



BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF
SHOW CAUSE NOTICE ISSUED TO WATEEN TELECOM LIMITED IN THE
MATTER OF ALLEGED VIOLATION OF SECTION 3 OF THE COMEPTITION ACT,
2010

(NO.52/Wateen/C&TA/CCP/2016)

Dates of Hearing: 25-01-2017
09-03-2017
02-05-2017
15-03-2018

Adjudicating Members:

Ms. Vadiyya Khalil
Chairperson

Dr. Shahzad Ansar
Member

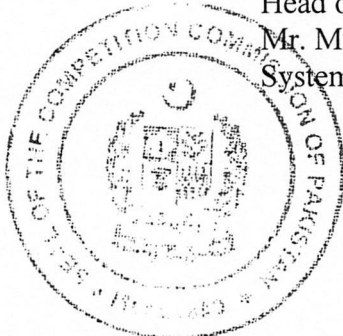
Assisted by:

Mr. Noman A. Farooqi
Director General (Legal)

Ms. Sophia Khan
Deputy Director (Legal)

Present for Wateen Telecom Ltd:

Barrister Ahmed Pansota
Barrister Daraab Wali Furqan
Barrister Hamna Zain
Mr. Haaris Anwar,
Head of SME and Consumer Sales
Mr. Muzammil Sobhan
System Manager,



ORDER

1. This Order shall dispose of the proceedings initiated pursuant to Show Cause Notice No. 58/2016, dated 30 December 2016 (the “SCN”), issued by Competition Commission of Pakistan (the ‘**Commission**’) to the M/s Wateen Telecom Limited (the ‘**Undertaking**’), for prima facie violation of Section 3 of the Competition Act, 2010 (the ‘**Act**’). The SCN was issued pursuant to an enquiry initiated under Section 37(1) of the Act and concluded vide an enquiry report dated 23 November 2016 (the ‘**Enquiry Report**’).
2. The principle issue in consideration is whether the Undertaking has resorted to a tie-in arrangement in the market for analogue television (the ‘**ATV**’) services in Phase V of Defence Housing Authority Lahore (the ‘**DHA**’), thereby restricting the choice of consumers and abusing its dominant position in violation of Section 3(1) read with Sections 3(2) and Section 3(3)(c) of the Act.

FACTUAL BACKGROUND

(I). PARTIES TO THE PROCEEDINGS:

3. The Undertaking is a company incorporated under the Companies Ordinance 1984. It is engaged in the business of providing converged communication/ telecommunication services including television, multimedia, voice, internet and enterprise solutions to residents as well as business organizations in Pakistan. A Dhabhi Group venture, the Undertaking began its operations in Pakistan in 2007 with the deployment of a fibre optic network in the country for its broad-based internet provision. It is an “**undertaking**” in terms of Section 2(1)(q) of the Act.

(II). ENQUIRY AND SHOW CAUSE NOTICE:

4. Around November 2015, the Commission received concerns from numerous residents of Phase V, DHA alleging that due to the absence of any other cable service providers in the area, the Undertaking was denying them the provision of ATV services on a standalone



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basis unless subscribed to in a bundled form with its other services which included digital television (DTV), internet or internet and voice.

5. As per the concerns, on 6 November 2015, the Undertaking issued a notice to its customers bearing the subject '*Discontinuation of Television only offerings*' through which customers were informed that starting 16th December 2015, they would be unable to enjoy the primary service (ATV) on a standalone basis and in order to continue enjoying the said service they would have to subscribe to it along with the newer digital technology (DTV) or one or both of the additional services under the package titles of "dual play" and "triple play" respectively. It was alleged that this conduct of the Undertaking amounted to an arrangement restricting the choice of consumers. Thereafter, the Commission took notice of the possible violation of Section 3 of the Act, initiated an enquiry in pursuance of Section 37(1) of the Act which culminated in the Enquiry Report.
6. During the course of the enquiry, the Undertaking was given an opportunity to explain its position with respect to the allegations levelled against it. The Undertaking stated that in accordance with the directions of the Pakistan Electronic Media Regulatory Authority (the '**PEMRA**') and the notice issued by it on 23 November 2015, the Undertaking was obligated to discontinue the provision of ATV on a standalone basis and shift from ATV to DTV completely.
7. It was further brought to the Commission's notice that on 10 December 2015 the Undertaking wrote to PEMRA in order to extend the deadline to 31 December 2015 for conversion of their existing ATV services set up to DTV, during which period it planned to convert its customers in phases until all of them would be switched according to PEMRA's directions. The said request was granted by PEMRA where upon it required all cable television service providers to follow the deadline for the mandatory conversion of services. The deadline for the compliance of PEMRA's directions was further extended till up to 30 September 2016, as submitted by the Undertaking.

8. In view of the foregoing facts and conclusion as to a *prima facie* violation of Section 3 of the Act, the Enquiry Report recommended the issuance of a SCN to the Undertaking under



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Section 30 of the Act. The SCN as issued by the Commission directed the Undertaking to submit a reply within fourteen days thereof and to appear before the Commission on 18 January 2017 to avail its opportunity of being heard. The relevant portions of the SCN are as follows:

“AND WHEREAS, in terms of the Enquiry Report in general and paragraphs 10-17 in particular, the market for the provision of Hybrid Fibre Coaxial (HFC) based analogue television service in the Phase V area of the D.H.A region of Lahore has been identified as the relevant market in terms of Section 2(1)(k) of the Act;

AND WHEREAS, in terms of the Enquiry Report in general and paragraphs 18-19 in particular, it appears that the Undertaking is dominant in the relevant market;

AND WHEREAS, in terms of the Enquiry Report in general and paragraphs 20-24, the Undertaking appears to have introduced a tying arrangement in the relevant market, thereby restricting the choice of consumers and in doing so prima facie abused its dominant position in violation of Section 3(1) read with Section 3(2) and Section 3(3)(c) of the Act.

AND WHEREAS, the Commission is mandated under the Act to ensure free competition in all spheres of commercial and economic activity, to enhance economic efficiency and to protect consumers from anti-competitive behaviour including abuse of dominant position.

NOW THEREFORE, you, the Undertaking, are called upon to show cause in writing within fourteen (14) days of this show cause notice and to appear and place before the Commission facts and material in support of your contention, and avail the opportunity of being heard through either in person or through a duly authorized representative on 18-01-2017 at the office of the Commission located on the 8th Floor South, ISE Towers, 55-B,



Jinnah Avenue, Islamabad at 11:00 a.m. or anytime thereafter convenient to the Commission, as to why an appropriate order under Section 31 of the Act may not be passed and/or a penalty may not be imposed under Section 38 of the Act for the abovementioned violations.”

III. ORAL AND WRITTEN SUBMISSION OF THE UNDERTAKING:

9. The Undertaking submitted its response to the SCN on 8 March 2017. Subsequently, three hearings were held before the Commission in this matter on 25 January 2017, 9 March 2017 and 2 May 2017. A summary of the Undertaking's submissions before the Commission are as follows:

- a) That the Undertaking was not aware of any complaint received by the Commission that warranted initiation of the instant proceedings;
- b) That the Undertaking is a converged communication services provider and fulfils connectivity requirements for organizations and individuals in Pakistan;
- c) That the relevant market has been too narrowly construed in the Enquiry Report on the basis of assumptions and surmises;
- d) That the Undertaking does not hold a dominant position in the relevant market as alleged in the Enquiry Report or any other market. The Undertaking has a 15% market share in Audio visual content market (in DHA Phase V), which is not sufficient to form a dominant position. Even otherwise, the Undertaking is trying its utmost to survive in a cut throat competitive environment and retain its customer base while trying to abide by all laws, including the Act;
- e) That even if the Commission finds the Undertaking dominant in any market, the Undertaking has not abused/ is not abusing its dominant position;
- f) That the existence of any entry barriers in the relevant market cannot be attributed to the Undertaking. Furthermore, the practice of a tie-in consists of restricting, reducing or distorting competition in the relevant market. The chances of tying-in or bundling exist only when the tied and the tying products are separate and distinct products. This is not the case with ATV and DTV bundling.



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- g) The allegation by the Commission that, the Undertaking is forcing its customers to avail the Dual or Triple play service is denied. Therefore, any bundling beyond the ATV and DTV bundled service is beyond the scope of these proceedings and any such allegation does not merit a reply;
- h) That the primary service/product of the Undertaking may loosely be defined as distributor/transporter of audio visual content. ATV on standalone basis or cable TV only has never been the Undertaking's primary product;
- i) That the Undertaking informed its customers of the discontinuation of provision of ATV services on a standalone basis, as per PEMRA's directions. As PEMRA is well aware, complete digitalisation of the Undertakings existing customer base is a capital and labour intensive job. For a business whose main focus is the distribution of audio visual content, an immediate shift towards digitalisation will gravely impact its financial condition;
- j) Offering an upgrade to dual/triple play services is a business decision taken in order to retain existing customers which is in line with applicable laws and policies. The date by which ATV services were to be disbanded was extended by PEMRA after meeting with all stakeholders including the Undertaking. It was well within PEMRA's knowledge that the Undertaking has not and could not disband all ATV services by or before 31 December 2015;
- k) The Undertaking continues to provide ATV services to its consumers but from 6 November 2015 onwards, the Undertaking has not been providing ATV as a standalone product. This has been resorted to as an interim measure;
- l) That ATV and DTV are two modes for distributing audio visual content. Audio visual content displays characteristics of multi-sided markets, wherein the price alone is not the factor deciding cross elasticity of products. Therefore, a product market cannot be defined by an over simplistic substitutability test limited to mere physical differences between the products;
- m) That the Commission has taken into account an irrelevant consideration to define the relevant product market. Hybrid Fibre Coaxial (HFC), being used by the Undertaking, is an older technology which requires higher capital expenditure and maintenance than Fibre to the Home (FTTH) and/ or Internet Protocol Television (IPTV). IPTV service



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offered by PTCL resembles the Undertaking's digital service. Both ATV and DTV are indivisible parts of Audio visual content and hence the relevant product market must be defined as the market for Audio visual Content in Pakistan. This is so even if there is a stark variation in the characteristics, quality, performance, number of channels and channels between IPTV and FTTH as compared to HFC based ATV.

- n) That since PEMRA has ordered the Undertaking to phase out the ATV standalone mode, the Undertaking has primarily been supplying the Audio visual Content through DTV mode. The ATV is tied to DTV mode out of logistical necessity, which stems out of ill planning of the regulator and the Undertaking's desperate attempt to provide best services to its clients and protect its customer base.
10. A fourth hearing was held on 15 March 2018 for the reconstitution of the Bench. In the hearing, the bench sought further information from the Undertaking, inquiring whether Undertaking's customers pay any development charges to DHA and whether any client has switched from the Undertaking to another TV service provider on account of dissatisfaction with the former's service. This information was duly provided by the Undertaking via a letter dated 20 March 2018.
11. In support of their contentions, the Undertaking relied on the following resources and judgements:
- a) OECD Policy Roundtable - Competition Issues in Television and broadcasting 2013;
 - b) Chapter 1 EC Practice of Defining Markets in the Media Sector;
 - c) Resetting Competition Policy Frameworks for the Digital Ecosystem;
 - d) In the Matter of Show Cause Notice issued to Wateen Telecom and Defence Housing Society;
 - e) In the Matter of Show Cause Notice issued to Pakistan Bahria Town (Pvt.) Limited.

ISSUES

12. In view of the foregoing, the Commission deems that the following issues need to be addressed in these proceedings:

What is the relevant market for the purpose of these proceedings and in terms of Section 2(1)(k) of the Act?



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- (ii). *Whether the Undertaking holds a dominant position in the relevant market in terms of Section 2(1)(e) of the Act?*
- (iii). *Whether the Undertaking has abused its dominant position in the relevant market in violation of Section 3(1), Section 3(2) read with Section 3(3)(c) of the Act;*

DELIBERATION AND ANALYSIS

(i). **The Relevant Market:**

13. At the outset and before making an assessment as to dominance, it is imperative to define the relevant market in which the Undertaking operates. Below is a reproduction of Section 2(1)(k) of the Act where under 'relevant market' has been defined as:

“... the market which shall be determined by the Commission with reference to a product market and a geographic market and a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products' characteristics, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogenous and which can be distinguished from the neighbouring geographic areas because, in particular, the conditions of the competition are appreciably different in those areas.”

14. In light of the definition provided under Section 2(1)(k) of the Act, the relevant market in which undertakings operate is an amalgamation of two components, one being the relevant product (goods or service) market and the other, the relevant geographic market. The Enquiry Report's identification of the relevant product market is *the market for the provision of ATV services based on HFC technology* due to the differentiation in characteristics, quality and price which makes HFC based ATV services such that it cannot



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be seen as a substitute for the other types of ATV and DTV services being offered such as FTTH or IPTV. The relevant geographic market has been defined as *Phase V of DHA region of Lahore* as it was concluded that the conditions of competition in this area with respect to the provision of the relevant product are distinct from other areas. This determination has been vehemently challenged and contested by the Undertaking who claims that both the relevant product market and relevant geographic market have been incorrectly defined. Thus the Commission will henceforth proceed to make an independent determination as to the identification of the relevant market for the purposes of these proceedings, in light of and in line with the characteristics, elements and other considerations required to be taken into account in accordance with the Act and settled law on the delineation of the relevant market.

The Relevant Product Market:

15. In essence, the proceedings before us require a determination as to whether the Undertaking has restricted the availability of ATV services whereby ATV services are no longer available on a stand-alone basis and instead have been tied with DTV and other services in order to be availed. Therefore, at the outset the Commission must clearly identify the relevant market in which the Undertaking operates, in order to proceed further as to whether or not a violation of the Act has in fact and in law been made out.
16. It is noted that the Undertaking has submitted that PTCL's Smart TV is a direct competitor to its ATV standalone and ATV and DTV bundled services, because audio visual content through wireless technology cannot be restricted or sub segmented further. It is further claimed that the arrival of international actors (Apple, Google, Amazon and Netflix) have impacted on the conditions of competition as these actors have important financial resources and substantial market power to negotiate access to premium content.
17. We observe that the Undertaking's submissions revolve around the concept of "digitalization" an ongoing process of technological advancement and development with the end result of a technological dependent world, the effects of which are evident in the changing dynamics of markets relating to communication. With regard to the instant proceedings, the television broadcasting sector in particular is evolving through the



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transition from ATV to DTV services based on the directions of PEMRA. Such evolution and technological advancement has already been achieved in most of the developed world, due to which the Commission considers it appropriate to consider the jurisprudence developed on the issue in those jurisdictions as well.

18. Furthermore, we are vary of the fact that the broadcasting industry comprises a multitude of relationships. Therefore a precise definition of the relevant market in this context is driven by a clear understanding of both demand- and supply-side substitutions all the way along the value chain.¹ Since the broadcasting of television involves a multitude of players, the analysis of interchangeability and substitution of the product in accordance with the Act, must take into account all of them, including advertisers, viewers, broadcasters, infrastructure/network operators, or content rights-holders.²
19. As per the guidelines and recommendations of the Organisation for Economic Co-operation and Development (OECD), markets in the broadcasting industry may be narrowed down on the basis of:
- i. *the type of broadcaster (i.e. commercial vs. public), and in particular the provision of pay-TV as opposed to free-to-air television;*³
 - ii. *the type of platform that is used for transmitting the television broadcasting (i.e. cable, satellite, digital terrestrial, etc);*
 - iii. *the type of pay-TV services (pay-per channel, pay-per view, video-on-demand, digital interactive broadcasting);*
 - iv. *the type of premium content that is provided, in particular premium sport channels and premium film channels.*

¹ OECD, 'Competition Issues In Television And Broadcasting' (2013) <<http://www.oecd.org/daf/competition/TV-and-broadcasting2013.pdf>>.

² *Ibid.*

³ For example, in the 2003 News Corp/Telepiu merger, the European Commission held that "there is a clear distinction, from the viewpoint of both customers and suppliers, between free-to-air TV and pay-TV", (*News Corp / Telepiu*, para. 19). In this case, no distinction was made with respect to the means of transmission of the relevant content. In a more recent acquisition of the remaining 60.9% of the British Sky Broadcasting Group PLC (Sky) by News Corp, the Commission again found that the retail supply for pay-TV and free-to-air TV constituted separate markets. Case M.5932, *News Corp / BSKyB*, 21 December 2010.



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20. The European Commission (EC) has comprehensively dealt with the question of whether ATV and DTV make up for separate relevant markets. One of the key differences between ATV and DTV services is the increased bandwidth available in the case of DTV and following from this a greater diversity of the programmes offered.⁴ Although the EC in the past has used the content of programmes as a criterion to delineate markets⁵ it refused to do so in the case of ATV and DTV services as in its view the pay TV market could not be subdivided into ATV and DTV as DTV was merely a further development of ATV.⁶ Moreover, inevitable digital evolution of pay TV services through the transition from gradual replacement to complete supersession of ATV by the more superior DTV technology did not justify segmenting ATV and DTV into two separate sub markets within the pay TV services market.⁷ Therefore, the EC has repeatedly held that the main distinction lies between the market for retail distribution of pay TV (through subscriptions) and the market for free TV (through advertising). This is because of the different trading relationships involved, the different conditions of competition, price of the services and the characteristics of the two types of television.⁸ Thus, since its last major decision dealing with the TV broadcasting industry, *Newscorp/Telepiu*⁹, the EC did not see any reasons to depart from these views.¹⁰
21. The Commission in the instant proceedings is also of the considered view that there exists no justifiable reason to distinguish between the markets for ATV and DTV services, both

⁴ Commission Decision, 94/922/EC, MSG Media Service, [1994] OJ L 364/1, para. 33.

⁵ Commission Decision, 94/922/EC, MSG Media Service, [1994] OJ L 364/1, para. 33; Commission Decision, Case IV/M.410, 2 August 1994, Kirch/Richemont/Telepiu, para. 15; Commission Decision, Case IV/M.110, 10 September 1991, ABC/Generale des Eaux/Canal+/W.H. Smith TV, para. 11.

⁶ See Commission Decision, 1999/153/EC, Bertelsmann/Kirch/Premiere (Case IV/M.993), [1999] OJ L 53/1, para. 18; Commission Decision, 1999/242/EC, TPS I (Case IV/36.237), [1999] OJ L 90/6, para. 26; Commission Decision, 2001/98/EC, Telia/Telenor (Case IV/M.1439), [2001] OJ L 40/1, para. 262; Commission Decision, Case COMP/JV.37, 21 March 2000, BSKyB/Kirch Pay TV, para. 25.

⁷ See Commission Decision, 1999/153/EC, Bertelsmann/Kirch/Premiere (Case IV/M.993), [1999] OJ L 53/1, para. 18; Commission Decision, 2001/98/EC, Telia/Telenor (Case IV/M.1439), [2001] OJ L 40/1, para. 262.

⁸ See Commission Decision, Case COMP/JV.37, 21 March 2000, BSKyB/Kirch Pay TV, para. 24; Commission Decision, 1999/781/EC, British Interactive Broadcasting/Open (Case IV/36.539), [1999] OJ L 312/1, para. 24. See also R. Capito, in: EMR (supra note 8), paras. 1.66 et seq.

⁹ Commission Decision, Case COMP/M.2876, 2 April 2003, Newscorp/Telepiu.

¹⁰ See Commission Decision, Case COMP/C.2.-38.287, 29 December 2003, Telenor/Canal +/Canal Digital, para. 28. See also Commission Decision, Case COMP/M.3411, 17 May 2004, UGC/Noos, paras. 13 et seq.



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forming an integral part of pay TV services as a whole. The Commission is also fortified in its view that DTV is merely a further development of ATV technology and therefore neither of them constitute a separate relevant product market from a competition point of view.

22. Moreover, in terms of market players, all pay TV operators build up the relevant product market of “pay TV services”. Therefore, the provision of packages of TV programmes to final users by operators of satellite/ FTTH/ IPTV digital platforms as well as analogue based cable operators or analogue TV providers though HFC, are all classified as the same relevant market for the provision of pay TV services as consumers are provided with a very similar service for the same intended use (regardless of the applied technology) with a slight variation in price, quality and characteristics.

The Relevant Geographic Market:

23. The Commission, having identified the relevant product market as the market for the provision of pay TV services, will now proceed to define the geographical dimension of the relevant market. It is only when the geographical extent of the said service market has been defined that the Commission may be in a position to assess the market power of the Undertaking.
24. As maintained by the Commission in earlier decisions, the geographic market consists of all the areas where there are sufficiently homogenous conditions of competition. The Enquiry Report has defined the relevant geographic market as the Phase V area of DHA region of Lahore as conditions of competition in DHA phase V region with respect to the provision of relevant product are distinct from other areas. Moreover, the Enquiry Report purports that ‘there was no way for the residents of the area in question to acquire the primary service other than to relocate to another region, which is a completely impractical proposition’.

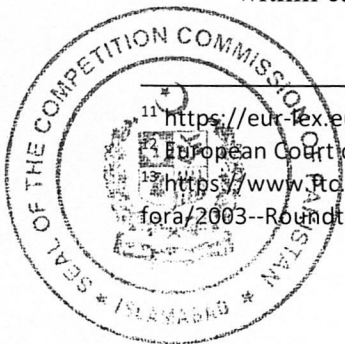


25. According to the EC Guidelines on Market Analysis for Electronic Communications Networks and Services (2002/C 165/03)¹¹, the United Brands case¹² defines the relevant geographic market as an area where the undertakings concerned are participating in the supply and demand of the relevant products or services, in which area the conditions of competition are the same or ‘sufficiently homogeneous’ and which can be distinguished from neighbouring areas where the conditions of competition are ‘appreciably different’.
26. As per this definition of geographic market, the conditions of competition between traders or providers of services are not required to be perfectly homogeneous. According to the EC Guidelines, ‘*it is sufficient that they are similar or sufficiently homogeneous*’.
27. The EC has customarily defined the scope of the relevant geographic market for electronic communications sector by two main standards; a) the area covered by the network; b) the existence of legal and regulatory instruments. Therefore, based on these two determining factors, geographic markets can be considered to be local, regional, national or covering territories of two or more countries in sector for electronic communications in the EU.
28. The United States Department of Justice (US DoJ) considered the issue of the definition of geographic dimensions in media markets during its examination of a proposed merger between two undertakings (Echostar and DirecTV)¹³, who are direct broadcast satellite service providers. In this matter, the US DoJ determined that the relevant geographic markets in which to examine the transaction’s competitive effects were “local areas”. It was self-evident that consumers purchasing pay TV services could only select from among those companies that offer such services directly to the consumers’ home. The geographic markets relevant for competitive analysis were thus delineated around groups of customers who faced similar choices among pay television services. Thus, although the set of providers able to offer service to individual consumers’ residences generally is the same within each local community, it differs from one local community to another.

¹¹ [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002XC0711\(02\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002XC0711(02)&from=EN)

¹² European Court of Justice in Case 27/76 *United Brands v Commission* [1978] ECR 207

¹³ <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/2003--Roundtable%20Discussion%20on%20Media%20Mergers.pdf>



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29. Keeping in view the discussion above, the Commission is of the considered opinion that the geographic market with regards to the product market identified by the Commission - pay TV services - is the local area of DHA phase I to V, as the Undertaking is involved in the supply of the service of pay TV in these phases of DHA. Moreover, as confirmed by information from the administration of DHA Lahore via its Letter dated 23 June 2016 addressed to the Commission, there are numerous Pay TV providers throughout phases I to V of DHA where the Undertaking operates making it a local geographic area where a group of customers face similar choices among Pay TV services. Some of these competitors include PTCL, Worldcall and Optix. PEMRA has also confirmed, through its Letter dated 6 June 2016 to the Commission, the presence of various cable operators throughout phases I to V of DHA making it a further competitive geographic market. Thus, the geographic dimensions in this case cannot be restricted to DHA phase V alone. Moreover, the argument of the Enquiry Report that the only way for a customer of DHA phase V to avail the primary service from another competitor is to relocate to another geographic location is absolutely untenable as there are numerous options within phase V which customers can switch to. This is also evident from information provided by the Undertaking via its Letter dated 21 March 2018, regarding data of customers in phase V who have switched from the Undertaking's service to other Pay TV service providers.
30. Therefore, the Commission is of the view that the Enquiry Report has erred in establishing the relevant product and geographic market in the current matter. The Commission's identification of the relevant market for the purposes of these proceedings is the market for the provision of pay TV services in the local area of phases I to V of DHA.

(ii). **Dominant Position:**

31. Now that the relevant market has been conclusively determined, it needs to be established whether the Undertaking holds a dominant position in the relevant market. The Act under Section 2(1)(e) defines a "dominant position" as follows:

"dominant position" of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or



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undertakings have the ability to behave in an appreciable extent independently of competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent;"

32. The concept of a dominant position was defined by the European Court of Justice in United Brands case as being:

"...a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."

33. The Enquiry Report based on its erroneous identification of the relevant market being that of ATV services through HFC technology only in the area of Phase V of DHA, has further concluded that the Undertaking holds a 100% market share therein, being the only such provider of ATV (HFC based) services. On the other hand, the Undertaking has out rightly denied holding 100% market share in the relevant market and has denied being dominant by submitting that in the market of all audio visual content it has a market share of 15% in Phase V DHA and an overall 30% within all of DHA and Gulberg Lahore.

34. Other than the above contested values of market shares (as contained in the Enquiry Report and the submissions of the Undertaking), the Commission has no further information on record to either rebut or back up the same. Even otherwise, the Commission is of the view that based on the correct identification of the relevant market being that of pay TV services within phases I to V of DHA, there is no evidence that suggests that the Undertaking holds a dominant position. The conclusion of the Enquiry Report that the Undertaking is dominant due to its 100% market share is untenable and rejected due to an erroneous demarcation of the relevant market and lack of information on record to support the same.



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(iii). Abuse of Dominant Position:

35. The Commission's determination as to Issue B above, renders it redundant to delve into a consideration and analysis of whether there has been an abuse of a dominant position. This is so because there exists insufficient evidence on record to conclusively determine the existence of dominance of the Undertaking in the relevant market.
36. However, the Commission considers it appropriate to comment that a determination under Section 3(3)(c) of the Act which prohibits the abuse of a dominant position through the practice of a tie-in, entail an analysis to be carried out as to whether the sale of a product is made conditional on the purchase of another product from another market. The European Commission in this regard laid down four elements in the presence of which tie-in is prohibited, and the Court confirmed them *Microsoft v Commission*.¹⁴ The elements are (1) the tying and tied products are two separate products; (2) the undertaking concerned is dominant in the market for the tying product; (3) the undertaking concerned does not give customers a choice to obtain the tying product without the tied product; (4) the practice in question forecloses competition.
37. We are also in agreement with the foregoing approach. With reference to the first condition, we have already reached an opinion that pay TV market could not be subdivided into ATV and DTV as DTV was merely a further development of ATV.¹⁵ Moreover, inevitable digital evolution of pay TV services through the transition from gradual replacement to complete supersession of ATV by the more superior DTV technology did not justify segmenting ATV and DTV into two separate sub markets within the pay TV services market. Since, ATV services and DTV services cannot be sub segmented into two separate product markets. Hence, the question of a tie-in of substitutable services within the same relevant market does not arise. With reference to the Second condition, based on the correct identification of the relevant market being that of pay TV services within Phases I to V of

¹⁴ Case T-201/04 *Microsoft v Commission* [2007] ECR II 3601, para. 859

¹⁵ See Commission Decision, 1999/153/EC, Bertelsmann/Kirch/Premiere (Case IV/M.993), [1999] OJ L 53/1, para. 18; Commission Decision, 1999/242/EC, TPS I (Case IV/36.237), [1999] OJ L 90/6, para. 26; Commission Decision, 2001/98/EC, Telia/Telenor (Case IV/M.1439), [2001] OJ L 40/1, para. 262; Commission Decision, Case COMP/IV.37, 21 March 2000, BskyB/Kirch Pay TV, para. 25.



DHA, there is no evidence that suggests that the Undertaking holds a dominant position. The conclusion of the Enquiry Report that the Undertaking is dominant due to its 100% market share is untenable and rejected due to an erroneous demarcation of the relevant market and lack of information on record to support the same. With reference to the third condition, we note that television broadcasting sector in particular is evolving through the transition from ATV to DTV services based on the directions of PEMRA. Such evolution and technological advancement has already been achieved in most of the developed world, hence, we are of the considered opinion that it is not an independent decision of the Undertaking, rather it is due to the intervention by the sector regulator owing to the technological advancements. Hence, even the third condition is not satisfied. With reference to the fourth condition, the data provided to us by DHA Lahore via its letter dated 23 June 2016 addressed to the Commission, there are numerous Pay TV providers throughout phases I to V of DHA where the Undertaking operates. Some of the undertakings engage in the provision of competing services include PTCL, Worldcall and Optix. PEMRA has also confirmed, through its letter dated 6 June 2016 to the Commission, the presence of various cable operators throughout phases I to V of DHA making it a further competitive market. In addition, the Undertaking has also submitted the dated vide its letter dated 21 March 2018, wherein data of customers of DHA Phase V is provided, who have switched from the Undertaking's service to other Pay TV service providers. Hence, we are of the considered view that no market is foreclosed. Accordingly, no case for abuse of dominance is made out.

CONCLUSION

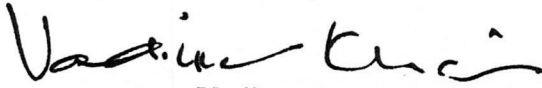
38. With regard to Issue (i), we hereby conclude that the Enquiry Report has erroneously defined the relevant market and that the correct identification in the instant matter is the market for pay TV services which includes both ATV and DTV and all other ancillary and related services within the area of phases I to V of DHA Lahore.

39. Furthermore, due to lack of sufficient data and evidence on record, we are unable to make a conclusive finding with regard to Issue (ii), hence the Undertaking cannot be held to



possess a dominant position in the relevant market. Consequently, the question of an abuse of dominant position, in contravention of Section 3 of the Act, does not arise.

40. In light of the above determinations, we do not find merit in the SCN issued to the Undertaking.
41. In terms of the above, the SCN is hereby set aside and disposed of.



Vadiyya S. Khalil
Chairperson



Dr. Shahzad Ansar
Member



Islamabad ¹⁴ day of November 2018