

COMPETITION COMMISSION OF PAKISTAN

ENQUIRY REPORT

(Under Section 37(2) of the Competition Act, 2010)

**IN THE MATTER OF COMPLAINT FILED AGAINST PAKISTAN BROADCASTERS
ASSOCIATION (PBA), MEDIALOGIC (Pvt) LIMITED AND BROADCASTERS AND
ADVERTISERS COUNCIL (BAC)**

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Dated: 26 October, 2018

BACKGROUND & FACTS

1. The Competition Commission of Pakistan (the ‘Commission’) received a complaint under Section 37 (2) of the Competition Act, 2010 (‘the Act’) from BOL Media Network, M/s Labbaik (Pvt.) Ltd and BOL Enterprise (Pvt) Ltd (‘the Complainant’) against Pakistan Broadcasters Association (‘PBA’) Medialogic (Pvt) Ltd. and Broadcasters and Advertisers Council (‘BAC’), (collectively referred to as ‘the Respondents’). (Copy of Complaint ‘Annex A1’ and rejoinder by Complainant at ‘Annex A2’ and ‘A3’).
2. The Complainant stated that it is a world renowned TV network, consisting of diversified platforms, including television (BOL news and BOL Entertainment), Digital Media (Web, Social Media & Media Apps), Print Media (Newspaper and Magazine), Cinemas & Movies, Theatre and Radio. The Complainant is duly licensed to operate Satellite TV channels and to handle all such dealings related to BOL news and BOL Entertainment concerning broadcasting, marketing and other affairs of Satellite TV Channels in Pakistan.
3. The Complainant notes that Medialogic is a TV Ratings provider in Pakistan which runs overnight TV Audience Measurement (‘TAM’) panel which provides daily ratings for all local and international Satellite TV Channels. It also notes that since Medialogic has been endorsed by BAC, advertisers and businesses engage and advertise on those Satellite TV Channels whose ratings are provided and published by Medialogic. The Complainant further states that advertisers do not consider ratings provided by any other company except Medialogic and if the same does not provide rating of any particular TV Channel, the advertisers refrain and hesitate from engaging or advertising on it.
4. The Complainant alleged that previously Medialogic provided and published ratings for it however, due to some conspiracy by the Respondents, BOL’s ratings were discontinued. In 2018, the Complainant obtained release orders for advertisement

through BLITZ Communications and Brainchild Communication (Pvt.) Ltd but that the release order got cancelled allegedly due to the fact that PBA had approached the said advertising agencies and coerced and threatened them in cancelling the release orders of the Complainant.

5. In 2018, the Complainant again requested for registration/subscription with Medialogic for publishing its rating however, Medialogic failed to issue rating on an excuse that they require prior approval/ N.O.C of BAC. As per the Complainant, an agreement exists between Medialogic and BAC that restricts Medialogic to publish ratings of channels for which BAC has issued approval/ N.O.C.
6. According to the Complainant, it had requested for the approval of BAC but the board meeting of BAC on which approval of the Complainant was to be decided was postponed without any reason and no information as to the approval/N.O.C has been received either by Medialogic or by the Complainant. It highlighted the fact that Medialogic publishes the ratings of multiple channels that are neither members of PBA nor have obtained approval/N.O.C from BAC. It also noted that a similar agreement was signed between Medialogic and PBA in 2014 allegedly to restrict Medialogic to publish ratings for only members of PBA.
7. The Complainant further alleged that it has also applied for membership of PBA but it had been denied membership and as part of the application process private and sensitive information was demanded from the Complainant. As per Memorandum and Articles of Association, PBA has no mandate to demand such information from a broadcaster applying for membership. The Complainant alleged that it is a discriminatory treatment on part of the association and in violation of Section 4 of the Act.
8. The Complainant stated that no advertising agency wishes to engage and do business with it for the sole reason that Medialogic is not publishing ratings of the Complainant TV Channels. The Complainant further states that Medialogic desists from publishing/issuing ratings of the complainant due to the reason that they require

approval/N.O.C from BAC while PBA has made unprecedented excuses in order for them to reject membership of the complainant. This abuse of dominant position on part of Medialogic and anti-competitive actions of the respondents have the cumulative effect of depriving the Complainant of advertisements.

9. On 16th August, 2018 an enquiry under Section 37(2) of the Competition Act, 2010 ('the 'Act') in the matter was authorized and the following officers were appointed to investigate the matter for any possible violations of the Act: Mr. Syed Umair Javed, Director, Ms. Maliha Quddus, Deputy Director and Ms. Aqsa Suleman Management Executive (the 'Enquiry Committee').

Proceedings in the Honourable Supreme Court in the matter

10. The Honourable Supreme Court of Pakistan through Order dated: 05.09.2018, passed in Criminal Original Petition No. 108 of 2018, was pleased to direct the Competition Commission of Pakistan to inform and submit the relevant information/documents regarding the subject agreements between PBA, Medialogic and BAC, regarding TV rating. (Copy of Order 'Annex B').

11. Furthermore, the Honorable Supreme Court passed Order dated 27.09.2018 in Criminal Original Petition No 108/2018 wherein CCP has been directed, in paragraph 6, to decide the said matter in accordance with the law within four weeks:

"We have been informed that a petition filed by BOL Media Network before the Competition Commission of Pakistan ("CCP") has been pending since long and is not proceeding owing to pendency of instant matter before this Court. We accordingly direct CCP to decide the said matter in accordance with the law within four weeks".

12. The Enquiry Committee forwarded the aforementioned complaint to Medialogic, PBA and BAC i.e. the Respondents and the submissions made by each of them are summarized hereunder and will be referenced subsequently in the Analysis part of this

Enquiry Report. (Full responses are attached as Annexures ‘C’ –Medialogic, ‘D’— PBA and ‘E’--BAC):

Medialogic

13. Medialogic’s response, to the Enquiry Committee’s letter dated 17th August, 2018, was submitted vide letter dated 19th September, 2018 and 15th October, 2018. The key submissions are as follows:

“At the very outset, it must be pointed out that the Complainant fails to disclose material information pertaining to the subject matter, including, most importantly:

- a. *The factum of pending proceedings in Human Rights Case No. 3406/2018, Crl.O/P 1082018 and Crl.O.P 114/2018 before the Honourable Supreme Court of Pakistan. Pursuant to the orders of the Honourable Supreme Court, a consensual way forward for the relevant industry is being developed and is to be submitted in the same proceeding by PEMRA; and*
- b. *The Complaint and the ensuing Enquiry suffers from non-joinder of necessary and proper parties, especially Pakistan Advertisers Society (‘PAS’), a representative body of the advertisers.*

Subject to the above, it is respectfully submitted that the Complaint (as shared with Medialogic) is vague, false and frivolous. It fails to depict the correct factual and legal position. It levels allegations against various parties, including Medialogic, without showing even prima facie evidence/proof of any alleged violation or potential violation of the Competition Act. Medialogic has, at all times, operated within the bounds of the law and hereby reaffirms its willingness and intent to further streamline its operations in accordance with the law.”

14. Explaining the nature of the TAM business, Medialogic notes that the main purpose of channel rating is to enable advertisers to make informed decisions regarding placement of advertisements and there are two stakeholders in TAM data: advertisers and

broadcasters. According to Medialogic the prevalent global model in the industry was/is that TAM data is gathered and provided by companies/agencies operating in the private sector. The key stakeholders i.e. advertisers and broadcasters, together with advertising agencies, form Joint Industry Committees ('JICs') to appoint, supervise and regulate TAM data providers.

15. In 2006, PAS which is a representative body of all large advertisers and brands floated an international tender for rating/research services. Medialogic won the tender and entered into an agreement with PAS and also bilateral agreements with different advertisers and broadcasters. Medialogic clarified that the agreement with PAS did not mean there was any bar on any advertisers and/or broadcasters from obtaining television ratings data from any other companies providing such data. The PAS agreement expired in 2010.

16. In 2014, PBA entered into an agreement with Medialogic which obliged Medialogic to, *inter alia*, comply with the "Global Guidelines for Television Audience Measurement System". The Agreement did not bind anyone, including PBA members, to procure data from Medialogic.

17. In late 2015, PAS floated another tender for TAM and Rating Services and during that process the industry bodies for broadcasters (PBA) and advertisers (PAS) agreed to form a JIC in line with international best practices to *inter alia*, supervise the tendering process. The JIC called BAC comprising most of the leading broadcasters and advertisers as well as media agencies was officially registered in 2018. The tender process lasted for several months and was supervised by the world's leading TV Audience Audit and Consulting Firm, CESP. In 2017 Medialogic/Kantar was awarded the project for five years (2018-2023) and an Agreement was signed in 2018. The BAC Agreement envisaged two options: (i) BAC could become exclusive client of Medialogic by paying a fixed fee every year; or (ii) Medialogic would continue to operate as an independent service provider and continue to enter into bilateral contracts with its various clients (advertisers and broadcasters). BAC eventually opted for the

option “ii” and this is how Medialogic has operated even in the presence of BAC Agreement, i.e. through independent agreements with each of its clients.

PBA

18. The Enquiry Committee wrote to PBA vide letter dated 17th August 2018 seeking its comments on the complaint filed by BOL. In its response, vide letter dated 31st August 2018, PBA sought an extension of four weeks’ time in filing of the requisite information. The Enquiry Committee in reply vide letter dated 03rd September 2018 granted PBA a till 11th September 2018 to file its response. In its reply vide letter dated 10th September 2018 noted that the matter was pending before the Honourable Supreme Court and the CCP should adjourn its proceedings until further orders, or clarifications, are issued by the Honourable Supreme Court of Pakistan regarding this issue.
19. The Enquiry Committee vide letter dated 13th September 2018 informed PBA that there was nothing in the Order dated 05.09.2018 passed by the Honourable Supreme Court passed in Criminal Original Petition No. 108 of 2018 that barred it from proceeding and that the said Order merely inquires as to what proceedings in the matter are pending before CCP. PBA was therefore, asked to provide its comments on the complaint filed by BOL, to the Enquiry Committee, without further delay.
20. In its reply submitted vide letter dated 15th September 2018 PBA reiterated its stance and requested the Enquiry Committee to defer the proceedings before it on the issue. PBA was asked again by the Enquiry Committee to submit its response vide letter dated 18th September 2018 and PBA in its response submitted vide letter dated 23rd September 2018 referred to again to the proceedings in the Honourable Supreme Court and reiterated that proceedings pending with CCP should be adjourned till further directions/clarifications from the Court.
21. Pursuant to the Honourable Supreme Court’s Order dated 27th September, 2018 the Enquiry Committee wrote to PBA vide letter dated 05th October, 2018 to file

comprehensive replies in the matter. PBA in its response received dated 15th October, 2018 noted that the Court's order makes it absolutely clear that the present complain has to be decided in accordance with law without being influenced by any interlocutory or tentative observations of the Court in the matter.

22. PBA noted that in 2014 it entered into a contract with Medialogic with the principal aim being quality assurance and the ability to be in a supervisory role for an industry association (i.e. broadcasters' association) over the authenticity of the data provided by Medialogic. It also noted that it entered into a Joint Venture Agreement with BAC on 16th November, 2018. BAC was established as a platform to deal with a ratings company, the clear aim being that since both broadcasters and advertisers have an interest in ensuring transparency and authenticity of data, they should agree to common standards regarding quality control, supervision, right to conduct audit of the rating company, and to ensure that it (rating company) cannot unilaterally amend the parameters on which data collection is premised. It further adds that PBA and BAC entered into agreements with Medialogic to ensure certain industry wide standards and quality control mechanisms.

BAC

23. The Enquiry Committee wrote to BAC vide letter dated 5th September, 2018. In its response vide letter dated 12th September, 2018 BAC requested CCP to defer the proceedings until the matter was clarified by the Honourable Supreme Court. The Enquiry Committee vide letter dated 13th September, 2018 asked BAC to submit its reply in the matter. BAC vide letter dated 01st October, 2018 requested extension for filing of its reply and a detailed reply was subsequently filed by BAC on 15th October, 2018.
24. It submitted that the establishment of BAC was akin to that of Joint Industry Committee ('JIC') which is recognized globally as the preferred and most effective method for the management of TAM research, including, but not limited to, in the United Kingdom

and the European Union and goes on to state the various benefits of a JIC. It further noted that the contract award to Medialogic followed a competitive tender process and that an international consultant was hired to oversee the entire process.

25. BAC was formulated as the regulatory, supervisory and approving authority on parameters of the research required for viewership coverage and ratings, including but not limited to, source funding, research methodology and data quality checks. Through the BAC Agreement, BAC has merely endorsed Medialogic and its services as being the ‘official industry currency’ for the provision of TAM ratings in Pakistan.

ISSUES

26. Based on the facts stated above, the question before the Enquiry Committee is whether the arrangements between PBA, Medialogic and BAC and the conduct of PBA and BAC constitute, *prima facie*, violation of Section 4 of the Act.

27. In order to determine the answer to the question above, the Enquiry Committee will be pursuing the following lines of inquiry:

- a. Whether PBA and BAC can be considered as ‘*association of undertakings*’ in terms of Section 2(1) (q) of the Act;
- b. Whether Medialogic can be considered as an undertaking in terms of Section 2(1) (q) of the Act;
- c. Whether the arrangements between PBA, BAC and Medialogic, and the conduct thereof, are *prima facie* anti-competitive in terms of Section 4.

ANALYSIS

28. Before proceeding with the analysis of any possible violation of Section 4 of the Act it would be pertinent to first ascertain the relevant market where the alleged anti-competitive conduct occurred and which market was affected by it.

29. The relevant market in terms of Section 2(1)(k) of the Act is defined as follows:

“relevant market” means the market which shall be determined by the Commission with reference to a product market and a geographic market and a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products’ characteristics, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those areas”.

30. The Complaint in the instant matter revolves around the provision of TAM data & ratings which are primarily used for the placement of advertisements on broadcast media i.e. TV channels by the advertisers mostly using services of advertising agencies. AC Nielsen defines TAM as follows:

“TAM (Television Audience Measurement) is the specialized branch of media research, dedicated to quantifying (size) and qualifying (characteristics) this detailed television audience information. With the billions of dollars spent annually on TV programs and commercials, reliable TV audience information is required to evaluate and maximise the effectiveness of this investment. These ratings, if reliable and valid, become the 'common currency' for the market's commercial airtime. Media planners and buyers evaluate the alternative programs offered to best achieve their advertising goals; broadcasters evaluate

the program or station's popularity and how much to charge an advertiser for commercials during a program or on a given channel”¹.

31. PBA vide its submissions to the Enquiry Committee notes:

“In a burgeoning and competitive industry with many broadcasters, the economics for entities wanting to advertise their products/services is quite simple: they will want their products advertised with those broadcasters that are viewed the most by the consumer public. But what dictates choice? How would a rational commercial actor, in the position of a company wanting to advertise its product, decide upon a particular broadcaster? This is where the modern day ratings system, i.e. TAM comes in”.

32. BAC and PBA have submitted to the Enquiry Committee that the relevant market in this case is the market for TAM services which involves research dedicated to quantifying (size) and qualifying (characteristics) the detailed television audience information.

33. In terms of the above discussion it appears that in the instant matter, the product market consists of provision of TAM data & ratings services.

34. As regards the relevant geographic market, it comprises whole of Pakistan, as the conditions of competition for all market participants across Pakistan are fairly homogenous.

35. As discussed earlier, broadcasters sell airtime for advertisements to advertisers on the basis of TAM data & ratings. Therefore, the market for advertising airtime on TV Channels in Pakistan is very closely related with the market for TAM data & ratings.

¹<http://www.agbnelsen.com/aboutus/whatistam.asp>

Whether PBA can be considered as an ‘association of undertakings’ in terms of Section 2(1)(q) of the Act;

36. Section 2(1)(q) defines undertakings as follows:

“undertaking” means any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association of undertakings”.

37. In terms of PBA's own submissions, it is an association comprising of television and radio broadcasters. The association membership has two categories, namely:

- a. Television Broadcaster: Broadcasters that have acquired ownership and / or are operating Television Channel either through Satellite or Terrestrial.
- b. Radio Broadcaster: Broadcasters that have acquired ownership and / or are operating as Radio Station.

38. Therefore PBA is a representative body of undertakings engaged in the business of providing TV & Radio broadcasting services and so, PBA is an association of undertakings in terms of Section 2(1)(q) of the Act.

Whether BAC can be considered as an ‘association of undertakings’ in terms of Section 2(1)(q) of the Act;

39. The Memorandum of Association of BAC states that it is a:

“not-for-profit joint industry body of advertisers, broadcasters and media agencies through their respective associations and societies and any other relevant stakeholder to safeguard their common interest, to promote advertising and media industry and to set high standards of practices and transparency through various initiatives including but not limited to media

research and monitoring, advisory services and self-regulation for the benefit of the advertising and media industry and the public at large”.

40. As per the Articles of Association of BAC it shall have 15 members and the General Body would have the following composition:

- a. 06 (six) members nominated by PAS;
- b. 06 (six) members nominated by PBA;
- c. A representative of the media houses of Pakistan, nominated by PAS;
- d. A representative of the media houses of Pakistan, nominated by PBA;
- e. A Chairman appointed by the Board of Directors of the Society, provided that the first Chairman shall be Mr. Sarfraz.

41. Based on the foregoing, it appears that BAC consists of members of PBA, PAS & representatives of media buying houses which are all undertakings in terms of Section 2(1)(q) of the Act ,therefore, BAC being a representative association of the broadcasters, advertisers & media buying houses is an association of undertakings in terms of Section 2(1)(q) of the Act.

Whether Medialogic can be considered as an ‘undertaking’ in terms of Section 2(1) (q) of the Act;

42. Medialogic is a company that is engaged in the business of TAM data & rating services in Pakistan and is, therefore, an undertaking in terms of Section 2(1)(q) of the Act.

Whether the arrangements between PBA, BAC and Medialogic are anti-competitive in terms of Section 4 (1), read with Sub-section (2) (a) of the Act.

43. Section 4 of the Act defines prohibited agreements as follows:

“Prohibited agreements .— (1) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings,

shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5.

(2) Such agreements include but are not limited to-

(a) fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any service;

(b) dividing or sharing of markets for the goods or services, whether by territories, by volume of sales or purchases, by type of goods or services sold or by any other means”;.....

(f) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage;

44. In terms of the submissions made by all parties, following three arrangements/agreements need to be considered to ascertain possible violation of Section 4 of the Act:

- a. The Agreement between PBA and Medialogic (Agreement 1) (Annex ‘F’);
- b. The Agreement between Pakistan Advertisers Society (‘PAS’) and PBA 7 (‘Agreement 2’) (Annex ‘G’);and
- c. The Agreement between BAC and Medialogic (‘Agreement 3’)(‘Annex ‘H’).

Agreement 1

45. The agreement was signed between PBA and Medialogic on 15th July, 2018 to remain in force till such time the parties decide to terminate it with mutual consent. The agreement is for the provision of ratings services² by Medialogic to PBA for which the

² As per Clause 4.1.1 to 4.1.10 these services include inter alia selection of households, installation of meters, collection of viewership data and meaningful compilation of the data, provide daily viewership ratings data through INFOSYS on a daily basis, based on 675 meters installed in the main television sets of 675 households for the viewing of all PBA member channels (satellite and terrestrial channels).

latter would pay an agreed upon consideration. As per Clause 6 of the Agreement titled Payment and the submission made by Medialogic, bilateral agreements between individual broadcasters and Medialogic were signed separately for payment of services rendered. Clause 6.1 of the Agreement is reproduced as under:

*“In consideration of Services provided by Medialogic, **PBA shall ensure that broadcasting members of PBA pay the required fees to Medialogic**”.*

46. Clause 3.5 of the agreement restricts Medialogic from providing services to any broadcaster that is not a PBA member. The said clause is reproduced below for reference:

*“3.5 Medialogic shall provide Services to only those broadcasters **that are members of PBA**. The guidelines for broadcasters to qualify for Medialogic TAM subscription are given below:*

3.5.1 The broadcasters must have a valid legal license by PEMRA;

3.5.2 The broadcaster must not have any interest in a parallel ratings company setup, this interest includes ownership, promotion, marketing or supporting parallel ratings setup on its own electronic or digital media platforms;

3.5.3 The broadcaster must not be having any interest in a parallel industry body claiming to represent the interests of broadcasters;

*3.5.4 **For any broadcaster not fulfilling the above requirements, Medialogic must seek approval from PBA before issuing ratings data for such broadcasters**”.*

47. Medialogic in its response, to the Enquiry Committee, regarding Agreement 1 states:

“...this was merely an endorsement contract and did not bind anyone, including PBA members, to procure data from Medialogic”. The Enquiry Committee notes that the question in the instant matter does not concern whether or not PBA members are contractually bound to procure rating services from Medialogic – even though it could be argued that Agreement 3 does endorse it as the ‘single industry currency’ and in effects binds broadcasters and advertisers to rely on its data while making business decisions. Rather it has to be ascertained whether Agreement 1 has the object or effect

of denying non-PBA members the ability to attract advertisements by denying them TAM ratings and data.

48. PBA contends that a big reason for Clause 3.5.1 was to prevent illegally aired Indian channels from being included in any TAM rating. If Indian channels (being illegally aired) received TAM ratings then this would distort the local market as well as create incentives for driving advertising away from channels being legally aired in Pakistan. However, the justification provided by PBA does not appear valid because the task of proceeding against illegally aired TV channels is covered under the regulatory domain of PEMRA.

49. With regards to seeking approval from PBA in case broadcasters did not meet the criteria set out in Clauses 3.5.1 to 3.5.3, PBA has argued that this was to ensure quality control and to ensure that standards set to ensure compliance were not bypassed. The Enquiry Committee observes that PBA has failed to disclose how PBA approval in the instant matter would ensure the same.

50. PBA further states: *“There is no evidence on record that such permission has been unreasonably withheld”*. The Enquiry Committee would like to cite the Order dated 09.08.2018 passed by Honourable Supreme Court in Criminal Original Petition No. 108 of 2018 in Human Rights Case No. 34069 of 2018. Paragraph 11 of the said order states:

“We have gone through the suit filed by PBA before the Civil Courts of Lahore. Perusal of the contents of the plaint clearly indicates that it is a collusive and self-serving suit. The main purpose of the suit appears to furnish a legal shield to an exclusivity agreement and create an artificial and contrived legal hurdle to prevent BOL from seeking rating which as stated above is necessary to enable it to secure advertising revenue in order to remain in the market. It is also significant to note that although the focus of the plaint was to seek relief against BOL, the said company was never impleaded as a party in the said suit. An ex parte restraining order was obtained by PBA against Medialogic to prevent it

from granting rating to BOL. Understandably no real effort was made on either side to get the main suit or the matter of interim relief decided. As a result, the said ex-parte restraining order has remained uncontested and was cleverly used as an excuse before PEMRA to deny grant of rating to BOL.

The above court judgment indicates that apart from the earlier mentioned clause, Medialogic was also restricted to provide services to non-PBA members through court orders.

51. Furthermore, Clause 10 of Agreement 1, titled Termination and Event of Default threatens Medialogic with punitive consequences in case it provides ratings to broadcasters who are not members of PBA. The relevant clause is reproduced below:

“10.2 PBA can terminate this Agreement immediately, if the Medialogic provides Services to those broadcasters who are not the members of PBA, as it will result in an event of default”.

52. The Complainant has also alleged that advertisers issued release orders of advertisement and payment of the same on the condition that Medialogic shall issue ratings to BOL. In this regard an email between Starcom, an advertising agency and BOL is reproduced:

“This is to bring into your notice that our client TCCEC has shown its interest for placing business on BOL network but the only deadlock right now is your availability on KANTAR (Medialogic). BOL’s non-availability on KANTAR makes it impossible for us to evaluate the channel’s performance and run our post buys.

Kindly let us know if there are any updates of your channel’s subscription on KANTAR. Your availability on KANTAR is very crucial as our decision to place business is entirely dependent on it.

Looking forward for a prompt response on this matter.

Thanks,

Mujtaba Kamal”

53. The contents of this email and other email correspondence with advertising agencies show that *prima facie* BOL was unable to receive advertising from various brands unless it was rated by Medialogic (Annex ‘F1’).

54. BOL has also alleged that it had managed to obtain release order for its advertisements via Blitz Communications and Brainchild Communication but the advertisements were cancelled after PBA approached the said advertising agencies and threatened them to cancel the release orders of BOL. It also mentions an email by Executive Director of PBA to Brainchild Communications Pakistan (Pvt.) Ltd. relevant excerpts of which are reproduced:

“...The purpose of this letter is to convey to you the unfortunate facts regarding BOL News and its relation with AXACT and Mr. Shoaib Shaikh and mysterious sources of their funding so that as an industry stakeholder, you may take an informed decision on this matter. As the situation stands, while PEMRA has revoked BOL News License, the Government of Pakistan is prosecuting Mr. Shoaib Shaikh and other executives of AXACT for various criminal offenses involved in selling fake and forged degrees as well as money laundering.

As a representative body of the electronic media of Pakistan, it is our obligation to keep safeguarding the reputation of the entire industry and to keep making an effort to prevent induction of proceeds of crime into the media industry of Pakistan. The Board of Directors of PBA has unanimously resolved vide their meeting dated May 14, 2018 to intimate all stakeholders in the industry to be extremely careful when dealing with any such operator for any commercial or non-commercial relationship.

This letter is being written for your information only. In case you need any further information or clarification, please feel free to contact us.

Sincerely for,

Pakistan Broadcasters Association

Muhammad Ali Butt

Executive Director.”

55. Subsequent to the above mentioned email/letter, the Chief Executive of Brainchild Communications (Pvt.) Limited addressed an email to the Complainant’s Head of Sales (attached with the Complaint) cancelling its release orders. Email is reproduced here for reference:

“Dear Mr.Masoom,

Head of Sales

I refer to the email written to our Chairman by Mr. Mohammad Ali Butt, Executive Director, PBA. I also refer to a clarification meeting between the Chairman and Executive Council, PBA held on May 15, 2018 at the offices of Pakistan Broadcasters Association.

I hereby, write this note to inform you that pursuant to the conversation of May 15, 2018 and contents of the following mail, all commercial transactions stand cancelled with immediate effect between Brainchild Communications Pakistan (Pvt.) Ltd and BOL News Network. Any and all Release Orders sent by the agency stand cancelled.

After this email, no commercial claims from BOL News Network will be entertained.

Regards,

Taqi Abbas

Chief Executive

Brainchild Communications Pakistan (Pvt.) Ltd (Annex ‘F2’)”

56. The above mentioned emails clearly indicate that PBA has made all out efforts to enforce the clauses of the agreement and to ensure that the non-members do not get any advertising business.

57. Whereas, non-PBA members are being deprived advertising business by means of denying them TAM data and rating services, the Complainant has also alleged that it is not being granted membership of PBA. The Complainant has submitted that

membership to PBA has been made conditional upon the provision of commercially sensitive information which is being arbitrarily demanded from the Complainant only (Annex 'F3'). It is noted that demanding information of this nature falls purely within the domain of PEMRA which conducts its due diligence on these matters while granting a broadcaster license to operate and any licensee of PEMRA may be automatically assumed to have fulfilled all the criteria necessary for a broadcaster.

58. *Prima facie*, clauses 3.5.1, 3.5.3, 3.5.4 and 10.2 essentially deny ratings for any broadcaster that is not a member of PBA or from any other broadcasters' association and appear to be more restrictive when read in the context of the agreement between BAC (representing advertisers and PBA) and Medialogic (Agreement 3) which also restricts Medialogic to contract with other parties without prior approval of BAC.

59. It appears that Agreement 1 specifically Clauses 3.5.1, 3.5.3, 3.5.4 and 10.2 are an attempt on the part of an association (PBA) designed to foreclose the market for a potential competitors (including the Complainant) of its members and is tantamount to imposing a restrictive condition by an association which is a violation of Section 4 (1), read with Sub-section (2) (a) of the Act.

60. It also appears that the conditions for obtaining ratings by Medialogic are different for PBA members as compared to non-PBA members who are granted ratings only after meeting the criteria set out in Clause 3.5. These dissimilar conditions are due to the clauses laid out by PBA through Agreement 1 and also its conduct vis-à-vis the Complainant as discussed in the foregoing paragraphs. Therefore, Clause 3.5 of Agreement 1 is *prima facie* in violation of Section 4 (1), read with Sub-section (2) (f) of the Act.

Agreement 2

61. Agreement 2 is a Joint Venture ('JV') agreement between PAS and PBA for the establishment of BAC and was signed on November, 2017 and will continue unless it

is terminated by any of the parties. As per the response submitted by BAC and the JV agreement BAC is operating as a registered society (under the Societies Registration Act, 1860). It operates as not-for-profit body, *inter alia*, to control and manage a transparent TAM and any other Media Measurement, and to establish a new system for authentically checking the ratings of television channels either by introducing foreign technology or by other means.

62. According to Clause 4.1 the membership of BAC comprises: 06 members nominated by PAS; 06 members nominated by PBA; representatives of the media houses of Pakistan, nominated by mutual consent of the PBA and PAS and a Chairman appointed by the Board of Directors.

63. BAC, PBA and Medialogic all have in their representations to the Enquiry Committee have alluded to BAC being modelled after a Joint Industry Committee ('JIC') which is a recognized model globally for management of TAM research, in practice in jurisdictions such as the UK, EU and Australia among others. The Enquiry Committee conducted its own research as to the prevalence of JICs for managing rating/TAM services which reveals that this model is indeed one of three models in vogue for the above cited services. To quote a document from the EU:

"In each EEA country, the provision of TAM services is based on one of the three basic business models: (i) joint industry committees ("JIC"); (ii) media owner ("MO") model; or (iii) proprietary service ("PS"). A JIC is jointly set up by broadcasters, advertiser associations, advertising agencies and media buyers. The JIC selects a single TAM provider and negotiates specifications and terms of supply of data. The MO model is set up by a broadcaster or a group of broadcasters. The MO has the power to select the TAM provider through the organization of a tender. As for the PS model, the TAM service provider itself sets up and operates the TAM service on its own account³".

³Case No COMP/M.5232 - WPP / TNS

64. According to BAC, while JICs may differ in forms depending on jurisdiction, in essence they comprise of the relevant stakeholders, i.e. the broadcasters, advertisers and media agencies. The JICs also provide data to their clients/interested parties in the media industries in the form of a ‘single currency’ and contract with such research companies through a competitive tender process.
65. It is argued by the Respondents, especially BAC, that a JIC has a number of benefits which outweigh the other two models however, the Enquiry Committee believes that since it involves the participation of industry associations (PBA and PAS) an exemption application should have been filed with the Commission in terms of Section 5 of the Act showing cognizable efficiencies and verifiable pro-competitive aspects of the agreement. The Enquiry Committee understands that no such application was filed with the Commission.
66. In order to set up a successfully operating JIC a report by the World Federation of Advertisers opines that it is imperative that all the interested parties have the option of having their views known. It further notes that where broadcasters are grouped in several sectors, each should be represented on the committee. In some cases, each broadcaster will be represented individually on the JIC⁴. It appears that the constitution of BAC limits the representation of the broadcasters to PBA (which has 6 members) and does not include broadcasters who are not members of PBA i.e. the Complainant, whereas, such JICs need to have broad industry representation and not exclusive in order to produce credible ratings.
67. It appears that Agreement 2 is a decision on part of an association of undertakings i.e. PBA designed to restrict entry of and exclude non-PBA members from the JIC/BAC and its anticompetitive effects are exacerbated by Agreement 3 (as noted in the subsequent paras of this enquiry) which requires approval of BAC before Medialogic can grant ratings to any other customer. Therefore, Agreement 2 is anti-competitive in terms of Section 4 read with Sub-section (2) (a) of the Act.

⁴ Page 15, The WFA, EACA Guide to the Organization of Television Audience Research

Agreement 3

68. It is important at this point to examine Agreement 3 to fully understand the potentially anti-competitive effects of Agreement 2. Agreement 3 is an agreement between BAC and Medialogic entered into on 5th January, 2018 and is valid for a period of five years. BAC had submitted that the agreement was entered into after a tender process:

“In this respect, it is submitted that the TAM system was implemented in Pakistan through a rigorous tender process in 2015, wherein all interested parties submitted their bids, (it may be noted that while PAS initiated the process, i.e. floated the tender and invited companies to participate, BAC was simultaneously formed as a JIC hence, it was BAC/JIC that received the first round of presentations with all interested parties), and which eventually resulted in the engagement of Medialogic Pakistan (Pvt.) Limited (partnered with Kantar Media)”.

BAC also submitted that it had hired a specialized third party, international technical expert/consultant to oversee and assist the tender process.

69. Agreement 3 has been undertaken by BAC to engage Medialogic for the provision of audience measurement, rating and viewership data services. As per Clause 1(f) of the Agreement:

“1(f) During the Term:

- a. *Medialogic shall be BAC’s exclusive provider of services similar to the Services*
- b. *BAC shall endorse Medialogic and the Services as being the ‘official Industry currency’ for the provision of TAM ratings in Pakistan”.*

70. Clause 2(f) Representations and Warranties of Each party states:

“During the Term, Medialogic and Kantar shall not contract with any entity (corporate or individual) in furtherance of the Services that conflicts, directly or indirectly, with the interests secured herein other than the Direct Customer Contracts. However, if there arises such a need to contract with any entity, it shall require prior written approval from BAC”.

71. BAC in defence of the agreement has asserted that the agreement does not prohibit advertisers and broadcasters from availing ratings from other rating companies in Pakistan as TAM rating is an unregulated activity in Pakistan. It further notes that the agreement does not impose the ratings of Medialogic on advertisers and broadcasters, who may or may not choose to rely on the same. BAC only endorses Medialogic as a reliable provider of TAM ratings.
72. However, the Enquiry Committee notes that the agreement expressly endorses Medialogic as the ‘official industry currency’ which essentially translates into it being the only rating acceptable to broadcasters and advertisers alike.
73. Whereas Clause 1(f) recognizes Medialogic as the ‘official industry currency’ for audience rating, Clause 2(f) requires it to seek permission from BAC prior to providing rating services to other customers (i.e. other than broadcasters and advertisers who are BAC’s constituent members). It appears that these clauses foreclose the market for broadcasters that are not members of PBA since it is channels/broadcasters that actually require to be rated.
74. Furthermore, Clause 3(b)--Services says:
- “Provide daily viewership ratings Data through Instar on a daily basis, based on 1,800 meters installed in the main television set of 1,800 households, for the viewing of the following satellite and terrestrial television channels throughout urban areas of Pakistan, including but not limited to Karachi, Lahore, Islamabad and Rawalpindi:*
- i. GeoTv,*

ii. ARY Digital,

iii. PTV,

iv. Hum TV;

or other channels as may be mutually agreed between BAC and Medialogic;”

75. BAC has stated that although the clause requires mutual agreement between BAC and Medialogic before providing viewership ratings to other channels not specified in the BAC agreement, it is submitted that in practice, ratings are already provided to all channels. The Enquiry Committee notes that if this was indeed the case then this clause would not have been inserted in the agreement.
76. BAC was also of the view that the agreement does not place any prohibition on Medialogic from continuing its independent contracts with customers for services similar to providing ratings, which were entered into on or before the date of the agreement. This assertion means that new entrants to the broadcast industry who are not members of PBA would still be disadvantaged because of these conditions which in essence are designed to give PBA and BAC power over ratings and eventually advertising business received by each channel/broadcaster.
77. From the foregoing it appears that Clauses 1(f), 2(f) and 3(b) of Agreement 3 are tantamount to imposition of a restrictive condition by an association which is a violation of Section 4 (1), read with Sub-section (2) (a) of the Act. It also appears that by denying ratings to the Complainant, which is on air and has an audience, in effect means that PBA has divided or shared the market for TV advertisement air time between its member undertakings which is a violation of Section 4 (1), read with Sub-section (2) (b) of the Act.
78. The Enquiry Committee notes that the *prima facie* anti-competitive object/effects are apparent if the three agreements (i.e. Agreements 1, 2 and 3) are collectively examined combined with the established facts that the Complainant is being denied ratings by Medialogic and membership by PBA. Agreement 1 excludes non-PBA members from

receiving ratings from Medialogic and Medialogic is threatened with punitive consequence if it does so without the permission/approval of PBA. As per Agreement 2 non-PBA members do not constitute a part of BAC and are denied rating by Medialogic through Agreement 3.

79. The Respondents have argued that they are not part of the same market and hence the question of anti-competitive conduct does not arise. It is noted that although the agreements are vertical agreement they have a horizontal impact i.e. hindering competition in the relevant market as well as the allied market. Another potential anti-competitive aspect of these agreements is that ratings are used by channels to price time slots for advertisements and so the arrangements with Medialogic particularly Agreement 1 could directly impact pricing of airtime.

CONCLUSION & RECOMMENDATIONS

80. Based on the facts of the case the question before the Enquiry Committee was whether the arrangements between PBA, Medialogic and BAC and the conduct of PBA constitute, *prima facie*, violation(s) of Section 4 of the Act.
81. Based on the findings of paragraphs 33 and 34, the relevant market in the instant matter appears to consist of provision of TAM data & ratings. As regards the relevant geographic market, it comprises whole of Pakistan, as the conditions of competition for all market participants across Pakistan are fairly homogenous.
82. Based on the findings of paragraph 38 it appears that PBA is a representative body of comprising of members in the business of television and radio broadcast services and this PBA is an association of undertakings in terms of Section 2(1)(q) of the Act. Based on the findings of paragraph 41 it appears that BAC consists of members of PBA and PAS, who themselves are undertakings, and is thus an association of undertakings in terms of Section 2(1)(q) of the Act. Based on the findings of paragraph 42 Medialogic is a company that is engaged in the business of TAM services in Pakistan which is used

by broadcasters, advertisers and media houses and is, therefore, an undertaking in terms of Section 2(1)(q) of the Act.

83. Based on the findings of paragraph 59, it appears that Agreement 1 specifically Clauses 3.5.1, 3.5.3, 3.5.4 and 10.2 have the object and effect of foreclosing the relevant and allied markets for a potential competitors of PBA's members and also amounts to a decision by PBA imposing a restrictive trading condition, in violation of Section 4 (1), read with Sub-section (2) (a) of the Act.
84. Based on the findings of paragraph 60, it appears that the conditions for obtaining ratings by Medialogic are different for PBA members as compared to non-PBA members who are granted ratings only after meeting the criteria set out in Clause 3.5. These dissimilar conditions on otherwise equivalent transactions put non-PBA members at a competitive disadvantage and are due to the clauses laid out by PBA through Agreement 1 and also its conduct vis-à-vis the Complainant. Therefore, Clause 3.5 of Agreement 1 and the conduct of PBA is a violation of Section 4 (1), read with sub-section (2) (f) of the Act.
85. Based on the findings of paragraph 67 it appears that Agreement 2 designed to restrict entry of and exclude non-PBA members from the JIC/BAC and its anticompetitive effects are exacerbated by Agreement 3 which requires approval of BAC before Medialogic can grant ratings to any other customer. Therefore, Agreement 2, also amounting to a decision by BAC and PBA, is anti-competitive in terms of Section 4 read with sub-section (2) (a) of the Act.
86. Based on the findings of paragraph 77, it appears that Clauses 1(f), 2(f) and 3(b) of Agreement 3, which also amount to a decision by BAC imposing a restrictive trading condition, which is a violation of Section 4 (1), read with sub-section (2) (a) of the Act. It also appears that by denying ratings to the Complainant, which is on air and has an audience, in effect means that PBA has divided or shared the market for TV

advertisement air time between its member undertakings which is a violation of Section 4 (1), read with Sub-section (2) (b) of the Act.

87. In light of the above mentioned findings, it is recommended that the Commission may consider initiating proceedings against PBA, BAC and Medialogic under Section 30 of the Act.

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Enquiry Officer

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