

REGULATION AND POLICY SPACE



A Spirited Debate on Competition and Markets

Dr. Nadeem Ul Haque's View (NUH): All markets face heavy government intervention.

Mr. Ikram Ul Haque Qureshi's View (IUHQ): Not all markets are facing heavy government intervention. But certain markets such as telecoms and electricity are perhaps being over-regulated. The government needs to reduce intervention where there is no sector regulator such as agriculture. Subsidies and support prices are destroying the agriculture. The government must focus on agricultural technology and gradually reduce subsidies and support price mechanisms.

NUH: Government likes to control markets and be an active player from agriculture to industry.

IUHQ: Pakistan has inherited most of its laws from the colonial regime such as anti-hoarding and profiteering law. They need to be abolished or at least reformed in a manner to leave the market on supply and demand and open and competitive bidding of products and services. Competition law is also one of the instruments which strictly prohibits imposition of any maximum or minimum resale prices. However, the fixing of resale price maintenance at minimum is considered lesser evil.

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NUH: Market monopolies and dominance is given by policy such as protection exemptions.

IUHQ: The exemption under CCP law are granted to market players operating in the downstream markets such as supply chain. The example could be of franchisee and distribution. These exemptions are granted only when the supplier or distributor is able to prove that any restrictions will improve distribution and production process and standardization, and the supply chain would lead to economic efficiency and benefit the consumer eventually. The benefits of exemption are required to out weight the adverse effect of prohibition. This is well settled principle of competition law enforced in all countries.

NUH: On many markets, policy places direct price controls or regulates trade.

IUHQ: Direct policy control is not permitted. This is a wrong assumption. Regulating trade by prohibiting cartels/collusion among undertakings or abusing their dominant position by imposed unreasonable prices on consumer by a firm is prohibited under the Competition law being enforced in Pakistan. It is highlighted that dominance is allowed while abuse of dominance is prohibited. This practice is being followed almost all the countries including USA.

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NUH: Investment is low because of the lack of market opportunities in Pakistan because of the dominance of government in markets.

IUHQ: Competition law is mandated to check if there is collusion to restrict investment or innovation under Section 4 of the Act. Section 4 relates to Prohibited Agreements. It is the duty of Federal or Provincial government and the Board of Investments to create an investment conducive environment. The role of Competition Law is limited as it should be i.e to prohibit abuse of Dominant Position, cartelisation, Deceptive Marketing Practices and merger control. The Competition Commission, at the best can issue Policy Notes or Opinions to the Governments to create investment opportunities by breaking the entry barriers etc.

NUH: Many investors are constantly involved in lengthy court cases because of this excessive government dominance over markets.

IUHQ: The cases are pending in the courts, however, no adverse order has so far been passed by the courts against any of substantial or procedural provision of the Competition Act, 2010. It is the duty and function of the courts to pass judgments on the pending litigation to bring certainty in the action of Competition Commission. The Competition Commission always pursued the cases without taking adjournments. The Government and the Attorney General in the past have supported Competition Commission before the Courts. The Competition Commission did get directions for expeditious disposal of cases but unfortunately the courts did not pass judgments despite of final hearing on various occasions. The delay is not on the part of Competition Commission.

NUH: What we needed was a deregulation commission like in several countries.

IUHQ: Deregulation commission and the privation commission of Pakistan have the same job as I have stated during the Webinar. Your question is terminology focused. What privatization commission has not done and what the deregulation commission could have done. There is no need for a separate deregulation commission. Rather the Competition Commission and other relevant agencies/Regulators need to collaborate with each other to improve the market function, reducing competition breaches and restricting anti-competitive behaviour/practices. It will result in an efficient and thriving economy by providing level playing field to all the players in their economic and commercial activities. These concepts are well placed in the Competition law in Pakistan as well as in all other competition jurisdictions. The effectiveness of competition regime and its importance for every country's economy may be appreciated.

NUH: As usual World Bank believes in the cookie cutter that all countries must have the same agencies. They gave us a competition commission in a country where competitive markets don't exist.

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IUHQ: The World Bank may have floated the idea of establishing the Competition Commission, however, it is the legislature that understood the importance of establishing the Competition Commission. The Competitive markets exist in Pakistan such as telecom, banking, IT, construction, among others. However, the need to have competitive markets across the economic sectors is an ongoing process. This process needs to be strengthened by all the stakeholders including the consumer associations.

NUH: CCP has been looking for ghosts like monopolies and price gouging.

IUHQ: It is the duty of CCP to look into abuse of dominant position and that is quite different than what you have stated as looking for ghosts like monopolies etc. My suggestion is that an extensive reading and research on competition law including orders passed by the Competition Commission can only solve the conceptual difficulties.

Many new entrants have entered the Pakistan markets which has led to increased investment and innovation, primarily due to a robust merger and acquisition control regime.

NUH: CCP has only increased the regulatory burden of investors not eased it.

IUHQ: Could you give any example? Many new entrants have entered into the Pakistan markets which has led to increased investment and innovation, primarily due to a robust merger and acquisition control regime. CCP is always supposed to work to enhance ease of doing business. Please read Article 18 of the Constitution. The Competition Commission is formed to ensure freedom of trade guaranteed by none other but the Constitution. Article 18 specifically allows to ensure freedom of trade through regulation. The Competition Act, 2010 is the regulation to eliminate anti-competitive practices that are harmful for freedom of trade. This is how simple it is as I understand.

NUH: CCP can't seem to get clarity on its role. It wants price controls through DCs. It wants used automobiles to not come into country and in some cases merely wants more regulation where more market is required.

IUHQ: Competition Commission is very much clear on its aims, duties and functions. They are to ensure free competition, curbing anti-competitive behaviours by undertakings (especially dominant undertakings or the undertakings who attain dominance by collusion). CCP has never suggested to increase regulatory burden and stop investment or imports in the automobile sector. Please give some examples, if you have. Kindly note that no investment is a good investment if it breaches the chapter II (prohibitions) provided under the Competition Act, 2010. I am of the view that import of vehicles should be allowed for creating competition in this relevant market. It is wrong on the part of Competition Commission to suggest barrier to import of vehicles.

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NUH: With regulation and now CCP, the inky growth industry in Pakistan is lawyering. 12. Yes it has been shown a country where lawyers thrive the economy and others suffer.

IUHQ: That is the common problem in most of the countries, unless judiciary plays its role in a lucid manner. You will appreciate that everyone has the right to thrive in their profession. The lawyers are providing services to their clients. The courts are required to pass judgments to settle the competition related issues pending adjudication. The consumers are suffering by a decade long “injunctive orders” passed by the high courts, not by the Competition Commission. It was ordered for the Competition Commission to carry out adverse proceeding but not to take any adverse action. The questions of substantial, procedural and constitutional issues must be settled by the courts. It appears that the cartelists will enjoy freedom to breach competition law unless adverse orders are passed against them.

NUH: We still need PC to be the deregulation commission (get give off backs of business). and CCP to probably put in abeyance for next few decades until we reach per capita income of 10000!.

IUHQ: Privatization Commission is a robust agency and it shall continue. What difference would it make if we call it a deregulation commission now? Are there any substantive suggestions? During the last two decades, more than 120 countries have adopted competition laws which are common around the world. All of such countries are unwise? Obviously not. The Australia has probably the biggest competition consume protection agency in the world. The role of CCP has nothing to do with per capita income. If you think it has, please provide some examples in an empirical manner.

IUHQ: At the end I would like to emphasise the fact that there is always room to develop an institution. Competition Act is an evolving creature as I understand. The list of Abuse of Dominant position or Cartelisation are non-exhaustive. The Competition Commission is free to introduce jurisprudence in the matter of all prohibitions. For example, a prohibited agreement is not only the signed agreement on paper but mere exchange of price sensitive information can very well lead to an agreement for increase in prices by eliminating competition. Another example could be the predatory price fixing. The newly established competition agencies are lucky to have precedents set by the US and EU jurisdictions. The courts in EU and US have been proactive making decisions to enhance the understanding of competition regime. The courts in Pakistan must examine such judgments for their considerations in order to pass judgments on the principles of competition law. The Competition Commission needs competition economists, as stated in the Webinar by Ms. Rahat Kaunain Hassan, former Chairperson. Ms. Rahat Hassan used to say “emphasise on the facts”. If you come out with better facts corroborating the breaches with the culprits, there would be more and effective enforcement of competition law. Mr. Khalid Mirza used to say “competition commission is here and it is going to stay”. Therefore, Deregulation Commission or no Commission, the Competition Commission is a fact in the economy of Pakistan.

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It is my considered opinion after working with the Competition Commission for many years that without protection of competition in various sectors, a country cannot develop its economy. There won't be foreign direct investment in a country where there is no competition agency. Competition agency is a must for each country. Therefore, instead of asking questions on its existence, the consideration should be made how to strengthen it and how to make it more robust agency. That in my opinion would be beneficial for the stakeholders and the overall economy. This is the time where a country cannot survive without following the international best practices may it be in the shape of laws such the Competition Act, 2010.

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