

**COMPETITION COMMISSION OF PAKISTAN**  
**Government of Pakistan**

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**ENQUIRY REPORT**

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

**IN THE MATTER OF ALLEGED DISCRIMINATORY PRACTICES  
AND REFUSAL TO DEAL BY DEFENCE HOUSING AUTHORITY AGAINST  
NAYATEL PRIVATE LIMITED**

**Arshad Javed | Sophia Khan | Irfan ul Haq**

**Dated: 07 March 2018**

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## Background

1. On 21 October 2015, the Competition Commission of Pakistan (the "**Commission**") received an email from a resident of the Defense Housing Authority Islamabad–Rawalpindi (hereinafter, "**DHA**") raising concerns that the resident(s), specifically those in DHA Phase-I, have no choice nor access to any alternate Cable Internet and Telephony services ("**CIT services**") provider, but to subscribe to either Pakistan Telecommunication Company Limited ("**PTCL**") or DHA Teleman ("**Teleman**", a service provider subsidiary of DHA). It was contended that while the residents of DHA were demanding CIT services from Nayatel, being a Fiber-to-the-Home (**FTTH**) based CIT service provider, DHA's management was refusing to issue a No Objection Certificate (NOC) to Nayatel to install its infrastructure within DHA Phase-I and other sectors. According to the resident(s), this was a clear attempt, *inter alia*, to monopolize the CIT services market in DHA sector(s).
2. On 15 November 2015, the Cartels & Trade Abuses (C&TA) department of the Commission authorized an initial probe into the contents of the email and to assess the allegations leveled therein. On 17 November 2015, the C&TA department wrote to Nayatel enquiring as to whether it had intended to extend the provision of its CIT services to DHA; whether it had approached DHA/ DHA's management for obtaining an NOC in this regard; and whether it had been refused an NOC by DHA/ DHA's management. On 25 November 2015, Nayatel replied along with documentary proof of its correspondence with DHA /DHA's management (**Annex A**). It stated that despite repeated requests and meetings held with DHA/ DHA's management to negotiate a commercial deal, it has not been granted an NOC for the provision of CIT services within the DHA region, specifically in Phase-I and Phase-II. The following is a summary of the correspondence and meetings held between Nayatel and DHA/DHA's management:
  - i. 21 January 2011: A letter was sent by Nayatel to DHA/ DHA's management for grant of an NOC for the provision of CIT services in DHA Phase-I and Phase-II.
  - ii. 01 February 2011: A meeting was held between CEO Nayatel and the Administrator DHA.

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- iii. 07 March 2011: DHA/ DHA's management replied to Nayatel's request stating that "*there is no additional space left for excavation/laying of fiber.*" However, DHA/ DHA's management proposed a joint venture (JV) between Nayatel and DHA-Teleman.
- iv. 04 March 2013: Nayatel sent another request to the Administrator DHA for grant of an NOC.
- v. 14 March 2013: DHA/DHA's management asked Nayatel to develop a suitable business proposal.
- vi. 11 October 2013: Nayatel presented two options to DHA/ DHA's management:
- "a. **Option-1:** Provision of dedicated duct of minimum 2" size for laying OFC cable with the permission of making hand-holes (2.5x2.5x1.5) for the placing of joint boxes.*
- b. **Option-2:** Permission to dig and lay OFC cable at the depth of 1.5 to 2 feet with hand-holes of size mentioned in option-1."*
- vii. 12 December 2013: DHA/DHA's management informed Nayatel that "1. Proposal on the subject has been re-evaluated by concerned departments. There is no space available either in Phase-I or Phase-II for additional excavation for laying new ducts. The already laid communication ducts are also fully used up as space has been taken by different service providers/operators. However, to cater for the demand of operators now showing interest, DHA has planned additional ducts in upcoming Housing Projects like Phase-II (Extension), Phase-IV, etc. 2. You may like to study these projects for feasibility and forward your demand for duct space well in time."
- viii. 16 April 2014: Nayatel again requested DHA/DHA's management for permission to lay infrastructure in Phase-I and Phase-II.
- ix. 30 May 2014, Nayatel received a letter from DHA/DHA's management to send a proposal for Phase-II sectors K to P (Ex-commoners Town).

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- x. 09 October 2015: Nayatel sent a letter to DG, Vice President DHA for grant of permission/ access in DHAI Phase-I and Phase-II.
  - xi. 04 November 2015: Nayatel's officials met with Administrator DHA to discuss the grant of an NOC for Nayatel to enable it to start its operations in all DHA sectors.
  - xii. 05 November 2015: CEO Nayatel sent a letter to Administrator DHA to express its willingness to partner with DHA for development on a long-term basis and provide its services in all sectors including Phase-I and Phase-II.
3. Based on the above correspondence, Nayatel contended that DHA/ DHA's management has refused to issue an NOC and grant it a deal on the terms and conditions as offered to PTCL and DHA Teleman. Moreover, the proposed JV with DHA Teleman by DHA/ DHA's management was commercially and technologically unviable as they cannot use their competitor's infrastructure for a downstream operation as being dependent on them could hurt their business interest gravely. Lastly, it was submitted that a large number of DHA residents, which also include Nayatel ex-customers, now residing in DHA, being unsatisfied with the quality of existing CIT services, have been requesting Nayatel to start its operations in DHA.
4. On 01 December 2015, the C&TA department wrote to the Vice President of DHA, highlighting the residents' concerns viz., quality and choice of the CIT services, and sought copies of the agreements under which the incumbents i.e. PTCL and DHA Teleman were operating therein. DHA was also asked to provide any comments that were pertinent in this regard. On 08 December 2015, a similar letter was sent to the Administrator of DHA, followed by a reminder dated 06 January 2016.
5. On 07 January 2016 (**Annex B**), Secretary DHA stated that through several MOUs/agreement all major telecommunication service providers were operating within DHA. Also, it was submitted that they are following an open policy to minimize the chances of monopoly/ exclusivity to any service provider. The telecommunication operators providing services to the residents of DHA were identified as PTCL (providing

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landline, smart TV, and broadband), Wi-Tribe wireless Data, DSL Broadband, DWTN Digital Wireless TV, PASCOMS and NTC Voice and Telecom services. In addition, it was stated that all Cellular Mobile Operators (CMOs) were providing voice and 3G/4G services within DHA. It was further submitted that competition has not been restricted or prevented in this regard and that Nayatel by choice elected to stay away from DHA due to the low expectancy of ROI (Return on Investment) as DHA is intrinsically slow in the growth of population. Furthermore, DHA/ DHA's management stated that it has recently invited Nayatel to forward its proposal for landing their services in DHA on the following terms:

- a. In already developed sectors/ phases of DHA, through the shared use of existing infrastructure for external services of Nayatel.
  - b. In phases being developed or to be developed in future within DHA, provision of EoI (express of interest) and infrastructure requirements, so that requirements of all companies can be dovetailed from the outset in planning and development stages by DHA.
  - c. A proposal from Nayatel based on the exchange of technical data identified through meetings of two organizations officials.
6. On 01 February 2016, the C&TA department deemed it appropriate to seek Nayatel's comments on the aforesaid contentions of DHA/ DHA's management. Furthermore, based on DHA's allegations of damage to property, Nayatel was asked to state the extent of damage, if any, to the existing landscape that would be caused in the event that it was permitted to lay down its infrastructure in the developed sectors of DHA. On 18 February 2016, a reminder was sent to Nayatel. On 25 February 2016 (Annex C), Nayatel made the following submissions:
- a. DHA never invited Nayatel to participate in any of their infrastructure development processes in the past. A few years back, upon Nayatel's pursuance, they were verbally informed by DHA to apply for permission for Phase-II, which was in a very initial phase of development with no occupancy. On the other hand, Phase-I of DHA was partially developed and

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Nayatel had some customer requests from the area at that time. That since a substantial investment in the deployment of optical fiber network is required to make, there has to be some RoI and if they had been given the permission to install their network in Phase-I, they would have proceeded with the installation of their network in Phase-II as well. Only PTCL was operating in DHA Phase-I at that time and even though Nayatel's request for permission had merit, it was not acceded to.

- b. As regards the JV option with Teleman, being a subsidiary of DHA, Nayatel believes that such ventures with governmental bodies never creates a good business model for the participating private organizations. Reliance is placed on DHA's own joint venture with Teleman which ran into issues a couple of years back and eventually, DHA acquired 100% shares of Teleman from its private shareholders.
  - c. If DHA permits Nayatel to install its infrastructure in the built-up area, it would not be damaging to DHA's existing landscape, as they would immediately restore the same to original condition as part of the process of installation. This is the strategy that is adopted while carrying out work in all sectors of Islamabad, being fully cognizant of the upkeeps of the civic environment and the convenience of the residents and local authorities.
7. On 26 February 2016, a letter was sent to the Administrator DHA sharing the above response of Nayatel for its further comments, followed by reminders dated 10 March 2016 and 04 April 2016. On 25 April 2016 DHA/ DHA's management replied that it had not received the earlier letters sent by the Commission. Therefore, on 03 May 2016, the Commission's letter dated 26 February 2016 was resent to DHA/ DHA's management. However, DHA's management did not respond within the specified duration.
  8. On 15 July 2016, the C&TA Department in the exercise of its power to call for information under Section 36 of the Competition Act, 2010 (the "Act") required DHA/ DHA's management to provide the requisite information by 30 July 2016. On 28 July 2016 (Annex D) DHA's management responded, wherein it reiterated its position (already stated *vide* letter dated 07 January 2016) regarding the provision of CIT services.

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Moreover, DHA/DHA's management stated that it is principally open to any service provider who can land services meeting its bylaws and development parameters. Furthermore, it was reiterated that Nayatel while laying down its infrastructure in Bahria Town Phase-VII and Phase-VIII along the main boulevard under the footpath, across a distance of about 08 km, has caused damage to the infrastructure and public property. Photographs were enclosed along with DHA's response, as evidence of such damage to the infrastructure in Bahria Town. Therefore, DHA/ DHA's management contented that DHA Phase-II, which comprises of about 428 km, would sustain unreasonable damage due to Nayatel being permitted to proceed with its independent installation. Lastly, DHA/ DHA's management submitted that infrastructure laid down by Nayatel runs through the trench under the footpath in Bahria Town, which in the case of DHA carries electrical service cables and cannot be used for communication services technically.

9. On 01 August 2016, the C&TA department shared the aforesaid response with Nayatel and sought its comments. *Vide* its letter dated 15 August 2016 (Annex E), Nayatel responded attaching photographs of its infrastructure laying in Bahria Town to rebut the claim of DHA and stated that there were no complaints in Bahria Town and post-installation the area was restored to its previous state to the satisfaction of the management of Bahria Town.
10. On 22 August 2016, the Commission decided to initiate an enquiry into this matter under subsection (1) of Section 37 of the Act, and appointed Zulfiqar Ali (Management Executive), Muhammad Arshad Javed (Deputy Director) and Sophia Khan (Deputy Director) as enquiry officers in this regard (hereinafter, the "Enquiry Committee"). On January 19, 2018, the Commission reconstituted the Enquiry Committee for the reason that one of the officers of the said committee Zulfiqar Ali (Management Executive) left the Commission therefore in his place Irfan ul Haq (Deputy Director) was made part of the Enquiry Committee.
11. The Enquiry Committee held meetings with DHA and Nayatel for certain factual clarifications and further assessment of the alleged anticompetitive behavior. Therefore, vide letters dated 21 September 2016, the Enquiry Committee called upon DHA and

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Nayatel for its presence at meetings scheduled for 27 and 28 September 2016, respectively.

12. On 27 September 2016, a representative of Nayatel attended the meeting in which he explained Nayatel's position and expressed its willingness to install its network in all phases of DHA. According to Nayatel's representative, DHA's management was not granting them an NOC for deployment of their FTTH network. Subsequently, he submitted a letter dated 10 March 2016 addressed to DHA's management requesting them to grant NOC for DHA Phase-II extensions and Phase-IV. Also, he shared a copy of a letter dated 03 October 2016 addressed to PEMRA notifying it of their grievance in terms of denial of the right of way by DHA to protect and favour their own subsidiary, Teleman's interest.
13. On 28 September 2016, a representative of DHA attended the meeting in which he contended that DHA's management has never refused any CIT operator to install its network in any of the sectors within DHA. Furthermore, he communicated that DHA welcomes the new market players to promote competition in the best interest of the residents. The representative was advised by the Enquiry Committee to submit its contentions in writing within a weeks time. However, he did not comply with the same and the Enquiry Committee sent reminders to the representative, first on 29 October 2016 and subsequently on 01 November 2016.
14. On 15 November 2016, DHA's management submitted to the Enquiry Committee, copies of documents/correspondence between DHA and Nayatel with regards to deployment of Nayatel's services in DHA phases. Furthermore, it once again stated that DHA has never declined access to any service provider and it would welcome any service provider to provide value-added services on the basis of a mutually agreed business plan. DHA also requested the Commission to direct Nayatel to visit DHA offices to present their project plan for further engagement.
15. The documents/correspondence submitted by DHA include:

**2011 Correspondence (Annex A)**

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- i. Letter dated 21 January 2011 addressed to Director IT&T, DHA for No Objection Certificate regarding the provision of services in Phase 1 and 2.
- ii. A letter dated 04 February 2011 addressed to DHA's management by Nayatel regarding a meeting held at DHA's office on 01 February 2011.
- iii. A response dated 07 March 2011 to Nayatel by DHA's management stating that "*extra underground infrastructure is required to provide Fibre to the Home services which have been mentioned in your letter. The infrastructure developed by DHA is already in use by DHA Telemat and PTCL. It is almost impossible to make this infrastructure available for a third service provider. However, other arrangements can be negotiated to land services referred in your letter in DHA as a joint venture with DHA Telemat. One of the models could be the usage of already laid HFC network from the platform of DHA Telemat, Nayatel can land its telephony services on this network in such a way that access network will be HFC and back-end connectivity will be Nayatel network. Other technical and commercial models can be negotiated...*"

#### **2013 Correspondence**

- iv. A letter dated 04 March 2013 addressed to DHA's management by Nayatel seeking permission to install FTTH network in DHA.
- v. A response dated 14 March 2013 to Nayatel by DHA's management about the possibility of joint development for the provision of telecommunication services/infrastructure, which may be beneficial for both organizations.
- vi. A letter dated 11 October 2013 addressed to DHA by Nayatel referring to a meeting between them held on 27 September 2013. Nayatel stated that it is interested in extending its facilities of FTTH network in DHA Phase I & II as follows: (mentioned above in paragraph 2(vi)):
  - a. **Option -1:** Provision of the dedicated duct minimum 2" size for laying OFC cable with the permission of making hand holes (2.5x2.5x1.5) for placing of joint boxes.

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- b. **Option -2:** Permission to dig and lay OFC cable at the depth of 1.5 to 2 feet with hand-holes of the size mentioned in option-1.
- vii. A letter dated 12 December 2013 wherein DHA wrote to Nayatel that they have re-evaluated the aforesaid proposal and there is no space available in either Phase-I or Phase-II for additional excavation for laying new ducts. The already laid communication ducts are so fully used up as space has been taken by different service providers. However, to cater for the demand of operators now showing interest, DHA has planned additional ducts in the upcoming Housing Projects like Phase-II (Extension), Phase-IV, etc.

#### **2014 Correspondence**

- viii. A letter dated 16 April 2014 addressed to DHA's management by Nayatel (referring to the above mentioned letter) stating that *"please apprise about the status of development work in the sectors mentioned in your letter to study the feasibility of development work in the sectors [ie Phase-II (Extension), Phase-IV] mentioned in your letter to study feasibility of deployment of our network. As for as DHAI phase 1 and 2, provide use with some way out as the number of residents which have been shifted to DHAI from Islamabad/ Rawalpindi are approaching Nayatel for the provision of our services in DHAI. We will you appreciate your kind consideration to evaluate your stance and allowing Nayatel [...] to extend its services in Phase 1 and 2."*
- ix. A letter dated 30 May 2014 by DHA's management to Nayatel stating that *"currently we are in a stage of developing services infrastructure in Phase-II sectors K to P (Ex-Commoners Town). You are requested to forward your proposal for the development of UG infrastructure in the above-mentioned area."*

#### **2015 Correspondence**

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- x. A letter dated 05 November 2015 addressed to DHA's management by Nayatel stating that *"Nayatel would be glad to become a development partner of DHAI for your new projects such as Phase -4 and Phase -2 Extension, etc. We would also request that you kindly have a fresh look at a viable role for Nayatel in Phase 1 and 2..."*

#### **2016 Correspondence**

- xi. An email dated 02 January 2016\_by DHA's management to Nayatel stating that *"Nayatel rep has taken our infra plan in Sec K, L, M, N, and Ph-IV on 22 Jan to dovetail Nayatel plan but we could receive your plan yet. Kindly expedite"*.
- xii. A letter dated 10 March 2016 addressed to DHA's management by Nayatel requesting a grant of NOC for DHA Phase-2 Extensions (K, L, M, N) and Phase-4. *"We shall commence our civil works for deployment of FTTH network after having a detailed meeting with your relevant teams and mutually agreeing upon deployment methodology"*. Furthermore, *"we intend to start our deployment work from areas where house is already constructed and occupied. Gradually our network will extend to other areas as and when houses are built. This is due to the reason that if we deploy out the network in the area where there is no occupancy, fiber duct, cables and related infrastructure cannot be maintained properly. In order to have a properly maintained network, we need to have live customers on our network, because network without active customers soon becomes abandoned the property. In order to ensure good quality of the network industry best practices demand that there should be live subscribers of the network"*.

16. Since December 2016, Nayatel and DHA management have been communicating via emails, letters and telephonically (while keeping the Enquiry Officers in the loop) to discuss the feasibility and terms and conditions for the provision of Nayatel's infrastructure in different phases of DHA. The correspondence is summarized hereunder: **(Annex F)**

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- i. On 29 December 2016, Nayatel wrote to DHA's management requesting them to have a meeting to discuss the extension of the telecommunication services plan in various phases of DHA.
- ii. On 12 January 2016, DHA's emailed to Nayatel stating that "*DHAI-R welcomes any service provider in its vicinity to provide a choice of comm services to its residents. Town plans of upcoming DHAI-phases have already been provided to Nayatel. You are welcome in our office at any time of your convenience but our meeting will be fruitful once network plans of Nayatel have been finalized according to provided town plan...*"
- iii. On 14 January 2017, Nayatel emailed to DHA's management that "*we have exchanged letter on upcoming sectors of DHAI-R with your office previously. In order to keep things simple, we request you to send us the right of way (ROW) charges that DHAI-R would charge to Nayatel for installation of its network. Currently, we want to expand our network to Phase-1 and Phase-2 of DHA and would be grateful if you could please share the ROW charges that we can proceed accordingly. The reinstatement charges should not be part of ROW charges as we ourselves would re-instate all civil works carried out by us. If you want to follow the revenue share model, then we can pay [-]% of our gross revenue from Internet and Cable TV services (excluding one-time installation and telephone revenue) earned within DHA*".

17. However, DHA's management did not respond to the above proposal. On 28 March 2017, the Enquiry Officers wrote to both Nayatel and DHA's management to apprise them on the matter to enable them to proceed further on it. On 06 April 2017 DHA invited Nayatel to meet with their management to discuss a further course of action.
18. On 14 April 2017, both the parties held a meeting and agreed to a systematic way forward for the grant of an NOC to Nayatel for laying their infrastructure in DHA. The parties

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provided the Commission with a copy of the minutes of the said meeting on 15 May 2017 (Annex G). However, since no timelines were included in the said meeting as seen in the minutes, the Enquiry Committee wrote to the parties on the same date asking them to provide the said information to the Commission by 22 May 2017. On 27 July 2017 (Annex H), Nayatel submitted a copy of its proposed network plan on a CD-ROM and requested DHA's management to share with it the "Revenue Sharing" or ROW and its modalities, the receipt of which was acknowledged by DHA's official on 03 July 2017. In the meantime, DHA's management informed the Enquiry Committee that both "Nayatel and DHA are in coordination over the logical steps of the mutually agreed roadmap. CCP demanded timelines vide para (2) of the above-referred letter from both Nayatel and DHA, though the letter was only addressed to DHA. The Said timeline may not be provided at this stage, however, we are trying to mature the agreed roadmap at the earliest. Requisite info about the process will be provided to CCP from time to time"

19. In the meantime, it may be noted that numerous other residents have continued to raise the same concerns against DHA with the Commission via email and letters.

#### **Issues**

20. The following are the core issues to be addressed in the Enquiry Report:
- a. *Whether DHA's management holds a dominant position in the relevant market?*
  - b. *Whether DHA's management has abused its dominant position in violation of Section 3 of the Competition Act, 2010 by applying dissimilar conditions on Nayatel, excluding it from the relevant market and/or refusing to deal with it?*

#### **Assessment**

21. In the event of a potential prohibition of an abuse of a dominant position under Section 3 of the Act, an assessment of the relevant market, undertaking's market power or dominant position, and its conduct in the relevant market is mandated under the Act. For this

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purpose, a step-wise approach as to whether the alleged conduct constitutes an abuse of dominant position is adopted, which, inter alia, includes:

- i. *Defining the undertaking(s) concerned;*
- ii. *Defining the relevant market;*
- iii. *Whether the undertaking(s) is dominant in the relevant market; and*
- iv. *Whether the undertaking is abusing its dominant position.*

### **Undertaking(s)**

22. An “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.”*

23. While assessing whether an entity is an undertaking under the Act, the key consideration is whether it is engaged in commercial and/ or economic activity.

- a. DHA is an entity engaged in real estate development and management projects across Pakistan and is, therefore, an undertaking in terms of Section 2(1)(q) of the Act.
- b. Nayatel is a private limited company headquartered in Islamabad. The company is engaged in the business of FTTH services, now in various cities, and is a sister concern of Micronet Broadband. It is, therefore, an undertaking in terms of Section 2(1)(q) of the Act.

24. It is observed that DHA and Nayatel are both engaged in commercial and economic activities in different locations within Pakistan; hence both entities fall within the meaning of an “undertaking” and are subject to the provisions of the Act.

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## Relevant Market

25. To assess whether or not an undertaking holds a dominant position or substantial market power, it is imperative to delineate the relevant market. Section 2(1)(k) of the Act provides that “relevant market means the market which shall be determined by the Commission with reference to a product or a geographic market in accordance with which:

*“...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.”*

26. In view of the above, a relevant product market may comprise of all those goods and/or services which are regarded as interchangeable or substitutable by the consumers owing to the products’ characteristics, prices, and intended use. While relevant geographic market comprises is a geographic territory in which competition conditions in a relevant market of a product or service are sufficiently the same for all participants in such markets and therefore this territory can be separated from other (neighboring) territories.
27. It appears that the relevant product market in the matter at hand consists of the market for the grant of ROW to provide CIT services. As noted above, CIT services consist of Cable, Internet, TV and Telephone services. The relevant geographic market may consist of entire DHA or a part of it, depending on the prevailing conditions of competition. Since

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the prevailing conditions of competition appear to be sufficiently homogeneous in different parts of DHA and may be distinguished from the neighboring geographic areas because a resident of DHA might not be able to subscribe CIT services available in the neighboring residential society such as Bahria Town or other parts of Rawalpindi and Islamabad, the relevant geographic market may be taken as the whole of DHA.

28. In the CIT services market, the main barrier to entry may be the high (sunk) costs of deploying the technological network(s) and equipment. Other than that, licenses are required to be obtained from regulatory bodies such as Pakistan Electronic Media Regulatory Authority and/or Pakistan Telecommunication Authority for operating in the market of CIT services. Furthermore, approval/NOC may be required by the local development authority in charge of development and maintenance of the municipalities, which in the case of Rawalpindi and Islamabad may be the Rawalpindi Development Authority and Capital Development Authority respectively.
29. Additionally, certain rent or revenue share as consideration is to be paid to the relevant development authority for continuing operation of CIT services within the territory under their management. In the case of private property, management/developer of a society may introduce additional restrictions or barrier to entry, which in the instant case appears to be a refusal to issue an NOC for ROW at the first instance. While CIT services providers need to obtain ROW permit on a timely basis, any undue or unreasonable delay or restrictive practice on the part of the public body or private entity managing the specified territory can increase the operator's cost of deployment of such network(s). The present technology of CIT services requires infrastructure laying that involves earth/civil works for infrastructure operation and maintenance. Thus, for CIT services, ROW can be described as an essential facility which operators require to lay down their infrastructures across public and/or private areas for the provision of the relevant CIT services to the residents of that area.

#### **Dominant Position**

30. According to Section 2(1)(e) of the Act, "*dominant position*" of one or more undertakings in relevant market shall be deemed to exist:

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*“if such undertaking or undertakings have the ability to behave to an appreciable extent independently from competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent.”*

31. To assess if an undertaking has substantial market power or holds a dominant position in the relevant market, the Commission considers qualitative indicators of market power which include an undertaking's ability to profitably sustain prices above competitive levels, restrict output, degrade quality below competitive levels, apply dissimilar conditions to equivalent transactions, placing competitors at a competitive disadvantage, boycotting/excluding any undertaking from the production, distribution or sale of any goods, providing services to public, or refusal to deal, among other things.
32. It is on the record that DHA is owned and managed by DHA's management. No CIT services provider can enter the market without prior approval of DHA/ DHA's management. Apparently, DHA's management does not need to share its decision making with any other entity and enjoys sole/arbitrary discretion as to how the area will be developed as well as to whom they may or may not provide service corridors/ ROW. Therefore, DHA's management is dominant or possesses substantial market power within the territory of DHA and also appears to have the ability to foreclose the market in the downstream segments for one or more actual or potential competitors, which has the potential to eliminate effective competition, including in the relevant market as delineated above.

#### **Abuse of Dominant Position**

33. Section 3 of the Act provides that:

*“1. No person shall abuse dominant position.*

*2. An abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices*

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*which prevent, restrict, reduce or distort competition in the relevant market.*

*3. The expression practices referred to in subsection (2) shall include, but are not limited to—*

*[...]*

*(e) applying dissimilar conditions to equivalent transactions on other parties, placing them at a competitive disadvantage;*

*(g) boycotting or excluding any other undertaking from the production, distribution or sale of any goods or provisions of any service;*

*(h) refusal to deal.*

34. One or several undertakings with substantial market power may have the ability and incentives to harm competition in different ways, *for instance*, by restricting or reducing existing competition, by raising the barrier to entry or impeding innovation or the provision of innovative products and/or services.

35. Abusive practices may be categorized into exploitative abuses or exclusionary abuses. Exploitative abuses are directly concerned with consumer harm since they encompass all conducts by a dominant undertaking which may result in direct loss of consumer welfare. Those include, *inter alia*, excessive pricing, discriminatory practices, poor quality of products or services. Exclusionary abuses refer to practices by dominant undertakings that harm competition by impairing their competitors' ability to compete effectively in the market and cover practices behaviours impairing the market structure which indirectly harms consumers and competition for the market. There is no rigid demarcation between the two categories as the same practices may exhibit both exploitative and exclusionary characteristics.

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36. As noted above, DHA's management holds a dominant position in the relevant market. It has granted service corridors/ROW to PTCL and its subsidiary Teleman for providing (G-PON) and allied CIT services to the residents. However, numerous residents of DHA have raised concerns before the Commission that the incumbents are enjoying monopolistic status and degrading the quality of services offered by them and since DHA's management is not granting NOC to Nayatel they have effectively no substitutable services and are restricted to subscribe them for the provision of CIT Services. This fact suggests, *inter alia*, that the incumbent are so free of the competitive constraints that they appear not to move along with the technological advancement and providing superior quality innovative services. By employing delaying tactics and effectively not allowing any other undertaking to enter into the relevant market, DHA/DHA's management appears to have acted in contravention of Section 3 of the Act. The above facts suggest DHA/DHA's management appears to have constructively and effectively refused to deal with Nayatel and impose discriminatory conditions, without any objective justification. The photographs of Nayatel's work-in-progress in different phases of Bahria Town, as provided and relied upon by DHA, appear to misinform and/or mislead the Commission, which is culpable under the provisions of the Act. In its earlier decisions the Commission has observed that the grant of ROW and laying infrastructure whether in private society or public municipality on exclusive basis to certain party(s) can result in restriction, prevention and reduction of competition and deprive consumers to have choices and avail more technologically advanced solution such as FTTH in the instant matter.
37. DHA/DHA's management controls utility corridors/ ROW and the underlying pipes/ducts and it appears that they are not providing access to any alternative services provider(s), in particular, FTTH operators *such as* Nayatel to enter into the relevant market. It appears that the grant of exclusivity to the incumbent has the potential to adversely affect on competition in terms of absence of choice to potential FTTH subscribers and fostering competition among the players of such service providers. It appears that the restrictions imposed by DHA/DHA's management effectively enable the incumbents to behave to an appreciable extent independently of competitors, customers, and consumers in the relevant

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market. At the same time the market players in the neighboring areas are not allowed to enter and provide their services in DHA, to make an investment and provide advanced and more innovative CIT services that otherwise would have aided in the development and expansion of the CIT Services therein.

38. The conduct of DHA by allowing incumbents only to carry out their operations in the DHA area is detrimental to the business feasibility of new players intending to launch similar rather more advanced services for the reason that the same depicts a stagnant and unfavorable scenario from the viewpoint of business environment, operation, and expansion that will have a direct impact on the industry and future customers.
39. While negotiating with Nayatel, DHA apart from refusing to deal on the basis of, *inter alia*, non-availability of space has put forth terms that were commercially unviable for Nayatel that includes offer to enter into joint venture between Nayatel and Teleman and use the existing infrastructure, in addition to non-provision of timeline to reach an agreement with Nayatel. Such practices appear to constitute refusal to deal in violation of the Act. The DHA/DHA's management anticompetitive practices have foreclosure effect in the relevant market.
40. It is noted that refusal to deal need not be absolute. In the instant scenario, however, competition concerns are heightened when DHA/DHA's management, on the one hand, prompts its willingness to provide access to ROW either by replication or duplication of the facility but on the other hand, it makes it practically impossible to work out and grant such access. It also appears from the facts that DHA management's proposals to Nayatel to enter into a JV arrangement with one of its subsidiary is likely to result in reduced technical operability, hence Nayatel's concerns appear to be justified. Lastly, it appears that DHA/ DHA's management strategy is, *prima facie*, adversely affecting innovation and incentives to invest in the emerging technologies to the detriment of consumers. The utility corridors/ ROW are regarded as essential facilities. In this backdrop, it appears that DHA/DHA's management delaying strategies, stating discriminatory terms and/or denial to Nayatel to access the facility which is essential to reach customers, constitutes, *prima*

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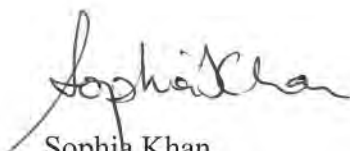
*facie*, a contravention of sub clauses (e) (g) and (h) of subsection (3) read with subsections (2) and (1) of Section 3.

### Conclusion and Recommendations

41. DHA/DHA's management appears to hold a dominant position in the relevant market and has, *prima facie*, abused its dominant position and prohibited agreements in violation the aforementioned provisions of Chapters II of the Act.
42. Given the significance of innovative FTTH based CIT services and residents' apparent inability to access and choose between competing services and service providers, it is recommended that the Commission may initiate proceedings against DHA under Section 30 of the Act for a *prima facie* violation of the aforesaid provisions of Section 3 of the Act.



Arshad Javed  
Enquiry Officer



Sophia Khan  
Enquiry Officer



Irfan ul Haq  
Enquiry Officer