

REGULATION AND POLICY SPACE



CCP Slumbered while Consumers Short-Changed?

By Joseph Wilson and Khalid A Mirza

The Competition Commission of Pakistan (CCP) was established, in October 2007, with the objective to “maintain and enhance competition.” This brief, simple mandate is enshrined in the preamble of the Competition Act, 2010 (“the Act”). It is, therefore, reasonable to expect that every action of Commission must be geared to achieve its sole objective of maintaining and enhancing competition. The consequential effect of competition is to enhance economic efficiency in all spheres of commercial and economic activity and to protect the consumer from anti-competitive behavior, which is what the Act aims to provide.

What is competition? Why is competition so important? How is competition maintained and enhanced? Handling these questions with clarity and focus is fundamental to the work of all concerned within the Commission. To state the obvious, when we talk about competition in reference to the functioning of the market, we mean the rivalry amongst economic agents to secure a larger (or largest) share of the market. A market is called competitive, when there are a large number of market players, products are fairly homogeneous, buyers have perfect information, and there are no unreasonable barriers to entry or exit from market. A competitive market, on the supply side, induces innovation, higher quality and lower prices, and on the demand side, it offers information, choices in products and services of higher quality at competitive prices. All of this may be summed up as “consumer welfare,” which is ultimately achieved by promoting, maintaining and enhancing competition. “Consumer” is the main protagonist in this entire internet of things.

With this backdrop, it is quite disconcerting and our jaws drop when it is noted that some recent decisions of the Commission are chilling competition, instead of maintaining and enhancing it. For instance, the Commission’s Order of 30 March 2018 in the matter of Kamyu.pk, the concerned two-member bench gave an incongruous interpretation of Section 37(2) of the Act and held that an inquiry could not be initiated upon a complaint by a consumer. The bench took pains to highlight that since the word “consumer” is not defined in the Act, the consumer is deprived of any capacity to file a complaint ignoring the obvious fact that a consumer could always draw the attention of the Commission to an alleged wrong-doing and the Commission could take ‘suo motu’ notice to proceed further in the matter in accordance with law.

Devising effective regulatory measures to capture the non-viable firms in the marketplace, regulators can generate larger space for the more productive and small-medium enterprises (SMEs) to access the credit.

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The superior courts in Pakistan favour purposive interpretation that is in line with the spirit of the law so as to further its aim and not to stifle it. Contrary to this view, as a consequence of their questionable interpretation, the bench members went ahead to upset the entire appellate holding that an inquiry could not have been initiated in this case under Section 37(2) thereby obviating any subsequent proceeding under Section 30, and therefore, both the Enquiry Report and the SCN [show cause notice] were set aside.” Not satisfied with this, the bench from its high pedestal went further and also took the opportunity to reprimand the “concerned Head of Departments of the Commission” warning them to ensure “future compliance with the explicit provisions of the Act.” By doing this, the bench sabotaged a significant part of the Commission’s work since effectively it would not be possible for the Commission’s officials to entertain consumer complaints and conduct enquiries under Section 37(2).

We remain in awe, as to how a proceeding under Section 30 of the Act can be initiated unless “the Commission is satisfied that there has been or is likely to be a contravention” which in many instances is possible only after holding an enquiry under Section 37. Clearly, before any action is taken or authorized under Section 30, the Commission has a sacred duty to first satisfy itself that, prima facie, there has been a contravention or the likelihood that a contravention has occurred. This is a non-delegable duty. It is really surprising that the adjudicating members did not recall that the Commission as a whole, of which they were an integral part, had actually authorized the proceedings based on the findings of the Enquiry Report submitted to the Commission. For the bench to then reprimand the officers concerned seems unconscionable and not possible to defend. Engaged in technicalities, and that too incorrectly, members of the bench, through this inexplicable decision, clearly wasted the time of the Commission’s officers, and their own time, all of which was paid by the public exchequer, and the complainant ended with no remedy!

Slumber: Another decision by the Commission that makes us shake our heads was issued on 16 December 2019 in the matter of Pakistan Flour Mills Association (PFMA) pertaining to cartelization by the flour mills. The Commission found that the PFMA had engaged in cartelization and slapped the Association with a penalty of Rs. 75 million. While the decision may be right, this case illustrates the well-established legal axiom “justice delayed is justice denied.” Here the denial of justice is again to consumers, who have been ripped off by flour mills that colluded and charged inordinately high monopoly prices. The timeline of events, as documented in the Order, loudly proclaims the snail’s pace at which the Commission proceeded in this matter, in fact seems to be sleep-walking throughout! This case shows that efficiency in processing and disposal of cases is not a priority of the Commission and shows remarkable apathy or lack of concern for the welfare of the consumer which is a significant part of the raison d’être underlying the Commission’s existence.

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While the Commission first took notice of cartelization on 28th June 2015, it took fifteen months for the Commission to take a decision to raid, or inspect by surprise, the offices of PFMA, which occurred on 4th October 2016. Thereafter, the officers concerned spent ten months to prepare an inquiry report, which they submitted to the Commission on 1st August 2017. It then took the Commission six long months to read the inquiry report and authorize the issuance of a Show Cause Notice, which was issued on 22nd February 2018. The first hearing was conducted on 29th March 2018, and then there was a long hiatus of seventeen months to resume the hearings on 20th and 29th August 2019, subsequent to which the Commission took another three-and-a-half months to issue the order. Thus, from June 2015 till December 2019, it took four years and six months for the Commission to conclude a case, while in the meantime flour mills kept on ripping off consumers with impunity.

While two members and the Chairperson who adjudicated in the three cases mentioned above have since been removed from office, it is important that the Commission be re-constructed and re-oriented to ensure that consumers get the protection they have the right to expect under our competition regime. It is such cases that have, inter alia, given rise to questions being raised regarding the efficacy of the system embodied in the Act as well as the plea that this system be jettisoned and, if at all, possibly replaced by a regime suited to our circumstances, whatever that may be! We are pinning our hopes on the two remaining members - after the recent removal of three members - both of whom seem focused and committed to doing what is right, and on the Government filling the vacancies with persons that are not only highly competent but also, above all else, are persons of unimpeachable integrity.