

## **Right to Be Heard under the Competition Act 2010: A Comprehensive Analysis**

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### **Abstract**

*The right to be heard stands as a cornerstone in the robustness of competition investigations, ensuring a fair and transparent process for parties involved. This crucial right allows parties undergoing competition investigations in both the European Union and Pakistan to articulate their perspectives and substantiate their positions with supporting evidence, thereby forming a robust defense against assertions made by competition authorities. While both the European Commission and the Competition Commission of Pakistan have implemented measures such as objection notices and access to records to uphold this right, challenges persist. The Competition Commission of Pakistan lacks comprehensive guidelines for parties' defense rights, leaving room for interpretation. To enhance the administration of the right to be heard, the Competition Commission of Pakistan should issue detailed guidelines for fair investigations, akin to international standards. Moreover, establishing an independent forum, similar to the European Union's Hearing Officer, could further safeguard this right and provide a mechanism for dispute resolution. Enhancing procedural clarity, transparency, and addressing timing issues are essential steps in protecting the right to be heard in competition investigations, contributing to fair and effective enforcement of competition law.*

**Keywords:** *Competition Investigation, Competition Commission of Pakistan, Right to be Heard, Hearing Officer, Enforcement of Competition Law, Robust Defense*

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### **1. Introduction**

The Competition Act 2010 and the Treaty on the Functioning of the European Union (TFEU) outline several protective entitlements for individuals or entities under examination by the Competition Commission of Pakistan (CCP) and the European Commission. Collectively, the entitlement to examine the case records, coupled with the privilege of participating in an oral hearing and submitting written documentation, are commonly denoted as the “parties’ right to a fair hearing” (Lianos and Andreangeli, 2012:411). This article aims to explore and evaluate these protections. It focuses particularly on the entitlement to a “Statement of Objections”, the ability to access the competition authority's records, the opportunity to submit written remarks, and the right to an oral hearing. The CCP, in its orders, interprets the law and not only agrees, in most of its observations, to the view taken by the European Commission and the EU Court but also incorporates decisions/judgments of the European Commission and the EU Courts in its Orders. However, the question whether the appellate courts of Pakistan would agree to the interpretation adopted by the CCP is yet to be seen.

#### **1.1 Research Objectives and Questions**

The article seeks to assess the rights of defense within the context of competition investigations, drawing comparisons between the European Union and Pakistan while delving into potential areas

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for improvement and harmonization. Considering Pakistan regards the European Union competition rules as a point of reference. It aims to address the following questions: What procedural safeguard is used by the European Commission and Competition Commission of Pakistan and what is its significance in ensuring the right to be heard in competition proceedings? Whether the competition rules in Pakistan aim to improve transparency and predictability in competition proceedings, and how have they impacted the rights of defense for parties under investigation? What are the specific regulations in the European Union and Pakistan that grant addressees of a Statement of Objections access to the competition authority's file, and what impact do these provisions have on the defense rights of the parties involved? How do the competition regulations in Pakistan and the European Union define and ensure the opportunity for parties to be heard on allegations of anti-competitive conduct, and what are the key differences between these provisions? What is the role and significance of an independent forum to guarantee a fair opportunity for parties to avail their right to be heard?

## **2. Right to a Show Cause Notice/Statement of Objections**

### **2.1 Definition, Purpose and Significance**

A "Show Cause Notice/Statement of Objections" serves as a crucial procedural safeguard, guaranteeing the right to a fair hearing in all proceedings (Joined Cases 142/84 and 156/84, 1986:para 63). It cannot be independently contested through an annulment action, and any contentions regarding the legality of a "Show Cause Notice/Statement of Objections" must be brought up within the context of an appeal against the final decision of the competition authority since it constitutes a preparatory procedural step preceding the formal decision (Case 60/81, 1981:paras 10-21).

In Pakistan, the CCP provided a definition for the term "show cause" in "*LPG Association of Pakistan Jamshoro Joint Venture Ltd*". According to this definition, "show cause" signifies the act of presenting a satisfactory "explanation or justification", typically in the context of a "motion or application submitted to a court" (LPG Case, 2009:50). In the "*Pakistan Poultry Association*" case, the CCP emphasized the well-settled principle that the show cause notice must encompass "precise and clear allegations, incorporating intricate particulars of the accusations". The CCP elucidated the rationale and objective behind this established principle, which is to facilitate the undertaking in articulating its stance concerning the allegations and to afford it the opportunity to counter the charges. This objective can only be realized when the undertakings in question are made aware of the specifics of the accusations (Pakistan Poultry Order: 2010:6). In "*LPG Association of Pakistan Jamshoro Joint Venture Ltd*", the CCP highlighted that the "Lahore High Court" determined that issuing a "Show Cause Notice is not an unfavorable action but a progression toward the issuance of a final order" (LPG Case, 2009:50). The CCP further expounded that the issuance of "Show Cause Notices", which ask the parties to furnish their written responses, does not, in any way, constitute an "adverse action". At this stage, the parties are simply summoned to "provide a written explanation and to take advantage of the opportunity for a hearing" (LPG Case, 2009:54).

A similar interpretation can be discerned in the context of EU competition jurisdiction. The European Commission provides a written "Statement of Objections" to the parties under investigation, notifying them of the objections lodged against them (Regulation 773, 2004: Art: 6 (1)). These objections are required to be comprehensive and must be formulated in language that, although concise, is adequately clear to allow the concerned parties to fully comprehend the conduct contested by the Commission (Joined Cases T-5/00, 2003:para 33; Joined Cases C-89/85, 1993:para 42). The fundamental purpose of a Statement of Objections is to ensure that the European Commission furnishes the involved undertakings with all the requisite information to

mount an effective defense and offer their input on the accusations levelled against them. As a result, the Commission is obligated to disclose to the concerned undertakings all the facts and documents that it intends to use in its final decision, regardless of whether these are already known to the involved undertaking(s) (Case 85/76, 1979:paras 9,11; Case T-7/89, 1991:para 53). For instance, in the case of “*Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v Commission*”, the Commission’s failure to notify the applicant that certain documents would be employed in the final decision hindered AEG from presenting its perspective on the evidential significance of these documents. The critical issue here is not solely the documents themselves, but rather the inferences and conclusions that the European Commission derives from them (Case 107/82, 1983:paras 26-27). The Commission is under a legal obligation to provide the involved parties the right to a fair hearing (Lianos and Andreangeli, 2012:411).

## 2.2 Analysis of the Legal Provisions and Relevant Case Law

When the CCP receives a complaint alleging anti-competitive behavior, it initiates a preliminary fact-finding inquiry or investigation, and when it deems it has adequate grounds to substantiate a potential infringement, it commences formal proceedings (CA, 2010: § 30). The CCP has the authority to issue a “Show Cause Notice” to the parties in question, outlining the rationale behind its issuance (General Enforcement Regulations, 2007:Regulation 22 (1)). The CCP can also start an investigation and issue a Show Cause Notice on its own motion.

The first step following the submission of a complaint is to initiate an inquiry. Nevertheless, if the CCP determines that the information available in the records is satisfactory to establish that a contravention of any provision in “Chapter II of the CA 2010” has occurred or is likely to occur, it has the authority to issue a “Show Cause Notice” without the necessity of conducting an inquiry (General Enforcement Regulations, 2007:Regulation 22 (2)).

During the inquiry stage, the involved undertakings are not participants. In “*LPG Association of Pakistan Jamshoro Joint Venture Ltd*”, the CCP clarified that the CA 2010 and General Enforcement Regulations 2007 explicitly state that there is no obligatory legal requirement for the CCP “to engage the concerned undertakings’ in the inquiry stage by issuing a notice or conducting a hearing at this point”. Regulation 16 of the General Enforcement Regulations 2007 provides the CCP with the authority to initiate an inquiry, among other methods, either *suo moto* (on its own initiative) or in response to a complaint. It specifies that when responding to a complaint, the criterion is that the available facts seem to indicate a “violation of the provisions outlined in Chapter II of the CA 2010”. As a result, there is no obligation for a notice or a hearing at this stage of the inquiry.

The CCP addressed the query concerning whether the procedures leading up to the issuance of a “Show Cause Notice”, such as conducting an inquiry, necessitate adherence to the principles of natural justice. In this context, the CCP cited a Supreme Court of Pakistan ruling which determined that “the rules of natural justice are not fixed in an inflexible mould, and that, depending on the particulars and conditions of each case, there is no obligatory demand for natural justice, whereby the other party must be notified before initial measures are initiated”. The Supreme Court concluded that it may be adequate to afford a person a “reasonable opportunity for a hearing before an adverse action or decision is made against them” (Commissioner of Income Tax Case, 2006 PTD 2502). According to a recent decision by the Supreme Court of Pakistan, the CCP is not obligated to provide “detailed reasoning to an undertaking when initiating an inquiry or to issue a reasoned order” in this regard (CCP-Press Release, 2023). After the Enquiry Officer completes and submits the inquiry report to the CCP, the subsequent stage involves granting the concerned parties an opportunity to be heard.

A similar procedure is outlined in the competition rules of the EU. All complaints undergo an initial assessment, and subsequently, proceedings are initiated if the European Commission is convinced that there are sufficient grounds to establish a violation (Regulation 773, 2004: Art: 2). According to Article 2 (2) of Regulation 773/2004, the Commission may publicly announce the commencement of proceedings through any means it deems appropriate. Typically, the Commission announces that it has initiated “proceedings” on the website of its “Directorate-General for Competition and releases a press statement”, unless such publication could negatively impact the ongoing investigation. The initiation of proceedings signifies that “DG Competition” will give higher priority to the case but does not imply the existence of an infringement in any manner. In cartel cases, typically, proceedings are initiated at the same time as the issuance of a Statement of Objections, although this may occur earlier in some instances (Notice for the conduct of proceedings, 2011:point 24).

The “Statement of Objections” encompasses the accusations against the involved parties, the underlying reasons for these allegations, and the measures that the European Commission intends to take, such as imposing fines. It also includes a specified timeframe during which the parties are permitted to submit their written responses to the Commission. The “Statement of Objections” is required to provide a clear delineation of the factual basis on which the Commission relies, its categorization of these facts, and a legal evaluation of the facts related to each undertaking. This ensures that the concerned undertakings are afforded the opportunity to contest the legal conclusions pertaining to the purported infringement (Case C-62/86, 1991:para 29; Joined Cases T-10/92 R, 1992). Nonetheless, in the case of “*Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association* (Impala)”, it was made clear that the Commission is not compelled to uphold the factual or legal evaluations presented in that document and provide justifications for any disparities in comparison to its provisional assessments outlined in a Statement of Objections (Case C-413/06 P, 2008:paras 64-65, 71). Instead, it is required to furnish, as the basis for its final decision, its ultimate assessments derived from the conditions prevailing at the time when the formal proceedings conclude. The Court of Justice, in the case of “*SGL Carbon AG v Commission*”, established that the provisional nature of the statement of objections is inherent, and it is susceptible to modifications by the Commission as part of its subsequent assessment, which takes into account the parties’ observations and further factual discoveries (Case C-328/05 P, 2007:para 62; Ezrachi, 2012:301; Giannakopoulos, 2011: 304). The Commission bears the obligation to delineate crucial factual and legal elements that may warrant the imposition of fines, a process integral to ensuring transparency and fairness in enforcement actions. This necessitates a detailed assessment of factors such as the “duration and seriousness of the infringement,” shedding light on the gravity of the violation. Additionally, the Commission is tasked with determining whether the infringement occurred “intentionally or negligently,” a distinction that holds significance in shaping the nature and extent of penalties. By explicitly specifying these key elements, the Commission not only fulfills its commitment to transparency but also provides clarity to the parties involved, facilitating a comprehensive understanding of the grounds on which fines may be imposed. This approach not only aligns with the principles of due process but also contributes to the overall effectiveness and credibility of the enforcement process (Case 322/81, 1983:para 19; Case C-289/04P, 2006:para 69). Furthermore, it should clearly identify that certain facts may potentially lead to the “aggravation of circumstances”, and, to the extent feasible, to the alleviation of circumstances.

The EU and Pakistani competition jurisdictions exhibit shared principles and procedures, demonstrating a convergence in their approach to addressing anti-competitive practices, as

outlined in the preceding discussion. Notably, both jurisdictions initiate preliminary investigations upon receiving complaints related to anti-competitive behavior. This process involves issuing a notice to inform the concerned parties about the allegations, the legal foundation of the charges, and the possible actions that may be taken. It is crucial to recognize that these notices are deemed “provisional,” indicating their openness to amendments contingent on subsequent assessments and the observations provided by the involved parties. The concerned parties are provided with an opportunity to be heard, allowing them to respond to the allegations and present their viewpoints. Both the European Commission and the CCP publicly announce the initiation of proceedings, usually on their websites and through press releases. This parallelism underscores a commitment to transparency, fairness, and due process in the enforcement of competition laws in both the EU and Pakistan.

However, there are also notable differences between them. For instance, in Pakistan, the CCP may initiate investigations *suo moto* (on its own motion), while the European Commission typically requires a complaint or a formal request to launch an investigation. The EU uses the term “Statement of Objections”, whereas Pakistan refers to a “Show Cause Notice”, though both serve similar purposes. In the EU, the opening of formal proceedings usually coincides with the issuance of a “Statement of Objections”. In contrast, Pakistan may issue a “Show Cause Notice” even before initiating formal proceedings. The European Commission’s Statement of Objections may contain both factual and legal assessments, whereas Pakistan’s Show Cause Notice primarily focuses on factual allegations, and legal assessments are typically reserved for the final decision stage. The EU explicitly mentions the possibility of aggravating and mitigating circumstances in the Statement of Objections, whereas Pakistan’s competition jurisdiction does not provide the same level of detail regarding these factors.

Overall, while there are commonalities in the basic investigative and procedural principles of competition law between the EU and Pakistan, differences exist in terms of the terminology used, the timing and methods of initiation, and the specifics of the legal assessments provided in the Statement of Objections/Show Cause Notice. These differences can be attributed to variations in legal frameworks and enforcement practices in the two jurisdictions

### **3. Access to the Competition Authority’s File**

#### **3.1 Purpose and Significance**

Access to the competition authority’s file is described as one of the “procedural safeguards” designed to uphold the “principle of ensuring a level playing field and safeguarding the rights of defense” (Notice on the rules for access to the Commission file, 2005:point 1). According to Jones and Sufrin, this access is a privilege granted to the parties to facilitate the effective exercise of their defense rights in response to the allegations put forth by the competition authority (Jones and Sufrin, 2014:1074). In the case of “*Air Inter SA v Commission*”, the Court elucidated that the fundamental principle of the “rights of the defense cannot be excluded or curtailed by any legislative provision”. Adherence to that principle must be guaranteed, regardless of “whether there is no specific legislation in place or if existing legislation does not inherently encompass that principle” (Case T-260/94, 2014:para 62).

### 3.2 Analysis of the Legal Provisions and Relevant Case Law

In Pakistan, Regulation 50A (1) of the General Enforcement Regulations 2007 offers a party involved in the proceedings the right, upon a written request, to review or acquire copies of the documents or records submitted during the proceedings. The CCP must, in granting this access, maintain the confidentiality standards stipulated in Regulation 48 of the General Enforcement Regulations 2007. Under Regulation 50A (2) of the General Enforcement Regulations 2007, the CCP has the authority to exercise its discretion in granting access to an individual who is not a party to the proceedings, permitting the inspection or copying of documents or records submitted during the proceedings. For such individuals, an application must be submitted, and there must be a valid reason provided for the request. The CCP, if it approves such access, allows individuals to inspect or obtain copies of the documents only under the supervision of an authorized officer and within the time limits specified (General Enforcement Regulations, 2007:Regulation 50A(3)).

The European Commission, in instituting a process for granting access to the file in competition cases, implemented rules that went beyond the standards set by the Court of Justice. As outlined in its “XIIth Competition Policy Report 1982”, the European Commission stated its intention to surpass the Court’s stipulated requirements and enhance the protection of defense rights during administrative procedures (Jones and Sufrin, 2014:970). The Commission explained that this:

*“... permits the undertakings involved in a procedure to inspect the file on the case. ... Undertakings are informed of the contents of the Commission’s file by means of an annex to the statement of objections or to the letter rejecting a complaint, listing all the documents in the file and indicating documents or parts thereof to which they may have access. They are invited to come and consult these documents on the Commission’s premises. If an undertaking wishes to examine only a few of them the Commission may forward copies. However, the Commission regards the documents listed below as confidential and accordingly inaccessible to the undertaking concerned: (i) documents or parts thereof containing other undertakings’ business secrets; (ii) internal Commission documents, such as notes, drafts or other working papers; (iii) any other confidential information, such as documents enabling complainants to be identified where they wish to remain anonymous, and information disclosed to the Commission subject to an obligation of confidentiality”. (XIIth Report on Competition Policy, 1983:paras 34-35)*

In “*Commission v Council*”, the Court ruled that the Commission is not permitted to deviate from self-imposed rules (Case 81/72, 1973:para 9). In “*SA Hercules Chemicals NV v Commission*”, it reiterated that the Commission is obligated to provide the involved undertakings with access to all documents, regardless of their favorability, acquired during the investigation, except in instances involving “the trade secrets of other undertakings, the Commission’s internal documents, or other confidential information” (Case T-7/89, 1991:para 54).

The right of the parties to have access to the file is enshrined in Article 27(1) and (2) of Regulation 1/2003, as well as in Article 15 of Regulation 773/2004. The Commission Notice, originally issued in 2005 and subsequently amended in 2015, elucidates the guidelines governing access to the file and the handling of sensitive information (Amendments to the Notice on the rules for access to the Commission file, 2015). This Notice also provides clarification regarding the eligible individuals who can access the case files. The phrase “access to the file” signifies the access granted to individuals, undertakings, or associations of undertakings to whom the Commission issues a

Statement of Objections. Regulations 1/2003 and 773/2004 utilize the term “access to the file” concerning complainants or other parties involved in the proceedings (Fatima, 2023:261-262).

The Commission permits the parties, upon their request, to examine the contents of the investigative dossier (Regulation 1, 2003:Art: 27(2), read with Regulation 773, 2004:Art: 15; Notice on the rules for access to the Commission file, 2005:points 26-27)). This file encompasses all documents acquired, generated, or compiled by the “Commissions Directorate-General for Competition” throughout the course of the investigation (Antitrust Manual of Procedures, 2012; Amendments to the Notice on the rules for access to the Commission file, 2015). In “*Solvay SA v Commission*”, the General Court established the “fundamental principle of equal treatment”, signifying that in a competition case, the understanding and information available to the undertaking under investigation concerning the case file should be “on par with that of the Commission” (Case T-30/91, 1995:para 83). This implies that it is impermissible for the Commission to possess specific documents when making a decision on an infringement and unilaterally determine whether or not to employ those documents against the undertaking, especially when the undertaking lacked access to those materials and was thus incapable of making an informed choice regarding their use in its defense (Case T-30/91, 1995:para 83). The Court emphasized that it is not within the Commission’s exclusive authority to determine which “documents are relevant for the purposes of the defense” (Case T-30/91, 1995:para 81).

Undertakings are required to submit a written request within five working days of receiving the Statement of Objections. This request is made to either “collect the CD-ROM/DVD at the DG COMP premises, receive the CD-ROM/DVD via registered mail with a delivery receipt, or access corporate statements in the event of leniency case” (Antitrust Manual of Procedures (Drafting of Statement of Objections), 2012:para 59; Regulation (EU) 1348, 2015). The parties do not possess the privilege of accessing the file before receiving the Commission’s Statement of Objections (Notice on the rules for access to the Commission file, 2005:point 26). Consequently, the Commission is authorized to decide on the mechanisms, taking into consideration the parties’ technical capabilities, by which the parties can gain access to the file. For example, the parties can gain access to the file through the utilization of a CD-ROM(s) or any other electronic data storage medium that may become accessible currently and in the future. They can also access the file through hard copies sent to them via postal mail or by inspecting the file at the Commission’s premises. The Commission has the discretion to select any combination of these methods (Notice on the rules for access to the Commission file, 2005:point 44). The Commission is not obligated to offer translations of the documents in the file; thus, they are accessible in their original language (Joined Cases T-25/95, 2000:para635). Documents acquired via access to the file under Regulation 773/2004 are solely to be employed for the objectives of legal or administrative proceedings relating to the enforcement of Article 101 TFEU (Regulation (EU) 1348, 2015:consideration 6). Should these documents be misused for other purposes, the Commission has the authority to bring the matter to the attention of the appropriate bar council for potential disciplinary measures (Amendments to the Notice on the rules for access to the Commission file, 2015:point 48). Upon utilizing the right to access the file, if a party deems it essential to have access to particular information that is not accessible, they can submit a well-founded request to the Commission. If the request is declined, and the party disagrees with the decision, the matter will be adjudicated by the “Hearing Officer” (Decision of the President of the European Commission regarding hearing officer, 2011:Art: 8).

Both the EU and Pakistan competition jurisdictions share similarities and differences regarding the right to access the competition authority's file. For instance, in both jurisdictions, parties

involved in competition proceedings have the right to access the competition authority's file, which contains relevant documents and information. Both jurisdictions establish conditions and procedures for accessing the file, including the requirement for a written request. Time limits for making requests to access the file are present in both jurisdictions. The primary purpose of accessing the file is for the defense of the parties involved in the proceedings.

The legal frameworks governing access to the file differ between the EU and Pakistan. The EU has specific regulations and notices that provide guidance on this right, while Pakistan's regulations and principles are distinct. In the EU, access to the file is typically granted after the Commission issues a Statement of Objections, while in Pakistan, access to the file may be allowed even before the formal proceedings are initiated. The mechanisms for access differ. In the EU, the Commission specifies various methods, including CD-ROMs, paper copies, and on-site examination, while Pakistan's approach is not as detailed and requires further elaboration. The EU mentions access to corporate statements in leniency cases, while this specific provision is still not highlighted in the Pakistan context (Fatima, 2023). The EU mentions the potential for disciplinary action by the relevant bar council if information is misused, while nothing is explicitly mentioned in the Pakistan context. In the EU, the "Hearing Officer" plays a role in resolving disputes over access to non-accessible information, while Pakistan lacks such a forum.

In summary, while both the EU and Pakistan recognize the right to access the competition authority's file, there are variations in the legal framework, procedures, and specific mechanisms governing this right. The EU's approach is more detailed and regulated, while Pakistan provides a general overview of the principles involved. Additionally, there are differences in how the two jurisdictions handle issues such as consequences for the misuse of information.

#### **4. Right to the Oral Hearing and Written Statement**

##### **4.1 Analysis of the Legal Provisions**

When the CCP, based on an enquiry report, determines that a "contravention of Chapter II CA 2010" has occurred or is likely to occur, it provides notice to the parties who appear to be in violation of the pertinent legal provisions. This notice serves to inform them of its intent to issue an order under Section 31 CA 2010 (General Enforcement Regulations, 2007: Regulation 26 (1) (a)). In the notice, the CCP designates a date on which the parties in question may appear before the CCP. This provides them with the chance to be heard and to present relevant facts and materials in support of their arguments (General Enforcement Regulations, 2007: Regulation 26 (1) (b)). Regulation 26(2) of the General Enforcement Regulations 2007 specifies the procedure for convening a hearing. The CCP retains the authority to summon the Enquiry Officer to attend and take part in the hearing (General Enforcement Regulations, 2007: Regulation 26 (2) (c)). While the hearing is in progress, if any mutual agreement is reached or an undertaking is provided by the parties, it is documented and signed by an authorized representative from both parties (General Enforcement Regulations, 2007: Regulation 26 (3)).

A hearing is conducted according to the following procedure. The initial step entails the parties in question, who were issued the "Show Cause Notice for breaching the provisions of Chapter II of CA 2010", presenting their case before the CCP (General Enforcement Regulations, 2007: Regulation 26(2)(a)). The CCP requests the involved "parties or their duly authorized representatives" to furnish pertinent "oral and/or documentary evidence" that substantiates their position (General Enforcement Regulations, 2007: Regulation 26 (1) (a) (i)). The CCP holds the authority to specify the manner and type of evidence permissible in the proceedings conducted before it (General Enforcement Regulations, 2007: Regulation 26A (1)). This means that it may, for example, request the parties to present evidence through affidavits or through oral testimony



in the case (General Enforcement Regulations, 2007: Regulation 26A (3)). In cases where the CCP instructs the parties to present evidence through oral testimony, if it deems it necessary or advantageous, it provides an opportunity for the other party or parties to conduct cross-examination of the individual providing the testimony (General Enforcement Regulations, 2007: Regulation 26A (5)).

The CCP has the authority to instruct that the evidence presented by any of the parties be documented by an officer or a designated individual for this specific purpose. This documentation should adhere to the manner prescribed by the CCP, taking into consideration the requirement and practicality of the prescribed method (General Enforcement Regulations, 2007: Regulation 26A (6)). The CCP, exercising its discretionary powers, chooses to record the process of taking evidence using either a tape recorder or a video camera (General Enforcement Regulations, 2007: Regulation 26A (4)). The CCP is empowered to instruct the parties to submit written notes of their arguments or submissions on the matter (General Enforcement Regulations, 2007: Regulation 26A (7)). If the parties involved in the proceedings do not present any evidence, whether oral or written, before the CCP during the Section 30 proceedings of CA 2010, they are not eligible to introduce any additional evidence at a later stage (General Enforcement Regulations, 2007: Regulation 26B (1)). The CCP possesses discretionary powers outlined in Regulation 26B(1) of the General Enforcement Regulations of 2007. In certain situations, the CCP is permitted to introduce fresh evidence, additional documents, conduct examinations of witnesses, and accept affirmations. The discretionary power vested in the CCP provides it with the capability to strengthen the body of evidence and acquire relevant information, thereby facilitating a more exhaustive and all-encompassing assessment of matters related to competition under scrutiny. This discretionary authority is applied judiciously. Additionally, the CCP retains the flexibility to entertain additional evidence if a party had not been adequately granted the opportunity to present it in the initial phases of the proceedings as mentioned in Regulation 26B (1) of General Enforcement Regulations 2007. This flexibility in procedure ensures a fair and thorough examination of cases, reinforcing the CCP's commitment to due process and a comprehensive evaluation of competition-related matters. The undertakings under investigation are obligated to provide responses to the CCP, articulating justifications or defenses within a reasonable timeframe. This submission procedure facilitates a thorough and impartial scrutiny of the case, employing various approaches like written submissions, oral presentations, or a blend of both. Parties are afforded the flexibility to submit supporting documents personally or through authorized representatives to strengthen their positions. Crucially, representatives designated to appear before the CCP must possess a comprehensive understanding of all facets related to the facts and issues under consideration as per Regulation 26(2)(a)(ii) of the General Enforcement Regulations 2007. This procedural framework underscores the commitment to a fair, informed, and transparent evaluation, ensuring that entities subject to investigation have a fair opportunity to present their case comprehensively. It is essential that the designated representative holds the necessary authorization to make statements or offer commitments and must be authorized to respond to the CCP's inquiries in that particular case according to Regulation 26(2)(a)(ii) of the General Enforcement Regulations 2007. The hearing can be adjourned by the CCP if there is a valid reason, and this decision must be formally recorded in writing along with the reasons (General Enforcement Regulations, 2007: Regulation 26(2)(d)(i)). However, a hearing cannot be adjourned on more than two occasions, except in cases of truly extraordinary circumstances (General Enforcement Regulations, 2007: Regulation 26(2)(d)(i) proviso). These exceptional situations must be duly recorded (General Enforcement Regulations, 2007: Regulation 26(2)(d)(i) proviso). The CCP is empowered

to proceed with the proceedings if any involved party is absent and may issue *ex-parte* decisions when a party fails to appear, even after receiving a notice or acknowledging the scheduled date, including any rescheduled date following an adjournment (General Enforcement Regulations, 2007:Regulation 26(2)(e)).

In the European Union, in 1982, the European Commission created the Office of the “Hearing Officer” to ensure that parties could exercise their right to an oral hearing (Regulation 773, 2004:Art: 14; Lorenz, 2013:50; Van Bael, 2011:193). The “Hearing Officer” is responsible for organizing and overseeing the conduct of oral hearings (Regulation 773, 2004:Art: 14; Decision of the President of the European Commission regarding hearing officer, 2011; Lianos and Andreangeli, 2012:413). Moreover, as part of their right to a defense, the parties have the opportunity to present their counterarguments against the Commission’s allegations as outlined in the Statement of Objections. They can do so through a written response and during an oral hearing (Regulation 1, 2003:Art: 27(1), read with Regulation 773, 2004:Art: 12; Hofmann, Rowe and Türk, 2011:381). Hence, the primary objective of the “Statement of Objections”, as mentioned earlier, is to notify the parties involved about the objections raised against them. This notification is intended to empower them to assert their defense rights through written responses and oral presentations during a hearing. Article 12 of Regulation 733/2004 mandates the Commission to grant the parties who have received a “Statement of Objections” an opportunity to articulate their arguments at an oral hearing if they make such a request within the stipulated time frame for submitting their written responses (Guidance on procedures of the Hearing Officers, 2010:point 39). The “Hearing Officer” is responsible for overseeing the hearing, including scheduling the specific date(s), duration, and location in consultation with the Director in charge (Regulation 773, 2004:Art: 14(1)(2); Decision of the President of the European Commission regarding hearing officer, 2011:Art:12(1); Lianos and Andreangeli, 2012:416).

Oral hearings are not open to the public. Each individual may be heard individually or in the presence of other invited attendees, taking into consideration the legitimate interests of the undertakings in safeguarding their “business secrets and other confidential information” (Regulation 773, 2004:Art: 14(6)). Flattery suggests that this is the Commission’s endeavor to maintain fairness in the procedure by curtailing “opportunistic behaviour”. She defines “opportunism” as the situation where undertakings attempt to exploit their participation in a hearing to “gain insights into the commercial strategies of their competitors” (Flattery, 2010:66).

The statements delivered by each individual who participated in the hearing are documented and, if requested, provided to those who were present at the hearing. Nevertheless, it is essential to consider the legitimate interests of the parties in safeguarding their “business secrets and other confidential information” (Regulation 773, 2004:Art: 14(8)). If necessary, to uphold the right to be heard, the “Hearing Officer”, in consultation with the Director in charge, may grant the parties the chance to present additional written comments subsequent to the oral hearing. The “Hearing Officer” establishes a deadline by which these submissions should be filed. The Commission is not under an obligation to consider written comments received after the specified date (Decision of the President of the European Commission regarding hearing officer, 2011:Art 12(4)).

The “Hearing Officer” is required to present his preliminary report to the “appropriate Member of the Commission” regarding the hearing and the findings he has made concerning the adherence to the “effective exercise of procedural rights” (Decision of the President of the European Commission regarding hearing officer, 2011:Art 14(1)). A copy of this report must be provided to the “Director-General for Competition, the Director responsible, and other relevant services of the Commission”. Subsequently, the Commission, following the evaluation of the evidence and the

parties' submissions, formulates its conclusions. When the Commission identifies a breach of the EU competition rules, it formulates a preliminary draft decision. This draft outlines the violation discovered by the Commission and the actions it intends to pursue, which may include imposing penalties on each involved party. Nonetheless, prior to reaching a final decision, the Commission is obligated to consult with the "Advisory Committee on Restrictive Practices and Dominant Positions" (Regulation 1, 2003:Art: 14 (1)). The final decision is made by the "College of Commissioners" (TFEU:Art 245), based on the recommendation of the "Commissioner responsible for competition", and the parties concerned are notified accordingly.

Therefore, there are similarities between EU and Pakistan competition jurisdictions regarding the rights of parties to oral and written statements. For example, both the EU and Pakistan provide parties with the opportunity to present their arguments and evidence in both oral and written forms during competition investigations. In both jurisdictions, parties have the right to be heard and to defend themselves against allegations brought forward by the competition authority. The opportunity to present both oral and written statements aims to ensure a fair and transparent process while upholding the rights of the defense.

However, there are discernible distinctions between the competition jurisdictions of the EU and Pakistan in this regard. For instance, within the EU, the Commission has instituted the position of the "Hearing Officer" to oversee oral hearings and guarantee procedural fairness. Pakistan's competition framework does not possess a comparable institution. The competition rules in the EU encompass explicit provisions and regulations, particularly Regulation 1/2003 and Regulation 773/2004 that define the right to oral and written statements and the procedures for conducting hearings. In contrast, Pakistan's Competition Regulations 2007 lack sufficient detail regarding certain key elements. The procedures for conducting oral and written statements differ in their level of detail between the two jurisdictions, guided by their respective legal frameworks and regulations.

Hence, while both jurisdictions provide parties the right to present oral and written statements as an integral component of their defense in competition investigations, disparities exist in the institutional mechanisms, regulations, and modus operandi that oversee these rights in each jurisdiction.

### **5. The Right to be Heard in Competition Investigations in Pakistan: Challenges And Limitations**

In both jurisdictions, most complaints are subject to a preliminary evaluation. The European Commission can reject a complaint if it determines that there are insufficient grounds to pursue the complaint, considering the available information (Regulation 773, 2004:Art: 7; Lianos and Andreangeli, 2012:417). Complainants should be informed of the reasons for rejection and afforded an opportunity to express their viewpoint (Regulation 773, 2004:Art: 7; Fatima, 2023:260-263). Likewise, the CCP is empowered to reject a complaint based on the particular facts and circumstances of the case. This may happen when the complaint is considered "frivolous", "vexatious", unsupported by substantial evidence, or lacks any "*prima facie* evidence" (General Enforcement Regulations, 2007:Regulation 20 (1); Fatima, 2023:252). It is also important to highlight that CA 2010 does not contain explicit provisions that establish a specific time limit for initiating the procedure and rendering decisions based on the date when the CCP receives a complaint (Fatima, 2023:253). The European Commission strives to notify complainants of the action it intends to take on a complaint within a period of four months from the receipt of the complaint (Notice on the handling of complaints, 2004:point 61). The competition rules in the EU

also do not stipulate any particular timeframe within which the Commission must commence proceedings in order to reach decisions (Regulation 773, 2004:Art: 2). Article 2 of Regulation 773/2004 clarifies that “the Commission may decide to initiate proceedings with a view to adopting a decision pursuant to Chapter III of Regulation 1/2003 at any point in time, but no later than the date on which it issues a preliminary assessment as referred to in Article 9(1) of that Regulation or a “Statement of Objections”, or the date on which a notice pursuant to Article 27(4) of that Regulation is published, whichever is the earlier” (Regulation 773, 2004:Art: 2(1)). While there is no specific deadline mentioned for the Commission to commence proceedings leading to a decision, it is important to note that the EU is bound by principles of good governance. Article 2 of Regulation 773/2004 also indicates that the Commission can utilize its investigative powers as outlined in “Chapter V of Regulation 1/2003” before initiating proceedings (Regulation 773, 2004:Art: 2(3)).

Hence, in cases where the law does not specify time limits or deadlines for commencing and finalizing an investigation or rendering a decision, it can lead to uncertainty for the involved undertaking regarding the timing and nature of the anticipated decision by the authority. Moreover, the inclusion of time limits or deadlines serves to enhance clarity, predictability, and transparency in procedural matters. It is advisable that CA 2010 explicitly incorporates guidelines regarding time limits for determining the outcome of a complaint, commencing an investigation, and rendering a decision, rather than remaining silent on the matter.

When, following an enquiry, there exist adequate grounds to establish an infringement, the CCP in Pakistan and the European Commission in the EU release a “Show Cause Notice” and a “Statement of Objections”, respectively. A parallel can be drawn between the “Show Cause Notice” issued by the CCP and the “Statement of Objections” issued by the European Commission. Both documents are designed to notify the parties under investigation about the objections raised against them. Consequently, both play a pivotal role as a fundamental procedural safeguard to uphold the right to be heard in all proceedings. To enhance the transparency of the proceedings, both the European Commission and the CCP typically follow a general practice of issuing a press release that outlines the principal issues contained in a “Statement of Objections” and a “Show Cause Notice”, respectively.

Within the European Union, the right to access the Commission’s file is stipulated in Article 27(2) of Regulation 1/2003 and Articles 15 and 16 of Regulation 773/2004. This right allows the recipients of a “Statement of Objections” to examine the Commission’s file, thereby enhancing their capacity to present their viewpoints effectively concerning the Commission’s initial findings as detailed in the “Statement of Objections”. Detailed guidelines regarding the procedural right to access the file, encompassing comprehensive information on the types of accessible documents and confidentiality-related matters, are explained in a Commission Notice that addresses the rules governing access to the Commission’s file. It is important to emphasize that this Notice does not prevent the interpretation of these provisions by the EU Courts. Moreover, it should be acknowledged that using documents for purposes other than judicial or administrative proceedings may entail certain legal consequences. In Pakistan, the rules related to the procedural right of accessing the CCP’s file and the treatment of confidential information are explained. However, it should be noted that certain aspects are not covered in the General Enforcement Regulations of 2007. These regulations provide clear guidance on the individuals or entities eligible to access the CCP’s file. However, they do not explicitly outline the potential repercussions in the event of the misuse of documents obtained through access to the file. It is worth noting that access to the file

at the CCP's premises is granted under the vigilant oversight of an authorized officer. This ensures that the process remains controlled and that sensitive information is handled appropriately.

It is advisable for the CCP to establish a set of guidelines that furnish a framework for the exercise of the parties' right to defense as stipulated in CA 2010 and the General Enforcement Regulations of 2007. This can help provide clarity and consistency in the application of these rules and procedures. Implementing such guidelines would promote objectivity and ensure that all parties involved have an equal footing in competition proceedings. It is highly recommended that appellate bodies in Pakistan interpret the provisions regarding the right to a defense, ultimately enhancing predictability and fairness within the proceedings.

In the EU, Article 27(1) of Regulation 1/2003 highlights the importance of providing the undertakings concerned with an opportunity to respond to the Commission's allegations of anti-competitive conduct. Regulation 773/2004, as well as the "Notice on access to the Commission file", provide further guidance on the scope of this right. The Notice serves a dual purpose: it not only elucidates the fundamental principles governing access to the file but also delineates the protocols for handling confidential information. To enhance transparency and predictability in EU competition proceedings, the "Guidelines on the procedures of the Hearing Officer" and the "Commission Notice on best practices for conducting competition proceedings" were introduced in 2011. Therefore, in the EU, these initiatives aimed at safeguarding due process demonstrate the European Commission's commitment to enhancing the assurances of fair procedures.

Regulation 26 of the General Enforcement Regulations 2007 explains the procedure for conducting hearings once the Enquiry Officer submits the Enquiry Report to the CCP. It is recommended to set up an independent body, similar to the "Hearing Officer" Office in the European Commission, to guarantee the fair implementation of the right to be heard for parties participating in proceedings before the CCP. This institution would additionally function as a mechanism for addressing disputes related to this right. This initiative would contribute to improving the transparency and fairness of competition proceedings in Pakistan. It is advisable for the CCP to consider alternatives like enabling access to the file through electronic data storage devices and dispatching paper copies by mail.

Improving the efficiency and effectiveness of the administration of justice is vital for upholding the rights of all parties and strengthening the legal framework. Specific and comprehensive guidelines should be introduced to provide practical instructions for conducting proceedings before the CCP in accordance with the General Enforcement Regulations 2007. These guidelines should be designed to enhance the understanding of the CCP's investigative procedures and, consequently, improve the efficiency of investigations. Furthermore, these guidelines will contribute to increased transparency, improved clarity, and enhanced predictability in investigative processes. To develop these guidelines, the CCP should utilize its extensive experience in implementing CA 2010 and General Enforcement Regulations 2007. It is vital that these guidelines clearly express the CCP's perspective since the CCP's existing guidelines are too vague and devoid of practical particulars (CCP, Guidelines on Conduct of Proceedings).

## 6. Conclusion

The right to be heard is a cornerstone of fair competition investigations. While Pakistan's competition jurisdiction recognizes the significance of this fundamental right, it encounters specific challenges and limitations in ensuring its effective implementation. Pakistan can draw valuable lessons from experienced jurisdictions like the EU to enhance its investigative procedures and the rights of the parties involved. Within the EU, the European Commission has put forth

substantial efforts in crafting well-defined procedures, encompassing the issuance of Statements of Objections and granting access to the Commission's file. These measures are aimed at ensuring a transparent and fair process for parties undergoing investigation. Nonetheless, the system is not devoid of intricacies, and preserving "confidentiality" and safeguarding "business secrets" continue to be pivotal aspects. In Pakistan, the Competition Commission of Pakistan is progressively harmonizing its practices with EU standards, although there is still potential for improvement. The absence of comprehensive guidelines and the lack of an independent forum to resolve disputes related to the right to be heard are the reasons for the prevailing uncertainties in the process. To effectively safeguard the right to be heard, it is advisable for the CCP to issue comprehensive guidelines that offer practical instructions for conducting investigations. Furthermore, establishing an independent body similar to the EU's "Hearing Officer" would improve the administration of this right and foster fairness and transparency in proceedings. Overall, it is imperative to address these challenges and limitations to uphold the right to be heard in Pakistan's competition regime, ultimately promoting fair and effective enforcement of competition law.

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