



BEFORE THE  
COMPETITION COMMISSION OF PAKISTAN

DETERMINATION OF CCP'S JURISDICTION IN ACCORDANCE WITH  
THE ORDER OF THE HONORABLE LAHORE HIGH COURT, LAHORE

Date of Hearing

20 October 2015

Adjudicating Members

Ms. Vadiyya Khalil  
Chairperson

Mr. Mueen Batlay  
Member

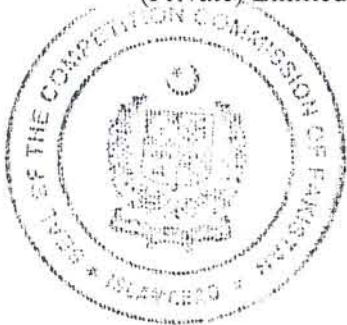
Dr. Shahzad Ansar  
Member

Mr. Ikram Ul Haque Qureshi  
Member

On behalf of M/s Educational Services  
(Private) Limited

Mr. Nauman Rahman  
Company Secretary

Mr. Feisal Hussain Naqvi, Advocate  
Haidermota BNR & Co.



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Competition Commission of Pakistan  
Government of Pakistan  
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## BACKGROUND

1. The Competition Commission of Pakistan (the '**Commission**'), upon receipt of concerns regarding allegedly unreasonable price increases in the private school sector began a probe in the matter in August, 2015.
2. As part of the investigation process, requests for information were made to Educational Services (Private) Limited (hereinafter referred to as '**Beaconhouse**') on 13.08.2015 and 27.08.2015 (the '**RFI**'). In view of its failure to provide the required information, Beaconhouse was issued a special order under Section 36 ('**Special Order**') of the Competition Act, 2010 ('the **Act**') on 18.09.2015 requiring it to provide certain information.
3. Beaconhouse filed a writ petition before the Honourable Lahore High Court, Lahore ('**W.P No. 26929/2015**') assailing both the Commission's constitutional legitimacy and its authority to issue the RFI.
4. In its order dated 1 October, 2015 (the '**LHC Order**'), the Honourable Lahore High Court, Lahore directed the Commission to determine its jurisdiction to look into the matter before proceeding further with the Special Order.
5. In compliance of the LHC Order, a hearing was held on 20 October, 2015 before the Commission.

## SUBMISSIONS

6. Through the objections raised in paragraphs 12 to 17 of W.P No 26929/2015, Beaconhouse contend that the actions of the Commission are *ultra vires* the Constitution of Pakistan, 1973 (the '**Constitution**'), void *ab initio*, without lawful authority and of no legal effect:

a. As Parliament lacked the necessary legislative competence to promulgate the Act;

b. As the Act purports to confer judicial powers on an executive body;



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- c. As the Act does not provide for the right to a fair trial as enshrined under Article 10A of the Constitution;
- d. As the Act suffers from excessive delegation and is void for vagueness;
- e. As the provisions regarding search and inspection in the Act are *ultra vires* of the Constitution;
- f. As the Commission's actions are *ultra vires* the Act because:
  - i. Primary and secondary education is a provincial subject under the 18<sup>th</sup> Amendment to the Constitution and is regulated by existing provincial legislation;
  - ii. There is no allegation that the normal dynamics of a free market are not in place.

7. Further grounds taken in the hearing by Beaconhouse are reproduced as follows:

- a. That an enquiry under Section 37(2) of the Act has been initiated without any reasoned opinion having been given in writing;
- b. That the RFI were issued not on the basis of *prima facie* proof of anti-competitive behaviour but on the basis of allegations of unreasonable increases in school fees;
- c. That the Commission had no jurisdiction to examine pricing of services *per se*;
- d. That there are special laws in place to deal with the reasonability of pricing in relation to private educational institutions.


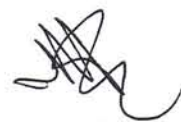
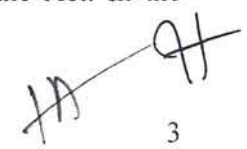
**DETERMINATION**

8. The issue referred to the Commission for adjudication through the LHC Order is that of its jurisdiction with regards the initiation of the enquiry into the matter by the Commission, including the issuance of the RFI and the Special Order (hereinafter collectively referred to as '**Impugned Proceedings**'). The only arguments that will be taken into consideration therefore are those that relate to the question of jurisdiction and not the merits of the enquiry or the case itself.

Beaconhouse is essentially making two different kinds of arguments. In the first instance, it has raised objections regarding the constitutionality of the Act. In the



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second instance, Beaconhouse is contending that the actions of the Commission are not in line with the scope and scheme of the Act.

**A. Constitutional Objections**

10. With respect to the constitutional grounds taken by Beaconhouse, it must be stated that the Commission cannot decide the question of its own constitutional legitimacy or that of the Competition Act, 2010 under which it has been formed. This particular aspect is under adjudication before various judicial fora, and pending a final order in the matter, no further comments may be made regarding the same.
11. This stance is in line with that taken by the Commission since its inception. In its order In the Matter of Show Cause Notice Issued to Pakistan Banks Association and Others, dated 10 April 2008, the Commission stated as follows:

*39 ...It is settled law that the Commission is not the appropriate forum to raise this issue. It was settled in Akhtar Ali vs Altaf-ur-Rahman, PLD 1963 Lah 390, that where there is an objection to the jurisdiction of a tribunal or that the law under which that tribunal is created is defective or invalid, such issue is not for the tribunal to decide. The tribunal must proceed on the assumption that its existence is legal and valid until a court of competent jurisdiction decides or directs to the contrary. This view has been consistently relied upon and upheld by the Superior Courts of Pakistan.*

**B. Objections relating to vires under the Act**

12. With regards to the Commission's jurisdiction to initiate the Impugned Proceedings, it is pertinent to point out at the outset that the Act empowers the Commission to investigate all behaviour which has or could potentially have an anti-competitive effect on the markets in Pakistan. This mandate extends to all sectors of the economy and includes all the various different industries currently in operation. The preamble to the Act provides a succinct summary of the mandate of the Commission and states as follows:

*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-*



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Chief Executive Officer

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*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;*

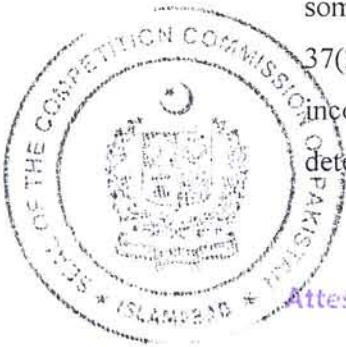
13. Anti-competitive activities prohibited under the Act are contained in Chapter II of the same. Section 3 of the Act prohibits dominant undertakings from using their market power to exclude others from competition or exploit consumers. Section 4 of the Act, *inter alia*, prohibits competitors from colluding to fix conditions of competition such as pricing, production, and sales etc. Section 10 of the Act prohibits deceptive marketing practices. Section 11 prohibits mergers and acquisitions that substantially lessen competition. Accordingly, in the scheme of the Act, the Commission is mandated and qualified to enforce the prohibition against anti-competitive behaviour across all economic and commercial activity when and wherever the behaviour takes place within Pakistan. Section 1(3) of the Act clearly states this in the following words:

*It shall apply to all undertakings and all actions or matters that take place in Pakistan and distort competition within Pakistan.*

14. It is pertinent to mention here that the enquiry in the matter has been initiated under Section 37(1) of the Act to determine whether *prima facie* any anti-competitive behaviour is taking place in the private education sector. The RFI and the Special Order have been issued in support of this fact-finding enquiry.
15. The main objections raised in this regard are dealt with individually as follows:

**Procedural Impropriety**

- a. Beaconhouse has made allegations as to procedural impropriety of the Impugned Proceedings, stating that the same, if proven, render the enquiry unlawful. It is imperative to point out that the counsel for Beaconhouse has somehow erroneously based his arguments on the requirements of Section 37(2) of the Act and not on 37(1) of the Act. Apart from being factually incorrect, these arguments are also manifestly outside the ambit of this determination. The matter before the Commission right now is whether the



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matter falls within the jurisdiction of the Commission. The matter of procedure can be looked into only once the Commission assumes jurisdiction in the matter and the matter comes to a stage where such determination is required. If deemed necessary, further elaboration on the procedural validity of the actions taken may be reserved for a later and more appropriate stage in time.

b. Some broader issues, nevertheless, need to be clarified here. Beaconhouse has alleged that the Commission initiated the Impugned Proceedings without any *prima facie* proof of anti-competitive behaviour. As mentioned above, the Commission will deal with specific alleged procedural issues at the appropriate stage if needed. This argument, however, shows an apparent lack of understanding regarding the working of the Commission. Under the scheme of the Act, the Commission has been given various enforcement powers. This includes the power to conduct inquiries, the power to initiate adjudicatory proceedings, and the power to make required orders to restore competition etc. Each denotes a particular stage in the enforcement process. An enquiry, for example, is conducted to determine, factually, whether any *prima facie* violation of the Act has taken place. It must be emphasized that the opening of an enquiry does not in any way mean that a finding of infringement of the Act will follow. The entire purpose of an enquiry is to determine whether or not any anti-competitive actions have taken place. If the Commission is already sure about a violation, there would be no need to conduct an enquiry in the first place. The outcome of an enquiry is solely dependent on the facts of the matter and the evidence available to the enquiry committee. Any assertion by Beaconhouse to the effect that the Commission already has made its mind in the matter is, therefore, both premature and unwarranted.

c. It must also be clarified here that a call for information is in fact one of the very mechanisms which allow the Commission to conduct enquiries. It should be underlined that requests for information are regularly sent not only to the undertakings under investigation, but also to other undertakings or associations of undertakings which may have information relevant to a case, or a potential case. It would be preposterous to assume that the Commission



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could conduct any enquiry or determine the nature of a violation, if any, without calling for information or obtaining evidence. The asking for information therefore, does not in itself manifest any intention of the Commission with regards to making up its mind regarding an allegation. The Commission's practice in this regard is line with best practices of competition authorities around the globe.

### Price Regulation

- d. It has been argued by Beaconhouse that the Commission has no jurisdiction to examine the reasonability of the prices of services *per se*. Beaconhouse contends that the Commission is not a price regulator and has no mandate to determine the reasonability of prices.
- e. It must be clarified at the outset that the Commission is not a price regulator and does not look into the reasonability of price *per se*. This position is vividly illustrated through several of its previous orders. In and of itself, a certain level of pricing does not constitute an anti-competitive behaviour. Prices, however, can be an indication and consequence of collusion or abuse of dominant position, both of which constitute anti-competitive behaviour prohibited under Sections 3 and 4 of the Act. Sub-sections 3 (3) (a) [unreasonable increase in prices], 3(3) (b) [discriminatory pricing], 3(2)(f) [predatory pricing] and 4(2) (a) [collusive pricing] of the Act provide specific instances of price-related anti-competitive behaviour that falls within the Commission's purview. It follows that the Commission acts within its mandate when it inquires into alleged or suspected price related anti-competitive behaviour.



f. Since the matter at hand is still at enquiry stage, it is, therefore, premature to allege that the Commission is inspecting prices without any relation to anti-competitive activities. It must be reiterated the very purpose of an enquiry is to determine *prima facie* if certain behaviour by undertakings is causally related to market forces or to anti-competitive actions. Under the Act, the

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Commission will only proceed against undertakings that are found involved in anti-competitive behaviour.

### Sector Regulation

- g. Finally, it has been alleged that primary and secondary education are subject to provincial regulation through special sectoral laws which assess the reasonability of prices in the private education sector. Therefore, Beaconhouse contends, that these sectors are out of the purview of the Commission's mandate.
- h. The provisions of the Act are not in conflict with any sector specific legislation related to education whether federal or provincial. Sector specific legislation in the education sector may encompass several issues including setting the curriculum thereof, outlining teaching standards, and regulating private schools etc. The Act, on the other hand, only relates to anti-competitive behaviour by business undertakings in any sector of the economy. It is necessary to reiterate that the Commission is not examining the prices set by Beaconhouse *per se*. It is only investigating, *inter alia*, whether or not the fees being charged by the private schools is due to anti-competitive behaviour such as cartelization or abuse of dominant position.
- i. With regard to implied or perceived conflict in jurisdiction of the Act and other sector specific legislation, the Commission has consistently held that jurisdiction can be best understood by considering the law that is relevant to the matter at hand. In the Order In The Matter Of Show Cause Notices Issued To Jamshoro Joint Venture Ltd (JJVL) & LPG Association Of Pakistan (LPGAP) dated 14 December 2009, the Commission held:

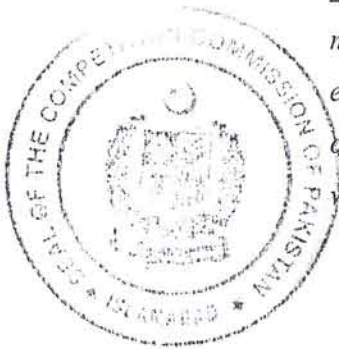


66. ...[T]he areas of regulation envisaged by the laws governing OGRA and the Commission are completely distinct. The issue of jurisdiction of the Commission against the jurisdiction of the OGRA can and will be examined below in light of legal principles governing general and

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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



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concerned enforcement agency in our considered view can be no other than the Competition Commission of Pakistan.

j. It follows that, in this matter, when businesses undertake anti-competitive activities, the relevant law that applies is the Act. For all other issues, the sector specific laws, whether federal or provincial, would be applicable. In light of the foregoing, therefore, there is no overlap or conflict between the provisions of the Act or the enforcement mandate of the Commission and that of sector specific legislation and regulators in the education sector, respectively.

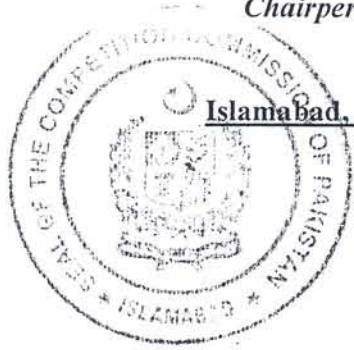
16. In view of the above, we find that the Impugned Proceedings have been initiated well within the scope of the Commission's jurisdiction as defined under the Act.

*Vadiyya Khalil*  
Ms. Vadiyya Khalil  
Chairperson

*Mueen Batlay*  
Mr. Mueen Batlay  
Member

*Dr. Shahzad Ansar*  
Dr. Shahzad Ansar  
Member

*Ikram Ul Haque Qureshi*  
Mr. Ikram Ul Haque Qureshi  
Member



Islamabad, 9<sup>th</sup> November 2015

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