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Anti-competitive Agreements and Interpretive Strategies in India and Pakistan

5.1 INTRODUCTION

The manner in which the CCI and CCP have interpreted the provisions of the Indian and Pakistani competition legislations in the first ten years of their operations is related to the compatibility and legitimacy generated for the legislations at the adoption stage. The greater compatibility and legitimacy generated for the Indian Act at the adoption stage allowed the CCI to rely on foreign precedents only when the legal questions involved in the case specifically required it to do so. However, the relatively weaker compatibility and legitimacy of the Pakistani Act, appeared to constrain the CCP to repeatedly invoke the close links between the Pakistani competition legislation and the EU and US competition models. Therefore, the interpretive strategies adopted by the CCI and CCP not only reflect the choice of strategy and interplay of institutions at the adoption stage but also play an important role in charting the enforcement trajectory of the competition legislations at the implementation stage.

To understand interpretive strategies employed by the CCI and CCP and their impact on the enforcement of the Indian and Pakistani competition legislations, this chapter examines the manner in which the CCI and CCP have interpreted the analytical tests for establishing anti-competitive agreements prescribed in their respective competition legislations. Given that these tests are embedded in the Indian and Pakistani legislations they have been shaped by the same transfer mechanisms and institutions that have shaped the legislations as a whole at the adoption stage. These tests also form the starting point for the CCI and CCP's assessment of anti-competitive agreements at the implementation stage. Therefore, an evaluation of the CCI and CCP's interpretation of these analytical tests not only helps understand thecompetition enforcement trajectory in India and Pakistan but also elaborates the links between the adoption and implementation stages of their respective competition legislations.

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To this end Section 5.2 sets out the tests for anti-competitive agreements as provided in the Indian and Pakistani competition legislations and identifies aspects of these tests that reflect the influence of relevant provisions in the EU and US competition or antitrust legislation; Section 5.3 reviews and compares selected decisions of the CCI and CCP in respect of horizontal anti-competitive agreements (including cartels) while Section 5.4 focuses on vertical agreements. Finally, Section 5.5 explores the links, if any, between the CCI and CCP's interpretive strategies and the transfer mechanisms and institutions engaged by the countries at the adoption stage.

5.2 ESTABLISHING ANTI-COMPETITIVE AGREEMENTS IN INDIA AND PAKISTAN

The tests for establishing anti-competitive agreements provided in the Indian and Pakistani competition legislations are derived from the foreign models which have been adapted for the Indian and Pakistani contexts to varying degrees through the transfer mechanisms and institutions employed by the countries at the adoption stage. This section examines and compares these analytical tests in light of their international antecedents.

5.2.1 *The Test for Anti-competitive Agreements in the Indian Act*

Although the Indian Act does not define anti-competitive agreements, it states in section 3 that these include 'cartels'[1] as well as any other agreements, practices, or decisions[2] in respect of the 'production, supply, distribution, storage, acquisition or control of goods or provision of services' in India, that cause or are likely to cause an appreciable adverse effect on competition (AAEC) within India.[3] The Act prohibits 'enterprises', 'associations of enterprises', 'persons' or 'associations of persons' from entering into such agreements[4] and declares these to be automatically void.[5] Section 3(3) lists agreements or decisions that are *presumed* to have an AAEC including agreements or decisions to fix prices, limit or control production, divide markets, or enable bid-rigging, while section 3(4) enumerates agreements whose anti-competitive effect needs to be established by the CCI. These include tie-in arrangements, exclusive supply agreements, exclusive distribution agreements, refusals to

[1] Indian Act section 2(c).
[2] ibid section 3(3).
[3] ibid section 3(1).
[4] ibid.
[5] ibid section 3(2).

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deal, and agreements for resale price maintenance.[6] In terms of section 3(5) agreements that restrict the infringement of, or place reasonable restrictions for protecting rights granted under legislations listed in the sub-section are exempted from the operation of the section.[7]

Section 3 of the Indian Act is reminiscent of both section 1 of the Sherman Act 1890 and Article 101 of the Treaty of Functioning of Europe (TFEU). In assuming jurisdiction over all agreements that have or are likely to have AAEC in India and declaring them to be automatically void, section 3(1) echoes section 1 of the Sherman Act as well as Article 101(1) and 101(2) TFEU. However, in stipulating a requirement of 'appreciable' adverse effect on competition, the section reflects the EU's Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the TFEU [2014] OJ C291/01 (the De Minimus notice), albeit, without providing comparable guidance for assessing appreciability.[8] Section 3 may equally be said to be a version of the US formula of 'substantial lessening of competition' employed in rule of reason analysis, which leaves it to the enforcement authorities to specify the necessary thresholds.[9]

The closed list of *presumed* anti-competitive practices enumerated in section 3(3)[10] is reminiscent of both the US per se rule and the 'by object' restriction stipulated in Article 101(1) TFEU.[11] To the extent that section 3(3) of the Act raises a *presumption* of anti-competitiveness in respect of certain agreements, it appears to be more in consonance with the scheme of Article 101 TFEU than with the per se rule, in that even though it does not specify whether the presumption is rebuttable, or list the pro-competitive factors that may be taken into account in rebutting the presumption[12] it provides an opportunity for arguments in rebuttal rather than

[6] In terms of the proviso to the section, joint ventures that increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services are exempted from the section.

[7] The laws listed in section 3(5) relate to intellectual property and include the Indian Copyright Act 1957, Patents Act 1970, Trade and Merchandise Marks Act 1958, Trademarks Act 1999, Geographical Indications of Goods Act 1999, Designs Act 2000, and the Semi-conductor Integrated Circuits Layout-Design Act 2000.

[8] In its *De Minimis* notice – Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (2014/C 291/01) – the EU Commission exempts agreements from the application of Article 101 if the market shares of the parties to the agreements meet the thresholds provided in the Notice.

[9] Clayton Act, ch 323, 38 Stat 730 (1914) (codified as amended at 15 USC §§ 12, 13, 14–19, 21, 22–27 (2012)). id § 13 (price discrimination); id § 14 (tying and exclusive dealing); id § 18 (mergers).

[10] Indian Act sections 3(3)(a) to (c).

[11] Indian Act sections 3(3)(a) to (c) closely resemble Article 101(1)(a) to (c). Herbert J Hovenkamp, 'The Rule of Reason' (2018) 70 Florida Law Review 81, 98.

[12] Although section 3(3) does not explicitly state this, the term 'presumption' suggests that if an agreement falls within the ambit of section 3(3), the burden of proof shifts to the defendant to prove that the agreement does not have AAEC in India.

outright declaring certain practices or agreements to be anti-competitive.[13] On the other hand, the requirement of establishing AAEC in respect of the non-exhaustive list of practices provided under section 3(4)[14] requires the balancing of anti-competitive and pro-competitive factors listed in section 19(3) of the Act, and appears to be in line with a US rule of reason analysis rather than the two-step analysis envisaged in Article 101 TFEU. Interestingly, however, the factors listed in section 19(3) closely resemble the conditions prescribed in Article 101(3) TFEU, although unlike Article 101(3), sections 3(4) or 19(3) of the Indian Act do not require the factors listed therein to be considered cumulatively.

The distinctive tests provided for anti-competitive agreements in sections 3(3) and 3(4) reflect the Act's differential treatment of horizontal agreements, that are presumed to be anti-competitive, and vertical agreements whose AAEC must be established. The Act's stance towards vertical agreements appears to be largely in consonance with the US and the EU approach traditional view of vertical agreements as only rarely anti-competitive.[15] The distinction between horizontal and vertical agreements is somewhat blurred in case of joint ventures which demonstrate specific pro-competitive effects. In terms of the proviso to section 3(3) these joint ventures may not be *presumed* to be anti-competitive but may be evaluated for AAEC. In doing so the Indian Act treats joint ventures more like section 3(4) vertical agreements distinct from other horizontal agreements under the Act. The distinctions are further confused by section 3(5) which while exempting from the application of the section, agreements placing 'reasonable' restrictions for the protection of rights under specific statutes listed in the section,[16] does not specify how reasonableness may be analysed or measured.

5.2.2 *Establishing Anti-competitive Agreements under Pakistani Competition Legislation*

The test for anti-competitive agreements under the Pakistani Act (and in the Ordinances preceding it) is spread over four sections: section 4 which stipulates the violation, and sections 5, 7, and 9 which provide for individual and block exemptions from the application of section 4. Section 4(1) defines the types of agreements and decisions that are considered anti-competitive under the Act; section 4(2) provides a non-exhaustive list of potentially anti-competitive agreements;[17] and section 4(3) declares that any agreement found to be anti-competitive

[13] Although section 3(3) does not explicitly state this, the term 'presumption' suggests that if an agreement falls within the ambit of section 3(3), the burden of proof shifts to the defendant to prove that the agreement does not in fact have AAEC in India. It is not clear, however, what factors the defendant may press in order to successfully rebut this presumption.

[14] Indian Act section 3(4)(a) to (e).

[15] See Hovenkamp (n.11) section IV and EU Commission Regulation No 330/2010.

[16] See n.7.

[17] These practices include price fixing, market partitioning, limiting quality or innovation, and collusive bidding.

under section 4(1) shall be automatically void. Section 5 allows for the possibility of individual exemptions while section 9 stipulates the criteria that an agreement or practice must fulfil in order to avail of the exemption. Section 7 enables the CCP to grant block exemptions on such terms as it may deem fit, however, unlike individual exemptions which may be obtained in respect of agreements already entered into, block exemptions may be granted prospectively if the CCP believes that a certain category of agreements or practices *are likely to* meet the criteria stipulated in section 9.[18]

These provisions of the Pakistani Act locate it squarely within the tradition and terminology of Article 101 TFEU. In prohibiting agreements that have the 'object or effect of preventing, restricting or reducing competition within the relevant market' section 4(1) replicates the language of Article 101 TFEU'; the categories of agreements listed in section 4(2) is nearly identical to the those referred to in Article 101(1) TFEU; and the criteria for exemptions provided in section 9 is comparable to that provided in Article 101(3) TFEU. Further, section 4(1), like Article 101(1) TFEU, does not distinguish between horizontal and vertical agreements; and section 4(2), declares that agreements entered into in violation of section 4 to be void just as Article 101(2) TFEU voids anti-competitive agreements under Article 101(1).

The CCP's power and discretion to grant block exemptions under section 7 of the Act appears to be in accordance with the EU's power to grant block exemptions.[19] However, section 9 which lists the conditions that must be fulfilled for block or individual exemptions is distinct form Article 101(3) in important respects. For instance, it does not require the conditions for an exemption to be established cumulatively and in fact introduces a balancing dimension[20] which is more reminiscent of the US rule of reason approach than of EU competition law.[21] In respect of individual exemptions, section 9 also does not clarify whether the exemption may be granted in independent proceedings that may be initiated by the party seeking the

[18] Pakistani Act section 7(1). In terms of section 8(1)(b) it is incumbent upon the CCP to engage the public before granting any such exemption.

[19] The EU Commission has issued a number of block exemptions in respect of horizontal and vertical agreements. See for instance, in respect of horizontal agreements, Commission Regulation (EU) No 1217/2010 of 14.12.2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements and Commission Regulation (EU) No 1218/2010 of 14.12.2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialisation agreements, and in respect of vertical agreements, Commission Regulation (EU) No 330/2010 of 20.04.2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices and Commission Regulation (EU) No 461/2010 of 27.05. 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector.

[20] Pakistani Act section 9(1)(c).

[21] Michael A Carrier 'The Four-Step Rule of Reason' (Spring 2019) 33(2) Antitrust 51; Phillip E Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (2nd edn 2003) 1507(C), 385–86.

exemption, or whether an exemption application may be made in the course of a hearing under section 4.[22]

5.2.3 *How the Adoption Processes shaped the Tests for Anti-competitive Agreements*

The test for establishing anti-competitive agreements as provided in section 3 of the Indian Act combines, re-organises, and re-casts the tests for establishing anti-competitive agreements provided in the US and EU antitrust and competition laws. This suggests that rather than simply reproducing the best available, most authoritative international formula, India chose to study and adapt several authoritative formulas for the purposes of the Indian economy. This '*Indianisation*' of the test for anti-competitive agreements reflects India's dominant strategy of *socialisation*,[23] and its preference for 'learning', from the experience of countries where these competition principles had originated, even though the learning was bounded rather than rational, and did not result in the clearest possible articulation of the test for the Indian context.

The strong similarity between the scheme for evaluating and assessing anti-competitive agreements prescribed in the Pakistani Act and Article 101 TFEU, bears the unmistakable stamp of Pakistan's dominant transfer strategy of *coercion*.[24] Pakistan adopted its competition legislation at the recommendation of multi-lateral agencies and with their assistance – the government of Pakistan had initially been convinced of the need to upgrade its anti-monopoly legislation on the sidelines of the WTO Ministerial Conferences; the deliberation phase for the competition law had been spearheaded and managed by a team led by the World Bank, and the legislation itself was drafted by the Brussels-based law firm of Jones Day.[25] Given the high degree of similarity between the scheme for establishing anti-competitive agreements in the Pakistani Act and the EU competition law, suggests that Pakistan adopted the analytical test for anti-competitive agreements perhaps without fully understanding its import or how it works and without sufficient independent application of mind, or an attempt to learn from the model on which the test was based.

The fact that despite the difference in the dominant transfer strategies adopted by India and Pakistan, the tests for establishing anti-competitive agreements provided in their respective competition legislations are substantially and essentially similar, suggests that when it came to provisions relating to the mandate of the CCI and

[22] If exemptions can only be obtained in independent proceedings, then the scheme of section 4 read with section 9 departs from that of Article 101 in terms of which the defendant is required to establish the pro-competitive effects as part of the proceedings under Article 101(1).

[23] See Chapter 3.

[24] ibid.

[25] ibid.

the CCP, both countries opted for *emulation*. However, while India Indianised the language in which the test is stated, Pakistan reproduced it verbatim.[26]

The similarlity between the Indian and Pakistani tests for anti-competiive agreements also means that it is also makes it possible to compare the interpretation of these tests to understand whether the mechanisms of *socialisation-emulation* and *coercive-emulation* employed by India and Pakistan in adopting these tests continue to shape their interpretation at the implementation stage. Arguably, if the influence of the mechanisms and strategies employed at the adoption stage persists through to the implementation stage then, in the case of India, the CCI may be expected to adapt and *Indianise* foreign precedents for the Indian context and thereby continue to enhance the compatibility and legitiamcy of the competition legislation, while the CCP may be expected to rely upon EU decisions and materials in interpreting the analytical tests without adequately adapting these for the Pakistani context and in doing so, widening the gap between the adopted competitiion legislsation and the context for which it is intended.

5.3 CARTELS AND OTHER HORIZONTALS: THE FIRST DECADE OF THE CCI AND CCP

In the first ten years of their operations, both the CCI and CCP have focused more on cartels than any other type of anti-competitive practice. However, while the Indian Act *presumes* the AAEC of a cartel, the Pakistani Act leaves it to the CCP to decide whether a cartel is anti-competitive or not. This section examines selected decisions of the CCI and CCP in respect of different types of cartels, to understand how the authorities have interpreted and applied the relevant provisions of their Acts in this regard.[27]

5.3.1 *CCI and Agreements* Presumed *to Be Anti-competitive*

The questions, what is an agreement (for the purposes of section 3) and what does a 'presumption of AAEC' mean and entail are common to the CCI's orders relating to cartels, regardless of whether these are cartels for price fixing, limiting output, bid-rigging, and so on and underpin the review of the CCI's orders that follows.

5.3.1.1 The Confusion That Was the Indian Banking Association Case

The *Indian Banking Association* case was the CCI's first order in respect of any section 3 practice.[28] The issue before the CCI in this case was whether the banks' collective decision to impose a pre-payment penalty in respect of housing finance loans was anti-competitive. After reviewing the report of the DG and the evidence

[26] Ibid.

[27] This chapter only examines orders issued by the CCI under sections 26(6) and 27 of the Indian Act.

[28] *Neeraj Malhotra v Deustche Post Bank Home Finance Ltd & others* Case 5/2009 decided 02.12.2010. ('the *Indian Banking Association* case').

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provided by the parties the CCI came to the conclusion that the banks had neither entered into an agreement nor acted in concert.[29] The CCI nevertheless proceeded to examine 'whether this practice causes effects of the nature mentioned under clauses (a) to (d) of sub section (3) of section 3 of the Act' or any 'appreciable adverse effect on competition' in India,[30] and found that the banks had sufficient economic justification for imposing a pre-payment penalty and, therefore, were not in violation of the section 3 of the Act.

The CCI's analysis is interesting for several reasons: first, the CCI does not just focus on the existence or otherwise of an agreement among the banks but also on the state of competition in the banking and housing industry;[31] second, the CCI refers to anti-competitive practices listed in section 3(3)(a)–(d) as anticompetitive *effects* and fails to distinguish between practices that are *presumed* to be anti-competitive and those whose anti-competitive effects must be established by the CCI with reference to the factors listed in section 19(3); and finally, it is interesting that the CCI does not clarfiy whether the section 3(3) presumption is or the person or authority that bears the responsibility to displace it.

Two CCI members dissented from CCI's main order. One of these, Member Prasad, examined the context in which the banks were operating but concluded that the banks *agreeing* to impose pre-payment penalty was an anti-competitive agreement within the meaning of section 3 of the Act. However, his conclusion rested more on a concern about and understanding of consumer interest rather than an incisive analysis of the law.[32] The other dissenting member, Member Parashar, engaged in a more rigorous analysis of the banks' 'meetings', 'common approach', and 'common decision' to impose a pre-payment penalty and concluded that these acts constituted an agreement for price fixing and limiting and controlling the provisions of services, which are *presumed* to have AAEC within the meaning of section 3(3)(a) and 3(3)(b) of the Act.[33] He also analysed the meaning of the presumption with reference to the jurisprudence of the Indian Supreme Court and concluded that it was rebuttable[34] by the defendant with reference to the factors listed in section 19(3).[35] Although member Parashar referred to both EU and US jurisprudence in arriving at his conclusion, the language he used was more closely aligned with that of US anti-trust.

5.3.1.2 An 'Agreement' Under the Indian Act

The term 'agreement' as defined in section 2(b) of the Act includes among others, understanding and arrangements whether formal or informal and whether or not

[29] ibid para 17.
[30] ibid para 18.
[31] ibid para 15.1.
[32] ibid R Prasad dissenting order.
[33] ibid para 84.
[34] ibid paras 96–97.
[35] In this case the member concluded that the defendants had failed to rebut the presumption.

legally executed. Further, in terms of section 3 such an agreement may be entered into by an enterprise or association of enterprises or person or association of persons.[36] Over the years, the CCI has issued several orders in which it has treated decisions and practices of trade associations as agreements. For instance, the CCI found the 'joint decision making' of the association of film producers and distributors (in the *Producers and Distributors Forum* case)[37] and of the members of the Tamil Nadu Film Exhibitors Association (in the *Tamil Nadu Film Association* case)[38] and of the members of the Indian Cement Association (in the *Cement Manufacturers Association* case)[39] to be agreements for the purposes of this section. In the *CDA Goa* case, the CCI held that since the trade association was taking decisions 'relating to distribution and supply of pharma products' on behalf of its members, its practices and decisions fell within the ambit of section 3;[40] and in the *Jute Mills Association* case, it held that the 'action in concert' of members of the Gunny Trade and Jute Mills Associations to 'determine and control prices' was tantamount to a 'tacit agreement' contrary to section 3.[41] In certain cases (the *Paper Merchants Association* case, for instance),[42] the CCI found that the byelaws of the trade association rather than its decisions or actions constituted an anti-competitive agreement.[43]

The CCI's approach towards finding an agreement in cases of collusive bidding or bid-rigging is different of necessity because these agreements do not ordinarily involve trade associations. For instance, in the *PES Installations* case, the CCI looked to circumstantial evidence to establish collusion among the parties and found that the 'identical typographical mistakes in price format' reflected 'mutual contribution' and 'meeting of minds' on the part of the bidders.[44] Similarly in the *Aluminium Phosphide* case, the CCI found that the fact that the bidders had quoted

[36] See Indian Act section 2(h) for definition of 'enterprise'.

[37] *FICCI v United Producers/Distributors Forum & others* Case 1/2009 decided 25.5.2011 ('*Producers and Distributors Forum* case') para 23.5.

[38] *Reliance Big Entertainment Limited v Tamil Nadu Film Exhibitors Association & others* Case 25/2010 decided 16.02.2012 ('the *Tamil Nadu Film Exhibitors Association* case'), para 41.

[39] *Builders Association of India v Cement Manufacturers Association & others* Case 29/2010 decided 20.06.2012 ('the *Cement Manufacturers Association* case'), paras 6.5.3, 6.5.4, 6.5.19, 6.5.38, 6.5.50.

[40] *Varca Druggist & Chemist and others v Chemists & Druggists Association Goa and others* MRTP Case No. C-127/2009/DGIR (4/28), decided 11.06.2012 ('the *CDA Goa* case'), para 27.12.

[41] *Indian Sugar Mills Association & Others v Indian Jute Mills Association & others* Case 38/2011 decided 03.04.2014 ('*Jute Mills Association* case'), para 165.

[42] *Vijay Gupta v Paper Merchants Association Delhi & others* Case 7/2010 decided 24.03.2011 ('*Paper Merchants Association* case'), para 4.7.

[43] In certain other cases, the CCI's assessment of what constitutes 'an agreement' remained limited, almost cursory. See for instance *Uniglobe Mod Travels Pvt Limited v Travel Agents Federation of India & others* Case 3/2009 decided 04.10.2011 ('*Travel Agents Federation of India* case'), paras 68.1.1, 68.1.2, 68.4.5.

[44] *A Foundation for Common Cause & People Awareness v PES Installations (Pvt) Limited* Case 43/2010 decided 16.4.2012 ('*the PES Installations* case'), paras 6.2, 6.45, 6.46.

identical rates despite very different manufacturing and transportation costs was evidence of co-ordinated behaviour contrary to section 3,[45] and in the *Orissa Concrete* case, the CCI accepted the DG's view that the quotation of similar rates, the use of the same handwriting to fill out all tender documents, combined with the failure of the parties to provide a reasonable justification for these, was sufficient proof of collusion on their part.[46]

5.3.1.3 Interpreting the Presumption of AAEC

Like the concept of agreement, the CCI's understanding of the presumption of AAEC – the stage at which it comes into play and whether and how it may be rebutted – has also evolved considerably over time. For instance, in the *Producers and Distributors* case the presumption was established once the CCI found that the parties were engaged in price fixing (by fixing the revenue ratio) and limiting and controlling production (by boycotting multiplexes).[47] The CCI claimed that the presumption was rebuttable (without providing a legal justification for the claim),[48] and indicated that the rebuttal would have to be made with reference to the 'factors of AAEC given in section 19(3)'.[49] Although the CCI suggested that the primary onus for the rebuttal was on the defendants[50] it took into account the DG's examination of section 19(3) factors[51] in concluding that the presumption had not been rebutted and the parties were, therefore, in contravention of section 3 of the Act.[52]

However, this clarity of analysis is not always evident in subsequent cases. In the *CDA Goa* case the CCI noted that once a violation of section 3(3) has been established, the presumption regarding AAEC is triggered and the onus shifts to the infringing party to rebut the presumption with reference to section 19(3) factors.[53] However, after noting that the defendants had failed to discharge the burden to rebut the presumption,[54] the CCI evaluated evidence brought by the DG, however, not to decide whether the presumption could be rebutted as in the *Producers and Distributors* case, but to support its finding of AAEC.[55]

[45] *Re Aluminum Phosphide Tablets Manufacturers* Suo motu Case 2/2011 decided 23.04.2012 ('the *Aluminum Phosphide* case'), paras 7.21, 7.22, 7.29, 7.32, 7.40.
[46] *Shri B.P Khare v Orissa Concrete and Allied Industries & others* Ref Case 5/2011 decided 21.02.2013 ('the *Orissa Concrete* case') para 34.
[47] *Producers and Distributors* case (n.37) para 23.9.
[48] ibid para 23.10.
[49] ibid.
[50] ibid paras 23.51, 23.53.
[51] ibid paras 23.54–23.57.
[52] ibid para 24.
[53] *CDA Goa* case (n.40), para 27.29.
[54] ibid.
[55] ibid para 27.31.

This confusion persisted in CCI's order in the *Travel Agents Association of India* case[56] and the *Cement Manufacturers Association* case[57] where after asserting the presumption and then rejecting the rebuttal offered by the defendants, the CCI examined section 19(3) factors not to investigate whether there was evidence of a rebuttal but to establish AAEC.

This apparent confusion regarding the nature of the presumption and the steps that the CCI took to establish AAEC in light of the presumption, gave way to a new clarity in the CCI's subsequent orders. For instance, in the *Jute Mills Association* case, the CCI observed that the argument that the CCI is required to establish AAEC for agreements falling within the ambit of section 3(3) 'is fallacious.'[58] It also referred to the defendants' attempt to shift the statutory burden of proof onto the CCI in this regard as 'wholly untenable'[59] and did not evaluate section 19(3) factors to conclude that the defendants had acted in contravention of section 3 of the Act.[60] CCI adopted a similar approach in the *Paper Merchants Association* case[61] and the *Tamil Nadu Film Exhibitors Association* case.[62]

In bid-rigging cases, the CCI's focus remained almost entirely on establishing collusion in bidding rather than on considering the presumption of AAEC. In the *PES Installations* case the CCI made no reference to the presumption of AAEC let alone to section 19(3) factors and the need for their evaluation.[63] In the *Aluminium Phosphide* case the defendants specifically raised the objection that the CCI had erred in failing to analyse section 19(3) factors.[64] However, the CCI rejected the objection on the basis that since a contravention of section 3(3)(b) and 3(3)(d) had been established, 'the AAEC [was] presumed per se' and the presumption could only be rebutted by the defendants' through 'cogent evidence'.[65] Interestingly, despite rejecting the legal requirement for doing so, the CCI still evaluated section 19(3) factors before concluding that the defendants had contravened section 3 of the Act.[66] The CCI followed a similar approach in the *Orissa Concrete* case.[67]

[56] *Travel Agents Federation of India* case (n.43) paras 68.2.1, 68.2.4, 68.2.5, 68.9.2.
[57] *Cement Manufacturers Association* case (n.39) paras 6.10.7, 6.10.8, 6.10.11.
[58] n.41 para 173.
[59] ibid.
[60] ibid. Regardless, however, the CCI noted the DG's evaluation of section 19(3) factors in this regard.
[61] n.42 para 4.10.
[62] n.38 para 45.
[63] n.44 paras 6.60–6.64.
[64] n.45 para 7.6.
[65] ibid para 7.42.
[66] ibid paras 7.43, 7.45.
[67] n.46 paras 35, 36, 38, 42.

5.3.2 *Interpretive Challenges for the CCP*

Like its Indian counterpart, the CCP has also tackled several cartels in the years it has been in operation. This section examines how the CCP has interpreted the terms 'agreement' and 'by object' as well as its overall strategy for establishing cartels under the Pakistani Act.[68]

5.3.2.1 Defining the 'Agreement'

In its earliest orders, the CCP appeared sure-footed in defining anti-competitive agreements. For instance, in the *Pakistan Banking Association* case,[69] it found that an advertisement issued by the Pakistan Banking Association regarding the Enhanced Savings Account scheme constituted a decision of the association and was, therefore, an agreement for the purposes of the Act.[70] Similarly, in the *Institute of Chartered Accountants of Pakistan* case it found a circular conveying a decision of the Institute's Council to be an agreement,[71] while in the *Karachi Stock Exchange* case, it held that the decisions of the three stock exchanges constituted an arrangement among them and their respective members, and were therefore, agreements under the Act.[72]

In bid-rigging cases the CCP focused on conduct which 'may amount to a concerted practice', and on situations in which parties knowingly adopt or adhere to collusive practices which facilitate co-ordination.[73] CCP also considered 'coincidences' and 'indicia' to point in the direction of an agreement if there were 'no other plausible explanation' for them..[74] Factors the CCP took into consideration in this regard included failure to contest 'wrongful' disqualification and failure to provide basic documents required of a bid,[75] formation of a joint venture for the purposes of bidding, voluntary price reduction, absence of consideration for an agreement, membership of the same corporate group and close business dealings among bidders (evidenced by a common business address and use of common business facilities).[76]

[68] Pakistani Act section 2(1)(b).
[69] File 2/sec-4/CCP/07 decided 10.04.2008.
[70] ibid para 46.
[71] File 3/Sec-4/CCP/08 decided 04.12.2008. para 3. The CCP relied on this decision in subsequent cases, see for instance, *Pakistan Vanaspati Manufacturers Association* case File 1(15)/PVMA-ISB decided 30.06.2011 ('the *Vanaspati Association* case'), para 34.
[72] File 1/Dir(Inv.) KSE/CCP/08), decided 18.03.2009.
[73] *Dredging Companies* case, File 3(17)/L.O/CCP/2009 decided 23.07.2010 paras 40, 42.
[74] ibid para 41.
[75] ibid para 43.
[76] *PESCO Tender Order/Amin Brothers Engineering et al* case, File 13/PESCO/CMTA/CCP/2010 decided 13.05.2011 ('*the PESCO Tender Order* case'), paras 47–48, 51–52.

In certain cases, such as the *1-Link* case,[77] where the CCP was presented with a formally executed agreement, it did not have to establish the existence of the agreement, and, therefore, moved directly to an evaluation of whether such an agreement had the object or effect of restricting competition in Pakistan.

5.3.2.2 Between the 'Object' and the 'Effect'

For an agreement to be found anti-competitive under section 4 of the Pakistani Act, it must either have an anti-competitive object or effect. In the *Pakistan Banking Association* case, the CCP found that the agreement among the banks to collectively decide rates of profits and other terms and conditions regarding deposit accounts was in violation of section 4 of the Act. In reaching this conclusion, the CCP relied almost exclusively on EU and US precedents[78] rather than considering the objectives of the agreement or the context in which it was executed. It also did not provide an opportunity for the defendants to argue for an exemption under section 5 (read with section 9) of the Act (thereby excluding an Article 101(3) TFEU style analysis of possible pro-competitive effects of the agreement).[79] The CCP also rejected the possibility of applying an EU style *de minimis* rule.[80]

In the *Institute of Chartered Accountants of Pakistan* case, the CCP found the practice of prescribing a minimum fee to be tantamount to price fixing and, therefore, per se anti-competitive[81] or anti-competitive by object.[82] Similarly, in the *Karachi Stock Exchange* case the CCP categorised the exchanges' decision to fix a price floor, as a 'per se violation'[83] and concluded that it had the object of restraining competition.[84] In the *1-Link* case, the CCP drew a distinction between prices fixed by a joint venture for the purposes of 'creating significant and beneficial efficiencies that could not otherwise be accomplished'[85] and other 'horizontal price fixing agreements'.[86] It held that while the former 'may be considered under a rule of reason' and would be eligible for consideration of an exemption under the Act,[87] the latter were to be viewed 'as having the object of preventing, restricting and reducing competition' and, therefore, not eligible for an exemption.[88] Interestingly,

[77] *1-Link Guarantee Limited & Member Banks* case ('*the 1-Link* case') File 1/24/ATM Charges/C&TA/CCP/2011 decided 28.06.2012.
[78] n.69 paras 48–50.
[79] ibid.
[80] ibid.
[81] n.71 para 12.
[82] ibid paras 21 and 35.
[83] n.72 paras 44–45, 48–49, 52–53.
[84] Even though the order argues that the object of the agreement is to be determined by understanding the objective intent of the parties, it makes little attempt to do so.
[85] n.77 para 62.
[86] ibid para 91.
[87] ibid para 62.
[88] ibid para 97.

however, even in respect of agreements where the CCP deemed a rule of reason inquiry to be warranted, it moved directly to considering the exemption without actually engaging in such analysis.[89]

In cases of collusive bidding, the CCP appeared uncertain about the analytical test to apply. In the *Dredging Companies* case[90] the CCP examined the treatment of collusive bidding in various jurisdictions,[91] and came to the conclusion that 'bidding consortia are to be treated on case-to-case basis applying the rule of reason and should not be treated as per se illegal i.e. agreements that always have anti-competitive objects and effects'.[92] However, rather than actually undertaking a rule of reason analysis, the CCP decided the case on an evaluation of the relevant market, specifications of the project that had been bid for, and the legal status of the parties to the agreement. Within a year of this order the CCP reconsidered its position when in the *PESCO Tender Order* case it held that 'collusive bidding remains in the restraint by object category before the Commission' as the 'anti-competitive effects of these actions have consistently been established over a hundred years of competition jurisprudence and no economic evidence has been established that shows pro-competitive benefits of these actions'.[93] Interestingly, the CCP did not distinguish the *Dredging Companies* case,[94] and did not cite any precedent in support of its arguments.

In contrast to its treatment of bid-rigging, the CCP found all instances of market allocation to be anti-competitive per se or by object. However, a closer reading of two of its decisions in this regard – one in the *GCC Medical Centres* case[95] and the other in the *LDI* case[96] – reveals disparity in the CCP's reasoning. In the *GCC Medical Centres* case, the CCP noted the existence of two anti-competitive agreements, one for price fixing and the other for market allocation. However, rather than categorising these agreements as horizontal or vertical or as anti-competitive by object or by effect, the CCP simply analysed the texts of the agreements, described the allegedly anti-competitive practice and concluded that the agreements were in violation of section 4 of the Pakistani Act by reference to foreign literature and precedents. In respect of the price fixing agreement, the CCP accepted the justifications offered by the defendants,[97] while in respect of the market allocation agreement, it penalised the defendant on the ground that division

[89] ibid para 64.
[90] n.73 para 47.
[91] n.73 paras 48–52, 56–57.
[92] n.73 para 59.
[93] n.76 para 30.
[94] n.73.
[95] *GCC Approved Medical Centres* File 2(2)/JD(L)/POEPA/CCP/2011, decided 29.06.2012 ('the *GCC Medical Centres* case'), paras 100–05.
[96] *LDI Operators* case File 5(114)/Reg/ADG-SCP/LHC/CCP/13 decided 30.04.2013 ('the *LDI* case') to the extent that it relates to price fixing (paras 93–108).
[97] n.95 para 94.

of markets was restrictive of consumer choice and therefore exploitative of consumers.[98] It was only in quantifying the penalty for these contraventions that the CCP noted that 'respondents have engaged into an arrangement . . . which is per se illegal'.[99] The CCP adopted a different approach in the *LDI* case, in which after it had declared quota/market allocation as 'a per se' violation under EU competition law, and had expressly acknowledged that it was not required to conduct economic analysis for a per se violation,[100] it carried out perhaps its first (if not only) quasi economic analysis of an anti-competitive agreement.[101]

5.3.2.3 CCP's Analytical Steps for Horizontal Agreements

The CCP typically commenced its analysis of horizontal agreements by establishing the existence of an agreement. In the majority of its orders, this finding was immediately followed by a strong invocation of the Pakistani Act's foreign antecedents. For instance, in the *Pakistan Banking Association* case, before applying section 4 of the Act to the alleged anti-competitive agreement, the CCP traced the links of the provision to Article 81 of the EU Treaty and reproduced the analytical test as stated in Article 81, noting in particular that the terms 'object' and 'effect' were disjunctive, that is, if an agreement is deemed to have an anti-competitive object there was no need to inquire into its effect.[102] The CCP then cited a range of EU and US precedents in support of its arguments to establish the international context,[103] before moving on to examining the alleged agreement between the banks, however, even this analysis was carried out largely with reference to foreign precedents rather than the likely economic impact of the agreement in the context in which it was intended to operate.

The CCP similarly invoked its foreign pedigree in the *ICAP* case:[104] it noted that section 4 was 'similar to Article 81 of the Treaty of Rome'[105] and was also 'in congruity with section 1 of the Sherman Antitrust Act of the United States'.[106] Then relying almost exclusively on US decisions, the CCP came to the conclusion that ICAP's actions were tantamount to a per se or by object restriction of competition and therefore in violation of section 4 of the Act.[107] In the *Karachi Stock Exchange* case, the CCP combined the EU understanding of 'by object'[108] with

[98] ibid paras 100, 102, 105.
[99] ibid para 107.
[100] n.96 paras 119–20. Interestingly, in finding a per se violation the CCP drew support from the EU Guidelines on Application of Article 81.
[101] n.96 paras 144–60.
[102] n.69 para 48.
[103] ibid paras 49, 50.
[104] n.71.
[105] ibid para 11.
[106] ibid.
[107] ibid paras 12, 13, 14.
[108] n.72 para 42.

the US concept of 'naked restraints'[109] and thereby found the stock exchanges' decision to fix a price floor, to be a 'per se violation'[110] of the Act and having the object of restraining competition.

The CCP repeated its reasoning in the *Karachi Stock Exchange* case in a several subsequent orders such as in the *All Pakistan Newspaper Society* case,[111] the *All Pakistan Cement Manufacturers Association* case,[112] the *Dredging Companies* case,[113] and the *PESCO Tender Order* case.[114] Over time, however, the CCP's reasoning in this regard grew more cursory,[115] such that when it issued its decision in the *1-Link* case, the CCP simply addressed the facts before it rather than recounting the history of its connection with the EU and US regimes.[116] The CCP, however, continued to cite foreign precedents in support of its arguments.

This seeming uniformity in the CCP's approach towards horizontal agreements was punctuated with interesting exceptions. For instance, in the *PESCO Tender Order* case,[117] after a discursive review of the Pakistani Act's fundamental connection with EU and US regimes, the CCP noted that '(t)his similarity with the EU Law does not mean that Pakistan must only look at EU case law and principles ... we have over time developed our own jurisprudence and are not bound by any particular international jurisprudence.[118] The CCP then leveraged this declaration of independence to hold that collusive bidding was a by-object restraint of competition albeit with the support of precedents from a range of international jurisdictions, and without distinguishing the *Dredging Companies* case.[119] Another departure from its uniform approach is evident in the *Vansapati Association* case,[120] in which responding to an argument that it was incumbent upon the CCP to examine the

[109] ibid.
[110] ibid paras 44, 45, 48, 49, 52, 53.
[111] File 06/Sec 3/CCP/08 decided 23.04.2009.
[112] File 4/2/Sec 4/CCP/2008 decided 27.08.2009.
[113] n.73.
[114] n.76.
[115] See, for instance, *Jamshoro Joint Venture Limited and LPG Association of Pakistan* File 3/LPG/DIR(INV)/M&TA/CCP/2009 decided 14.12.2009; *Takaful Pakistan Ltd and Travel Agents' Association of Pakistan* File 9/M(A&R)/CAA-TAAP/CCP/2007 decided 29.01.2010; *Pakistan Poultry Association* File CCP/Cartels/04/2010 decided 16.08.2010; *Pakistan Jute Mills Association and its member mills* File CCP/Cartels/03/2010 decided 03.02.2011; *Pakistan Ship's Agents' Association* File 08/APPMA/CMTA/CCP/10/1709 decided 22.06.2011, and *LDI Operators* case (n.96).
[116] n.77. The CCP stated in its order that the difference between EU and US competition/antitrust law was only of 'semantics' and that the EU law encompassed 'the principles developed in the US jurisdiction within its statute' (para 25). The CCP also stated that the 'EU classification of "object" and "effect" echoes the broad principles developed by the US courts in the "per se" and "rule of reason" doctrines' and the 'various terms developed in the US and the EU, therefore, have the same underlying principles' (para 27).
[117] n.76.
[118] n.76 para 28.
[119] n.76 para 30.
[120] n.71.

legal and economic context in which the agreement had been executed, the CCP held that establishing the legal and economic context of the agreement was the responsibility of the defendant and not that of the CCP.[121]

5.3.3 *Evolution of CCI's and CCP's Approach towards Anti-competitive Agreements*

The CCI's more recent decisions demonstrate increasing clarity and uniformity in its approach towards horizontal anti-competitive agreements. While the CCI has interpreted and explained the analytical test for anti-competitive agreements in a number of its decisions,[122] in an almost equal, if not greater number of other decisions it has applied a somewhat truncated version of the test to the facts before it without any reference to the provisions of the Indian Act.[123]

In the majority of its decisions, the CCI has applied the test uniformly, without reference to its US or EU antecedents and without expressly citing international case law. The CCI has focused on establishing the existence of an agreement and has *presumed* AAEC, eschewing the urge to examine section 19(3) factors to establish it. For instance, in the *Malayalam Movie Artists* case, the CCI focused on finding a tacit understanding between the members of the association, and then directly imposed a penalty on the parties for their anti-competitive conduct.[124] Similarly in the *Dry Battery Cell* case[125] and the *EPS Systems* case,[126] the CCI moved

[121] ibid para 53(b).

[122] For instance *Indian Foundation of Transport Research & Training v Sh. Bal Malkait Singh & others* Case 61/2012 decided 16.02.2015; *Sheth & Co. & others* Suo Motu Case 4/2013 decided 10.06.2015; *Cartelization in Public Sector Insurance Companies* Suo Motu Case 2/2014 decided 10.07.2015; *Shri Ghanshyam Das Vij v Bajaj Corporation Limited & others* Case 68/2013 decided 12.01.2015; *Express Industry Council of India v Jet Airways (India) Limited & others* Case 30/2013 decided 17.11.2015; the *Cement Manufacturers Association* case (n39); *Re Alleged Cartelization by Cement Manufacturers v Shree Cement Limited and others* RTPE 52/2006 decided 31.08.2016.

[123] For instance *Swastik Stevedores Private Limited v Dumper Owner's Association & others* Case 42/2012 decided 21.01.2015; *Rohit Medical Store v Macleods Pharmaceutical Limited & others* Case 78/2012 decided 29.01.2015; *Shri Jyoti Swaroop Arora v Tulip Infratech Limited & others* Case 59/2011 decided 03.02.2015; *Bio Med Private Limited v Union of India & others* Case 26/2013 decided 04.06.2015; *Kerala Cine Exhibitors Association v Kerala Film Exhibitors Federation & others* Case 45/2012 decided 23.06.2015; *Kannada Gratiakara Koota Shri Ganesh Chetan v Karnataka Film Chamber of Commerce & others* Case 58/2012 decided 27.07.2015; *Crown Theatre v Kerala Film Exhibitions Federation* Case 16/2014 decided 08.09.2015; and *Shivam Enterprises v Kiratpur Sahib Truck Operators Transport Society Limited & others* Case 43/2013 decided 04.02.2015.

[124] *Shri T G.Vinayakumar v Association of Malayalam Movie Artists and others* Case No. 98/2014 decided 24.03.2017 ('the *Malayalam Movie Artists* case'), paras 7.51–7.72, 7.91.

[125] *In Re: Cartelisation in respect of zinc carbon dry cell batteries market in India* Suo Motu Case No 02 of 2016 decided 19.04.2018 ('the *Dry Battery Cell* case').

[126] *In Re: Cartelisation in the supply of Electric Power Steering Systems* Suo Motu Case No 07 (01) of 2014 decided 09.08.2019 ('the *EPS Systems* case').

immediately from establishing the existence of the cartel to considering the application of leniency (in the *Dry Battery Cell* case)[127] and the quantum of penalty (in the *EPS Systems* case).[128]

Like the CCI, the CCP also appears to have moved away from detailed discussions regarding its international antecedents. However, the CCP still appears hesitant to set out an analytical test for anti-competitive agreements that is fully anchored in the language of section 4 and continues to hinge its findings either on a single foreign decision that fits the particular facts of the case before it[129] or on its own earlier decisions.[130]

5.4 VERTICAL AGREEMENTS UNDER THE INDIAN AND PAKISTANI ACTS

In addition to horizontal agreements under section 3(3) of the Indian Act, the CCI has also examined a number of vertical agreements under section 3(4) in terms of which it is incumbent upon the CCI to establish AAEC with reference to section 19(3) factors. However, a review of some of the CCI's key decisions under section 3(4) reflects a lack of consistency if not confusion as to the type of agreements that may be included in this section as well as how these may be analysed.

The CCI first discussed a section 3(4) violation in the *Global Automobiles* case[131] in which it was alleged that the agreements between defendant automobile companies and their distributors were unduly restrictive and therefore anti-competitive. In deciding this case, the CCI listed five requirements for establishing a contravention of section 3(4): there must be an agreement; the parties to such agreement must be at different stages or levels of the production chain; the parties must be in different markets; the agreement should be for one or more of the practices listed in clauses (a) to (e) of section 3(4), and the agreement should cause or be likely to cause AAEC.[132] The CCI further stated that in ascertaining AAEC of such an agreement, the 'existence of the first three factors listed in section 19(3) would normally indicate no AAEC as they are in the nature of efficiency justifications',[133] however, it also cautioned that the absence of the last three factors alone could

[127] n.125 paras 9.24, 9.28, 9.30.
[128] n.126 paras 24–25.
[129] *Pakistan Poultry Association* File 42/PPA/C & TA/CCP/2015 decided 29.02.2016 ('the *Poultry* case').
[130] *Pakistan Automobile Manufacturers Authorized Dealers Association & Member Undertakings* File 1/101/PAMADA/C & TA/CCP/2013 decided 10.04.2015 ('the *PAMADA* case').
[131] *Automobile Dealers Association v Global Automobiles & others* Case 33/2011 decided 03.07.2012 ('*Global Automobiles* case').
[132] ibid para 12.4.
[133] ibid para 12.9.

neither determine AAEC nor establish efficiency. On this basis the CCI concluded, that in most cases it would be prudent to examine all section 19(3) factors to arrive at the agreement's net impact on competition.[134] On the facts of the case, although the CCI found an agreement as well as evidence of anti-competitive practices[135] it held that the parties to the agreement had only an 'insignificant presence in the market' and, therefore, were not capable of causing AAEC. In doing so the CCI explicitly drew support from the EU *de minimus* rule stating that 'this is probably the reason that in EU, vertical agreements are not given much of a thought unless both parties possess at least 30% market share in respective markets'.[136]

The CCI followed a similar approach in the *Apple* case[137] in which it held that although Apple and Airtel/Vodafone had entered into a tying-in agreement which was proscribed under section 3(4),[138] the agreement did not cause AAEC because 'for a vertical agreement to be anti-competitive requires the monopolization claim to hold, and given the minuscule market share of the tying party the monopolization claim will be contrived'.[139] The CCI nevertheless evaluated section 19(3) factors before concluding that the defendants had not infringed section 3(4).[140] The CCI also noted that the defendants did not have an 'intention' to foreclose competitors.[141]

The 'intent to foreclose' argument appeared once again in the *Hockey India* case,[142] in which the restrictions placed by Hockey India on the free movement of hockey players were alleged to be in violation of section 3(4).[143] Although the CCI found the agreement between Hockey India and the players to be a vertical agreement,[144] it cited its decision in the *Apple* case[145] to argue that for a vertical agreement to be anti-competitive the entitty imposing the vertical restriction should be in a dominant position and should have the intention to foreclose competition in the market.[146] On the specific facts of the case, the CCI found the restrictions imposed by Hockey India to be 'proportionate' to its objectives and, therefore, not in contravention of section 3(4).[147] By re-emphasizing the element of intent which it

[134] ibid.
[135] ibid para 12.5.
[136] ibid paras 12.10, 12.13.
[137] *Shri Sonam Sharma v Apple Inc. USA & others* Case 24/2011 decided 19.03.2013 ('the *Apple* case').
[138] ibid paras 63, 65, 69.
[139] ibid para 70.
[140] ibid para 80.
[141] ibid paras 70, 74.
[142] *Shri Dhanraj Pillay & others v Hockey India* Case 73/2011 decided 31.05.2013 ('the *Hockey India* case').
[143] ibid para 10.13.1.
[144] ibid para 10.13.2
[145] n. 137.
[146] ibid para 10.13.2.
[147] ibid para 10.13.6.

had earlier referred to in the *Apple* case,[148] and by introducing the element of proportionality the anti-competitive effects of an agreement the CCI not only conflated an abuse of dominance analysis with a vertical agreement analysis but also re-defined the very idea of anti-competitive effect.

In the *Honda Siel* case[149] the CCI examined agreements between Original Equipment Manufacturers (OEMs) and their Original Equipment Suppliers (OESs) and distributors and re-affirmed and clarified several important principles relating to section 3(4) agreements which also formed the basis of several of its subsequent decisions.[150] For instance, the CCI underscored that parties to a vertical agreement must be part of the same production chain; it explicitly recognised the single economic entity doctrine as enunciated in EU law (in relation to the agreements between the OEMs and their overseas OESs) but relied upon US jurisprudence to establish the parameters of the doctrine.[151] The CCI also re-asserted the significance of section 19(3) factors in establishing AAEC, and defined the trigger for and scope of the section 3(5) exemption.[152] Finally, although the CCI acknowledged the possibility of selective distribution networks (in relation to agreements between OEMs and their authorised dealers), after examining guidelines and decisions from more advanced competition regimes,[153] it concluded that there was no justification for allowing such networks to operate in the present case.[154] The CCI also identified more 'Indianised' aspects of anti-competitive vertical agreements: for instance, in respect of agreements between OEMs and their foreign OESs that were not part of the same group, the CCI required evidence of a 'conspiracy' in addition to the finding of an agreement,[155] while in respect of agreements between OEMs and their local distributors (which the CCI found to be anti-competitive) the CCI relied upon the unexplained concept of 'greater public good'.[156]

[148] n.137.

[149] *Shri Shamsher Kataria v Honda Siel Cars India Limited & others* Case 3/2011 decided 25.08.2014. ('the *Honda Siel* case').

[150] For instance, *ESYS Information Technologies Pvt Ltd v. Intel Corporation (Intel Inc.) & others* Case 48/2011 decided 16.01.2014; *Magnus Graphics v Nilpeter India Pvt Ltd & others* Case 65/2013 decided 02.12.2014, and Case 52/2013 *Financial Software and Systems Pvt Limited v ACI Worldwide Solutions Private Limited and others* decided 13.01.2015.

[151] n.149 para 20.6.3.

[152] ibid para 20.6.7.

[153] ibid paras 20.6.24–20.6.42. The CCI also drew an analogy between section 19(3) and Article 101 (3) TFEU and referred to the Guidelines on the Application of Article 81(3), EU Vertical Block Exemption Regulations (with specific reference to hardcore restraints), the practice and decisions of Brazilian and South African competition authorities, the French Competition Authority's sectoral inquiry of motor vehicle and to several EU and US decisions.

[154] ibid para 20.6.23.

[155] ibid para 20.6.6.

[156] ibid paras 20.6.26, 20.6.28.

The CCI's most interesting, indeed controversial decision in respect of vertical agreements was in the *Hiranandani Hospital* case,[157] in which the CCI found an agreement between a hospital and a stem cell bank to be in violation of section 3(4). The CCI arrived at this conclusion by reading section 3 of the Act in light of the Act's overall purpose (which it said was to protect freedom of trade and consumers' interests), and by arguing that doing so allowed it to consider the impact of *any* agreement that fell within the ambit of section 3(1) even if it could not be clearly categorised as a section 3(3) or 3(4) agreement.[158] The CCI found the agreement between the hospital and the stem cell bank to be 'anti-competitive' on the basis that exclusive contracts between a hospital and stem cell bank restricted consumer choice, dampened innovation, and foreclosed competition in the stem cell market.[159] Further, although the CCI engaged in a spirited examination of section 19(3) factors, it stopped short of an economic analysis and ignored the 'appreciability' argument which had informed its earlier decisions.[160] Two members issued dissenting orders in this matter: Member Gauri arguing that there was no vertical agreement in this matter because 'the hospital was a platform'; there was no 'final consumable product', and no tie-in because 93 per cent of the patients had the choice of availing only maternity services offered by the hospital,[161] and Member Tayal arguing that section 3(1) could not be 'interpreted de-hors of section 3(3) and section 3(4) of the Act', and that the provisions of section 3(4) may be applied only when there is an agreement between two undertakings operating at different stages of the production chain.[162]

In its recent decisions, the CCI has clarified the principles for evaluating vertical agreements, not only in respect of traditional brick and mortar sectors but also in the digital space, however, the CCI has still avoided a detailed analysis of section 19(3) factors as well as rigorous economic analysis. For instance, in the *Hyundai* case[163] in which it considered allegations relating to exclusive supply agreements, retail price maintenance, and at least three different types of tie-ins, the CCI analysed the facts and the relevant clauses of the agreement and affirmed its decisions in the *Honda Siel* case[164] and the *Apple* case,[165] to establish retail price

[157] *Mr Ramakant Kini v Dr LH Hiranandani Hospital, Powai, Mumbai* Case 39/2012 decided 05.02.2014 ('*Hiranandani Hospital* case'). The CCI followed this reasoning in several later cases, including *PK Krishnan v Paul Madavana Alkem Laboratories & others* Case 28/2014 decided 01.12.2015 and *Maruti & Company v Karnataka Chemists & Druggists Association & others* Case 71/2013 decided 28.07.2016.

[158] ibid para 15.

[159] ibid para 20.

[160] ibid. Also n.131, n.137.

[161] ibid Dissenting Order, Member Gauri para 61, 67.

[162] ibid Dissenting Order, Member Tayal para 4, 14.

[163] *Fx Enterprise Solutions India Pvt Ltd v Hyundai Motor India Limited* Case Nos 36 & 82 of 2014 decided 14.06.2017 ('the *Hyundai* case').

[164] n.149.

[165] n.137.

maintenance.[166] However, instead of examining possible pro-competitive justifications listed in section 19(3) the CCI moved directly to sanctioning Hyundai.[167] Similarly in the *KAFF Appliances* case,[168] the CCI explored the elements of anti-competitive vertical agreements in the digital space and found evidence of price prescription. However, instead of establishing whether the price prescription led to AAEC, the CCI moved directly to considering the justifications offered by KAFF.[169] Its decisions in the *Hyundai* case and the *KAFF Appliances* case reflect the CCI's reasoning in the *Hiranandani Hospital* case,[170] despite its decision having been overturned by Indian Tribunal.[171] In the *Hyundai* case for instance, the CCI held that for two products to be tied together it is not necessary that the products form part of a single product chain or result in an observable end-product,[172] while in the *KAFF Appliances* case it held that a platform is part of a vertical supply chain.[173]

Unlike the CCI, the CCP evaluates vertical agreements in the same way as it does horizontal agreements. Although the CCP first discussed anti-competitive vertical agreements in the *Karachi Stock Exchange* case,[174] it did not apply this discussion to the facts of the case, and it was only in the *Wateen* case which dealt with an exclusive services agreement between a telephone company and a residential authority that it focused specifically on vertical agreements.[175] Even in this case, however, instead of exploring the concept of vertical agreements or the context in which the particular agreement in the caes was operating, the CCP concluded that the agreement was anti-competitive after simply interpreting the clauses of the agreement.[176] The *Vanaspati Association* case offered another opportunity for the CCP to consider vertical agreements between the Vanaspati Manufacturers' Association and transporters' associations.[177] However, instead of evaluating the object or effect of these agreements the CCP simply held that 'no determination with respect to this issue [could] be made unless all parties concerned are probed on this account'.[178]

[166] n.163 paras 76, 94, 104, 108, 114.
[167] n.133 para 116 onwards.
[168] *In Re: Jasper Infotech Private Limited (Snapdeal) v KAFF Appliances (India) Pvt Ltd (Kaff)* Case No 61 of 2014 decided 15.01.2019 ('the *KAFF Appliances* case').
[169] ibid see paras 56–63, 69–70.
[170] n.157 and the text thereto.
[171] *Dr LH Hiranandani Hospital v CCI and another* Appeal 19/2014 decided 18.12.2015.
[172] n.163 para 99.
[173] n.168 paras 36–37. More interestingly, the echoes of the *Hiranandani Hospital* case may also be heard in the CCI's decisions in respect of horizontal agreements. For instance, in the *Malayalam Movie Artists* case the CCI notes that the scope of section 3 of the Act is much wider than sections 3(3) and that even if an agreement does not fall within these two sub-sections it may be deemed to be anti-competitive if it has AAEC. n.124 para 7.93.
[174] n.72 paras 43–45.
[175] *Wateen Telecom (Pvt) Limited and Defence Housing Authority* case, Case 09/Reg/Comp/CAP/CCP/2010 decided 22.03.2011. ('the *Wateen* case').
[176] ibid para 29.
[177] n.71 para 51.
[178] ibid para 54.

The CCP issued a somewhat more detailed decision in respect of vertical agreements in the *Engro Vopak Terminal Limited* case,[179] which related to a concessionary agreement between a port authority and a terminal operating company for the handling and storage of liquid chemicals. Although the CCP concluded that the agreement was anti-competitive because it granted exclusive rights to a private entity and was likely to foreclose competition in the relevant market,[180] it did not categorise the agreement as either horizontal or vertical, did not address whether the agreement was anti-competitive by object or effect, and did not engage in any economic analysis in arriving at its conclusion. Instead, as it had in the *Wateen* case,[181] the CCP relied entirely on a literal interpretation and analysis of the concessionary agreement to establish a violation of section 4 of the Act.[182]

More recently the CCP examined vertical agreements in the *Reliance Paints* case,[183] and the *NFC Employees Society* case,[184] however, once again it failed to clarify the law in this regard. In the *Reliance Paints* case, the CCP addressed both exclusive dealing and resale price maintenance. However, rather than categorising the agreements as horizontal or vertical or clarifying that the parties to the agreements operated at different levels of the market, the CCP simply discussed the anti-competitiveness of exclusivity agreements,[185] providing the only clue as to its understanding of the nature of the agreements by its reference to the EU Notice on Vertical Restraints.[186] In the *NFC Employees* case[187] the CCP once again avoided categorising the agreement as either horizontal or vertical, did not confirm whether the was anti-competitive by object or by effect (although it did refer to the enquiry report which identified it as a by object infringement);, or needed to be assessed under the per se rule or rule of reason.[188] In fact the the CCP stated that the relevant clauses had 'the object as well as the effect of reducing, restricting and preventing competition in the relevant market' and even when it noted that the agreement was detrimental to the 'overall competitive process in the market' it did not elaborate on the observation.[189]

More worryingly, in all its decisions in respect of vertical agreements, as it had been in the case of horizontal agreements, the CCP appears to be hesitant to fully anchor the test for anti-competitive vertical agreements in the language of section 4 or the

[179] *Port Qasim Authority and Engro Vopak Terminal Limited* case Files 6/LP/CMTA/CCP/2010 & 2/(192)/AGR/Exm./Reg/CCP/2010 decided 29.06.2011.
[180] ibid paras 2, 55.
[181] n.175.
[182] ibid para 57.
[183] *Reliance Paints* File no 31/RP/C&TA/CCP/2015 decided 30.03.2018 ('the *Reliance Paints* case').
[184] *NFC Employees Co-operative Housing Society* File no 80/NFCEHS/C&TA/CCP/2016 decided 27.11.2018 ('the *NFC Employees* case').
[185] n.183 paras 27, 31.
[186] ibid para 34.
[187] n.184 para 27.
[188] ibid paras 28–29.
[189] ibid para 33.

economic context of Pakistan and prefers instead to link its findings either to a specific foreign decision that fits the particular facts of the case before it,[190] or to its own earlier decisions[191] and continues to adopt a formalistic and increasingly summary strategy for deciding matters.

5.5 RELATING CCI AND CCP'S INTERPRETIVE STRATEGIES TO THEIR ADOPTION PROCESSES

The CCI and CCP's interpretive strategies, as evident in the case of anti-competitive agreements, may be traced to the mechanisms and institutions through which India and Pakistan adopted the Indian and Pakistani Acts. This section explores the manner and extent to which the adoption processes in the two countries have shaped the respective interpretive strategies of the CCI and CCP.

5.5.1 *Reliance on Models From Which Analytical Tests Were Derived*

The extent to which the CCI and CCP rely on precedents from their parent competition models in interpreting and applying the analytical tests for anti-competitive agreements offers an important insight into the link between the adoption and implementation stages of the Indian and Pakistani Acts. Given that the Indian Act is adapted from a range of international models, it may be expected that in interpreting the analytical test for anti-competitive agreements the CCI may also draw inspiration from a variety of international models, whereas given the strong nexus between the Pakistani and EU competition regimes the CCP may be expected to rely primarily on EU precedents. Further, given India's dominant transfer mechanism of *socialisation* which underscores its desire to *learn* from foreign systems rather than simply to *emulate* them, the CCI may also be expected to *adapt* any precedents it relies upon for the Indian context, whereas given Pakistan's dominant transfer mechanism of *coercion* which underpins its motivation to gain international legitimacy and to leverage it in the domestic context, the CCP may be expected to cite foreign precedents as much for their normative value as for their substantive appropriateness.

The CCI's orders in respect of horizontal and vertical agreements meet expectations on both counts. The CCI's express reliance on foreign materials and precedents is limited and the precedents and materials it has cited are derived from a range of jurisdictions. However, in addition to *expressly* citing foreign cases and materials, the CCI has also *implicitly* relied on foreign precedents and materials and has integrated these into its analysis. This strategy affirms the CCI's inclination to *learn* from and to apply these precedents rather reproducing these merely for their

[190] For instance, the *Poultry* case, n.129.

[191] Examples include the *PAMADA* case, n.130 and *Pakistan Engineering Council* case (File 2(32)/ Comp Cell/CCP/2015 decided 20.04.2016.

normative value. At the implicit level the CCI's orders appear to lean towards an EU style of reasoning: several of its orders examine allegedly anti-competitive agreement in their economic and legal context and in light of their objectives; the CCI acknowledges and applies the *de minimis rule* where relevant; and engages in an Article 101(3) style analysis of pro-competitive factors, even in respect of *presumed* anti-competitive agreements.

In contrast, the CCP's interpretive strategy deviates from expectations. While in its early orders the CCP relies extensively on foreign precedents and materials, it cites EU and US cases in almost equal measure rather than relying exclusively on EU precedents and also relies upon precedents from other jurisdictions albeit not as frequently. However, rather than adopting the EU analytical approach and semantics wholesale, the CCP most often alternates between the EU and the US approaches, often conflating the two. Therefore, while the EU's impact is evident in several of its orders in which the CCP asserts that it is incumbent upon it to examine 'the object or effect' of an agreement and that the 'object' and 'effect' are disjunctive concepts, the US influence may be seen when the CCP interprets 'object' to mean 'per se'; when, in a majority of its orders, it does not consider the context of the agreement; when it refers to an effect-based enquiry as a rule of reason enquiry; and when it does not allow a *de minimis* style exception in any of its orders. Further, the CCP's very explicit recourse to foreign precedents not merely as aids in interpretation in its analysis of anti-competitive agreements, but also as an assertion of the close ties between the Pakistani Act and foreign authoritative models Pakistani Act, underscores its need foreign authoritative models for both international and domestic legitimacy.

5.5.2 *Continued Recourse to Transfer Mechanisms Employed in the Adoption Process*

In interpreting the analytical tests for anti-competitive agreements, both the CCI and CCP appear to continue with the transfer mechanisms used by India and Pakistan respectively at the adoption stage: the CCI continues to *socialise* foreign precedents and materials for the domestic Indian context, while the CCP prefers to *emulate* foreign precedents and materials especially when it relies on these to establish its authority (and, by extension of the Pakistani competition legislation). Although the CCP does engage in some *socialisation* it appears to superimpose meaning on the express wording of the Pakistani Act, rather than engaging directly wtih and clarifying it.

5.5.3 *Impact of Adoption Processes on the Evolution of CCI and CCP's Interpretive Strategies*

Over time, the CCI's interpretation of the section 3 analytical test has become more consistent and predictable. In the majority of its orders the CCI begins by

considering whether there is an agreement. If an agreement is established, it considers whether the agreement is horizontal or vertical with reference to the economic and legal context within which the agreement operates. In case of horizontal agreements, the CCI most often requires the defendant to rebut the presumption of AAEC with reference to factors listed in section 19(3), whereas in respect of vertical agreements it considers the effect by taking into account possible pro-competitive factors. The CCI also applies the *de minimis rule* to exclude certain agreements from the ambit section 3. However, the CCI does not consider itself bound by this consistency where it forms the view that the sector[192] or the practice[193] merits a flexible or novel approach.

In contrast, the CCP's approach tends to lose its consistency and structure over time and the CCP appears to remain more anchored in EU and US precedents rather than focusing on the express wording of the provisions of the Pakistani Act. In its earliest orders the CCP first categorised an agreement either as anti-competitive by object (which it conflated with the per se rule), or by effect (which it used interchangeably with the rule of reason) and then analysed it, albeit often exclusively with reference to EU and US precedents.[194] Over time, however, the CCP has either omitted the categorisation step altogether[195] or has simply placed the agreement or practice within a category without providing a basis for doing so.[196] Also, the CCP has applied different tests to similar agreements or practices at different times not due to changing economic conditions or its evolving understanding of the economic factors underlying these agreements, but rather on the basis of a single precedent that, in its view, fit the facts of the case before it.

Despite the considerable disparities between them, there are at least two similarities between the CCI and CCP's interpretive strategies: first, the analytical tests as applied by both authorities are almost unrecognisable in a strictly EU or US sense. However, while in India the analytical test has been almost entirely 'Indianised' linguistically as well as in application, the analytical test in Pakistan remains suspended between the express provisions of the Pakistani competition legislation and the international precedents the CCP relies upon in interpreting and applying it. Second, and perhaps more damagingly, both the CCI and CCP have interpreted the analytical tests in an entirely formalistic manner rather than anchoring these in an economic analysis of the alleged anti-competitive agreements and practices even when the law and the practice under review has warranted such an analysis

The CCI's recourse to *socialisation* in interpreting the Indian Act at the implementation stage is directly correlated with India's use of *socialisation* through a wide range of bottom-up, participatory, and inclusive institutions at the adoption

[192] For example n.122 (cement); n.137 (IT sector), and n.149 (automobiles).
[193] n.157 and text thereto.
[194] For example, n.69, 72, 73, 77 and text thereto.
[195] n.73 and 111 and texts thereto.
[196] n.76.

TABLE 5.1. *Essential features of CCI and CCP's interpretive strategies for anti-competitive agreements*

Factors	CCI	CCP
Express reliance on foreign precedents	Limited.	Extensive.
Continued recourse to dominant transfer mechanism	Yes. Evident in CCIs *socialisation* of precedents derived from a range of sources.	Yes. CCP continues to *emulate* foreign precedents. Some *socialisation* also evident.
Reference to the statute	Extensive.	Limited.
Economic analysis	Limited to non-existent.	Limited to non-existent.
Evolution of strategy	Greater opening up to international influence.	Greater focus on CCP's own decisions.

stage. At the adoption stage, India through the mechanism of *socialisation* had succeeded in creating an 'Indianised' analytical test for establishing anti-competitive agreements, which while combining elements from EU and US regimes does not fully align with either and which is stated sufficiently precisely in the Indian Act to be interpretable by the CCI without extensive recourse to foreign competition jurisprudence and materials. It is no surprise therefore that the CCI also anchors its evaluation of anti-competitive agreements at the implementation stage in the wording of the analytical test as expressed in section 3 of the Act, and resorts to foreign precedents and materials only when necessary and then also adapts and *socialises* these for local context.[197] However, this strategy has the negative effect, particularly in these early years of the CCI's operations, of generating a certain Indian-ised hubris towards competition enforcement and of isolating it from international developments in this regard.

Similarly, the CCP's preference for *emulation* in the interpretation of its analytical test for anti-competitive agreements may also be traced to Pakistan's adopting its competition legislation primarily through *coercion*. Adoption by *coercion* had succeeded in transferring the *words* of competition principles but had failed to generate a deep understanding of their meanings in the Pakistani context. The lingering

[197] The CCI cites foreign, particularly EU case law only exceptionally: for instance n.39 (the *Cement Manufacturers Association* case) & n.122 (*Alleged Cartelization of Cement Manufacturers* case); n.38 (the *Tamil Nadu Film Exhibitors Association* case); n.137 (*Apple* case); n.149 (*Honda Siel* case). In all these cases the CCI was entering new sectors which had already been addressed internationally or the agreements it was examining were particularly complex.

impact of *coercion* is evident in the CCP's preference for foreign precedents over the express words of its competition statute, and the absence of a meaningful attempt on its part to correlate foreign jurisprudence and the words of the Pakistani legislation.[198] Although this combination of *coercion* and *emulation* in adopting the legislation made the CCP more pre-occupied with asserting its international legitimacy by tracing its lineage to the EU and US competition/anti-trust systems from which it was derived, it also had the positive effect of aligning the CCP, even in its earliest orders, with the international approach towards competition enforcement.

[198] India, despite its preference for *socialisation*, demonstrates a similar confusion in its early orders which may be attributed to bounded rationality in its pursuit of *socialisation*.