
Rights of Complainant in the Competition Regime of Pakistan: An Appraisal

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Abstract

Complaints are a significant source of information for identifying competition law infringements. It is, therefore, essential to provide a well-defined, effectual modus operandi for lodging complaints and details concerning certain specified information to be submitted to the competition authorities to bring predictability and transparency to the system. In this manner, a complainant can predict what he needs to submit to make his complaint admissible. This article raises questions concerning the availability of the rights of complainants. It analyses how the competition regime of Pakistan could benefit from the European Union's competition jurisdiction in making the procedure of filing complaints more effective. How well the rights of a complainant are defined and protected as compared to the more developed and experienced regime of the European Union? The article discusses the eligibility criteria for filing a complaint against competition infringement. It reviews the existing rights available to complainants by Pakistan and the European Union competition regime. It deliberates on the need to prioritize the complaints received by the enforcement agencies.

Keywords: Complainant's Right, Competition Infringement, Competition Commission of Pakistan, Competition Act 2010, Consumer Welfare

1. Introduction

1.1. Brief Overview of Competition Law in Pakistan

The Competition Act 2010 (CA 2010) serves as the main statute which aims to promote sustainable economic development in Pakistan. The Competition General Enforcement Regulations 2007 serves as an implementing regulation that provides guidelines for the enforcement of the law. The Competition Commission of Pakistan (CCP), is the regulatory authority responsible for the enforcement of the law.

1.2. Importance of Complaints' Rights in Ensuring Fair Competition

The World Bank Report 2007 highlights the key principles that were developed for the regulatory authority (the CCP) to follow and apply the competition policy agenda, and achieve the goals set for the competition law.¹ “Facilitating business” is described there as a vital principle. The main purpose of this principle is to highlight competition law as a supportive statute for a private business that focuses “to promote consumer welfare without hampering the everyday activities of business undertakings”. The report emphasizes the “coordinated approach” in which citizens, as well as business entities, help in implementing a competition law by bringing forward complaints. Complaints are a significant source of information for identifying competition law infringements. It is, therefore, essential not only to provide a well-defined, effectual *modus operandi* for lodging complaints before the competition authorities but also to highlight the rights of complainants to stimulate filing complaints against violations of the law.

1.3. Research Questions and Objectives

The article aims to review the existing rights available to a complainant by Pakistan and the European Union competition regime. It intends to analyze how the competition regime of Pakistan could benefit from the European Union competition jurisdiction in making the procedure of filing complaints more effective. It deliberates whether the rights of a complainant are well defined and well protected in Pakistan’s competition regime, as compared to the more developed and experienced regime of the European Union. In this regard, this article discusses the eligibility

¹ In 2005, the Pakistani government requested technical support from the World Bank and DFID to develop a new competition law. It's worth noting that the preliminary documents for the Competition Ordinance of 2007 remain unpublished. Nevertheless, the World Bank's 2007 report and the CCP's 2008 Annual Report emphasize the fundamental principles of this updated competition law. See World Bank, A Framework for a New Competition Policy and Law: Pakistan, 2007, World Bank, “A Framework for a New Competition Policy and Law: Pakistan,” *Open Knowledge Repository* (World Bank, Washington, DC), accessed June 10, 2023, <https://openknowledge.worldbank.org/handle/10986/19612>.

criteria for filing a complaint against competition infringement, complainants' current rights and the need to prioritize the complaints received by the enforcement agencies.

2. Processes and Procedures for Filing Complaints

2.1. Who May File a Complaint?

In the case of Pakistan, a complainant is defined by Regulation 17 of General Enforcement Regulations 2007, as an undertaking/registered consumers' association that files a complaint. The Federal Government of Pakistan may also fall into this category by conveying a reference to the competition authority.² The competition law fails to provide clarity regarding the recognition mechanism/test applied to determine the status of a complainant.

In the European Union (EU) also, formal complaints can be used as a significant means for the European Commission to initiate an investigation. The European Commission published a Notice on the conduct to deal with complaints.³ This Notice explains the Commission's practice to deal with complaints. Regulation 1/2003 states that any person (natural or legal) having a lawful interest in the matter may file a complaint against an infringement of Article 101(1) TFEU.⁴

Thus, in the EU the recognition of the status of the complainant will depend not only on the complaint being lodged but also on his lawful interest in the subject matter of the case.⁵ The

² Competition Commission (General Enforcement) Regulations 2007, SRO. No 1189(I) 2007 (Published in the Gazette of Pakistan, Extraordinary, 8 December 2007) [General Enforcement Regulations 2007], Regulation 2 (e).

³ European Commission, Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, p. 65.

⁴ Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty, OJ L 1, 4.1.2003, p. 1 [Regulation 1/2003], Art: 7 (2). See also Commission Regulation (EC) No. 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123, 27.4.2004, p.18 [Regulation 773/2004], Art: 5; Joined Cases T-213 and T-214/01, *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission*, ECLI:EU:T:2006:151, paragraphs 124-129; European Commission, Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, p. 65, point 26.

⁵ European Commission, Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, p. 65, points 33-40.

General Court, in *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission*, clarified that certain conditions need to be satisfied to attain the status of a complainant in competition proceedings. It is specified by the Court that the complainant meets the ‘legitimate interest’ test when he establishes that he has or is likely to be suffered an economic loss because of an alleged violation. The Commission, however, is under an obligation to investigate whether or not the claims of a complainant regarding economic damages are just.⁶ The Court also clarified that the prior commencement of an investigation by the European Commission, on its own instance (ex officio) or the basis of some other complaint does not disqualify the applicant as a complainant.⁷ This is because the investigations are normally kept secret to ensure the effectiveness of actions. Therefore, third parties who meet the ‘legitimate interest’ standard are normally unaware of the commencement of the Commission’s investigations into the alleged prohibited agreements/practices.

2.2. Required Documentation and Information

In Pakistan, Regulation 18(2) of General Enforcement Regulations 2007 specifies the requisites of complaint/reference filed before the CCP. It includes a short account highlighting the facts, a concise version of the alleged infringement of CA 2010, a short presentation of an alleged violation, a list of all supportive documents (affidavit and relevant evidence) to substantiate each presentation, such other particulars as may be specified by the CCP, and the relief(s) sought.⁸

In the EU, the complaint, to be admissible, must provide specified information, such as the complainant’s identity details, contact information, and correspondence address both electronic and postal. In case the complainant is an undertaking, the details regarding the nature and purpose

⁶ Joined Cases T-213 and T-214/01, *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft AG v Commission*, ECLI:EU:T:2006:151, paragraphs 124-129.

⁷ Ibid, paragraphs 92-94.

⁸ General Enforcement Regulations 2007, Regulation 18 (2).

of the business enterprise must also be provided. Furthermore, the complaint needs not only to ascertain the respondent undertakings/association of undertakings but also, where applicable, to provide all available information relating to their business pursuits. Additionally, the complainant needs to specify its own position (for instance, competitor or consumer/costumers) towards the complaine. ⁹ Regulation 773/2004 includes a ‘Form C’ for filing a complaint following Article 7 of Regulation 1/2003. ¹⁰ The Commission, at its discretion, may waive any requirement of Form C, for instance, to provide any document/information. ¹¹ Thus, a person must file a complaint in a prescribed manner according to Article 5(1) of Regulation 773/2004 to qualify as a complainant. If a person claims the status of ‘complainant’, but does not satisfy the condition of having a legitimate interest, may be heard only where he has a ‘sufficient interest’ in the result of the proceedings. ¹² The Hearing Officer grants the person the status of “interested third party”. ¹³ Regulation 1/2003 acknowledges third parties' right to participate in the proceedings when they are declared to have a sufficient interest in the proceedings. ¹⁴

3. Rights of a Complainant

3.1. Commencement of an Enquiry and Decision on a Complaint

⁹ Regulation 773/2004, Form C: Complaint Pursuant to Article 7 of Regulation (EC) No 1/2003.

¹⁰ Ibid; European Commission, Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, p. 65, points 29-32.

¹¹ Regulation 773/2004, Art: 5(1).

¹² Sufficient interest is “an economic or legal interest which is or may be detrimentally affected by the infringement of the Commission’s decision”. See Khan, N. and Kerse, C.S., *EC Antitrust Procedure*, 5th Edition, London: Sweet & Maxwell, 2005, as cited by Andreangeli, A., *EU Competition Enforcement and Human Rights*, Cheltenham: Edward Elgar Publishing, 2008, 40. See also Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93, *Metropole télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission*, ECLI:EU:T:1996:99, paragraph 61.

¹³ Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29, Art: 5.

¹⁴ Regulation 1/2003, Art: 7 (2), read with Art: Art: 27 (3).

The complainants enjoy certain benefits under CA 2010 which are further explained in General Enforcement Regulations 2007. It is a right of the complainant that the CCP commences an enquiry on receiving a complaint when there exist a *prima facie* case of violation of specified provisions of CA 2010.¹⁵ Section 37 CA 2010 deals with conducting an enquiry. The CCP needs to satisfy certain conditions to conduct an investigation under this Section. According to Section 37 (4) CA 2010, there must be existence of a *prima facie* case. The CCP's opinion to initiate proceedings must be justified by the findings of an enquiry and on the ground of the public interest.

As mentioned earlier, the CCP may conduct an enquiry, under Section 37(1) CA 2010, on its own instance or because of the reference forwarded by the Federal Government. Section 37 (2) of CA 2010 states that the CCP may start investigations after receiving a written complaint. However, frivolous or vexatious complaint are not entertained when there is a reason to believe that *mala fide* intention exists. Similarly, the application based on inadequate facts or absence of corroborated evidence in favor of applicants may also become the ground of rejection of complaints.

The language of Section 37(1) and (2) CA 2010 highlights the discretion of the CCP in conducting an enquiry. Section 37(1) CA 2010 uses the word 'may' ("The Commission *may*, on its own,"), showing the discretion of the CCP. The use of the word 'shall' ("Where the Commission receives from an undertaking or a registered association of consumers a complaint in writing of such facts as appear to constitute a contravention of the provisions of Chapter II, it *shall*....") in Section 37 (2) CA 2010 is followed by mentioning certain matters that the CCP may exclude at its discretion. ('...unless it is of opinion that the application is frivolous or vexatious or based on insufficient

¹⁵ General Enforcement Regulations 2007, Regulation 16 (1) (c).

facts, or is not substantiated by prima facie evidence...'), hence mitigating the power of 'shall' into 'may'.

The CCP, in *All Pakistan Cement Manufacturer Association (APCMA) and member undertakings*, clarified that Section 37(2) of CA 2010 is complainant focused provision that grants protection to the complainant more than the complaine. The Order states that a remedy may be sought by the complainant when the CCP fails to take action on a complainant. According to the provision the CCP is under obligation to decide on whether or not the action could be taken on complaint submitted.¹⁶ When no action is taken upon a complaint, in what way and where a complainant may seek redress is not clear.

A complainant may withdraw its complaint, with the permission of the CCP, at any stage of the enquiry. The withdrawal of the complaint does not necessarily discontinue the proceedings unless the CCP decides so.¹⁷

It is pertinent to mention that no specific provision is provided in CA 2010 prescribing any limitation period to initiate the procedure and to take decisions accordingly from the date the CCP receives a complaint. CA 2010 is silent on any specific form for lodging a complaint. A complaint may be submitted using fax, e-mail, or regular mail. However, General Enforcement Regulations 2007 elucidate that name, postal/electronic address, telephone/fax number of the complainant, and name and address of the respondent are mandatory elements of a complaint/application or reference.¹⁸ Therefore, if the law fails to highlight time limits or deadlines for initiation and conclusion of an investigation or to reach to a decision, it leaves a concerned undertaking in a state

¹⁶ Competition Commission of Pakistan, *All Pakistan Cement Manufacturer Association (APCMA) and member undertakings Order*, 27.8.2009, 40,

[http://www.cc.gov.pk/images/Downloads/Cement%20\(final%20order\)%2027-08-2009.pdf](http://www.cc.gov.pk/images/Downloads/Cement%20(final%20order)%2027-08-2009.pdf), accessed on 18.6.2023

¹⁷ General Enforcement Regulations 2007, Regulation 21.

¹⁸ Ibid, Regulation 18(1).

of uncertainty as to the timing and type of expected/forthcoming decision of the authority. Additionally, mentioning the time limits or deadlines bring clarity, predictability, and transparency in procedures. It is recommended that CA 2010 specifically highlights any guidelines regarding time limits to decide the fate of a complaint, initiate an investigation, and make a decision instead of being silent on the issue.

In the European Union competition regime, the European Commission's Notice on the conduct of complaints provides guideline on how to seek relief in case of alleged violation of competition rules. The Notice explains the complainant's rights during administrative procedures and the European Commission's discretion to reject complaints.¹⁹ Part II of the Notice discusses the significance of both public and private enforcement in creating a balance in competition regime. The Notice highlights the benefits available to complainants. It indicates the forums that are available to file a complaint, for instance the option to file a complaint before the European Commission, a litigation before the national courts.²⁰ It points out the advantages for complainants, in some circumstances, in bringing an action before national courts instead of filing a complaint before an enforcement agency. For example, it states that the relief in a form of damages can only awarded by a national court. Similarly, only a national court may nullify the contractual relationship between parties under Article 101 (2) TFEU. The power to award the cost of legal proceedings to a successful party also belongs to the courts. The competition authority's proceedings are normally administrative in nature so such remedies are not available.²¹ The Notice also explains the provisions regarding allocation of cases within the European Competition

¹⁹ European Commission, Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, p. 65, points 53-81.

²⁰ Ibid, point 7.

²¹ Ibid, point 16.

Network, which would assist a complainant to take informed decision on where to lodge its complaint (which public authority is reasonable to approach).²²

The complainant has several rights when the Commission pursues a complaint. However, the rights of the complainants are less as compared to the rights of the undertakings suspected of a violation.²³ The Court, in *British American Tobacco Company and R. J. Reynolds Industries v Commission*, explains this point in the following words:

*“the procedural rights of the complainants are not as far-reaching as the right to a fair hearing of the companies which are the object of the Commission’s investigation. In any event, the limits of such rights are reached where they begin to interfere with those companies’ right to a fair hearing”.*²⁴

The European Commission, within 4 months of receiving a complaint, informs the complainant regarding its proposed action with respect to the complaint. However, this time limit does not amount to statutory binding.²⁵

3.2. Right to Receive a Non-confidential Version of a Statement of Objections

Where, as a result of an enquiry, there are sufficient grounds to establish an infringement, the CCP and the European Commission generally issue a “Show Cause Notice” and a “Statement of Objections” respectively. There is a similarity between a ‘Show Cause Notice’ issued by the CCP and a “Statement of Objections” issued by the European Commission. Both aim to inform parties under investigation of the objections raised against them. Thus, both operate as a vital procedural

²² Ibid, points 19-25.

²³ Case T-17/93, *Matra-Hachette SA v Commission*, ECLI:EU:T:1994:89, paragraph 34 ; Willis, P.R. and Wessing, T., “Competition Authorities”, in *Introduction to EU Competition Law*, Edited by Peter R. Willis, Oxon: CRC Press, 2013, 225; Hofmann, H.C.H., Rowe, G.C. and Türk, A.H., *Administrative Law and Policy of the European Union*, 1st Edition, Oxford: Oxford University Press, 2011, 380.

²⁴ Joined Cases 142/84 and 156/84, *British American Tobacco Company and R. J. Reynolds Industries v Commission*, ECLI:EU:C:1987:490, paragraphs 19-20.

²⁵ European Commission, Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, p. 65, point 61.

defense ensuring respect for the right to be heard during the proceedings before a competition authority. Both the European Commission and the CCP normally publish a press release highlighting the main concerns in a Statement of Objections and a Show Cause Notice respectively to further improve the transparency in the investigation procedures. Although the CCP follows the same procedure as the European Commission, an explanation to deal specifically with the complaints is missing.

However, in the European Union, Regulation 773/2004 spells out the rights of a complainant. Chapter IV explains the procedure to deal with the complaints. The European Commission, after receiving a complaint regarding a matter, communicates its concerns to a party concerned through a “Statement of Objections”. The Commission may also provide the complainant (being a person with “sufficient interest”) an opportunity to submit its written statement concerning the matter within a specified time duration as determined by the Commission after receiving a non-confidential form of the Statement of Objections.²⁶

Flattery argues that the complainants ought to have the right to essentially join in the competition proceedings because they may be as affected (for instance, having an adequate interest in the proceedings being the competitors) by the result of investigation proceedings as the undertaking alleged to violate the law.²⁷

The Commission also provides the complainants a brief description of the matter under investigation in a non-confidential form of the “Statement of Objections”.²⁸ However, according to the ‘Antitrust Manual of Procedures’ of the European Commission, a non-confidential form of

²⁶ Regulation 773/2004, Art: 6 (1), read with European Commission, Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, p. 65, point 64.

²⁷ Flattery, J., “Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing”, *The Competition Law Review* 7, Issue 1 (2010): 65.

²⁸ Regulation 773/2004, Art: 13 (1).

the Statement of Objections cannot be received by third parties as a matter of right.²⁹ In practice, they may, depending on each case, either receive a summarized letter mentioning the subject matter of the case, or a non-confidential form of the “Statement of Objections”.³⁰ The Hearing Officer deals with the requests made by the complainants and third parties regarding the correctness of the received information.³¹

3.3. Right to Participate in the Oral Hearing

The CCP may provide a complainant a right of being heard before passing an Order. The Appellate Bench, in *Fecto Belarus Tractors (Pvt.) Limited v Shahzad Trade Links*, held that “it would be in the interest of justice to provide the appellate/complainant an opportunity of hearing” before passing an Order.³² The CCP, in *Fecto Belarus Tractors (Pvt.) Limited v Shahzad Trade Links*, dismissed a complaint based on the findings of an Enquiry Report. The CCP informed the complainant and other concerned parties through a letter that the proceedings could not be initiated as the complaint failed to make out any violation of the law.³³ An appeal against the decision was filed by the complainant before the Appellate Bench of the CCP. The Appellate Bench considered the matter and stated that the complainant may be provided an opportunity of being heard before the final disposal of the complaint following the principles of natural justice even when the findings of the enquiry conducted based on said complaint indicate the absence of *prima*

²⁹ Case T-17/93, *Matra Hachette SA v Commission*, ECLI:EU:T:1994:89, paragraphs 16-18.

³⁰ European Commission, “Antitrust Manual of Procedures”, Internal DG Competition working documents on procedures for the application of Articles 101 and 102 TFEU, March 2012, Right to be Heard, paragraph 11, http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf accessed on 17.2.2023.

³¹ Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29, Art: 7 (2).

³² Competition Commission of Pakistan Order, Appellate Bench, Appeal Filed by Fecto Belarus Tractors Ltd against Shahzad Trade Links, 16.3.2010, <http://cc.gov.pk/images/Downloads/Final-Fecto-Belarus-Tractors-Appeal-Order.pdf> accessed on 18.6.2023

³³ Competition Commission of Pakistan, *Fecto Belarus Tractors (Pvt) Limited v Shahzad Trade Links* Order, 2.10.2009, <http://www.cc.gov.pk/images/Downloads/fecto%20order.pdf> accessed on 18.6.2023

facie violation.³⁴ Hence, on 16 March 2010, the matter was remanded back to the CCP (Bench that passed the Order) with a direction to provide the hearing opportunity to both the parties, and anew Order may be passed keeping in view the circumstances of the case. On 5 May 2010, the CCP invited both the complainant and the respondent to present their case before the former on 18 May 2010. On 8 May 2010, the complainant requested to withdraw the complaint. The CCP, because of the request made by the complainant, dismissed the complaint as withdrawn.³⁵

In the EU, complainants can participate in the investigation according to Article 6(2) of Regulation 773/2004 by requesting to provide the opportunity of being heard.³⁶ Article 27(3) of Regulation 1/2003 and Article 13 (2) of Regulation 773/2004 state that the Commission may decide when it deems necessary to provide the hearing opportunity to other natural/legal persons upon receiving their application in this regard. So the right to be heard cannot be granted automatically. The applicants need to satisfy the “sufficient interest” test.³⁷

The Hearing Officer decides on whether or not the opportunity of being heard would be provided to interested third parties and the competition authorities of the Member States are allowed to request the Commission in this regard.³⁸ According to the Guidance on procedures of the Hearing Officers, the potential interested third parties, for the most effective use of their procedural right,

³⁴ Competition Commission of Pakistan Order, Appellate Bench, Appeal Filed by Fecto Belarus Tractors Ltd against Shahzad Trade Links, 28.5.2010, 3, <http://www.cc.gov.pk/images/Downloads/fecto%20belarus%20-%20final%20order.pdf> accessed on 18.6.2023

³⁵ Competition Commission of Pakistan Order, Fecto Belarus Tractors (Pvt.) Limited, 28.5.2010, <http://www.cc.gov.pk/images/Downloads/fecto%20belarus%20-%20final%20order.pdf> accessed on 18.6.2023.

³⁶ Regulation 773/2004, Art: 6 (2), read with European Commission, Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, p. 65, point 65. See also Willis, P.R. and Wessing, T., “Competition Authorities”, in *Introduction to EU Competition Law*, Edited by Peter R. Willis, Oxon: CRC Press, 2013, 225.

³⁷ Regulation 1/2003, Art: 27(3); Regulation 773/2004, Art: 13.

³⁸ Decision of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29, Art: 6 (2).

are urged to apply formally as soon as a Statement of Objections is issued.³⁹ The Hearing Officer assesses the request for third-party status and takes into consideration the party's contribution in establishing the case and proving the relevancy of the facts/circumstances significant to the proceedings which would otherwise not be believed to be as sufficient.⁴⁰ Flattery argues that the goals, such as protecting individual rights and establishing legal certainty in proceedings could be achieved by specifying these participatory rights in the proceedings. She considers this ensures bringing "fairness and objectivity" to the Commission-wide discretion in allowing/disallowing the right to be heard and the form of hearing.⁴¹

3.4. Right to Respect Confidentiality

The complainant may request the CCP to treat the documents submitted as confidential under Section 51 of CA 2010. The CCP, in *Pakistan Poultry Association*, highlighted the fact that the CCP has the discretion to declare the documents, including emails of complainants regarding a violation of the law, confidential under Section 51 (3) of CA 2010, read with Regulation 48 of General Enforcement Regulations 2007. Thus, it also needs to be appreciated that any confidential document can never be part of the Public Register.⁴²

In the European Union, the complainants may submit documents containing classified information either voluntarily or following the Commission's request. The Commission is bound to protect the

³⁹ European Commission, Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU, point 34, http://ec.europa.eu/competition/consultations/2010_best_practices/hearing_officers.pdf accessed on 1.3.2023

⁴⁰ Ibid, point 33; Giannakopoulos, T.K., *Safeguarding Companies' Rights in Competition and Anti-dumping/anti-subsidies Proceedings*, 2nd Edition, Alphen aan den Rijn: Kluwer Law International, 2011, 227.

⁴¹ Flattery, J., "Balancing Efficiency and Justice in EU Competition Law: Elements of Procedural Fairness and their Impact on the Right to a Fair Hearing", *The Competition Law Review* 7, Issue 1 (2010): 65.

⁴² Competition Commission of Pakistan, *Pakistan Poultry Association Order*, 16.8.2010, 7, http://www.cc.gov.pk/images/Downloads/ppa_order_16_august_2010.pdf accessed on 18.7.2022.

confidential information shared.⁴³ The complainants' legitimate and reasonable request regarding non-disclosure of identity and submissions made must be respected to protect their valid legal interests (particularly when there are qualms of retribution).⁴⁴

The Commission officials and the members of the Advisory Committee are bound to maintain professional secrecy to encourage complainants/informants to come forward without hesitation.⁴⁵

The Commission may utilize such evidence even when it has a corroborative value but is not sufficient in itself to establish the infringement.⁴⁶ The Court of Justice, in *Salzgitter Mannesmann GmbH v Commission*, stated that the documents forming the "part of a body of evidence" are of "ancillary importance".⁴⁷

3.5. Rights in Case of Rejection of a Complaint

In Pakistan, as mentioned earlier, the CCP may reject frivolous or vexatious complaints or applications based on inadequate facts or insufficient corroborated evidence. Whether any redress is available to the complainants in case of rejection of their application is not clear. However, the European Commission provides some rights to the complainants in case of rejection.

3.5.1. Rejection Notification

The European Commission rejects a complaint when it fails to meet the 'sufficient interest' standard to justify further investigation.⁴⁸ However, the complaint may also be rejected on the grounds of lack of competence (lack of competence means that it is unlikely that the alleged

⁴³ Regulation 1/2003, Art: 28; Regulation 773/2004, Artt: 15-16, read with European Commission, Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, p. 65, point 66.

⁴⁴ Regulation 773/2004: Art: 16(1).

⁴⁵ Regulation 1/2003: Art: 28.

⁴⁶ Case 145/83, *Stanley George Adams v Commission*, ECLI:EU:C:1985:448.

⁴⁷ Case C-411/04 P, *Salzgitter Mannesmann GmbH v Commission*, ECLI:EU:C:2007:54, paragraph 47.

⁴⁸ Regulation 1/2003, consideration 18.

infringement would affect the trade between the Member States) and lack of an infringement (on substantive grounds). The lack of substantiation may constitute the ground for the rejection of a complaint as well. It means that the complainant fails to fulfill the minimum requirement of *prima facie* proof to establish violation of Article 101 TFEU. However, a complainant has a right to get formal information (an ‘Article 7’ notification), in case of rejection of his complaint.⁴⁹ The complainant needs to be informed and the opportunity of submitting written submission is provided when the Commission considers that there is a lack of sufficient grounds to initiate investigations based on the information received through a complaint. The Commission does not consider late written submission that is received after the specified time duration.⁵⁰ The purpose to allow a written submission is to protect the right to information of the complainant to whom an unfavorable decision is addressed.⁵¹ The notification under Article 7 of Regulation 773/2004 does not constitute an act of the Commission that becomes the subject matter of an annulment actions brought under Article 263 TFEU.⁵²

3.5.2. Request to Access Documents

Complainants cannot claim access to the Commission’s file as a matter of right as it is provided to the parties. According to the Court’s ruling, the rights of third parties are limited to the right to participate in the administrative proceedings.⁵³ However, when the Commission formally communicates to a complainant its intent to reject the complaint received, the complainant may request access to the documents constituting the basis of the Commission’s ‘provisional

⁴⁹ Regulation 773/2004, Art: 7.

⁵⁰ Ibid, Art: 7 (1).

⁵¹ Case C-282/95 P, *Guérin automobiles v Commission*, ECLI:EU:C:1997:159, paragraph 35.

⁵² Ibid, paragraphs 33-40.

⁵³ Case T-17/93, *Matra-Hachette SA v Commission*, ECLI:EU:T:1994:89, paragraph 34. The Court ruled that “the rights of third parties, as laid down in Article 19 of Regulation 17/62 (now replaced by Article 27 of Regulation 1/2003), were limited to the right to participate in the administrative procedure”.

assessment'.⁵⁴ The access may be granted on a one-time basis after the Commission communicates its intention through a letter to reject the complaint.⁵⁵ Complainants cannot access any classified information that the Commission found during the investigation.⁵⁶

3.5.3. Right to Appeal

The Commission rejects the complaint by decision when the complainant provides their written submission within the specified time duration and the submissions do not affect the merit of the decision.⁵⁷ However, the aggrieved party may file an appeal before the EU Courts.⁵⁸

In case of rejection, if the complainant claims that his right to participate in a hearing has been violated by the Commission's outright denial of a hearing, he must show that in not hearing him the Commission 'unduly restricted' the enquiry.⁵⁹ This may result in the annulment of the decision due to procedural irregularity.⁶⁰ However, Andreangeli argues that the "threshold" is quite high when the complainant requires to show that the denial of a right to participate in a hearing has "unduly restricted" the investigation. It is maintained that such a high standard may discourage third parties from justifying their hearing privileges.⁶¹ A decision to reject a complaint bars the complainants' request to reopen the investigation provided there is significant new evidence

⁵⁴ Regulation 773/2004, Art: 8 (1).

⁵⁵ Ibid; European Commission, Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005, p. 7, point 31.

⁵⁶ European Commission, Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005, p. 7, point 32.

⁵⁷ Regulation 773/2004, Art: 7 (2).

⁵⁸ Settled case law since Case 210/81, *Oswald Schmidt, trading as Demo-Studio Schmidt v Commission*, ECLI:EU:C:1983:277.

⁵⁹ Andreangeli, A., *EU Competition Enforcement and Human Rights*, Cheltenham: Edward Elgar Publishing, 2008, 41.

⁶⁰ Joined cases 209/78 to 215/78 and 218/78, *Heintz van Landewyck SARL and others v Commission*, ECLI:EU:C:1980:248, paragraph 47.

⁶¹ Andreangeli, A., *EU Competition Enforcement and Human Rights*, Cheltenham: Edward Elgar Publishing, 2008, 41.

available.⁶² Such a decision does not address the issue of the existence of a violation of Article 101 TFEU, even when the Commission's provisional assessment of the facts is based on this provision.⁶³ The General Court clarifies that the Commission does not initiate an investigation procedure to establish possible breaches of the EU competition rules to communicate to the complainants its final decision regarding the detection/absence of the alleged violation.⁶⁴

4. Prioritizing Complaints

The competition authority may prioritize their assignments depending on the total number of complaints received. In Pakistan, there is no official statistical data regarding the average number of complaints the CCP receives each year. In the European Union, Part III of the Notice on complaints explains the Commission's practice to deal with the complaints. It discusses that the Commission has a right, as a public enforcer, to prioritize its enforcement efforts so it may first concentrate on the most significant matters according to the set priority list. The Commission is an administrative authority that is required to perform in the public interest.⁶⁵ The EU Courts also have recognized the Commission's discretion to set priorities to carry out its enforcement responsibilities.⁶⁶ According to settled case law, the Commission may set different levels of priority for each complaint received keeping in view the broader objective of the EU interest. The General Court, in *Automec v Commission*, reiterated the fact that the Commission may focus on

⁶² European Commission, Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, p. 65, point 78.

⁶³ Ibid, point 79.

⁶⁴ Case T-432/05, *EMC Development AB v Commission*, ECLI:EU:T:2010:189, paragraphs 57-58; Case T-204/03, *Haladjian Frères SA v Commission*, ECLI:EU:T:2006:273, paragraph 27; Case 125/78, *GEMA v Commission*, ECLI:EU:C:1979:237, paragraphs 17-18; Willis, P.R. and Wessing, T., "Competition Authorities", in *Introduction to EU Competition Law*, Edited by Peter R. Willis, Oxon: CRC Press, 2013, 224.

⁶⁵ European Commission, Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, OJ C 101, 27.4.2004, p. 65, point 27.

⁶⁶ Case T-306/05, *Isabella Scippacercola and Ioannis Terezakis v Commission*, ECLI:EU:T:2008:9, paragraph 92; Case C-119/97 P, *Union française de l'express (Ufex) and others v Commission*, ECLI:EU:C:1999:116, paragraph 88; Case T-24/90, *Automec Srl v Commission*, ECLI:EU:T:1992:97, paragraphs 73-77.

the European Union's interest while determining the levels of priority the former applies to the numerous complaints it receives.⁶⁷ It restated this statement in *Isabella Scippacercola and Ioannis Terezakis v Commission*.⁶⁸ However, complainants are entitled to compel the Commission to investigate the alleged undertakings for potential violation of the competition rules by invoking Article 265 TFEU. Therefore, the individuals may involve the competition authority in litigation under Article 265 TFEU on the ground of "failure to act".⁶⁹

5. Pakistan Competition Regime: Challenges and Limitations

5.1. Absence of Clear Procedure after Rejection of a Complaint

As pointed out earlier, Regulation 773/2004 provides a detailed and clear procedure for handling complaints. For instance, according to Article 7, the European Commission provides a complainant the opportunity of expressing his views when the former rejects his complaint on the bases of insufficient grounds to act on the complaint. Likewise, Regulation 20 of General Enforcement Regulations 2007 empowers the CCP to reject a complaint if it finds that the complaint is frivolous, vexatious, based on insufficient facts, or without any prima facie evidence. The CCP also needs to provide a detailed and clear procedure for handling complaints. As it is unclear, in the case of Pakistan, whether parties have the right to get formal information about the rejection of their complaint and access to documents on request in certain circumstances. This is because the rules, policies, practices, and procedures involved in the competition infringement review process are neither clearly expressed nor publicly available.

⁶⁷ Case T-24/90, *Automec Srl v Commission*, ECLI:EU:T:1992:97, paragraph 85.

⁶⁸ Case T-306/05, *Isabella Scippacercola and Ioannis Terezakis v Commission*, ECLI:EU:T:2008:9, paragraph 93.

⁶⁹ Berry, E., Homewood, M.J. and Bogusz, B., *Complete EU Law: Text, Cases, and Materials*, Oxford: Oxford University Press, 2013, 256.

5.2. Lack of Competition Jurisprudence

The court of appeal generally determines the yardstick to measure the degree of protection that is provided to third parties in both procedures and judicially. The slow disposal of appeal cases in the Pakistani courts results in a lack of precedent in competition cases.⁷⁰

5.3. Requirement of an Independent Forum as the Guardian of the Right of Defense

In the EU, the Hearing Officers contribute effectively to the Commission's investigation proceedings. The Commission issued a Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU that highlights the significant role the Hearing Officer performs as the autonomous guardian of the 'rights of defense'. He ensures to bring a great degree of transparency, objectivity, and certainty in the Commission's investigation procedures.⁷¹

The Hearing Officer guarantees that the Commission upholds the complainant and interested parties' rights to effectively communicate their views through submissions and provides a fair chance to them to participate in the proceedings. In Pakistan, there is a need to develop an independent forum that can act as the guarantor to conduct fair proceedings before the CCP and can protect the right of defense of undertakings generally as well as complainant and other interested parties' procedural rights.

5.4. Need to Specify a Standard Form to Lodge Complaints

In the EU, it is observed that the DG Competition allows the complainant to participate in the proceedings based on their formal complaint following Article 5 of Regulation 773/2004. CA 2010 is silent on any specific form for lodging a complaint. Complaints are a necessary means of

⁷⁰ Fatima, S., "Role of Appellate Forums in Competition Cases of Pakistan: Challenges and Way Forward", *World Competition* 46, Issue 3 (2023): 353-376.

⁷¹ European Commission, Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU, point 1, http://ec.europa.eu/competition/consultations/2010_best_practices/hearing_officers.pdf accessed on 1.5.2023.

information for discovering and establishing violations of competition laws. It is, therefore, essential to define transparent and effective procedures for lodging complaints, and details concerning certain specified information to be submitted to the competition authorities to bring predictability and transparency to the system. In this manner, a complainant can predict what he needs to submit to make his complaint admissible. Regulation 17 of General Enforcement Regulations 2007 specifies the list of information to be submitted with the complaint. However, it is essential to specify a standard form that lists the information to be submitted to the CCP to bring uniformity to the procedure. Additionally, it should be a condition that the complaint against an anti-competitive activity can only be treated as a complaint if on a specified form and the required information listed in that form must also be submitted. In the EU, point 7 of Regulation 773/2004 emphasizes that a complaint can be entertained only when it fulfills the requirement of 'Form C'. Therefore, Regulation 773/2004 specifies 'Form C' for filing a complaint according to Article 7 of Regulation 1/2003. Point 7 of Regulation 773/2004 makes it clear that specifying 'Form C' to lodge a complaint against an anti-competitive activity is essential as the Commission receives all necessary facts through this form. As per 'Form C', a complainant is required to submit full details of their identity as a legal or natural person or body corporate whatever the case may be. It is further required to submit information regarding the complainees, and the nature and scope of their business ventures. Details of the alleged infringement and evidence are also required to be submitted. A complainant must submit details of the facts that he deems signify the existence of an infringement of Article 101 TFEU. A complainant must also provide all documents in his power and possession that relate to the facts highlighted in the complaint or are directly associated with them. A complaint must also contain the relief sought.

6. Conclusion

The article raises questions concerning the availability of the rights to complainants in Pakistan's competition regime. It discusses whether the rights of a complainant are well-defined and protected as compared to the more developed and experienced regime of the European Union. It analyses how the competition regime of Pakistan could benefit from the European Union's competition jurisdiction in making the procedure of filing complaints more effective. As complaints are a significant source of information for identifying competition law infringements.

Both Pakistan and the EU competition regimes provide certain rights to complainants. Both highlight the complainants' right to be heard, the right to receive a decision on a complaint submitted, the right to withdraw a complaint, and the right to request maintenance of confidentiality. However, in Pakistan, certain challenges need to be addressed to provide a well-defined and effective system to handle complaints and bring predictability and transparency to the system.

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