



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN
IN THE MATTER OF
COMPLAINT FILED BY M/S WISE COMMUNICATION SYSTEMS
(PRIVATE) LIMITED
(F.NO: 03/WISE/TA/CCP/2013)**

Date of hearing:

July 24, 2014

Present:

Dr. Joseph Wilson
Chairman

Mr. Mueen Batlay
Member

Dr. Shahzad Ansar
Member

On behalf of:

M/s Wise Communication Systems
(private) Ltd.

Barrister Mr. Afzal Hussain, Mr.
M. Asif Nishat and Mr. Shafiq A
Abbasi



ORDER

1. This order shall dispose of the Complaint filed by M/s Wise Communication Systems (Private) Limited (hereinafter the "Complainant") against Pakistan Telecommunication Company Limited (hereinafter the "Respondent") for alleged violation of Section 3 of the Competition Act, 2010 (hereinafter the "Act").

Undertakings

2. The Complainant is a company incorporated under the Companies Ordinance, 1984 and is engaged in the business of telecommunications. Therefore, it is an undertaking as defined in clause (q) of sub-section (1) of Section 2 of the Act.
3. The Respondent is a public limited telecommunications company of Pakistan established under Section 34 of the Pakistan Telecommunication (Re-Organization) Act, 1996 and, therefore, is an undertaking in terms of Section 2 (1) (q) of the Act.

Background

4. The Complainant in its Complaint filed on 24-12-13 before the Competition Commission of Pakistan (hereinafter the 'Commission') alleged that the Respondent holds a dominant position in the fixed local loop market (FLL) and has unilaterally discontinued the services to the Complainant who is a customer and the competitor of the Respondent in FLL market, hence such anti-competitive conduct excludes the Complainant from the provision of fixed local loop services in violation of the Section 3 (3)(g) of the Act.
5. The Commission initiated an enquiry pursuant to Section 37(2) of the Act by appointing an Enquiry Committee to look into the veracity of the Complaint. While the enquiry was pending, the Complainant filed a writ petition (WP No. 3464/2014) before the Hon'ble Islamabad High Court for disposal of the case by the Commission. The Hon'ble Islamabad High Court in its order dated 15-07-14 directed the Commission to decide the matter within 10 days and thereafter submit a compliance report.
6. The Complainant was informed vide letter dated 21-07-14 to appear before the Commission on 24-07-14 and avail the opportunity to establish the violation of Section 3 as alleged in the Complaint.
7. The legal representative for the Complainant made following submissions in the hearing:
 - i. Pakistan Telecom Authority (PTA) issued a letter/complaint to Federal Investigation Authority (FIA) on 04-11-13 on the pretext that the Complaint did not have record of calls terminated by it. Pursuant to this complaint an First Information Report was registered against the officers of the Complainant and office of the Complainant was raided. All the installed equipment of the complainant was seized and its bank accounts frozen upon F.I.A's orders.



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- ii. On 05-11-2013, the C.E.O/President of the Respondent issued a directive vide an email blocking all connections of the Complainant. Thereafter the Respondent restricted the access to the co-location rented by Complainant in Respondent's co-location area and inactivated all connections and other services on 26-11-13. The Respondent issued a payment notice dated 12-11-13 to the Respondent for payment of arrears of PKR 251,455,844 to justify its illegal actions in connivance with PTA.
 - iii. Earlier on 21-08-06, PTA made a determination according to which all the LDI operators including the Complainant were held entitled to a discount of 25% on A-leg charges related to a billing period. This charge was billed by the Respondent under a head called 'Dom Origination'. The Respondent challenged the above determination in a court of law and was granted a stay. The Complainant continued to pay as per PTA's determination and a dispute thus surfaced between the Complainant and the Respondent.
 - iv. The Complainant submitted that to address this issue a coordination committee was formed to deliberate on all matters of difference between the two parties. Subsequently, in a meeting held on 02-04-10 both the parties agreed that the Respondent will continue to bill at the rates mentioned in Schedule II of Reference Interconnection Offer. However there will be no forcing of payment of the disputed amount until a final decision is made by the Court. In view of this arrangement, the Respondent always included the 'Dom Origination' charges as being *sub-judice* in its payment notices. Meanwhile, on 13-4-2013, Islamabad High Court decided the matter in favour of PTA and held that appeal filed by PTCL [Respondent] is devoid of merits and therefore is dismissed.
 - v. The Complainant admitted arrears mentioned in the payment notice to the extent of PKR 21.886 million and disputed the remaining amount as it is covered under the head of 'Dom Origination' charges which is subject matter pending before the Court and has not attained finality. Further, sending a back dated notice on an address that is not the Complainant's official and bearing the stamp of 'night duty' also reveals the respondent's malicious intent.
8. With the factual background given above, the Complainant asserted that suspension of services in FLL market, issuance of disputed payment notice and en-cashing of the bank guarantee are deliberate acts on the part of the Respondent to knock out the Complainant from the market as it was the largest growing competitor of the Respondent in FLL market. That conduct of the Respondent amounted to abuse of its dominant position by preventing, restricting, reducing and distorting competition in the relevant market.
 9. During the hearing, the Bench asked the legal representative of the Complainant the exact market share of the Complainant as compared to the Respondent, which the legal representative of the Complainant failed to answer. However, the legal representative stated that the Complainant has 7000 to 8000 subscribers of FLL in the relevant market. The Bench made a rough calculation of the Complainant's share in the market which came out to be a very miniscule number, a small fraction of 1 percent and the same was not denied by the Complainant during the course of the hearing. Legal representative of the Complainant requested the Bench to give him ~~me~~ to submit in writing the exact market share of the Complainant in FLL market.



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10. The Bench highlighted that the Complaint focuses only on facts and does not address the aspect of competition in terms of test/principles applied to prove an exclusionary behavior. Mr. Afzal, the legal representative of the Complainant, was required to support his assertion of exclusionary behavior by highlighting it with the theory of harm and supported by case laws. The legal representative submitted that he will assist the Bench in this regard.
11. After the hearing, the legal representative of the Complainant was sent a letter on 26-08-14 as a reminder to submit the aforementioned information regarding the market share and exclusionary behavior which he himself had committed to provide to the Bench.
12. Instead of the legal representative, the Complainant itself replied vide letter dated nil and gave an average of its estimated market shares in various bazaars, colonies, chowks etc (total 25 in number) in five regions of KTR, ITR, RTR, FTR and GTR which is not the correct calculation of market share in the relevant market. Pertaining to the second query, the Complainant gave a one liner answer that it had already substantiated its claim in the Complaint under Section 3 of the Act.
13. Subsequently, the Respondent clarified the status of the dispute between the parties on Dom Origination charges claimed in the payment notice vide its letter dated 05-08-14. The Respondent submitted that this matter is still pending adjudication as the decision of the Hon'ble Islamabad High Court was challenged by the Respondent before the Supreme Court and the august Supreme Court remanded the case back to Hon'ble Islamabad High Court with the direction to decide the case afresh.
14. With regard to the suspension of services, the Respondent submitted on 27-08-14 that it carried out the suspension of services to the Complainant on PTA's directive and that the issuance of such PTA direction was mentioned in Writ Petition (WP No.2921/2013) filed with the Hon'ble Lahore High Court, Rawalpindi Bench by the Complainant and the same has not been denied by the PTA in its filing of report and para-wise comments in the same matter.

Issue

15. Whether the act of suspension of services and issuance of disputed payment notice to the Complainant by the Respondent amounts to exclusionary behavior in violation of Section 3(3)(g) of the Act.

Discussion

16. The relevant market involved in this case is the market for fixed local loop services in the five regions of KTR, ITR, RTR, FTR and GTR where the Complainant is licensed to carry out its functions of FLL.
17. The Respondent has more than 95% share in the fixed local loop subscriber base.¹ Further, the Respondent owns and controls the required copper line used for fixed loop facilities in Pakistan and its competitors are also its customers dependent



http://www.pta.gov.pk/annual-reports/annreport2013_1.pdf

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solely on its infrastructure. Given the market structure and the ability of the Respondent to behave independent of its customers and competitors, the Respondent holds a dominant position in the relevant market.

18. Now, coming to the allegation of abuse of dominance, the Complainant argued that suspension of services and issuance of payment notice is an exclusionary conduct of the Respondent in terms of Section 3(3)(g) of the Act. The European Court of Justice explains the concept of exclusionary conduct in the following terms:

An objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on basis of the transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.²

21. This definition implies that the conduct in question must in the first place have the capability, by its nature, to foreclose competitors from the market. Anti-competitive foreclosure is defined as "a situation where the access of actual or potential competitors to the market is hampered or eliminated to the detriment of consumers".³ A conduct which is capable of hampering or ultimately eliminating the competitor is not actionable unless it is proved that the effect of such conduct is actual or likely to harm consumers. To gauge the effect of the conduct, following four elements are considered:

- a. Conduct limiting rivals' production, markets or technical development;
- b. Actual or potential effect on competition;
- c. Prejudice to consumers; and
- d. Absence of objective, proportionate, relevant justification.

22. These elements assess exclusionary conduct as a commercial decision leading to anti-competitive foreclosure by the dominant firm without any objective justification that causes an actual or potential threat to the market and consumers. For instance, by eliminating competition in the market the dominant firm can then use the situation to its advantage and cause harm to consumers.

23. At this point we would like to highlight the background of the alleged action of the Respondent and record here those peculiar facts which gave rise to this instant matter before the Commission. These facts include:

- i. The Complainant in its Complaint has referred to an earlier action taken by PTA against the Complainant on 04-11-13 for engaging in alleged illegal telecom business. Office of the Complainant was raided, all the installed equipment of the Complainant was seized and its bank accounts frozen upon F.I.A's orders.



²Case 85/76 Hoffmann-La Roche & Co. AG v Commission [1979] ECR 461.

³DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, available at, <http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>.

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- ii. The Respondent in its reply has also referred to action taken by PTA against the Complainant and the direction of PTA which resulted in suspension of services of Complainant by the Respondent on 26-11-13.
 - iii. Payment notice dated 12-11-13 issued to the Complainant is admitted by the Complainant itself as disputed amount under the head of Dom Origination charges. The Complainant also provided the evidence in the form of annexure with the Complaint that the disputed amount was always an issue between the parties, particularly in light of the meeting held between the parties in April 2010 to reconcile on difference regarding the payment of services.
 - iv. Emails appended in the annexure to the Complaint reveal the warnings of the Respondent to pay its dues or else face action according to the books before the payment notice was issued.
 - v. Disputed amount mentioned in the payment notice is a matter *sub-judice* before the High Court.
24. In view of the abovementioned facts, the issue raised in the Complaint is a dispute between both the parties regarding determination of their rights and obligations under the Interconnection Agreement, which matter is pending adjudication before the Court. The other important aspect of this case is action taken by PTA against the Complainant for its alleged involvement in illegal behavior that led to suspension of services of the Complainant.
25. Given the contractual dispute and action taken by PTA, we do not consider that the Respondent's conduct of suspension of services to the Complainant has object or effect of preventing, restricting, reducing or distorting competition in the relevant market.
26. As per the PTA report of 2012-13, the fixed local loop market in Pakistan has one significant player, i.e. the Respondent, with a 95% market share. NTC has 3.77% market share, leaving roughly 1.25% of the pie to be shared by other operators such as Nayatel, Worldcall, Brain and others. 7000 to 8000 subscribers is a very miniscule share of the Complainant in the relevant market. A competitor having a negligible market share cannot be said to exert enough competitive pressure in the relevant market that its exclusion would impact the behaviour of the dominant undertaking and may cause prejudice to the consumers. Neither has the Complainant provided any evidence that shows any harm to consumers in terms of price, quality and choice etc. due to the alleged action of the Respondent.
27. The Bench has not found any evidence that establishes that the Respondent is engaged in an exclusionary conduct that has impeded competition in the relevant market to the detriment of consumers. Therefore, finding for objective justification is no longer necessary.



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28. In view of the foregoing, we hold that the Complaint does not establish a case for violation of Section 3(3)(g) of the Act and therefore, proceedings under Section 30 of the Act cannot be initiated. Hence, the complaint is hereby dismissed.



Dr Joseph Wilson
Chairman



Mr. Mueen Batlay
Member



Dr. Shehzad Ansar
Member



Islamabad, the October 01, 2014