

COMPETITION COMMISSION OF PAKISTAN
Government of Pakistan

ENQUIRY REPORT
(Under Section 37(1) of the Competition Act, 2010)

**IN THE MATTER OF ALLEGED VIOLATION OF SECTION 4 OF THE COMPETITION ACT,
2010 BY NFC EMPLOYEES CO-OPERATIVE HOUSING SOCIETY LIMITED AND M/S. MALIK
CABLE NETWORK**

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Dated: 27 December 2016

BACKGROUND

1. Established under Section 12 of the Competition Act 2010 (the **Act**), the Competition Commission of Pakistan (the **Commission**) is mandated to ensure free competition in all spheres of commercial and economic activities to enhance economic efficiency and to protect consumers from anti-competitive behaviour.
2. Chapter II of the Act expressly prohibits practices by undertaking(s) which involve abuse of dominant position, agreements between undertakings or decisions adopted by association of undertakings which have the object or effect of preventing, restricting or reducing competition within the relevant market, deceptive marketing practices, and mergers which substantially lessen competition by creating or strengthening a dominant position in the relevant market.
3. On 8 August 2016, the Commission received concerns from a resident of NFC Employees Co-operative Housing Society Limited, Lahore (**NFCECHSL**) with regard to the provision of cable television services in the said society. It was alleged on behalf of the residents of Phase 1 of NFCECHSL that they were being force to subscribe to only one cable operator and were being deprived of any alternate cable television services from competing cable operators as no other choice or options were available. A further concern of the residents was that they were forced to pay whatever amount the cable operator charged regardless of the quality of services provided.
4. On the same date, a letter was sent to NFCECHSL requesting the provision of information on the number of cable operators providing services in Phase 1 of the society in Lahore along with copies of the agreement(s) with such cable operator(s).
5. On 11 August 2016, NFCECHSL responded to the above letter confirming that only one cable operator, namely M/s. Malik Cable Network (**MC Network**) has been licensed to provided cable television services in Phase 1 of NFCECHSL. A copy of the Agreement dated 1 February 2016 executed between NFCECHSL and MC Network (the **Agreement**) was enclosed with NFCECHSL's response.
6. A perusal of the Agreement revealed the existence of an exclusivity clause therein to the effect that during the five year validity period of the same, no other competitor of MC Network would be accommodated in the territory of NFCECHSL, subject to its satisfactory provision of cable television services.

7. On 6 September 2016, another letter was sent to NFCECHSL seeking further information regarding cable operators in Phase II of the housing society, and also whether any other cable operator had shown intent or willingness to provide cable television services in both Phase I and II. A reminder was sent to NFCECHSL again on 26 September 2016.
8. On 29 September 2016, a reply was received stating that Phase II of NFCECHSL was unoccupied and that development work for the same had not yet commenced. It was further submitted that only one cable operator is providing services in Phase I along with Pakistan Telecommunication Company Limited's (PTCL) Smart TV system.
9. On 24 October 2016, verification from PTCL was sought of NFCECHSL's claim relating to its provision of Smart TV services in the housing society. PTCL responded on 30 November 2016 confirming that it had been offering and providing Smart TV services in the housing society since 2012-2013.
10. On 7 November 2016, another letter was sent to NFCECHSL for the provision of all agreements entered into with MC Network prior to the Agreement dated 1 February 2016. Such information request was necessitated after the perusal of the said Agreement wherein it had been stated in the recitals that "*...the first party [MC Network] already providing the service to the second party [NFCECHSL] since long*". Two further reminders dated 14 November and 25 November 2016 were issued to NFCECHSL, however to date no response has been forthcoming.
11. After the aforementioned initial probe into the concerns and allegations raised by the residents of NFCECHSL Phase 1, the Commission on 13 December 2016 proceeded to initiate a formal enquiry into this matter (the **Enquiry**) pursuant to its *suo motu* powers under Section 37(1) of the Act . For this purpose an enquiry committee was appointed comprising of the undersigned officers (the **Enquiry Committee**).

ISSUE

12. The Enquiry Committee has been directed to conduct the Enquiry in order to determine whether NFCECHSL and MC Network have acted in violation of Section 4 the Act. The pertinent issue to be considered is therefore as follows:

Whether the exclusive Agreement entered into by and between NFCECHSL and M/s Malik Cable Network for the provision of cable television services is a prohibited agreement under Section 4 of the Act, which has the object or effect of preventing, restricting or reducing competition in the relevant market?

ANALYSIS

UNDERTAKING(S)

13. 'Undertaking' as defined under Section 2(1)(q) of the Act 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 production, supply, distribution of goods or provision or control of services and shall include an association of undertakings."

14. NFCECHSL is a housing society in Lahore and registered on 15 July 1980 under the Cooperative Societies Act 1925. The society was originally sponsored by NFC employees who became founding members by subscribing to its share capital. Since enough purchasers were not available at the time from within NFC, in order to make up shortfall of funds outsiders were allowed to become nominal members.

15. While assessing whether an entity is an undertaking as defined in the Act and for the applicability of Section 4, the key consideration is whether it is engaged in commercial or economic activity in the relevant market. It is observed that NFCECHSL is engaged in the development, management and control of the housing society and therefore is engaged in commercial and economic activity. Hence this entity falls within the meaning of 'undertaking' and is subject to the provisions of the Act.

16. MC Network is an analogue cable television services provider operating in Lahore. Engaged in commercial activity, it is an 'undertaking' within the meaning and scope of the Act.

RELEVANT MARKET

17. The definition of relevant market comprises of two dimensions: *the relevant product market* and *the relevant geographic market*, which are defined under Section 2(1)(k) of the Act as follows:

"[...] a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the product's characteristics, prices and intended uses.

A geographic market comprises the area in which undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those areas."

18. In view of the above, a relevant product market comprises of all those goods or services that are regarded as interchangeable or substitutable by the consumers by virtue of their characteristics, price and intended use. While a relevant geographic market comprises the specified territory or area in which the undertaking(s) concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous.
19. Based on the above, the relevant product market for the purposes of this Enquiry consists of analogue cable television services (as provided by MC Network) only as distinct from digital cable television services which includes Smart TV services as provided by PTCL. Even though the intended use of both the services are the same, the characteristics and price are differentiating factors. Firstly, the quality of service of digital cable television is far superior along with the availability of roughly 60 additional channels that are not provided for in analogue cable television service. Secondly, digital cable television service costs more initially, as a digital set top box is an essential component for the service and costs in thousands of rupees, where as the analogue service requires no such additional costs.
20. The relevant geographic market is limited to NFCECHSL Phase 1 as the concerns raised were from residents of that particular area and no concerns are raised for any other region. Furthermore, even though the Agreement was executed for the provision of services across NFCECHSL without the mentions of phases and sub areas within the society, the said services are not yet being provided in Phase 2 as it is yet to be developed. It is also

pertinent to mention that the Agreement between NFCECHSL and MC Network creates barriers to entry as no other cable operators are allowed to provide services within the jurisdiction of the society. Therefore, the said geographical area is distinct from its surrounding geographic areas.

EXCLUSIVITY GRANTING AGREEMENT

21. Section 4(1) of the Act prohibits undertakings from entering into any agreement(s) and associations of undertakings from making decision(s) 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.
22. Section 4(2) of the Act provides a non-exhaustive list of agreement(s) and/or decision(s) which by their *object* or *effect* or both are prohibited *per se*. These agreement(s)/ decision(s), may include, *inter alia*:

"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 provisions of any services; ...

d. limiting technical development or investment with regard to the production, distribution or sale of any goods or the provisions of any services;"

23. It is pertinent to mention that since NFCECHSL is exclusively developed and managed solely by the co-operative society, no cable operator can enter into the market without prior approval and NOC of the society management. Also, the society management does not need to share its decision making with any other external entity and enjoys sole discretion as to how the area will be developed as well as to whom they may or may not provide service corridors or right of way.
24. NFCECHSL has entered into the Agreement with MC Network for the provision of cable television services within the territory of the society, wherein the relevant Clauses relating to exclusivity and its duration are reproduced herein below:

Clause 1 (Term): "The period of agreement shall be five year i.e. 01.02.2016 to 31.01.2021."

Clause 2 (Exclusivity): *“During this agreement no other competitor will be accommodated subject to satisfactory performance of the Cable Network Service.”*

Clause 8 (Renewal): *“On expiry of five years agreement if some better offer from other Cable Network Services is received then M/s. Malik Cable Network Services shall have to match the new offer or the society Management shall be at liberty to hire the services of other better party.”*

25. It appears that the Agreement which contains the above mentioned exclusivity granting clause, has in effect created barriers to entry as no other cable operators are allowed to provide their services in the area. Under these circumstances, free competition is likely restricted and prevented in the area under the control of NFCECHSL. In turn, by restricting and preventing competition in the relevant market, the residents of NFCECHSL Phase 1 are being forced to subscribe to the sole cable operator, MC Network. This conduct appears to restrict choice for consumers and leaves them with no option but to avail services of one market player despite the existence of a host of other cable operators who are not allowed to enter the relevant market.
26. Furthermore, the Agreement by virtue of the exclusivity granting clause appears to have the object and effect of restricting and preventing competition within the relevant market. Such an agreement is a prima facie violation of Section 4 of the Act as it amounts to an agreement "imposing restrictive trading conditions" and "limiting technical development and investment" with regard to the distribution of goods and provision of services" within the meaning and scope of Section 4(2)(a) and 4(2)(d) respectively.
27. It appears that a monopolistic position has been created in the relevant market that not only denies consumers the benefits resulting from a free market environment but also denies other cable operators the opportunity to compete with MC Network by offering better services at competitive rates. As mentioned above, such restrictive trading conditions which restrict competition constitute a prima facie violation of Section 4 of the Act. Furthermore, one of the main purposes of ensuring free competition is to encourage innovation in order to make the best known technology available to consumers at the lowest prices possible. By virtue of the exclusivity granting clause in the Agreement, MC Network has little or no incentive to upgrade its services or make further investments for innovation. Such appears to be the case for as long as the barrier to entry is maintained preventing competing cable operators from entering the relevant market.

28. Furthermore, the said Agreement dated 1 February 2016 states in its recitals that it is a renewal agreement and that MC Network has already been providing cable television services in the housing society managed by NFCECHSL since a long time. Therefore, the apparent infringement period cannot be ascertained without a perusal of the earlier contractual arrangements between NFCECHSL and MC Network as to the inclusion of an exclusivity clause therein. However, it is concluded that the prima facie violation of Section 4 of the Act by NFCECHSL and MC Network is a continuing one and shall remain so till the Agreement dated 1 February 2016 is valid.

CONCLUSIONS AND RECOMMENDATIONS

29. Based on the above analysis, the Agreement between NFCECHSL and MC Network which is effective up to at least 31 January 2021 and grants exclusivity to the later, appears to negate the existence of a level playing field in the relevant market by creating barriers to entry, denying a free market environment and disincentivising innovation. Hence, it appears to have the object and effect of preventing, restricting and reducing competition in the relevant market by providing a monopolistic position to MC Network in the area under the control of NFCECHSL. Such an agreement is a *prima facie* violation of sub-section (1) of Section 4 and in particular clause (a) & (d) of sub-section (2) of Section 4 of the Act.

30. Consequently, it is apparent from the above that both NFCECHSL and MC Network are involved in anti competitive practices which deny consumers free choice in attaining value for money. This type of restrictive trading condition, if remains unchecked, would have the effect of encouraging such behavior in other relevant and related markets leading to further competition and consumer harm.

31. In view of the foregoing and given the significance of the matter, it is therefore proposed that proceedings may be initiated against NFCECHSL and MC Network under Section 30 for prima facie violation of Section 4 of the Act.

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