of competition law. In that regard policies such as trade policy (which does not impose unnecessary tariffs, quotas, and subsidies that impede competition in the market), monetary/fiscal policies, industrial policy, labor policy and other structural policies should be tuned so that the competition principles should be taken account of.

In a nutshell, it is concluded that to make Pakistan stable economy and a truly welfare state where all the consumers' pursuit of happiness is taken account of, implementation of a strong competition regime is the need of the hour.

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