



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

IN THE MATTER OF

M/s. Pakistan Mobile Communications Ltd & others

(File No. 1/(I.O.)-R&I/Inv/Telecom/MCA/07)

Dates of hearing:	28-08-2007
Present	Mr. Khalid A. Mirza Chairman Mr. Abdul Ghaffar Member Raja Raza Arshad Member
Dates of hearing	29-11-2007, 29-01-2008, 28-05-2008
Present	Mr. Khalid A. Mirza Chairman Mr. Abdul Ghaffar Member Ms. Rahat Kaunain Hassan Member Ms. Maleeha Mimi Bangash Member Dr. Joseph Wilson Member
On behalf of Mobilink GSM:	Mr. Salman Chima (counsel) Mr. Niaz Brohi Head Law & Litigations Department, Mr. Atif Ahmed, Mr. Yousuf Allah Dad, Ms. Tamania Jafri Executives of the undertaking and Mr. Jamil Qureshi, Senior Carrier Technical Manager of RIM Mr. Javed Akhtar counsel for RIM,

ORDER

1. The facts of the case are that M/s. Pakistan Mobile Communications (Pvt.) Ltd. (hereinafter referred to as "**Mobilink GSM**") is an undertaking within the meaning of Section 2(1)(m) of the Monopolies and Restrictive Trade Practices (Control & Prevention) Ordinance, 1970 (hereinafter referred to as the "**MRTPO**") and is engaged in the business of providing mobile telecommunication services and other services including sale of BlackBerry handheld and other handsets in Pakistan.
2. M/s. Orascom Telecom Holding SAE (OTH) is a leading mobile telecommunication company operating in nine emerging markets in the Middle East, Africa and South Asia (hereinafter referred to as "**Orascom**") and is the holding company of Mobilink GSM.
3. Research In Motion Limited, (hereinafter referred to as "**RIM**") is a company incorporated in Canada, carrying out the business of manufacturing and selling telecom products and providing related services. RIM is the developer and manufacturer of the BlackBerry handset.

4. The BlackBerry handset is enabled to provide push based mobile access to e-mail and other communications and information for both corporate and individual customers. Unlike 'pull' technology where a customer has to log in to his account and then see the contents to retrieve (pull) the relevant information, in 'push' technology, once the mail reaches the mail box, it is automatically indicated on the handset over the General Packet Radio Services (the "**GPRS**") network.
5. Mobilink GSM acquired the rights to sell the BlackBerry™ handset in Pakistan from RIM, pursuant the Master Supply Agreement dated November 16, 2005 (hereinafter to as the "**Agreement**").
6. The show cause notice dated July 19, 2007 was issued to Mobilink GSM in accordance with Section 11 of the MRTPO in terms of paragraph 7 below for carrying on unreasonable restrictive trade practice under the MRTPO.
7. For ease of reference contents of the show cause notice dated July 19, 2007 are reproduced:

- "WHEREAS, M/s. Pakistan Mobile Communications Ltd (Mobilink GSM), engaged in trading of BlackBerry handset, is an undertaking (hereinafter referred to as the "undertaking") within the meaning of Section 2(1)(m) of the Monopolies and Restrictive Trade Practices (Control & Prevention) Ordinance 1970 (hereinafter referred to as the "Ordinance");*
- 2. AND WHEREAS, the undertaking is selling the product, BlackBerry™ alongwith the following products:
 - i). BlackBerry Internet Service (BIS, BES, BES Plus),*
 - ii). Mobile Telecommunication Service (Voice, SMS).**
 - 3. AND WHEREAS, the undertaking is charging the price of the three products separately from the users;*
 - 4. AND WHEREAS, the undertaking integrated/tied-in the three products in such a manner that if a user surrenders one product, for example mobile telecommunication service, he is denied of the internet service;*
 - 5. AND WHEREAS, the undertaking does not activate BlackBerry internet and telecommunication service on BlackBerry handset, if the handset is not purchased from it;*
 - 6. AND WHEREAS, such tie-in arrangement, prima facie, constitutes unreasonably restrictive trade practice as defined under sub-clause (ii) of clause (b) and clause (c) of sub-section (1) of Section 6 of the Ordinance;*
 - 7. AND WHEREAS, unreasonably restrictive trade practices are prohibited by the provisions of Section 3 of the Ordinance;*
 - 8. AND WHEREAS, the Monopoly Control Authority (hereinafter referred to as the "Authority") is satisfied that unreasonably restrictive trade practices are injurious to the economic well being, growth and development of the country and it is necessary in the public interest to make appropriate Order under Section 11 read with section 12(1)(c)(i)&(ii) of the Ordinance;*
 - 9. NOW THEREFORE, you, M/s. Pakistan Mobile Communications Ltd (Mobilink GSM), are hereby called upon to show cause in writing by August 06, 2007 as to why appropriate action under Section 11 read with Section 12(1)(c)(i)&(ii) of the Ordinance may not be taken against you.*

10. If no reply to the Show Cause Notice is received within the stipulated period, the Authority shall proceed in the matter as provided under the law."

8. Primarily, the Show Cause Notice maintains that Mobilink GSM is charging the price of the three products separately from the customer. However, these products are bundled/tied-in in such a manner that if a customer surrenders one product i.e. mobile telecommunication service from Mobilink GSM, it is denied access to the other products i.e. BlackBerry Internet and Email Services.
9. The three products are being charged separately from its customers in Pakistan as follows:
 - i). Blackberry handset (Sale of Hardware Products)
 - ii). BlackBerry Internet Service (BIS, BES, BES Plus);
 - iii). Mobile Telecommunication Service (Voice, SMS).
10. Show Cause Notices, were also issued to Orascom and RIM on July 19, 2007, on grounds substantially similar to the show cause notice issued to Mobilink GSM.
11. The undertakings were required to respond to the said show cause notices by August 06, 2007. Mobilink GSM responded to the show cause notice *vide* its letter dated August 03, 2007,

received by the Authority on August 06, 2007, whereas the other two undertakings did not respond to the show cause notices issued to them.

12. In its letter dated August 03, 2007, Mobilink GSM had submitted as under:

1. *The notice pertains to the BlackBerry services products being provided by Mobilink to its customers ("Subject Services").*
2. *The subject services constitute part of the telecommunications services being provided by Mobilink pursuant to the cellular mobile license issued by the honorable Pakistan Telecommunication Authority ("PTA").*
3. *It would be appreciated that in terms of the Pakistan Telecommunications (Re-Organization) Act, 1996 ("Act") PTA is to:*
 - *Regulate the establishment, operation and maintenance of telecommunication systems and provision of telecommunication services in Pakistan.*
 - *Promote and protect the interest of users of telecommunication services in Pakistan.*
 - *Promote the availability of a wide range of high quality, efficient, cost effective and competitive telecommunication services throughout Pakistan.*
 - *Promote rapid modernization of telecommunication systems and telecommunication services.*
 - *Investigate and adjudicate on complaints and other claims made against licensees arising out of alleged contraventions of the provisions of this Act, the rules made and licenses issued there under and take action accordingly.*
 - *Regulate competition in the telecommunication sector and protect consumer rights.*

In terms of the Act the PTA is also required to ensure fair competition in the telecommunication sector.

4. Pursuant to the provisions of the Act, PTA has been regulating the telecommunications sector and competition therein, as well as promoting and protecting the interests of consumers.
5. Indeed, the subject Services as well have been launched with the express approval of PTA.
6. Also, the Subject Services are being provided on terms which cannot be termed unreasonably restrictive. In fact, the Subject Services are being provided very substantially on the same terms as are applicable in other countries and no issues to its knowledge have been raised in this respect in such other jurisdictions.
7. Without prejudice to the aforesaid and the provisions of paragraph below, it is submitted that the Subject Services do not in any manner contravene sections 6(1)(b)(ii) or 6(1)(c), or for that matter any other provision of the Ordinance.
 - Section 6(1)(b)(ii) is not attracted as that applied to any agreement between supplier and dealer of goods fixing minimum resale prices, whereas no such thing is happening in the case of Subject Services.
 - Section 6(1)(c) pertains to agreement "which subjects to the making of any agreement to the acceptance by suppliers or buyers of additional goods or services which are not by their nature or by the custom of the trade, related to the subject matter of such agreement". As noted above, the Subject Services are fairly standard the world over and there is no 'tie in' agreement in violation of industry practices.

It is also clarified that:

- i. Mobilink has no issues with providing BlackBerry internet services to its subscribers who have not purchased a BlackBerry handset from Mobilink provided the customer assumes responsibility in respect of the following:
 - Possible lack of compatibility with Mobilink network.
 - The handset being locked by any other service provider.
 - Warranty issues with respect of the handset.
- ii. For those subscribers who are not interested in using Mobilink's voice telecommunication services but wish to be provided BlackBerry Internet services only (such as push emails and internet browsing) they can do so and they need only pay the BlackBerry charges. Accordingly

it is not correct to say that if a person does not desire usage of mobile telecommunication services he would not be provided the BlackBerry internet services by Mobilink.

- iii. Even if someone wishes to use the BlackBerry Handset for voice related services only and does not wish to obtain the BlackBerry internet services that too is possible.*
- iv. Finally, we do also offer BlackBerry services on handset from other manufacturers (such as Nokia, SonyEricsson) - subject naturally to compatibility with BlackBerry connect solution.*

Accordingly, we are unable to understand as to what tie-ins are of concern to MCA and reiterate that there is no violation of Section 6 of the Ordinance.

For the sake of completeness, we should though mention that there are of course certain technological constraints which need to be observed. For instance, while Mobilink has no issue in providing regular GPRS services to a customer who is using BlackBerry handset without such customer subscribing to the internet service, the set itself is not capable of such stand alone GPRS operation. However, such customer can avail the GPRS solution on a stand alone basis without acquiring the BlackBerry handset.

In the same vein, we may point out that mobile telecommunication services and internet (GPRS) services being provided by Mobilink are even otherwise available to customers, and they do not have to subscribe to subject services to avail these.

Moreover, other operators are free to deploy e-mail solutions and have done so in the past. They are also free to deploy the RIM infrastructure - so there are no issues of competition perspective.

8. We would also like to submit, respectfully indeed, that since our "activities" and "functions" (such as the Subject Services) are being regulated by PTA as noted above, the Subject Services in any case fall outside the purview of the ordinance (in light of section 25 of the Ordinance).

9.

"25. Ordinance not to apply to certain undertakings. This Ordinance shall not, unless the Federal Government by notification in the Official Gazette otherwise directs, apply-

(e) to the activity or functions of an undertaking or undertakings as are regulated, prescribed, determined or required to be approved by a Regulatory Authority.

Explanation - For the purposes of clause (e) the expression "Regulatory Authority" means -

(ii) the Pakistan Telecommunication authority established under the Pakistan Telecommunications (Reorganization) Act 1996 (XVII of 1996)."

In light of the aforesaid, we would respectfully submit that the Notice may kindly be disposed off without further action"

13. For the disposal of the show cause notices served to Mobilink GSM, Orascom and RIM, the matter was fixed for hearing on 28-8-2007 at 10.30 a.m. at Islamabad.
14. On 28-08-2007, Mr. Ehab Muhammad Roschdy Abdul Aziz, Chief Financial Officer and Mr. Babur Suhail, Head of Legal Department alongwith Mr. Ali Asim Sayed, Advocate and counsel of the undertaking appeared before the Authority and argued the case. The counsel contended that the telecommunications sector is being regulated by Pakistan Telecommunications Authority, and therefore, the MRTPO, 1970 is not applicable to that sector.
15. The Authority asked Mobilink GSM to provide the copy of the Agreement and certain clarifications with regard to various aspects of the case by Monday September 03, 2007 and the matter was adjourned. In response to the concerns raised by

the Authority, a copy of Agreement dated November 16 2005, executed by and between Moblink GSM and RIM was filed.

Mobilink GSM also submitted its response dated September 3, 2007 which is summarized below:

(1). It was reiterated that the notice is without jurisdiction and lacked jurisdiction in respect of the matter covered by the notice as the undertaking falls under Section 25 of the Ordinance and the services being provided form an integral part of the telecommunication services and the same are in fact nothing other than telecommunication services which are defined by the Pakistan Telecommunications (Re-organization) Act, 1996. The Telecom Act confers wide ranging powers on PTA to regulate telecommunications services on an ongoing basis.

(2). There is no element of unreasonably restrictive trade practices in the subject services. The services merely replicate similar services being provided by telecommunication operators in collaboration with RIM in many different countries. There is no exclusive relationship between Mobilink and RIM; and other telecommunication operators in Pakistan are absolutely free to enter into similar agreement(s) with RIM.

(3). The different elements that are included in the subject services are separately available to the customers and there is no necessary bundling which may be deemed prejudicial or unreasonably restricted in any manner.

(4). The subject services do not in any manner contravene Section 6(1)(b)(ii) or 6(1)(c) or for that matter any other provisions of the Ordinance. No bundling of services as set out in the SCN is taking place. Although, internationally such bundling is in practice "for instance I Phone which in the USA can only be acquired through AT&T and is locked to prevent mobility to other networks. In contrast, there is no such restriction with respect to the BlackBerry set being provided by Mobilink.

(5). The undertaking also addressed certain specific issues raised by the Authority during the hearing. It was inquired whether, if a Mobilink subscriber of Subject Services were to change (i.e. port) to another network, would a similar service still be available. The answer is yes, if the recipient operator supports the BlackBerry system and provides such services to the ported subscriber.

(6). However, it is also not technologically possible for such customer to continue to avail the Subject Services being provided by Mobilink. However, he can avail equivalent services (if they are being offered) by the recipient operator.

(7). Even apart from the technological constraint noted above, it would simply not be fair to ask Mobilink to provide Subject Services to such customer - any more than it would be fair to require Hotel A to continue to provide room or other services to a customer who has moved to Hotel B for instance! It is however clarified that Mobilink would have no issue with the use of the BlackBerry handsets purchased from Mobilink if it was being used (for whatever purpose) on another operator's network."

(8). In response to whether subscribers of other operators can avail the subject services, the undertaking submitted that it is not restricted from providing services or handsets that are similar to the BlackBerry handsets and RIM's push email solution. Also RIM is not restricted from providing its BlackBerry handsets and RIM's push e-mail solution through any other carrier in Pakistan.

(9). With regard to the concern that if a subscriber of the Subject Services moves to another network which does not support the RIM infrastructure, why such subscriber is deprived of the use of the BlackBerry set that he may have acquired as part of the Subject Services, it was submitted, this is not entirely so, as the customer would still be able to use the set as a mobile phone, and a number of features therein which are not dependent on the RIM infrastructure continue to be available. Also, as and when the RIM infrastructure is supported by the recipient network, full utility would be restored.

- (10). It would depend on the infrastructural development of the recipient operator whether or not the customer would be able to utilize all features of the BlackBerry handsets which he was able to use on the Mobilink network. That may indeed be a reason why the customer decides to stay with (or move to) a network which provides better and more enhanced services - but surely that cannot be held against such network."
16. The Competition Commission of Pakistan (the "**Commission**"), as successor to the Authority, fixed the matter for hearing on 29-11-2007 at Islamabad. Mr. Salman Chima, Advocate/counsel, alongwith Mr. Niaz Brohi, Head Law & Litigations Department & Mr. Mesum Mehdi, Manager of the undertaking, appeared before the Commission, and argued the case. The counsel responded to the queries of the Commission regarding BlackBerry handset, Internet Service (BIS, BES, BES Plus) and Mobile Telecommunication Service (Voice, SMS).
17. The Commission inquired from the undertaking to explain what technical problem, if any, exists for Mobilink customer to have access to BlackBerry internet and e-mail related services, when he switches to another network for mobile telecommunication services. The counsel requested for grant of two weeks time for filing response to the clarification and the Commission, acceding to his request, allowed two weeks time.

18. Mobilink GSM vide its letter dated 19-12-2007 submitted the following response (received from RIM) to the Commission's query with respect to a technical hindrance, if any, in switching over to another service provider or network for mobile telecommunication services, while continuing to avail Mobilink's BlackBerry services:

- *"A Mobilink Customer with a BlackBerry solution, who has shifted to another network, could not continue availing of the Mobilink BlackBerry service as a particular SIM can only recognize one carrier at a time.*
- *As for availing of BlackBerry solutions with the other carrier that would only be possible if that other carrier's SIM is recognized by RIM's infrastructure. RIM's network infrastructure has to recognize the carrier's identity on the SIM card in order to be able to allow BlackBerry service to the handset with such a SIM card, i.e. the other carrier must have connectivity with the RIM infrastructure.*
- *However, even if the other carrier has connectivity with RIM's network infrastructure, a Mobilink Customer shifting to such other network could not, technically, continue to work with the Mobilink network for provision of Mobilink BlackBerry services as such services would have to be with that new carrier.*

➤ *If the question is widened to ask whether a customer with a BB Handheld could use the handheld on another network, the answer would be yes (provided the set was not SIM-locked). However, the BB solutions and certain other data services would not be available if such other network did not have BB connectivity. This is because the way the BB handheld is designed (globally) is that this configuration information is in a "service book" and such service book is specific to a particular carrier and can only, once the device has left the factory, be pushed to the BB handheld through's RIM's BlackBerry network infrastructure hence and in order to do that, the other carrier would need to have connectivity with RIM's BlackBerry network infrastructure."*

19. The matter was again fixed for hearing on 29-01-2008 at Islamabad. Mr. Salman Chima, Advocate/counsel, alongwith Mr. Niaz Brohi, Head Law & Litigations Department, Mr. Atif Ahmed, Director IT, Mr. Bassam Elakkad, Operations Director and Ms. Sundas Ahad Khan, Associate VAS, of the undertaking, appeared before the Commission, and argued the case.

20. The counsel submitted that the undertaking fully appreciates the concerns raised by the Commission and in order to address such concerns they were working on few proposals. Short adjournment was, therefore, requested in order to formally

tender such proposals before the Commission. The Commission, acceding to their request, adjourned the matter.

21. The undertaking *vide* its letter dated March 5, 2008, in response to queries raised by the Commission importantly submitted as follows:

"1). ***Whether a technical solution is at all possible, whereby a Mobilink customer who has shifted to another operator (because he is not satisfied with Mobilink's mobile telephone service) may still be able to avail the Blackberry service being provided by Mobilink by accessing Mobilink's network (for an appropriate fee)?***

1.1 *It is pertinent to not that the Blackberry infrastructure is owned by RIM and Mobilink only 'joins' and connects to this infrastructure. This is a peer to peer direct connection shared between two infrastructures. This mechanism is implemented worldwide (i.e. every operator connects to RIM infrastructure to offer Blackberry services). The connectivity cannot be shared with any other operator due to its technical nature of being "point to point". As such, when a number is ported out of the Mobilink network, it moves out without its connectivity with RIM. Hence, Blackberry services cannot be offered by Mobilink to any SIM/Number/Device not connected to Mobilink.*

The only solution available at present is that the new operator MUST also have connectivity with RIM. In that case ported out number will use the new operator's "point to point" connectivity with RIM to run Blackberry services on their respective SIMs.

It is also worth mentioning here that even if a solution could be found, which may then allow the RIM infrastructure to be shared or extended to other

operators, this would require RIM to participate in the solution. RIM has patented information regarding its network topology and any change in this infrastructure beyond Mobilink's control.

Further, we may also refer the Honorable Commission to the international best practices of consumer rights and transfer of services upon portability (as applicable worldwide). To the best of our information transfer of RIM value added service (upon portability of a number) is not available anywhere else.

2). *Whether it is possible to use the Blackberry Handhelds for GPRS services without having to subscribe to Blackberry Services? And whether it is possible to do so, once the customer shifts to another?*

2.1. *Since the BB Handheld is a product developed by RIM, Mobilink thought it appropriate to address this issue to RIM. The questions posed in this behalf, and the responses issued by RIM are noted below.*

2.1.2. *If a Mobilink Blackberry handheld owner does not subscribe to Blackberry service (and doesn't have blackberry.net APN) and still wants to browse, send MMS via his handheld - how can he use those specific APN's through his handhelds? Is there a setting which can be done on handheld like the one we use while using BB as modem with laptop?*

RIM Response: "This can be achieved through preloaded service books. If any customer does not want the Blackberry service activated on the device they can still access Mobilink's WAP and MMS service as long as the service books are preloaded on the devices."

2.1.3. *Also for ported out subscriber: If a blackberry user ports out to another operator in Pakistan and still wants to use blackberry handheld as a normal GPRS/GSM phone, can he use the above settings if (a) The other operator doesn't have blackberry connectivity or agreement with RIM; (b) The other operator does have blackberry*

connectivity but customer doesn't have blackberry.net APN or service registered?

RIM Response: "If the users port to a different network operator they will not be able to use MMS & WAP, as the APN for the new carrier will be different from Mobilink. The preloaded service books only have the Mobilink APN."

- 3). **2.2.1. *Whether it is possible to use the Blackberry Handhelds for GPRS services without having to subscribe to Blackberry Services? It is indeed possible to use the Blackberry Handheld for GPRS services without having to subscribe to Blackberry Services. Mobilink will permit that in respect of Blackberry Handhelds acquired from third parties (provided naturally that they are not SIM locked).***

With respect to Blackberry Handhelds purchased from Mobilink itself, it needs to be noted that Mobilink buys these handsets specifically to provide Blackberry services. Mobilink does not buy these handsets for commercial selling (Mobilink is not into handset distribution or retail - however these sets are otherwise available in the market). Moreover, these are subsidized handsets and are sold at a price lower than the prevalent around the world. Mobilink, therefore, does not offer these handsets apart from the Blackberry services. This is the norm in the entire cellular industry and almost all international cellular operators offer sim locked or network locked handsets. However, customers are free to acquire Blackberry handsets from the market, and are free to use such handsets for GPRS purposes without subscribing to the Blackberry Services being provided by Mobilink".

22. The matter was fixed for hearing on 28-05-2008 at Islamabad after receipt of the response of the undertaking dated March 5, 2008. On 28-05-2008, Mr. Salman Chima & Mr. Javed Akhtar Advocate/counsel (Counsel for RIM's), alongwith Mr. Niaz Brohi,

- Mr. Atif Ahmed, Mr. Yousuf Allah Dad and Ms. Tamania Jafri Executives of the undertaking appeared on behalf of Mobilink GSM and Mr. Jamil Qureshi, Senior Carrier Technical Manager of RIM, appeared on behalf of Mobilink GSM as an 'Expert Witness' before the Commission, and made his submissions.
23. Mr. Jamil Qureshi (technical expert from RIM) reiterated the earlier written response to explain how it is not technically possible for a Mobilink GSM customer to avail BlackBerry services if he switches to another operator/service provider.
24. According to Mr. Jamil Qureshi a SIM of Mobilink GSM recognizes RIM's network and the RIM's network does not recognize SIM of any other operator who are not registered with RIM. He also informed that RIM is unique in that, apart from manufacturing the handset it also provides the network whereunder data transfer is protected through encryption. Apprising the Commission of the advantage of encryption, it was submitted that without it information passed on the internet would be available for any one to catch and read or may be otherwise compromised. Emails sent through BlackBerry are encrypted. RIM charges from Mobilink GSM separately for each

service provided by it to its BlackBerry customers. To a question whether there is any competitor of RIM in the world, he stated that Iphone and Palm Treo are the competitors of RIM. Commission was also informed that Warid, Telenor, Ufone and CM Pak would be provided the facility of interconnectivity with RIM's network shortly, therefore, the BlackBerry handset purchased from Mobilinik would be useable with other operators/service providers if Mobilink GSM would allow RIM to unlock the SIM. It was also submitted that it is not technically feasible to lock the handsets for a limited duration of time.

25. On behalf of Mobilink GSM, the Commission was repeatedly assured that due disclosure to potential and present customers regarding restrictions embodied in the provision of the services in question i.e. the (BlackBerry Solution) would be duly made if so desired by the Commission. However, the Commission was also informed that there are only about 15,000 Mobilink GSM BlackBerry customers. Mobilink sells BlackBerry to its customers at a rebate of upto 40% and thus the BlackBerry is sold at a loss; and that therefore unlocking of the SIM would not be a commercially viable option for Mobilink GSM.

26. In view of the submissions made before the commission in these proceedings, the following issues emerge from the subject proceedings:

(1) Whether the subject activity in these proceedings constitute part of Telecommunication Services that are regulated, prescribed, determined or required to be approved by a regulatory authority in terms of Section 25 of the MRTPO?

(2) Whether there is any technical constraint in providing access to the BlackBerry services (BIS & BES) through Mobilink GSM on the BlackBerry handset when a Mobilink GSM customer switches to another operator/service provider? If so, is there a possible technical solution to address this concern?

(3) Whether currently the Mobilink BlackBerry customer is entitled to exercise the option of switching over to another RIM enabled service operator for BlackBerry services?

- (4) Whether the buyer of a BlackBerry handset from Mobilink GSM is subjected to a tie-in arrangement which constitutes unreasonably restrictive trade practice under the MRTPO on the part of Mobilink GSM?**
27. With respect to the first issue, at the outset, it is pertinent to note that despite having taken the jurisdictional objection in its written submissions, this point was not pressed in the arguments during the hearings. Nevertheless, we consider it appropriate to address this aspect. It has been stated that by virtue of Section 25 of the MRTPO, the subject proceedings are not maintainable as the matter raised in the notice constitutes part of the "activity" or the "function" regulated by Pakistan Telecommunication Authority (the "PTA"). Hence, the provisions of MRTPO would not apply. It has further been stated that the subject services pertain to BlackBerry services/products which are being provided by Mobilink GSM to its customers and such services form an integral part of telecommunication services as defined under Pakistan Telecommunication (Re-organization) Act, 1996. Additionally, that the subject services are being provided by Mobilink GSM pursuant to a license issued by the PTA. Hence, these services are regulated by a regulatory

authority falling within the ambit of Section 25. It is also maintained that PTA has been conferred with such wide ranging power that it would be an anomaly if any aspect of the telecommunications sector was left to be regulated by MCA.

28. Having examined the above submissions, we are of the considered view that the very premise of the above argument is misconceived. The subject matter or the subject activity or functions against which the show cause and proceedings were initiated relates to the sale of the hardware product i.e. the BlackBerry handset and the arrangement or basis for sale thereof. Such activity or function cannot by any stretch of imagination attract the mischief of Section 25 of MRTPO. The three products i.e. the handset, the BlackBerry Services and the Mobilink Telecommunication Service are alleged to be integrated and tied-in in a manner that the arrangement constitutes an unreasonably restrictive trade practice under the MRTPO. Pursuant to the arrangement, it is not possible to access the BlackBerry internet or e-mail service without the mobile link telecommunications service from Mobilink GSM. Accordingly, such a 'tie in arrangement' is neither 'regulated' or

'prescribed' nor 'determined' or 'required to be approved' by PTA.

29. On the second issue, as for the first part regarding technical constraints on providing access to the Blackberry services (BIS & BES) through Mobilink GSM on the BlackBerry handset when the customer switches to another operator/service provider, we do find some merit in the submissions made before us. As we understand, a particular SIM can only recognize one carrier at a time. The BlackBerry handset is configured in terms of a service book which is specific to a particular carrier and can only be pushed to BlackBerry handset through RIM's BlackBerry network infrastructure. For this purpose, connectivity is required between RIM's BlackBerry network infrastructure and the service provider/operator's facility. The operator needs to establish data routers and data connections at RIM's facilities and establish RIM related routers at the operator facilities. RIM BlackBerry network infrastructure is under RIM's direct control which provides key intermediary and interpreter services between servers and wireless network associated with the BlackBerry wireless e-mail communication solution.

30. The above explanation in our view addresses the concern raised by the Commission as to why the owner of a BlackBerry handset cannot have access to the BlackBerry-internet and email related services when such customer switches to another net work. We are also informed that there is no exclusive relationship between Mobilink GSM and RIM and other telecommunication operators in Pakistan are absolutely free to enter into similar agreements with RIM. This fact is confirmed in terms of Clause 15 of the Agreement between RIM and Mobilink GSM.
31. However, in dealing with the second part of the issue we must record our disappointment that for an undertaking of the proclaimed stature of Mobilink GSM, virtually a market leader, both in terms of growth as well as having the largest customer subscriber base in Pakistan - a base claimed to be over 30 million and growing and purporting to provide state-of-the-art communication solutions to its customers, nothing tangible has been done to substantially address the possibility of finding a functional technical solution. The focus has been only on why it can not be done rather than how it may be done! In its response dated February 21, 2008 as excerpted below it is obvious how

superficially this concern of the commission has been addressed

by Mobilink GSM:

The honorable Commission however instructed Mobilink to evaluate whether a technical solution at all be ascertained/identified.

Pursuant to the honorable Commission's instructions, Mobilink has indeed examined the issue. However, Mobilink is unable to identify a solution in this regard. In other words, if a feasible solution of any kind does exist (the possibility of that can perhaps never be excluded in this fast developing area) Mobilink is unaware of any such solution.

However, before submitting the aforesaid position to the honorable Commission, Mobilink would like to be guided by the honorable Authority, particularly, whether the honorable Authority is aware of any feasible solution to the issue? An early response in this behalf would be much appreciated - as we would like to submit our finding to the honorable Commission as early as possible.

We must also add that Mobilink GSM and its senior management must appreciate that a company such as Mobilink GSM which proclaims unparalleled eminence must devote adequate attention and resources to research and development (R&D). Its commitment to R&D and desire to develop and put in place consumer beneficial systems must be proportionate to its growth in market share so as to ensure increasing improvement in the quality of the service and appropriate choices for the

- consumer. Also the fact that the Commission's advice and directions were taken so lightly is the kind of irresponsible conduct that is unbecoming of good corporate citizen.
32. Moreover, in our view it should not have taken so long for Mobilink GSM to understand and to explain the relevant technical aspects and that too eventually through RIM. During the hearing, upon being confronted it was admitted by Mobilink GSM's counsel that certain representations made before the Commission were incorrect owing to the fact that there was lack of clarity on the subject. These will be discussed in greater detail in the discussion on the next issue. While we appreciate the fact that the counsel did express regrets and apologized, it is extremely important for Mobilink GSM to realize that as a market leader, it ought to keep itself duly apprised of all technological developments and to ensure that adequate resources are available in house to provide assistance to any adjudicatory or regulatory body.
33. The issue is indeed very crucial. Throughout the proceedings, Mobilink GSM has maintained that the customer has the option

to switch over to another network and avail BlackBerry services provided that the service provider's network is RIM enabled. Mobilink GSM in its response dated August 03, 2007 has submitted:

"...the subject services are being provided on terms which cannot at all be termed unreasonably restrictive. In fact, the subject services are being provided very substantially on the same terms as are applicable in other countries..."

34. Mobilink GSM has further stated in its letter dated September 03, 2007 that:

It may also be noted that even though Mobilink is not bundling any specific services with the BlackBerry set as noted above, internationally such bundling is taking place - and to our knowledge is not being treated as anti-competitive by the regulators. One particularly visible example is that of I phone which in the USA can only be acquired through AT&T and is locked to prevent mobility to other networks. In contrast, there is no such restriction with respect to the BlackBerry set being provided by Mobilink.

...even apart from the technological constraint noted above, it would simply not be fair to ask Mobilink to provide Subject Services to such customer - any more than it would be fair to require Hotel A to continue to provide room or other services to a customer who has moved to Hotel B for instance!

It is however clarified that Mobilink would have no issue with the use of the BlackBerry handsets purchased from Mobilink if it was being used (for whatever purpose) on another operator's network."

"A concern was expressed that if a subscriber of the Subject Services moves to another network which does not support the RIM infrastructure, such subscriber would be deprived of the use of the BlackBerry set that he may have acquired as part of the Subject Services. This is not entirely so, as the customer would still be able to use the set as a mobile phone, and a number of features therein which are not dependent on the RIM infrastructure would continue to be available. Also, as an when the RIM infrastructure is supported by the recipient network, full utility would be restored."

35. Furthermore, Mobilink GSM in its response dated 19-12-2007 reiterated:

...., if a Mobilink Customer with BlackBerry Solution switches to another operator, the operator would need to have independent infrastructure connectivity to the RIM BlackBerry Network Infrastructure in order for the Customer to continue receive Service Access. If the Customer switches to another operator that has connectivity with RIM then that Customer can receive Service Access on the handheld that he/she originally acquired from Mobilink.

36. Subsequently, Mobilink GSM in its response dated March 05, 2008 reiterated RIM's response to the query as under:

- As for availing of Blackberry solutions with the other carrier, that would only be possible if that other carrier's SIM is recognized by RIM's infrastructure. RIM's network infrastructure has to recognize the carrier's identity on the SIM card in order to be able to allow Blackberry service to the handset with such a SIM card. i.e. the other carrier must have connectivity with the RIM infrastructure.*

- *However, even if the other carrier has connectivity with RIM's network infrastructure, a Mobilink Customer shifting to such other network could not, technically, continue to work with the Mobilink network for provision of Mobilink Blackberry services as such services would have to be with that new carrier.*
- *If the question is widened to ask whether a customer with a Blackberry Handheld could use the handheld on another network, the answer would be yes (provided the set was not SIM-locked). However, the BB solutions and certain other data connectivity....*

37. The above submissions are self explanatory, however, when it was enquired from the expert of RIM as to what is meant by the assertion "*provided the set is not SIM locked*" it was explained that the Subscriber Identity Module (SIM) locking is a software lock for the mobile handset which ensures that customer can only call using the network of the mobile provider from whom the customer purchases the mobile phone and such lock could be removed using the SIM unlock code. It was also highlighted that this has a security feature in case the handset is lost or stolen it could not be used through the insertion of another SIM card to obtain service from any operator. It was inquired that assuming Ufone and Warid provide the BlackBerry services and become RIM enabled, would the existing customer

who has purchased BlackBerry handset from Mobilink GSM and availing BlackBerry services (BES & BIS) has the option to switch over to another operator. The response of RIM's expert was yes, if Mobilink GSM allows RIM to unlock the SIM.

38. In this regard, Mobilink GSM's stance was that there are only 15,000 Mobilink BlackBerry customers. Mobilink sells BlackBerry to its customers at a rebate of upto 40% and thus the BlackBerry is sold at a loss. Therefore, unlocking the SIM would not be commercially viable. On this point it was inquired by the Commission whether it is possible to limit the duration for which the handset is SIM locked so as to make the duration of locking proportionate to the subsidy offered. Mr. Qureshi responded that it is not technically feasible to place SIM lock for limited duration.

39. At the outset, it is important to highlight that the stance taken by Mobilink GSM blatantly negates the submissions made above in this regard. Notwithstanding whether the service provider/operator is RIM enabled or not, a customer who has purchased BlackBerry handset from Mobilink GSM has no utility

of the handset for having access to BlackBerry services if he wants to quit Mobilink GSM service. In order to protect the subsidy of the handset, Mobilink GSM is using SIM locking as an effective tool for locking the customers into its network rather than approaching the customer to sign long term contracts!

40. Interestingly, as noted above, it has been stated that internationally such bundling is in practice but "in contrast" there is no such restriction with respect to the BlackBerry handset being provided by Mobilink. The instance quoted is that of iPhone which is only acquired through AT&T which prevents mobility to other networks by SIM locking. As far as we can see there is a stark similarity of the "bundling practice" and we fail to appreciate any contrast in this regard.

41. However, we have examined the SIM lock issue in great depth and note that SIM locking is the practice whereby handsets are locked so that they can only be used to obtain the services of the original provider of the mobile service and it is more accurately termed as "handset locking." The SIM card itself is not actually locked, as it can be used with other handsets (that

are not locked to other networks). The handsets are locked by the handset manufacturers at the request of mobile networks/service providers and can be unlocked with the code to be entered into handsets.

42. In most European countries, North America and Australia, where the service providers SIM lock, it is done for a limited duration of time. In the United States, for example, T-Mobile, one of the two national GSM carriers will unlock the handset if the subscriber has an active account in good standing for at least 90 days. In case of subsidy offered on a handset, the customer is required to retain services for a minimum of 30 days. Also there is cash back redemption which requires a customer to retain qualifying services for a minimum number of days.

43. In the United Kingdom, mobile service providers: Vodafone, O2, T-Mobile, Orange, and Virgin Mobile all unlock the phone for a fee or free at any time or after lapse of certain time period. It has been recognized that the SIM locking still represents a barrier to switching for at least some consumers and that

improved customer awareness is very much needed in this regard.

44. France and Belgium prohibit SIM locking simpliciter. The Netherlands and Spain require service providers to provide unlocking codes to their subscribers but may charge a fee for this during the first 12 months after purchase.

45. Indeed, the European Commission looked into the matter of SIM locking as early as in 1996. The Directorate-General for Competition directed the GSM/DCS1800 handset manufacturers and network operators in the European Economic Area to limit the use of the "SIM Lock" feature in mobile phone handsets.

The EC Commission required the network operators to

- i. inform the customers at the time of purchase whether the handset is locked, and the procedures for unlocking on request;
- ii. inform the customers of the existence/amount of any subsidy and conditions for its repayment at the time of purchase; and
- iii. provide an unlocking procedure that must be convenient to the customer (e.g. not involving return of the handset to a manufacturer).

46. More recently (May 2008), in New Zealand the Telecommunications Commissioner of the Commerce Commission objected to Vodafone for selling locked handsets in New Zealand. Pursuant to Commerce Commission's objection, Vodafone offered its customer who already purchased SIM locked handsets that "should they wish to unlock the handset in the future, they will be able to call a freephone number and do so free of charge."
47. From the above it is evident that where service providers use the SIM lock feature of the handset, they do it for a limited duration of time, and that unlocking is possible at any time, by as simple a procedure as making a phone call to the service provider who locked the handset. The Commission notes with regret that both Mobilink GSM and RIM are either not aware of contemporary practices worldwide or have deliberately tried to mislead the Commission.
48. Moreover, customers who travel abroad often (i) where roaming is not available; or (ii) to avoid roaming charges use a SIM card supplied by a local telecommunications service provider in the

country they are visiting. Thus for a customer, who is abroad and could not switch the SIM in a SIM locked BlackBerry handset, the value of the handset is equal to a nullity regardless of what he paid for it. This ability to absolutely restrict the use of handset by Mobilink, irrespective of the amount of subsidy it offered, is patently unreasonable and restrictive.

49. The practice of SIM locking handsets appears to be violative of Pakistan's Mobile Cellular Policy of 2004 that mandated mobile number portability (MNP). In order to promote competition, MNP allows users to switch the mobile service provider while keeping their existing mobile number. SIM locking handsets, on the other hand, discourage subscribers to switch to other service providers network and thereby prevents competition - the very antithesis of MNP.
50. To further understand the issue of SIM locking consider that a consumer purchased an expensive new television set and decided to switch cable/satellite providers, but the provider said "I'm sorry, your new TV will not work on our cable/satellite system,

you will have to purchase a new one from us." Clearly, this will be unreasonably restrictive for the customer.

51. We have also looked at potential arguments against removing SIM locking. It is often justified by service providers primarily on the basis of the need to protect handset subsidy and thus promote faster penetration. While it is possible that handset prices may become higher in some cases, these will still have to be priced at a level that customers would buy them. Also, in Pakistan, the Pakistan Telecommunication Authority (PTA) offers a service to block the handsets which are either snatched, stolen or lost. Thus, the rationale for SIM locking to protect theft of handsets is not so cogent in the case of Pakistan. Moreover, barring customers from use across all networks seems to be far more important. It is perhaps difficult to know how much consumers care about current locking terms as they are not sufficiently informed to be able to factor locking policies into their decision making. For this purpose, consumers ought to be made aware and properly informed - especially prior to the purchase of the handset about locking policy and unlocking conditions.

52. It may also be relevant to point out that the Commission, in order to appreciate the technical constraints on switching over to another network, had also inquired whether it is possible to use the Blackberry Handset for GPRS services without having to subscribe to Blackberry Services. GPRS is a packet-based wireless communication service that provides continuous connection to the internet for mobile phone and computer users. It is a series of functionalities that allow mobile data streaming and transfer to users of the Global System for Mobile Communications (GSM) mobile phone. Mobilink GSM responded to the query as follows:

It is indeed possible to use the Blackberry Handheld for GPRS services without having to subscribe to Blackberry Services. Mobilink will permit that in respect of Blackberry Handhelds acquired from third parties (provided naturally that they are not SIM locked). With respect to Blackberry Handhelds purchased from Mobilink itself, it needs to be noted that Mobilink buys these handsets specifically to provide Blackberry services. Mobilink does not buy these handsets for commercial selling (Mobilink is not into handset distribution or retail - however these sets are otherwise available in the market). Moreover, these are subsidized handsets and are sold at a price lower than the prevalent around the world. Mobilink, therefore, does not offer these handsets apart from the Blackberry services. This is the norm in the entire

cellular industry and almost all international cellular operators offer sim locked or network locked handsets. However, customers are free to acquire Blackberry handsets from the market, and are free to use such handsets for GPRS purposes without subscribing to the Blackberry Services being provided by Mobilink.

53. The thrust of the above discussion is that currently the Mobilink GSM BlackBerry customer does not have any option to switch over to another service operator whether RIM enabled or not. It would perhaps also be correct to state that most of the customers are not aware about the SIM locking restriction. Similarly, no procedure is in place whereby the customer can seek unlocking of the SIM from Mobilink GSM as of right, if it so desires for the purposes of switching over to another network/service provider.
54. Having examined the above issues we now proceed to determine the last issue whether the buyer of BlackBerry handset from Mobilink GSM is subjected to a tie-in arrangement which constitutes un-reasonable restrictive trade practice under the MRTPO on the part of Mobilink GSM.

55. For ease of reference the relevant provisions are reproduced as under:

S.3. Undue concentration of economic power, etc., prohibited:- There shall be no undue concentration of economic power, unreasonable monopoly power or unreasonably restrictive practices.

S.2 (1)(n) "unreasonably restrictive trade practice" means a trade practice which has or may have the effect of unreasonably preventing, restraining or otherwise lessening competition in any manner.

(k) "trade" means any business, industry, profession or occupation relating to the production, supply or distribution of goods or the control of production, supply or distribution of goods, or to the provision or control of any service.

(l) "trade practice" means any act or practice relating to the carrying on of any trade or business.

(a) "agreement" includes any arrangement or understanding whether or not in writing and whether or not it is or is intended to be legally enforceable.

S.6. Unreasonably restrictive trade practices: (1) Unreasonably restrictive trade practices shall be deemed to have been resorted to continued if there is any agreement.

(a).... .

(b) between a supplier and a dealer of goods fixing minimum resale prices including:

i). an agreement with a condition for the sale of goods by a supplier to a dealer which purports

to establish or provide for minimum prices to be charged on the resale of the goods in Pakistan; or

ii). an agreement which requires as a condition of supplying goods to a dealer the making of any such agreement.

(c): which subjects the making of any agreement to the acceptance by suppliers or buyers of additional goods or services which are not, by their nature or by the custom of the trade, related to the subject matter of such agreement.

56. We would first examine this issue with reference to the deeming provisions of sub-clause (ii) of Clause (b)&(c) of sub-section (1) of Section 6 of the MRTPO. In this regard, Mobilink GSM has taken the position that Section 6(1)(b) is not attracted as that applies to any agreement between supplier and dealer of goods fixing minimum resale prices, whereas no such thing is happening in the case of subject services. In this regard, we concur that both sub-clauses (i)&(ii) of Clause (b) of Section 6 pertain to fixing of minimum prices which in the present case is not applicable.

57. As for clause (c) of sub-section (1) of Section 6, an unreasonably restrictive trade practice is deemed to have been resorted to if there is any agreement which subjects the

making of any agreement, to the acceptance by the buyer of additional goods or services which are not by their nature or by the custom of the trade, related to the subject matter of such agreement.

58. Mobilink GSM's argument against the applicability of the above provision is that the subject services are being provided on terms which cannot be termed unreasonably restrictive. It is submitted that in fact, the subject services are being provided very substantially on the same terms as are applicable in other countries and no issues to its knowledge have been raised in this respect in such other jurisdictions. The subject services are fairly standard the world over and that there is no 'tie-in' arrangement in violation of industry practices.

59. In view of our finding on the third issue, we have no doubt in our minds that the arrangement of the selling of the Blackberry handset, the provision of BlackBerry internet and e-mail service (BIS & BES) and the mobile telecommunication service (SMS) are bundled and tied in such a manner through SIM locking that if the customer surrenders one product for example mobile

telecommunication service he is denied provision of other services as well. From the threadbare deliberations in the above mentioned paragraphs, it is manifest that by custom of trade, such services can not be tied-in in such manner. While the SIM lock function has been or could be allowed in practice in other jurisdictions, such restriction does not exist in absolute terms. Mobilink GSM has neither made any express disclosure vis-à-vis SIM locking to its customers nor is the restriction made time bound. Furthermore, the fact that it is unwilling to allow such unlocking, leaves the customer with no choice but to buy a new handset in order for him to switch over to another provider. Accordingly, such practice for all intents and purposes in our view clearly falls within the purview of clause (c) of sub-section (1) of Section 6.

60. Although having established the above violation it may not be necessary to examine the issue with reference to Section 3 read with Section 2(1)(n) and other relevant provisions under the MRTPO. However, in this regard it is important to appreciate that Section 6 is a deeming provision and does not restrict the scope of the term unreasonably restrictive trade practice as envisaged under Section 3 and defined under Clause

(n) of sub-section (1) of Section 2. For the purposes of invoking these provisions, which are independent of Section 6, it needs to be established whether the subject trade practice i.e. the tie-in arrangement of bundling the three products through SIM locking has the effect of unreasonably preventing, restraining or otherwise lessening competition in any manner. In our considered view, locking the SIM card in the handset and preventing its replacement restricts the customers from changing their service provider even though the SIM card can technically be unlocked. With no procedures in place for unlocking it effectively deters the consumer choice and mobility. Therefore, we have no doubt in our mind that such practice on the part of Mobilink GSM, even otherwise independent of Section 6, has the effect of unreasonably preventing, restraining and lessening competition.

61. In view of above findings Mobilink GSM is directed to:
 - a. make full disclosure and inform all its customers regarding the SIM lock feature. Importantly, all advertisement and promotional sales material with respect to BlackBerry handsets will in future carry a boldly displayed clear statement that the sales of these handsets are linked/tied with the BlackBerry service and Mobilink GSM Mobile telecommunication service;
 - b. disclose the amount of subsidy, in each sale and a reasonable time period not exceeding one year determined

on the basis of a pre-established formula on expiry of which the subsidy would be deemed recovered;

- c. inform the customers how the subsidy could restrict the customers ability to unlock the SIM lock feature;
- d. provide an unlocking procedure that must be convenient to the customer (e.g. not involving return of handset to a manufacturer);
- e. make the SIM locking time bound for the customer, keeping in view, international best practices but not exceeding the time period determine as per (b) above; and
- f. provide the option to switch over to another service provider upon payment of a specified, reasonable fee if the customer wants to switch prior to the expiry of the term.

62. As for RIM, since SIM locking for Mobilink GSM is carried out by RIM, Mobilink GSM is hereby directed to instruct RIM to implement the SIM lock feature in terms of the ruling given above. Mobilink GSM & RIM are directed to implement the above within a period of 12 months and report its compliance to the Commission.

63. As for show cause notice issued to Orascom the same is withdrawn as the tie-in arrangement does not involve Orascom in any manner in the subject proceedings.

64. Last but not the least, we would like to emphasize that the commission has taken a lenient view on the contravention been pointed out and not imposed any fine or penalty. However, commission will be constrained to consider such measures if

Mobilink GSM and its senior management does not duly demonstrate that it shall become adequately responsive to the issues and concerns raised herein. Mobilink GSM, a subsidiary of Orascom must not only draw upon the latter's experience in maximizing profits for its share holders but also draw upon and enable the enormous customer base, existing and potential, to benefit from best practices worldwide. This commission is committed to the introduction, adoption and continuance of fair trade and business practices for the over all gain and benefits of the national economy. Mobilink GSM as the premier and traditional market participant must shoulder responsibility of conducting its business in accordance with business ethos and policy commensurate with the evolving regulatory perspectives.

65. Show cause notices issued to Mobilink GSM and RIM are disposed off in terms of this order.
66. A copy of this Order is forwarded to PTA for an appropriate industry-wide directive with respect to SIM locking of handsets.

(KHALID A. MIRZA) (ABDUL GHAFFAR) (RAHAT KAUNAIN HASSAN) (MALEEHA MIMI BANGASH) (DR. JOSEPH WILSON)
Chairman Member Member Member Member

Islamabad the July 25, 2008