



BEFORE THE
COMPETITION COMMISSION OF PAKISTAN
IN THE MATTER OF
SHOW CAUSE NOTICE ISSUED TO

PAKISTAN TELECOMMUNICATION COMPANY LTD (PTCL)
ON COMPLAINT FILED BY
M/S LINKDOTNET TELECOM LTD, M/S NEXLINX (PVT.) LIMITED &
M/S MIRCORNET BROADBAND (PVT.) LIMITED

(F. NO: FILE NO. 2(3)/DD(L)/PTCL/COMMISSION/2010)

Date(s) of hearing: 18-01-2018
08-03-2018

Commission:

Ms. Vadiyya Khalil
Chairperson

Dr. Shahzad Ansar
Member

Dr. Muhammad Saleem
Member

Assisted by:

Noman A. Farooqi
Director General (Legal)

Present on behalf of:

M/s LinkdotNet Telecom Ltd

Nemo

M/s Micronet Broadband (Pvt.) Limited

Mr. Faisal Khan, Advocate
Mr. Ikram ullah Mahar
Mr. Umer Tariq, Advocate
AQLAAL

M/s Nexlinx (Pvt.) Limited

Nemo

M/s Pakistan Telecommunication
Company Ltd (PTCL)

Mr. Ali Raza, Advocate Supreme Court
Mr. Ghulam Mustafa, GM (Legal Affairs)
Mr. Sikandar Naqi, Chief Development Officer
Mr. Aziz ur Rehman,
Sr. Manager Contract & Policy Studies,
Ms. Aaminah Azeem, Assistant Manager (Legal),
Ms. Anoosh Jaffar, Assistant Manager (Regulatory Affairs)
Ms. Habiba Alvi.



ORDER

1. This order shall decide the maintainability of the proceedings initiated vide Show Cause Notice No. 70/2012 dated 14th June 2012 (hereinafter the 'SCN') issued to M/s Pakistan Telecommunication Company Limited (hereinafter the '**Respondent** or **PTCL**') for prima facie violation under Section 3 of the Competition Act, 2010 (the '**Act**'). The SCN was issued pursuant to a complaint filed with the Competition Commission of Pakistan (the '**Commission**') by M/s LinkdotNet Telecom Ltd, M/s Nexlinx (Pvt.) Limited and M/s Micronet Broadband (Pvt.) Limited (hereinafter the '**Complainants**') whereby it was alleged that the Respondent had engaged in abuse of its dominant position in violation of Section 3 of the Act.

FACTUAL BACKGROUND

A. COMPLAINT, ENQUIRY AND SHOW CAUSE NOTICE:

2. A complaint was filed under Section 37(2) of the Act on 16th August 2010 with the Commission by AQLAAL Advocates on behalf of the Complainants against the Respondent for alleged violation of Section 3(3)(h) and (f) of the Act. The enquiry in the matter was authorized by the Commission on the same date i.e. 16th August 2010.
3. Subsequent to the initiation of the enquiry, the Complainants filed an application dated 7th March, 2011 for withdrawal of the complaint. In the said application, it was submitted by the Complainants that the complaint was filed on the basis of a determination of the Pakistan Telecommunication Authority (hereinafter the '**PTA**') dated 15th July 2010 whereby PTCL was declared as Significant Market Player (hereinafter the '**SMP**') in the Digital Subscriber Line internet (hereinafter the '**DSL**') market. However, the said determination was suspended by the Honourable High Court in an appeal filed by PTCL 20th August 2010 and was still pending. Furthermore, the Complainants submitted that one of the reliefs sought through the Compliant was that PTCL be directed to separate its accounts for DSL and other services and it is ambiguous to the Complainants whether the Commission has the power to order such separation of accounts. Therefore, the Complainants wished to file a complaint before PTA.



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4. The Commission vide letter dated 6th May 2011 informed the Counsel for the Complainants that the Commission had initiated the enquiry in the matter and while the Commission may permit the withdrawal of the complaint under Regulation 26 of the Competition Commission (General Enforcement) Regulations, 2007 (the 'GER'), however, the proceedings or enquiry initiated does not necessarily abate with such withdrawal. It was further explained that the information gathering process for the purposes of the enquiry was underway and that the outcome of the enquiry would determine whether the proceedings under Section 30 of the Act for prima facie violation of Section 3 of the Act would be initiated or the matter disposed of. The Commission also clarified that while the Complainants are free to pursue their remedies under any other law, as for and to the extent of a violation of competition law, the Commission remains the forum of competent jurisdiction.
5. With regard to the above allegations made in the complaint, an enquiry in terms of Section 37(2) of the Act was initiated by the Commission, which was concluded vide an enquiry report dated 4th June 2012¹ (the '**Enquiry Report**'). The Enquiry Report concluded as follows:

- i). *PTCL is a dominant player in the upstream market for provision of access to country wide copper infrastructure, which is an essential input for the undertakings operating in the market of providing DSL based broad band services. Based on the findings of cost analysis it appears that the margins in the DSL retail market due to PTCL's pricing for the access to its copper network are insufficient for an efficient competitor to operate profitably. The analysis of financial statements of DSL Operators appears to confirm that as a result of such low prices the profit margins of DSL Operators have gradually reduced and now they are operating under huge losses. Many of the players in the DSL retail market have exited the market. The cost analysis of PTCLs DSL operations shows that it has been able to record profits despite offering very low retail prices and having very low margins. PTCL being a vertically integrated company, its DSL business does*



Available at http://ccop.gov.pk/images/Downloads/enquiry_reports/ptcl_dsl_enquiry_report_11_june_2012.pdf

not incur/record some of the 41 expenses such as co-location charges, copper pair rent, additional overheads etc. that other operators have to bear.

- ii). apparently the lower tariffs are beneficial for the customers and are a good way to penetrate in a growing market for DSL based broadband services. However, such low tariffs and low margins are making this market unattractive for further investment, research and development. This may result in competitors leaving the market and creating a monopolistic situation in the long run, thus leaving the customers on the mercy of a super dominant player who will be at its free will to exploit customers. This also has the effect of preventing new undertakings from entering the DSL market.*
- iii). Section 3(1) read with Section 3 (2) of the Act prohibits practices by a dominant player which prevent, restrict, reduce or distort competition in the relevant market. Price squeezing has been established as an abusive practice in all the leading jurisdictions of the world and has the impact of monopolizing the market and preventing new entrants and thereby preventing, reducing and distorting competition within the relevant market.*
- iv). PTCL's pricing strategy in the broadband wholesale market is inducing a margin squeeze in the DSL retail market thereby making it impossible for an equally efficient competitor to conduct profitable operations in the DSL retail market. This margin squeeze is not only driving out competition in the downstream DSL retail market, but is also preventing new entrants from coming in. This pricing strategy appears to be a prima facie violation of Section 3 of the Act.*

Based upon the conclusions and recommendations of the Enquiry Report, the Commission approved the initiation of proceedings under Section 30 of the Act against the Respondent. In pursuance thereof, the SCN was issued to the Respondent, wherein it was required to respond in writing within fourteen (14) days as well as to appear before the



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Commission to avail its opportunity of hearing. The relevant portions of the SCN are reproduced below:

- “5. *AND WHEREAS, according to the Enquiry Report, in particular paragraphs 10 – 19, the product market is twofold, one being the up-stream market for providing access to copper infrastructure and the other being the downstream market for provision of broadband services through DSL technology. As the Undertaking has a nationwide copper infrastructure, the relevant geographic market for both the product markets, is the whole of Pakistan;*
6. *AND WHEREAS, in terms of the Enquiry Report, in particular paragraph 36, the country wide copper infrastructure is an essential facility for the provision of broadband services through DSL technology;*
7. *AND WHEREAS, according to the Enquiry Report, in particular paragraphs 32-35, margin squeeze is a practice when the vertically integrated incumbent, by its actions, reduces the difference between up-stream and downstream prices, for its downstream competitors, to such an extent, that entering the relevant market becomes prohibitive and staying in that market becomes uncompetitive;*
8. *AND WHEREAS, in terms of to the Enquiry Report, in particular paragraph 57-60, prima facie, the Undertaking, by keeping the prices low in the ‘DSL retail market’ in relation to the price associated with accessing the copper network (which is an essential facility for provision of broadband services through DSL) is inducing a ‘margin squeeze’, and rendering the ‘DSL retail market’ unprofitable for its competitors through prima facie abuse of its dominant position in terms of Section 3(1) read with Section 3(2) of the Act;*



9. *AND WHEREAS, according to the Enquiry Report, in particular paragraphs 57-60, such actions of the Undertaking are forcing its downstream competitors out of the market, and preventing new entry, which*

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is prima facie violation of Section 3(1) read with Section 3(2) of the Act;”

B. PROCEEDINGS BEFORE HONORABLE ISLAMABAD HIGH COURT IN WRIT PETITION NO. 2062/2012:

7. PTCL in response to the SCN filed *Writ Petition No. 2062/2012* (the ‘**Writ Petition**’) before the Honourable Islamabad High Court, Islamabad and the proceedings pending before the Commission were suspended vide Order dated 28th June 2012.
8. The Honourable Islamabad High Court, Islamabad vide its Order dated 22nd November 2017 allowed the Commission to proceed into the matter and the Writ Petition was disposed by the Court vide its Order dated 22nd January 2018 with the direction to decide the question of jurisdiction and maintainability by way of preliminary determination, preferably, within a period of one month.

C. WRITTEN REPLY FILED BY PTCL AND REJOINDER BY THE COMPLAINANT:

9. PTCL filed its reply to the SCN vide letter dated 29th January 2018 wherein the submissions made are summarized as follows:

- i). PTCL in accordance with its license has been granted the specific right by PTA to establish, operate and maintain a network of data, email and internet value added services and hence for all intents and purposes is on one of the Internet Service Provider (hereinafter the ‘**ISP**’) operating in Pakistan. In addition to the provisions of internet services licences, PTCL vide its license dated 15th April 1997 has also been granted the right to lease its network circuits to other telecom licensees in accordance with and for the purpose permitted under the Pakistan Telecommunication Authority (Re-Organization) Act, 1996 (hereinafter the ‘**PTRA**’). Hence forth PTCL has entered into standard agreements with a number of other ISP’s who for their own commercial purposes did not make the relevant investment to set up an independent network and broad band infrastructure and instead sought to utilize space available in PTCL’s copper line network and resources for the purposes of provision of internet services to their own respective customers. PTCL entered into the said infrastructure lease agreement



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with the Complainants, M/s. Micronet Broadband (Pvt) Limited, LinkdotNet (Pvt) Limited and Nexlinx (Pvt) Limited.

- ii). The Complainants withdrew the complaint earlier lodged with the Commission vide their application dated 07th March 2011 on the ground that the same had been initiated mistakenly and the very basis for lodging the Complaint being the determination of the PTA declaring the PTCL as the SMP in the broadband market no longer existed as the same had been set aside and remanded back to PTA by the Honorable Islamabad High Court vide its Order dated 31st January 2013.
- iii). PTA, with reference to the instant complaint filed by the Complainants, gave its determination and disposed of the matter on the grounds that PTCL would provide separated accounts for broadband services, in addition to services already covered in Accounting Separation Regulations,/Guidelines, 2007.
- iv). Despite the above, the Commission continued its proceedings under the Act, whereas PTA being the competent authority within their jurisdiction for the matter has already passed a determination.
- v). The Commission continued to conduct enquiry and issued the SCN on the basis that PTCL is a “*dominant player in the upstream market for provisions of access to country wide copper infrastructure*” and is forcing its “*downstream competitors*” out of the market by including a “*margin squeeze*” which is *prima facie* a violation of Section 3 of the Act.
- vi). The lack of knowledge and information in the possession of the Commission with regard to this matter and as evident from the said enquiry report is not surprising in view of the fact that the Commission is not a statutory regulator of telecom matters in Pakistan and nor was it required by law to initiate such an inquiry and is clearly usurping the functions and powers available solely to the PTA under the PTR. A.

The Commission is exceeding its jurisdiction in continuing the hearing, because the jurisdiction solely vests in PTA, who has been specifically entrusted by the



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legislator to regulate competition in the telecommunication sector and protect consumer rights of telecommunication subscribers.

viii). In the event any telecom licensee had a grievance in terms of arrangement or changes being sought by PTCL, the principle remedy as prescribed by law as well as the respective licenses of each telecom licensee is a complaint before PTA.

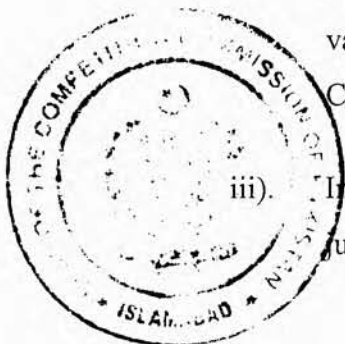
ix). Hence the instant proceedings have been exposed to two parallel proceedings in respect of the same matter which is humbly submitted is not permissible in law. Hence the Commission failed to exercise its jurisdiction properly under Section 37(2) of the Act by not refusing to entertain such a complaint and or declaring the same as frivolous and vexatious.

10. M/s Micronet Broadband (Pvt) Limited, one of the Complainants, filed a rejoinder to PTCL's reply dated 29th January 2018. The summary of the rejoinder is as follows:

i). PTCL's stance has been self-serving and contradictory before different forums where it has claimed or denied the competence of the Commission *vis-à-vis* the competence of the PTA as it suited PTCL's needs in any given dispute.

ii). The jurisdiction of the Commission *vis-à-vis* PTA is well recognized by the Supreme Court of Pakistan and the Islamabad High Court and is also established in the Commission orders. In CPLA No. 102-L/2013 titled ADG LDI Private Limited v/s Brain Telecommunication Limited etc., the Supreme Court vide its Order dated 21-02-2013 directed the Commission to decide the matter of International Clearing House (ICH). When the Commission issued show cause notices to fourteen LDI Operators, some LDI Operators secured a status quo order from the Sindh High Court, Karachi (CS No. 271/2013) on 9th March 2013, on the ground, inter alia, that only PTA has the jurisdiction to adjudicate on that issue. On the institution of contempt proceedings, the Supreme Court vacated the *status quo* order and directed all the parties to appear before the Commission.

iii). In the matter of ICH before the Commission, LDI operators contended that the jurisdiction is with the PTA to the exclusion of the Commission. Rejecting these



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contentions, the Commission held that the job of PTA is to devise appropriate ex ante policies, standards, regulations and licensing conditions that foster or encourage competition among the licensees and provide for a level playing field. Furthermore, Article 18(a) of the Constitution also distinguishes the regulation of any trade and profession through a licensing system, which role in the telecom sector has been entrusted to PTA under the PTRAs whereas the regulation of trade, commerce or industry in the interest of free competition as stipulated in Article 18(b) is a mandate that is entrusted to the Commission under the Act. There is no conflict between the PTRAs and the Act and even in such is assumed, the provision of the Act prevails over the PTRAs.

iv). In PTA's determination on "*Anti-competitive practices of PTCL in the Broadband Market*" dated 18th November 2011, PTCL contended that "*since the complaint primarily alleged anti-competitive practices on account of predatory pricing and cross-subsidization, the Authority lacks jurisdiction to adjudicate upon the matter.*" PTCL appealed this consent decree to the Honourable Islamabad High Court, Islamabad, wherein, it also took the same stance that it is the Commission, instead of PTA, which has jurisdiction to try these matters.

v). In Writ Petition No. 2062/2012 before the Honourable Islamabad High Court, Islamabad, PTCL vehemently challenged the jurisdiction of the Commission and the court proceeded to suspend the Show Cause Notice on 28-06-2012. However after more than five years, on 22-11-2017, PTCL completely out of the blue contended before the Honourable Islamabad High Court that it would be satisfied if the matter was decided by the Commission. By effectively delaying the substantive determination by the Commission for over five years, PTCL successfully managed to force all the DSL operators out of the market.

D. HEARINGS:

11. Upon receipt of the written replies by the parties to the instant proceedings and in compliance with the Orders dated 22nd November 2018 and 22nd January 2018 of the Honourable Islamabad High Court in the Writ Petition, hearings were held in the matter on



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18th January 2018 and 8th March 2018. The parties to the proceedings mainly reiterated the submissions made through their written replies.

E. ISSUES - MAINTAINABILITY:

12. Keeping in view the directions of the Honourable Islamabad High Court, Islamabad, we have constrained ourselves only to the extent of maintainability of the instant proceedings before the Commission and have refrained from making any comment or deliberations on the merits of the case.

13. In order to determine the maintainability of the instant proceedings, we are of the view that deliberation on the following issues is required:

(i) *Whether the Commission has jurisdiction to take cognizance of the alleged conduct?*

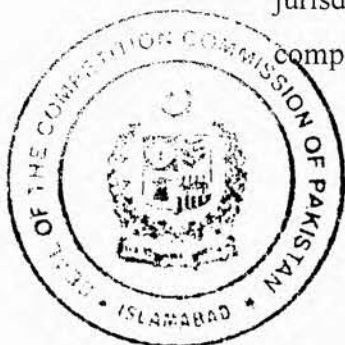
(ii) *Whether the Commission can proceed with the proceedings or enquiry upon withdrawal of the complaint or the Complainants?*

F. DELIBERATIONS AND ANALYSIS:

ISSUE No. I

Whether the Commission has jurisdiction to take cognizance of the alleged conduct?

14. With reference to the first issue the main contention of PTCL is that the Commission does not have the jurisdiction to adjudicate on the issue or even to entertain the Complaint filed by the Complainant. PTCL's stance is that the Commission at the initial stage should have refused to entertain the Complaint as it is PTA which has the sole jurisdiction to adjudicate on the matter under the PTR. PTCL has contended that PTA being the regulator of the telecommunication sector in Pakistan has exclusive jurisdiction in terms of the PTR to entertain and regulate the matters pertaining to the competition in the said sector, being a special law.



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15. On the other hand the Complainant has contended that the matter of exercise of jurisdiction by the Commission under the Act in the telecommunication sector has been deliberated upon in detail *in the matter of International Clearing House Agreement inter se LDI Operators* reported as *2012 CLD 767*.
16. We have heard the arguments of the parties and perused the record. The PTRAs and the Act both are special laws; PTRAs deal with the regulation of the telecommunication sector and the said exclusive role under the PTRAs is entrusted to PTAs. Similarly, under the Act, the Commission is entrusted with the exclusive domain "*to provide free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviours*". Further, both the statutes contain overriding clauses i.e. Section 58 of the PTRAs and Section 59 of the Act. However, to take guidance in such a situation, we deem it appropriate to rely on one of the recent judgements of the August Supreme Court reported as *Syed Mushahid Shah vs. Federal Investment Agency, 2017 SCMR 1218*, wherein the August Court has held that:

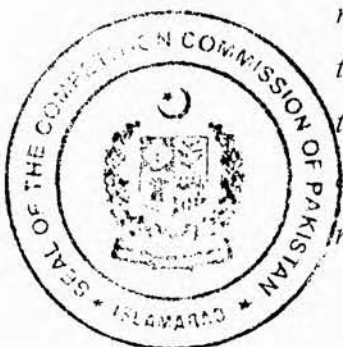
"[W]hen there are two special laws both of which contain overriding clauses in the case of conflict between the two laws generally the statute later in time will prevail over the statute prior in time. However, we are of the opinion that this presumption is not automatic. Instead a host of other factors including the object, purpose and policy of both statutes and the intent of legislature as expressed in the language employed therein, need to be considered in order to determine which of the two special laws is to prevail."

17. In one of the earlier decisions of this Commission i.e. *In the matter of Show Cause Notices issued to Jamshoro Joint Venture Ltd (JJVL) & LPG Association of Pakistan (LPGAP)*, a similar issue was decided, where it was argued by the parties that in view of Section 43 of the Oil and Gas Regulatory Authority Ordinance, 2002, the Commission had no jurisdiction to deal with the matter keeping in view the well settled proposition of law that where a special law applies the operation of general law is excluded. In this regard the Bench held:



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[T]he areas of regulation envisaged by the laws governing OGRA and the Commission are completely distinct. The issue of jurisdiction of the Commission against the jurisdiction of the OGRA can and will be examined below in light of legal principles governing general and special laws as well as non-obstante clauses. However, before delving into such matters the Commission would like to clarify the issue in a much simpler manner. We find ourselves aligned with the approach of the 3 member Bench of the Commission in the case of KSE's abuse of dominant position where it was stated: "the issue of jurisdiction can be best understood with reference to which law is relevant and applicable to an entity in a given context". In line with the reasoning of the Bench in the aforementioned case, consider an entity engaged in the LPG sector; as far as this entity's regulation regarding, incorporation, filing of accounts, issuing of prospectus etc. is concerned, the relevant law will be the companies' legislation and the sector specific regulator i.e., Securities and Exchange Commission of Pakistan will have jurisdiction. In relation to this entity's filing of tax returns the Federal Board of Revenue will be the relevant regulatory body and the relevant law will be the tax code of Pakistan. Similarly, any trade-marks or intellectual property of the concerned undertaking will be subject to the intellectual property laws and the relevant regulatory body shall be the Intellectual Property Organization. Similarly, in relation to its licensing requirements and other related matters, the relevant law will be the licensing legislation in the LPG sector and OGRA will be the relevant regulator. Accordingly, if and when this entity indulges in practices or enters into agreements that allegedly prevents, restricts or reduces competition within the relevant market then the relevant and the applicable law will be the competition related legislation. In our considered view the instant matter involves an issue of competition which falls expressly within the purview of the Ordinance, we feel it ought to be abundantly clear that the matter falls squarely within the jurisdiction of the Commission and the concerned enforcement agency in our considered view can be no other than the Competition Commission of Pakistan.

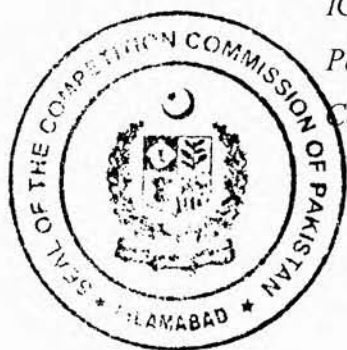


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18. With reference to the jurisdictional issue between PTA and the Commission under their respective enabling statutes, the matter was discussed in details in the matter of the ICH Agreement *inter se* the LDI Operators reported as **2012 CLD 767 *ibid***. A three Member Bench of the Commission after reviewing the entire legal framework under the PTRAs and the Act, reached the following conclusion:

37. *The above discussion made in the LPG case is quite relevant to the issue at hand. No provision in the Telecommunication Act, Rules and Regulations covers anti-competitive practices such as, inter alia, abuse of dominant position and cartelization/prohibited agreements by and among undertakings operating in the telecom sector. More pertinently, the legislative scheme under which PTA operates, contain no provisions that envisage/provide for an enforcement mechanism to remedy anti-competitive practices. Section 23 of the Telecommunication Act relied upon by the counsel of PTCL does not provide any specific remedy with regard to anti-competitive behaviour of the nature alleged in the Show Cause Notices.*

38. *Even if it is assumed that the Telecommunication Act is also a special law as argued by the parties, we must remember to take into account that the same cannot be determined without reference to both aspects; the parties/entities involved as well as the subject activity under scrutiny. While generally for telecom operators, Telecommunication Act may appear to be a special law when it comes to regulating their licensed activities, for alleged anticompetitive practices we have no doubt in holding that the competition law is the special law for such purposes. All LDI Operators are 'undertakings' in terms of Section 2(1)(q) of the Competition Act. This fact has not been disputed by the parties at all. As for the alleged activity i.e. the ICH Agreement and its consequences and impact on competition in Pakistan as discussed above fairly fall within the purview of the Commission.*





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19. Despite the above clear observation, we deem it appropriate to compare the provisions of the PTRA with the Act, in order to apply the test laid down by the August Court in 2017 SCMR 1218. The comparison is as follows:

PREAMBLE (SCOPE & OBJECT) OF THE STATUTES	
<p>PTRA</p> <p>An Act to provide for re-organization of telecommunication System</p>	<p>Act</p> <p>An Act to provide for free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviour.</p>
<p>WHEREAS it is expedient to provide for re-organization of telecommunication system in Pakistan by establishing the Pakistan Telecommunication Authority, the Frequency Allocation Board, National Telecommunication Corporation and the Pakistan Telecommunication Employees Trust, regulation of telecommunication industry, transfer of telecommunication services to private sector and for matter connected therewith or incidental thereto;</p>	<p>WHEREAS it is expedient to make provisions to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behavior and to provide for the establishment of the Competition Commission of Pakistan to maintain and enhance competition; and for matters connected therewith or incidental thereto;</p>
SUBSTANTIVE PROVISIONS PROHIBITING ANTI-COMPETITIVE PRACTICES	
<p>PTRA:</p> <p>Section 4 (1) (m) regulate competition in the telecommunication sector and protect consumer rights. [Inserted vide Pakistan Telecommunication (Re-organization) Amendment Act, 2006]</p> <p>Section 6 (e) fair competition in the telecommunication sector exists and is</p>	<p>Act:</p> <p>Section 3. Abuse of dominant position. — (1) No person shall abuse dominant position.</p> <p>(2) An abuse of dominant position shall be deemed to have been brought</p>



maintained; [Inserted vide Pakistan Telecommunication (Re-organization) Amendment Act, 2006]

Section 57 (2) (ad) preventing, prohibiting, and remedying the effects of anticompetitive conduct by licensees; [Inserted vide Pakistan Telecommunication (Re-organization) Amendment Act, 2006]

31. Offences and penalties. — (1) Whoever—

(a) establishes, maintains or operates a telecommunication system or telecommunication service or possesses any wireless telegraphy apparatus or carries on any other activity in contravention of this Act or the rules or regulations made thereunder, the Wireless Telegraphy Act, 1933 (XV of 1933) or the conditions of a licence;

(b) knowingly or having reason to believe that any telecommunication system or telecommunication service has been established or is maintained or is being operated in contravention of this Act, transmits or receives any intelligence by means thereof, or performs any service incidental thereto;

(c) dishonestly obtains any telecommunication service, with the intent to avoid payment of a charge applicable to the provision of that service;

(d) unauthorisedly transmits through a telecommunication system or telecommunication service any intelligence which he knows or has reason to believe to be false, fabricated, indecent or obscene;

(e) engaged in the operation of a public switched network otherwise than in the

about, maintained or continued if it consists of practices which prevent, restrict, reduce, or distort competition in the relevant market.

...

Section 4. Prohibited agreements.—

(1) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings, shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5.

...

Section 10. Deceptive marketing practices.— (1) No undertaking shall enter into deceptive marketing practices.

...

Section 11. Approval of mergers.—

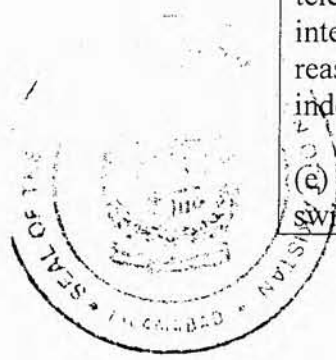
(1) No undertaking shall enter into a merger which substantially lessens competition by creating or strengthening a dominant position in the relevant market.

...

Section 28. Functions and powers of the Commission.— (1) The functions and powers of the Commission shall be—

(a) to initiate proceedings in accordance with the procedures of this Act and make orders in cases of contravention of the provisions of the Act;

(b) to conduct studies for promoting competition in all sectors of commercial economic activity;



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course of his duty intentionally modifies or interferes with the contents of a message sent by means of that network;

(f) prevents or obstructs the transmission or delivery of any intelligence through a telecommunication system or telecommunication service;

(g) intercepts, acquaints himself with the contents of any intelligence or unauthorisedly discloses to any person the contents of such intelligence;

(h) commits mischief;

(i) damages, removes, interferes or tampers with any telecommunication equipment;

(j) unauthorisedly deciphers the contents of any message transmitted over a public switched network;

(k) assaults or intentionally obstructs a person engaged in the operation of a public switched network or the establishment, maintenance or operation of telecommunication services over a public switched network or intentionally obstructs the course of business of that person;

(l) intentionally contravenes the rules made under sub-section (4) of section 29;

(m) intentionally obstructs an officer of the Authority or the Board in the exercise of his functions or powers under this act in relation to the inspection of any premises or telecommunication equipment or who, after ten days written notice, fails or refuses without due cause to provide any information which the Authority or the Board is entitled to obtain under this act or the rules or regulations made thereunder;

(c) to conduct enquiries into the affairs of any undertaking as may be necessary for the purposes of this Act;

(d) to give advice to undertakings asking for the same as to whether any action proposed to be taken by such undertakings is consistent with the provisions of this Act, rules or orders made thereunder;

(e) to engage in competition advocacy; and

(f) to take all other actions as may be necessary for carrying out the purposes of this Act.

Section 30. Proceedings in cases of contravention.- (1) Where the Commission is satisfied that there has been or is likely to be, a contravention of any provision of Chapter II, it may make one or more of such orders specified in section 31 as it may deem appropriate. The Commission may also impose a penalty at rates prescribed in section 38, in all cases of contravention of the provisions of Chapter II.

Section 31. Orders of the Commission.- (1) The Commission may in the case of-

(a) an abuse of dominant position, require the undertaking concerned to take such actions specified in the order as may be necessary to restore competition and not to repeat the prohibitions specified in Chapter II or to engage in any other practice with similar effect; and

(b) prohibited agreements, annul the agreement or require the undertaking concerned to amend the agreement or related practice and not to repeat the prohibitions specified in section 4 or to



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<p>(n) makes unauthorized use of the radio frequency spectrum where authorization from the Board is required.</p>	<p>enter into any other agreement or engage in any other practice with a similar object or effect; or</p> <p>(c) a deceptive marketing practice, require—</p> <p>(i) the undertaking concerned to take such actions specified in the order as may be necessary to restore the previous market conditions and not to repeat the prohibitions specified in section 10; or</p> <p>(ii) confiscation, forfeiture or destruction of any goods having hazardous or harmful effect.</p> <p>(d) A merger, in addition to the provisions contained in section 11-</p> <p>(i) authorize the merger, possibly setting forth the conditions to which the acquisition is subject, as prescribed in regulations;</p> <p>(ii) decide that it has doubts as to the compatibility of the merger with Chapter II, thereby opening a second phase review; or</p> <p>(iii) undo or prohibit the merger, but only as a conclusion of the second phase review.</p>
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NON-OBSTANTE CLAUSES IN THE STATUTES

<p>PTRA</p> <p>Section 58. Ordinance to override other laws. — The provisions of this Act shall have effect notwithstanding anything contained in the Telegraph Act, 1885(XIII of 1885), the Wireless Telegraphy Act, 1933 (XVII of 1933), or other law containing any provision inconsistent to this Act.</p>	<p>Act</p> <p>Section 59. Act to override other laws.— The provisions of this Act shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force.</p>
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20. From the above, it is clear that though the PTRAs have a general provision *vis-à-vis* the regulation of competition, which was inserted in 2006, however, no specific provision is available which provides for prohibition of any anti-competitive behaviour or a remedy against such a situation. On the other hand the legislature in all its wisdom has deliberately entrusted the Commission with the exclusive mandate of regulating anti-competitive conduct, by using the language “to provide for free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviour” and thereafter provided for prohibitions under Chapter II of the Act (Sections 3 to 11) and consequent penalties for violating Chapter II of the Act under Section 38 of the Act. The foregoing completely satisfies the test and criteria laid down by the August Court in the case referred above i.e. 2017 SCMR 1218; as the legislature has not only made special provision *vis-à-vis* the prohibition of anti-competitive behaviours but has also provided for a special mechanism to prohibit and remedy the situation. It is evident that in Section 31 of the Act, the legislature has specifically dealt with the type of orders which the Commission can pass while dealing with any particular type of anti-competitive conduct. In this regard reference is also placed on Alamdar Hussain vs. National Accountability Bureau and others, reported as 2017 CLD 1101, wherein the DB of Honorable Lahore High Court, Lahore while dealing with the preference and applicability inter se the National Accountability Bureau Ordinance, 1999 and Financial Institutions (Recovery of Finance) Ordinance, 2001, while referring to the judgements of the August Supreme Court reported as Mahmood Khan Achakzai vs. Federation of Pakistan and others, reported as PLD 1997 SC 426 and Apollo Textile Mills Limited vs. Soneri Bank Limited, reported as PLD 2012 SC 268 held that whenever there is a special law, it will override the general law and further even if there are two parallel laws, even then law which is latter in time would prevail. Hence, we have no doubt in holding that the objections of PTCL in this regard are not well founded and the Commission possesses the exclusive jurisdiction under the Act to take cognizance of the alleged conduct by the PTCL.



Whether the Commission can proceed with the proceedings or enquiry upon withdrawal of the complaint or the Complainants?

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21. Regarding the second issue, PTCL has stressed that the Complainants had withdrawn their complaint and are no more interested in pursuing the matter even at the enquiry stage, hence, the matter should have been closed by the Commission.
22. It now needs no emphasis that the Commission was established under the Act with the exclusive statutory mandate "to provide free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviours". Further, under the provisions of Section 37(2) of the Act, it is a mandatory obligation of the Commission to conduct an enquiry in the matter complained of, unless it is of the opinion, that the application/complaint is frivolous or vexatious or is based on the insufficient facts or is not substantiated with *prima facie* evidence. The Commission being conscious of the foregoing and while allowing the parties to withdraw the complaint under Regulation 21 of the GER, placed reliance on the categorical stipulation in the same regulation that the enquiry or the proceedings thereon do not necessarily abate on such withdrawal and the Commission may proceed in the matter, if so decided by it.
23. It is also worth mentioning that upon conclusion of the enquiry under the Act and in pursuance of the provisions of Section 37(4) of the Act, the Commission may initiate proceedings under Section 30 where **it is in the public interest so to do** (emphasis added). Hence, from the language used in the Act, it is clear that with the intent of the legislature being to create a level playing field in order to enhance economic efficiencies and to protect consumers from the anti-competitive behavior, it has enacted the Act in the public interest. In this regard, we would like to place reliance on the the case **Nasrullah vs. Province of Baluchistan**, reported as **2000 PLC (C.S.) 769**, wherein the Honorable Court observed as follows:

"The word public interest has not been defined in the statute, therefore, to view of its definition in above quoted citation in our opinion in broader sense this expression can be defined which is action that can be taken to protect the legal rights of the general public or a class of public with whom justice is required to be done by a competent authority keeping in view the relevant rules and laws available on the subject. In this behalf it is also to be added that

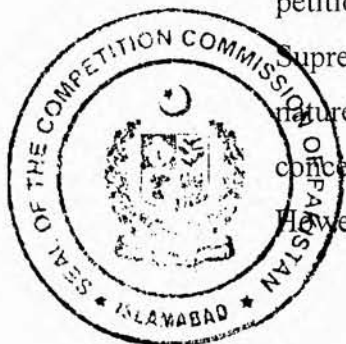


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competent authority though enjoys jurisdiction to adjudge in view of the prevailing circumstance to do or not to do a particular act in the public interest but at the same time care should be taken that such act may not cause injustice to some or majority of the members of the public who are also entitled equally for protection of a law/rules under which action has been taken."

24. The Commission is entrusted with the responsibility of looking after the interest of general public *vis-à-vis* anti-competitive conduct and to create a level playing field in order to enhance economic efficiency in all spheres of commercial and economic activity and that too in the public interest, such like the one alleged against PTCL in the instant matter. Hence, the unilateral withdrawal of the complaint by the Complainants does not prejudice the proceedings against PTCL pending before the Commission. In reaching the foregoing conclusion, we are guided by the judgments of *Innayyat vs. KBCA* reported as 1997 CLC 2039, wherein the Honorable Sindh High Court has held that "where public interest is also involved, withdrawal, even if unconditional, cannot be permitted, if the circumstances so require". In this regard, we are also guided by the judgement in the matter of *Judicial Activism Panel vs. Government of Pakistan and others*, reported as PLD 2017 Lahore 588, wherein the Honourable Lahore High Court has held that "matter pertaining to public interest could only be withdrawn with the permission of the Court as it was a dominus litis, and petitioner in such matters has no right to withdraw on his/her own sweet will".

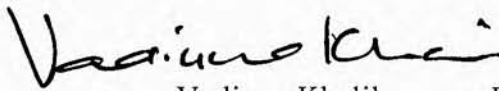
25. The Indian Supreme Court in one of the leading cases on the subject i.e. *Sheela Barse vs. Union of India & Other* reported as JT 1988 (3) 15 (Supreme Court of India) observed that only a private litigant could abandon a claim. The question before the Court was whether a suit instituted by an applicant concerning the interest of the public at large could be withdrawn unilaterally by the applicant. The applicant stated that not only did she have the right to withdraw and abandon her suit, but afterward, the main petition could not be continued by any other citizen or organization. The Indian Supreme Court stated that public interest litigation suits are fundamentally different in nature as compared to suits concerning private parties'. Traditional dispute-resolution concerns the adjudication of the matter pertaining to two sides of an argument. However, the Court considered that public interest litigation has an impact on the wider




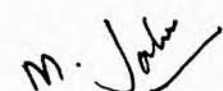
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society. It stated that ‘*The compulsions for the judicial innovation of the technique of a public interest action is the constitutional promise of a social and economic transformation to usher-in an egalitarian social order and a welfare-State.*’ Once the Court recognized its jurisdiction over a public interest matter, the applicant was not entitled to halt the proceedings by her unilateral withdrawal since the interest of the public at large were now at stake independently of her application and withdrawal in the matter. The applicant was allowed to withdraw herself from the proceedings, however the proceedings would continue.

26. In view of the foregoing, we are of the firm view that despite the request of withdrawal by the Complainant during the enquiry as well as the request made by the Complainants during the hearing held on 08th March 2018, we shall continue with the proceedings in the matter strictly in accordance with the provisions of the Act, however, the Complainants are allowed to withdraw themselves from the proceedings. Accordingly, the proceedings before Commission in the matter of Show Cause Notice bearing No. 70/2012 dated 14th June 2012 issued to PTCL for *prima facie* violation under Section 3 of the Act are maintainable and shall continue in accordance with law.
27. The Office of the Registrar is directed to post the hearing in these proceedings case in the second week of October 2018 and issue notices to the concerned. Further, in pursuance of the powers under Section 53(1) of the Act, the Registrar is directed to issue notice to PTA to provide assistance to the Commission in the instant matter and depute a senior official not below the rank of Director to attend the instant proceedings before the Commission.
28. It is so ordered.


Vadiyya Khalil
Chairperson


Dr. Shahzad Ansar
Member


Dr. Muhammad Saleem
Member



Islamabad, the 14th September 2018.