BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF
SHOW CAUSE NOTICE ISSUED TO
DEFENSE HOUSING AUTHORITY ISLAMABAD/RAWALPINDI FOR ALLEGED VIOLATION OF SECTION 3 OF THE COMEPTITION ACT, 2010

(F. NO. 43/NAYATEL/C&TA/CCP/2016)

Date(s) of Hearing:	09-08-2018 24-09-2019 21-05-2020
Commission:	Ms. Shaista Bano ***Member***
	Ms. Bushra Naz Malik ***Member***
M/s. Defense Housing Authority Islamabad/Rawalpindi **&** **M/s. DHAI Teleman**	Mr. Farooq Ahmed, *General Manager, Business Development & Regulatory Affairs*
	Mr. Muhammad Nisar Khattak *Law Officer*
	Mr. Muhammad Fahad, *Manager Telecom*
	Khurram Chohan *GM Operations*
M/s. Nayatel (Pvt) Limited	Mr. Muhammad Ahmed *Company Secretary*

ORDER

1. This Order shall dispose of the proceedings initiated pursuant to Show Cause Notice No. 16/2018, dated 7 July 2018 (hereinafter the '**SCN**'), issued by Competition Commission of Pakistan (hereinafter the '**Commission**') to the M/s Defense Housing Authority Islamabad/Rawalpindi (hereinafter the '**DHA-I**' or the '**Undertaking**'), for *prima facie* violation of Section 3 of the Competition Act, 2010 (hereinafter the '**Act**').

FACTUAL BACKGROUND

2. The Commission received several emails from the residents of DHA-I raising concerns that the residents, specifically those in Phase-1 of DHA-I, have no choice or access to any alternate Cable Internet and Telephony services (hereinafter the '**CIT Services**') provider, but to subscribe to either Pakistan Telecommunication Company Limited (hereinafter the '**PTCL**') or DHAI Teleman, as the management of DHA-I was not issuing No Objection Certificate (NOC) to Nayatel (Private) Limited (hereinafter the '**Nayatel**') to operate in Phase-I and other sectors.

3. It was contended that while the residents of DHA-I were demanding CIT services from Nayatel, being a Fiber-to-the-Home ('FTTH') based CIT service provider, DHA-I's management was refusing to issue an NOC to Nayatel to install its infrastructure within DHA-I Phase-1 and other sectors. On 17 November 2015, the Cartels and Trade Abuses ('C&TA') department of the Commission wrote to Nayatel enquiring as to whether it had intended to extend the provision of its CIT services to DHA-I; whether it had approached DHA-I/DHA-I's management for obtaining an NOC in this regard and whether it had been refused an NOC by DHA-I.

4. On 25 November 2015, Nayatel replied along with documentary proof of its correspondence with DHA-I. It stated that despite repeated meetings held with DHA-I's management to negotiate a commercial deal, it has not been granted an NOC for the provision of CIT services within the DHA region, especially in Phase 1. The correspondence and meetings held between Nayetel and DHA-I (hereinafter collectively referred as '**the Parties**') started with a letter sent by Nayatel to DHA-I on 21 January 2011 for the grant of an NOC for the provision of CIT services in DHA-I Phase 1. A number of letter and emails were exchanged, and different meetings were

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held, following the above-mentioned letter between DHA-I and Nayatel, in which DHA-I refused to grant an NOC to Nayatel, citing the reason that there was no additional space left in the area for excavation/laying of fiber. These letters and meetings went on till 5 November 2015.

5. Based on the afore-mentioned correspondence between the parties, Nayatel contended that DHA-I refused to issue them an NOC and to deal on the terms and conditions similar to the ones offered to PTCL and DHAI Teleman, who were already providing their services in DHA-I. Nayatel also shared that DHA-I proposed a Joint Venture (JV) with DHAI Teleman but it was commercially and technologically unviable for them and such a deal would gravely hurt the business interest of Nayatel.

6. In response to the submissions made by Nayatel, DHA-I wrote to the C&TA department that they are following an open policy to minimize the chances of monopoly to any service provider. The competition has not been restricted but instead Nayatel by choice elected to stay away from DHA-I due to low expectancy of ROI (Return on Investment) because DHA-I Phase 1 is intrinsically low in terms of growth of Population. Nayatel's comments were sought on these contentions and it submitted that DHA-I never invited Nayatel in any of their infrastructure development in the past and Nayatel's own requests were not entertained by DHA-I, when only PTCL was operating in DHA-I Phase 1, and those requests had a lot of merit.

7. An enquiry committee (hereinafter the '**Enquiry Committee**') was constituted under Section 37(1) of the Act. The enquiry in the matter was concluded vide Enquiry Report dated 7 March 2018 (thereinafter the '**Enquiry Report**'). The conclusions and the recommendations are as follows:

> *"41. DHA/DHA's management appears to hold a dominant position in the relevant market and has, prima facie, abused its position in violation of clauses (g) and (h) of subsection 3 and subsection 2 of Section 3 of the Act.*
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> *42. Given the significance of innovative FTTH based CIT services and residents apparent inability to access and choose between competing services and service providers, it is recommended that the Commission may initiate proceedings against DHA under Section 30 of the Act for a prima facie violation of the aforesaid provisions of Section 3 of the Act".*

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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 initiation of proceedings under Section 30 of the Act. The Commission, in terms of Section 37(4) of the Act, initiated the proceedings against DHA-I in public interest while issuing the Show Cause Notice and directed DHA-I to submit a reply within fourteen (14) days thereof and to appear before the Commission on 2 August 2018 to avail its opportunity of being heard. The relevant portions of the SCN are as follows:

> *"6. **AND WHEREAS**, in terms of the Enquiry Report in general and paragraphs 30 to 32 in particular, it appears that the Undertaking holds dominant position in the relevant market in terms of Section 2(1)(e) of the Act;*
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> *7. **AND WHEREAS,** in terms of the Enquiry Report in general and paragraphs 33 to 40 in particular, the Undertaking has prima facie abused its dominant position in contravention of subsection 3(1) read with subsections 3(2) and 3(3) (e) (g) and (h) of Section 3 of the Act by not allowing Nayatel the right of way to lay down its infrastructure and provide the residents alternate CIT services in Phase-I and other sectors of DHA;*
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> *8. **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 practices including "abuse of dominant position" as envisaged and prohibited under the Act".*

ORAL AND WRITTEN SUBMISSIONS:

9. DHAI Teleman vide letter dated 23 July 2018 requested for rescheduling of hearing on 6 August 2018. In response, a letter was sent to DHA-I that DHAI Teleman is not a party to proceedings and, therefore, its request for adjournment could not be entertained. However, in the interest of justice, hearing was rescheduled for 9 August 2018. DHAI Teleman was impleaded as a necessary party to the proceedings as it was one of the internet service providers in DHA-I at the time, and also a subsidiary of the

DHA-I, which is why the Commission deemed it necessary to include their take on the matter. Furthermore, Nayatel was also impleaded as a necessary party and was advised to appear before the Commission on the same date of hearing. The Undertaking submitted its response to the SCN on 7 July 2018 which is summarized as under:

a. *M/s. Nayatel (Pvt) Limited vide letter dated 21-01-2011 sought permission to establish communication network in DHA-I (Phase I&II), and a meeting was held between CEO Nayatel and Administrator DHA-I, in which Nayatel was informed that DHAI Teleman has already deployed their infrastructure in the available corridor and that new entry of another operator will create problems for the residents.*

b. *On insistence of Nayatel for issuance of NOC, they were asked to submit a proposal for development in Phase-V so as to process Right of Way ('ROW'). PTCL also submitted its plan to upgrade its communication. Thereafter, PTCL was allowed to proceed on the condition that no damage to any property of DHA-I or the residents shall be done.*

c. *DHA-I never refused processing of ROW to Nayatel as we believe to include healthy competition for provision of better services for our valued customers.*

10. On 9 August 2018 the authorized representatives of DHA-I and Nayatel appeared before the Commission and argued the case. DHA-I submitted that they never refused Nayatel's request for rendering their services and had offered them to start providing their services from DHA Phase-V, but Nayatel wanted to focus on DHA-I Phase-I only. It was further submitted that Nayatel is currently providing services in Sector F of DHA-I Phase-I. The authorized representative of Nayatel submitted that approval was taken from Bahria Town for laying down infrastructure at Sector F since the administrative control of the same is with Bahria Town.

11. After hearing the submissions, both parties were directed to resolve the matter within one month from the date of hearing and also to submit written statement to the Registrar pursuant to Regulation 26(3) of Competition Commission (General Enforcement) Regulations, 2007. The statement was recorded which is reproduced as under:

Recording of statement pursuant to Regulation 26(3) of Competition Commission (General Enforcement) Regulations, 2007
Show cause notice No. 16/2018
Issued to
Defence Housing Authority Islamabad/Rawalpindi
For prima facie violation of Section 3 of the Competition Act, 2010

"This is with reference to subject proceedings wherein authorized representatives of M/s Defence Housing Authority (DHA-I) and Nayatel (Pvt.) Limited (Nayatel) appeared before the Commission on 09-08-2018.

It was mutually agreed between both that:

"DHA-I will interact and negotiate with Nayatel to render its services in accordance with Para 3(a) to Para 3(d) of minutes of meeting held between DHA-I and Nayatel on 14-04-2017 and both parties will submit a compliance report to the Commission within thirty (30) days from the date of hearing i.e. on or before 8th September 2018."

-sd-
Lt. Col. Farooq Ahmed (Rtd)

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Mr. Muhammad Ahmed

12. On 24 June 2019 letters were sent to, both, DHA-I and Nayatel to file compliance report in light of statement submitted before the Commission on 9 August 2018. Nayatel vide its letter dated 25 June 2019 submitted that ROW cost offered by DHA-I is very high whereas DHA-I provided ROW to its subsidiary DHAI Teleman on no cost basis and recently acquired hundred percent shares of DHAI Teleman. DHA-I vide its letter dated 9 July 2019 stated that they are in negotiations and Commission will be kept informed about the process. Accordingly hearing was fixed for 24 September 2019.

13. On the date of hearing all the parties were present. The authorized representative of Nayatel submitted that DHA-I in their meeting dated 19 April 2019 proposed an unfair deal on rates that are too exorbitant. They referred to the letter provided to the Commission on 25 June 2019 with all the details regarding the meeting. They also submitted that ROW is taken as of right and doesn't require the beneficiary of the right to pay for it. The authorized representative of DHAI Teleman submitted that they are a wholly owned subsidiary of DHA-I and when they entered into an agreement to provide CIT services in DHA-I they paid deployment and right of way charges.

14. After hearing the submissions, the parties were directed vide letters dated 26 September 2019 to provide written replies to certain queries of the Bench. The information which was required from DHA-I is as follows:

(i). What was the deployment cost borne by DHAI Teleman when the system was installed in DHA-I; please provide relevant documentation?

(ii). What charges in respect of ROW were paid by DHAI Teleman to DHA-I?

(iii). DHA-I in its meeting held on 19-04-2019 offered Rs. 700/meter/10 years as ROW charges to for Phase-I and II to Nayatel. Kindly provide the working of ROW charges and also minutes of meeting dated 19-04-2019?

(iv). Please provide documentation reflecting DHA-I's acquisition of DHAI Teleman in 2012-13.

(v). What is the arrangement of DHA-I with Transworld, PTCL and how much DHA-I is charging as ROW to Transworld and PTCL. Please provide documentary evidence.

(vi). Any other additional information in support of your contention for assistance of the Bench.

15. Nayatel, in pursuance of the direction of the Bench, vide letter dated 26 September 2019 was required to provide the following information:

(i). Details of ROW charges Nayatel paid to CDA, Bahria Town and other areas of Rawalpindi/Islamabad;

(ii). Details of ROW charges paid by other communication licensees to DHA-I and other cities of the country;

(iii). Any other data of development authority in respect of ROW.

16. Nayatel, vide its letter dated 7 October 2019 submitted its replies to the queries referred by the Bench, which for ease of reference are summarized herein below:

(i). DHA-I initially proposed to charge Rs.800 per meter for 10 years and then revised the offer to Rs.700 per meter. Nayatel informed DHA-I that at this rate, cost of ROW comes closer to the cost of network deployment (capex). No FTTH project becomes financially viable at such higher costs.

(ii). Pursuant to Section 10 & 12 of the Telegraph Act, 1885 read together with Section 27 and 27-A of the Pakistan Telecommunication (Reorganization) Act, 1996 (the '**PTRA**'), the public authority has an obligation to permit a licensee of a public switched network and requires the licensee to pay to the Public Authority such fee or expenses as incurred by the local authority in allowing for the use of ROW to the licensee.

(iii). DHAI Teleman is 100% owned subsidiary of DHA-I and doing FTTH business. Nayatel also provided a legal opinion obtained on establishing a subsidiary company and ROW charges of other societies and municipal authorities such as Bahria Town, CDA etc.

17. DHA-I vide their letter dated 25 October 2019 submitted its replies to the queries referred by the Bench, which for ease of reference are summarized herein below:

(i). DHA-I discussed the charges made in the SCN and challenged the mandate of Commission in determination of ROW. DHA-I referred to Section 27A of the Pakistan Telecommunication (Re-Organization Act, 1996) and submitted that Nayatel should approach Ministry of Information Technology and Telecommunication (MOITT) for redressal of their grievance.

(ii). DHA-I reiterated that they never refused ROW but Nayatel wants NOC for ROW on its desired rates/rent, which is against the law and not viable for DHA-I.

(iii). DHA-I has already granted NOC to PTCL and other service provider to provide a level playing field to all the interested parties to avoid assumption of abuse of dominance.

(iv). Nayatel has already accepted the ROW charges vide letter dated 6 September 2018 and now they cannot take shelter of other service providers.

18. After the decision of Islamabad High Court, Islamabad dated 24 April 2020 in I.C.A. No. 321 of 2020, a new bench of the Commission was constituted to conduct the hearing on 21 May 2020. However, due to COVID-19 health advisory, the hearing was held *via* video conferencing.

19. The authorized representative of Nayatel stated that the Commission intervened in the year 2016 and issued a Show Cause Notice in July 2018. Nayatel submitted that due to the deadlock between the parties the issue could not be resolved. It also apprised the Bench about the technicalities and the rates being charged in other areas for the operations of the network and, for proof, referred to previous documents and correspondences that they have spent approximately PKR 23 Million for building the infrastructure in Sector-F of Bahria Town, as a comparison to the rates DHA-I had been asking which were, as Nayatel alleged, extravagantly high.

20. The authorized representative of DHA-I submitted that during the pendency of these proceedings DHA-I entered into agreements with Transworld and PTCL. Nayatel was even offered to restore the working space as per the DHA-I standards by bearing its costs. DHA-I apprised the bench that there is no complaint filed by Nayatel as the

Commission had taken up this issue *suo moto*. It further submitted that Nayatel is interested in Phase-I & 2 only and both are densely populated areas. Nayatel is not ready to work in Phases 3, 4 & 5 despite the offers from DHA-I. Moreover, DHA-I's representative submitted, it was not possible for DHA-I to negotiate on the previous terms and conditions. DHA-I is ready to allow the work to Nayatel on the terms which have been offered to PTCL. DHA-I also alleged to have WhatsApp messages of Nayatel intimating DHA-I that it's not possible for Nayatel to work on these rates due to their weak financial condition.

21. The Law Officer of DHA-I submitted that they never refused Nayatel, however, they do have objective justification to refuse access to Nayatel. He referred the Section 27(A) of Pakistan Telecommunication (Re-Organization) Act, 1996 (PTRA) was introduced in the year 2006 and not before and also referred to Section 58 of the PTRA, as the Commission is without any mandate to take up this issue. He added that Section 59 stipulates the overriding of laws as the Act is general law and not a special law. In response to a query raised by Bench Member, the representative of DHA-I submitted that PTCL, Transworld and Wateen are currently operative in Phases 1 & 2. He apprised the Bench that the arrangement with PTCL and Transworld is based on revenue sharing and not cost sharing.

ISSUES AND ANALYSIS

22. On careful review of the Enquiry Report, the SCN and the submissions made in the subject proceedings before us, the substantive issues in the instant matter, for analysis and deliberation are as follows:

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

    (ii). Whether DHA-I has abused its dominant position in terms of Section 3 of the Act?

23. In the subsequent paragraphs all the issues in seriatim are deliberated upon in light of the law and the evidence made available on the record.

Issue No (i). Whether the Commission has jurisdiction to take cognizance of the alleged conduct?

24. An objection was raised by the representatives of DHA-I that the Commission lacks the mandate to determine the ROW. Another objection was raised that Pakistan Telecommunication Authority (the '**PTA**') has an exclusive mandate to deal with ROW and telecom related matters under the PTRA. Further, it has been submitted before us that in pursuance of Section 58 of PTRA the provisions of PTRA shall prevail over any other law including the Act. It has also been stressed that PTRA is a special law dealing with the provisions of the Competition Act as the former is a special law and the latter is a General Law.

25. The Commission in one of its earlier Orders; in the matter of **ICH Agreement *inter se* the LDI Operators** reported as **2012 CLD 767**, wherein the issue of conflict and overriding effect of PTRA with the Act was discussed. The relevant paras in this regard are as follows:

> *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.*

26. On a similar objection in one of the fairly recent orders i.e. **In the matter of Pakistan Telecommunication Company Limited, 2019 CLD 116**, the Commission after reviewing the provisions of the PTRA and Act, held as follows:

20. *From the above, it is clear that though the PTRA has 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.*

27. We, are in agreement with the rationale provided in the above judgments i.e. PTRA has exclusive mandate to regulate the Telecom Sector through licensing system, whereas, the Commission has the exclusive mandate of taking cognizance of anti-competitive practices and exercise its enforcement powers thereon in accordance with the Act. Therefore, when it comes to the overriding effect, the provisions of the Act, shall prevail over any other law, if they are in conflict with its mandate i.e. protecting the consumers from anti-competitive behaviours. Foregoing in view, we have no doubt in holding that the objections of DHA-I 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 DHA-I.

Issue No. (ii): ***Whether DHA-I has abused its dominant position in terms of Section 3 (3) (e), (g) & (h) of the Act?***

28. We will now attend to the above core issue of the matter. In this regard, in order to deliberate upon the alleged abuse of dominance by DHA-I, we deem it appropriate to evaluate *inter alia* the following:

(A). Whether the Parties to the proceedings i.e. DHA-I and Nayatel are 'undertakings' in terms of Section 2(1)(q) of the Act?
(B). What is the relevant market for the purposes of the instant matter?
(C). Whether DHA-I holds a dominant position in terms of Section 2(1)(e) of the Act?
(D). If DHA-I holds a dominant position, whether that dominant position has been abused by it through the conduct under discussion?

UNDERTAKING:

29. The definition of the 'undertaking' is provided under Section 2(1)(q) of the Act, and has been interpreted by the Commission in many orders, the latest one being "**in the matter of Utility Stores Corporation, 2018 CLD 292**." The Commission, after reviewing the provisions of the Act and the case law on the subject held as follows:

> *29. A bare perusal of the definition of an 'undertaking' leaves no doubt that it is divided in two parts. The first part of the definition takes within its folds the types of entities that can possibly exist i.e. an individual, a company, a firm, an association of undertakings, governmental entities, sector-regulators, a body corporate established under the Provincials or the Federal laws of Pakistan, a cooperative society and any other entity regardless of its legal status and the way in which it is financed. Whereas the second part focuses on the nature of activity which is performed by them be it directly or indirectly i.e. production, supply, distribution of goods or provision or control of services. The most important part of the second limb of the definition is that the legislature within its wisdom by using the words '**in any way**' (emphasis added), has made it clear that there is no condition on the legal entity to engage in commercial or economic activity to fall within the purview of 'undertaking' for the purposes of the Act. If any legal entity or natural person is engaged **in any way** in the production, supply, distribution of goods or provision or control of services, the said undertaking would fall within the purview of the term 'undertaking'.*

30. It is assessed that for any entity to fall in the ambit of the definition of 'undertaking' under the Act, its involvement in any type of commercial and/or economic activity is *sine qua non*.

31. DHA-I's core line of business is real estate development and project management throughout Pakistan. Therefore, DHA-I, as an entity is an undertaking within the scope of section 2(1)(q) of the Act. As far as Nayatel is concerned, it is an Islamabad based private limited company and is the subsidiary of Micronet Broadband (Pvt) Limited. The main line of business of Nayatel is the provision of FTTH services in various cities of Pakistan. Hence, Nayatel is also an undertaking within the meaning of Section 2(1)(q) of the Act.

RELEVANT MARKET:

32. The guidelines as to what constitutes a relevant market is provided by the legislature under Section 2(1)(k) of the Act, which for ease of reference is reproduced herein below:

> *"relevant market" means 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 neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those areas;*

33. A product market comprises of all those products that are regarded as interchangeable or substitutable by the consumer by the reason of products characteristics, prices and intended uses. Whereas, the geographical 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 homogeneous and which can be distinguished from neighbouring geographical areas because, in particular, the conditions of competition are appreciably different in those areas.

34. According to the Enquiry Report, the product market in the said case consists of grant of ROW to provide CIT services and the relevant geographic market consists of the

area where the DHA-I has developed the housing societies, as the conditions of competition are sufficiently homogeneous throughout that area and distinct from other neighbouring areas. The reason behind is that the DHA-I resident can only subscribe to the CIT services which are made available to them by the DHA-I. Hence, the relevant geographic market can be taken as DHA-I.

35. The CIT service market, upon review seems to be marred by multiple issues which may be considered barriers. Bearing of high (sunk) costs while deploying the technological network(s) and equipment by the service providers are considered significant barriers to entry. In addition, obtaining of licenses from regulatory authorities, such as Pakistan Electronic Media Regulatory Authority (PEMRA) and/or PTA are additional requirements for operating in CIT services' market. Furthermore, it may be mandatory to acquire the NOC/Approval of the local development authority in charge of development and maintaining municipalities such as Rawalpindi Development Authority, Capital Development Authority, Bahria Town or DHA-I.

36. The imposition of restrictions or barriers may vary in public and private sector and the list may not be exhaustive. The CIT service providers may be obliged to pay certain rent and revenue shares as consideration to relevant public authority or private entity to carry their services within the territory under their management. Additionally, in the private sector, the management or development authority may impose new barriers or restrictions. While CIT service providers need ROW permit, on a timely basis, any undue or unreasonable delay or restrictive practices on the part of public body or private entity, managing the specified territory can increase the operator's cost of deployment of such network(s). The modern-day technology development requires the CIT services of infrastructure laying that involves civil/earths for infrastructure operation and maintenance. Thus, for CIT services providers, ROW can be described as essential facility for laying down their infrastructure across the public and/or private areas for the provision of CIT services to the residents of that area.

37. Therefore, based on the above-mentioned facts, the Commission agrees with the Enquiry Report in terms of determination of the relevant market in this matter i.e. the market for the grant of ROW to provide CIT services in DHA-I.

SPILLOVER EFFECTS:

38. In **LPG Association of Pakistan vs. Federation of Pakistan etc. WP NO. 9518/2009**, the Lahore High Court upheld the Act as being constitutionally valid and dismissed challenges assailing the legislative competence of the Federation to enact a law on competition. On the issue of jurisdiction, the Court held that while Parliament's legislative competence extends to inter-provincial trade and commerce, if CCP wants to take cognizance of an intra-provincial matter it shall have to establish that the activity in question has an effect on trade and commerce beyond the boundaries of a province. The court further explained it through the concept of ***"spillover effect"***. The court stated that:

> *"In law; Spillover Effect may be referred to a situation where laws, regulations or polices of one governing unit effects the people outside its territorial limits. In the instant case if an anticompetitive behaviour is not affecting the trade and commerce of another Province, it does not come with the phrase 'interprovincial trade and commerce', as used in Entry 27 and discernible in Article 151. Conversely, if any act or omission, between anticompetitive behaviour, committed within geographical boundaries of a Province, has its effect beyond such territorial limits, would be subject of a Federal legislation and within its executive competence."*

39. The main issue in the current matter is regarding DHA-I's refusal to grant an NOC to Nayatel to provide CIT services in DHA-I. DHA-I is distributed within both Islamabad (Federal Area) and Rawalpindi (Punjab) and hence the possible anti-competitive effects have inter-provincial spillover effects. Even otherwise, we believe DHA-I's activities in question will have an anti-competitive effect beyond a single province or territory for the following reasons:

a) DHA-I is a residential area, and people from all over Pakistan reside inside DHA-I, either by owning a house there or renting one. By allegedly restricting Nayatel from providing CIT services in DHA-I Phase 1, DHA-I would be restricting consumer choice for CIT services to people from all over Pakistan residing inside DHA-I.

b) There are several businesses inside DHA-I, who provide their services online and otherwise to their clients and customers all over Pakistan, and to provide these services efficiently and conveniently, they obtain the services of different internet service providers according to their needs and preferences.

By allegedly refusing to grant an NOC to Nayatel for the provision of their services, the commercial businesses inside DHA-I will have a restricted choice to choose their internet service providers, which in turn can harm their business interest as their businesses are spread beyond the borders of the province to areas all over in Pakistan.

c) All the internet service providers which provide FTTH based CIT services to their customers have to lay a network of fibers and ducts underground after being granted the ROW. By allegedly restricting Nayatel from laying their network through fiber inside DHA-I, it could have an effect on the adjoining areas in Islamabad and Rawalpindi due to the blockade created by DHA-I by refusing to grant them ROW.

For the afore-mentioned reasons, it has been established that the alleged anti-competitive behaviour would have a spillover effect on trade and commerce beyond the boundaries of a single province or territory and the Commission has the jurisdiction take cognizance of the matter at hand.

DOMINANT POSITION:

40. After determination of the relevant market, we now proceed to analyse the presence of dominant position. The Act under section 2(1)(e) defines dominant position as follows:

> *"dominant position "of one undertakings or several undertakings in a relevant market shall be determined to exist if such undertaking or undertakings have the ability to behave to 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"*

41. The Commission in one of its earlier Orders i.e. **In the matter of Show Cause Notices issued to Jamshoro Joint Venture Ltd (JJVL) & LPG Association of Pakistan** (the '**LPG Order**'), has observed that the concept of dominant position envisaged under Section 2(1)(e) of the Act has two limbs:

(i) The first relates to a 'presumption of fact' which is a 'deeming clause'. The dominance of an undertaking can be deemed to exist if the facts imply that

the undertaking has the ability to behave, to an appreciable extent, independent of the competitors, customers, and suppliers, etc. This entails taking into account the practice or behaviour of undertaking(s) in the relevant market. If the facts reveal that such undertaking can act, to an appreciable extent, independent of its competitors, customers, consumers, and suppliers, it would be safe to assume that the undertaking(s) has a dominant position in the relevant market. Therefore, the dominance or market power of an undertaking does not flow solely from lesser or greater market share than the threshold stipulated in the Act. The test requires analysing the market dynamics in view of the market structure and direct or indirect competitive constraints inside and outside the relevant market such as a buyer's ability to switch to a competitor, entry and exit barriers, investment and licensing regimes among other things.

(ii). The second relates to a 'presumption of law' which provides that if an undertaking's market share exceeds 40%, it shall be presumed to have a dominant position. The presumption of 40% suggests who has to prove what, which can always shift back-and-forth. *Stricto sensu*, where an undertaking's market share exceeds 40%, it shall be presumed to have a dominant position in the relevant market.

42. The Enquiry Report has based its identification of dominance on the basis that an undertaking possesses certain features to assert its market power. Those certain features include, an undertaking's ability to profitably sustain prices above competitive levels, restrict output, degrade quality below competitive levels, apply dissimilar conditions to equivalent transactions, placing competitors at a competitive disadvantage, boycotting/excluding any undertaking from the production, sale or distribution of any goods, providing services to public, or refusal to deal, among other things.

43. It is on the record that DHA-I's management has exclusive rights to administer DHA-I including a grant of ROW for the provision of CIT Services and therefore, has 100 % market share in the relevant market.

44. Based on the above facts, we concur with the determination of dominant position adopted in the Enquiry Report; as DHA-I's management is dominant or possesses substantial market power within the relevant geographic market.

ABUSE OF DOMINANT POSITION

45. Having addressed all the three basic ingredients important to analyse any conduct vis-à-vis the violation of Section 3, we now proceed to check, whether DHA-I has abused its dominant position or not. In this regard, reference is made to Para (7) of the SCN, wherein a *prima facie* violation of Sections 3 (3) (e), (g) and (h) of the Act has been communicated to DHA-I. For ease of reference, the provisions in its relevant parts is reproduced herein below:

> **3. Abuse of dominant position.** — (1) No person shall abuse dominant position.
>
> (2) An abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restrict, reduce, or distort competition in the relevant market.
>
> (3) The expression "practices" referred to in sub section (2) shall include, but are not limited to –
>
> ...
> ...
> ...
>
> (e) applying dissimilar conditions to equivalent transactions on other parties, placing them at a competitive disadvantage;
>
> ...
>
> (g) boycotting or excluding any other undertaking from the production, distribution or sale of any goods or the provision of any service; or
>
> (h) refusing to deal.

46. The Commission in one of its earlier Orders i.e. **LPG Order**, has made an observations with reference to the responsibility of the dominant undertaking, which for ease of reference is reproduced herein below:

> *"92. The Commission has already enunciated the importance of this responsibility in the case involving KSE"s abuse of dominant position wherein referring to the observation of the Court of First Instance in*

the case of Case 322/81, Michelin v Commission [1983] ECR 3461 it was stated:

> *"[F]inding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market".*

> *193. We feel that this responsibility assumes greater importance in nations where competition culture still needs to be embedded. The burden of such a responsibility should rigorously guide entities engaged in businesses in relation to products and services that affect a large segment of the population."*

47. In addition to the above, the Commission has also in the matter of **"Abuse of dominant position by Karachi Stock Exchange"**, elaborated the concept of 'abuse of dominant position' in the following words:

> *"73. It would be relevant to elaborate the concept of abuse of dominance "from the well settled case law of the European Courts; the European Court of Justice in Case 85/76, Hoffmann-La Roche [1979] ECR 461, at paragraph 91, defined the concept of abuse under Article 82 of the Treaty in the following terms:*
>
> > *The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition."*

48. While keeping in view the above broad principles we will now analyse the conduct of DHA-I. The case before us is that the management of DHA-I is preventing or restricting, reducing or distorting competition in the relevant market in a systematic manner, *inter alia*, by favouring its own subsidiary i.e. DHAI Teleman, and/or applying dissimilar conditions in relation to two seemingly equivalent transactions by requiring revenue sharing percentage, exclusionary practices in terms of excluding Nayatel from the relevant market by not allowing it to lay down its infrastructure in the relevant market, and ultimately refusing to deal on the

pretext of potential physical damage to infrastructure and unavailability of space in the corridors, which according to DHA-I has already been occupied by DHAI Teleman, Wateen, Transworld and PTCL.

49. At the heart of the matter is whether DHA-I's refusal to allow Nayatel the ROW\pricing of ROW for Nayatel in DHA-I constitutes exclusionary conduct that hampers competition in the market.

50. We are cognizant of the fact that when a dominant undertaking, in the instant matter DHA-I, owns and/or controls and/or itself uses and/or has the ability to grant the right to use an essential facility i.e. the facility or the infrastructure without access to which other undertakings cannot provide competing services to the end-consumers, refuses competitors to access such facility or grants access to competitors only on terms less favourable than those which it gives to others, it places the competing undertakings at a disadvantage; these are considered exclusionary practices that are specifically prohibited under Section 3 read with subsection (3) clauses (e) and (h) of the Act. In terms of "essential facility" doctrine, we place our reliance on **IN THE MATTER OF Show Cause Notice dated April 10, 2008 for Violation of Section 3 of the Competition Ordinance, 2007 M/S KARACHI STOCK EXCHANGE (Guarantee) LIMITED,** which provides us with the criteria of the matters where the concept of "essential facility" applies. The Commission in the above mentioned matter stated that:

> *The concept of essential facilities is linked to the concept of 'refusal to supply/deal', generally this concept is applied where a dominant undertaking refuses to supply a service or platform to a competitor as opposed to a product. This concept, as applied in the lower courts in America involves the following elements:*
>
> *(i) The dominant player controls access to an essential facility*
> *(ii) The facility cannot be reasonably duplicated by a competitor*
> *(iii) The dominant player denies access to a competitor; and*
> *(iv) It was feasible for the dominant player to grant access*
>
> *We have reviewed the literature and cases involving essential facility and there is no disagreement among scholars when it comes to cases of public utility, i.e., "a business infused with the public interest that was required to serve all." We are of the opinion, that a stock exchange is "a business infused with the public interest that was required to serve all," and therefore see the application of "essential facility" doctrine in the case at hand completely fitting."*

51. In the above mentioned case, the Commission has explained the full criteria that in case of a public utility infused with the public interest is required to serve all. In the current era, the CIT services are an essential need for almost every person in the country, as many of the users need it for personal use and communication, and the commercial businesses use them for the provision of their services to different parts of the country. The ROW is a platform for internet service providers for the provision of CIT services. The Commission believes the "essential facility" doctrine applies to the current matter for the following reasons:

a) DHA-I, in a dominant position, controls access to the ROW in DHA-I Phase 1
b) The ROW in DHA-I Phase 1 cannot be duplicated by Nayatel nor does it have another platform to provide its service to the people residing in DHA-I Phase 1,
c) DHA-I, which has given ROW to its own subsidiary, DHAI Teleman, has been denying access to Nayatel, which is a direct competitor to DHAI Teleman
d) It was feasible for DHA-I to give ROW to Nayatel, because after Nayatel's request for the grant of ROW, DHA-I has been granting access to other services providers, *inter alia*, PTCL, Transworld and Wateen.

For the afore-mentioned reasons, the Commission is of the view that the "essential facility" doctrine is applicable to the matter at hand.

52. For the abuse of dominant position and refusal to deal, reference is made to **EU Commission's decision dated 21 December 1993 in (IV/34.689) Sea Containers v. Stena Sealink, (1994) OJ L 15/18**, in the said case, the EU Commission held that measures taken by Stena Sealink Ports to facilitate its subsidiary Stena Sealink Line while refusing the access to Sea Containers Limited amounts to abuse of dominant position. The following principle of Abuse of Dominant position was explained in the case:

"An undertaking which occupies a dominant position in the provision of an essential facility and itself uses that facility (i.e. a facility or infrastructure, without access to which competitors cannot provide services to their customers), and which refuses other companies access to that facility without objective justification or grants access to competitors only on terms less favourable than those which it gives its own services, infringes Article 86 if the other conditions of that Article are met. An undertaking in a dominant position may not discriminate in favour of its own activities in a related market. The owner of an essential facility which uses its power in one market in order to protect or strengthen its position in another related market, in particular, by refusing to grant access to a competitor, or by granting access on less favourable terms than those of its own services, and thus imposing a competitive

disadvantage on its competitor, infringes Article 86."

53. Another case dealing with the same kind of situation is EU Commission's decision dated 14 January 1998 in **IV/34.801 FAG - Flughafen Frankfurt/Main AG, (1998) OJ L 72/30**, where Flughafen Frankfurt/Main AG, a company which owned and operated Frankfurt airport took the ground of lack of space at the airport to refuse the authorisation of self-handling and independent ramp handlers. The EU Commission rejected the justification of lack of space and held that this practice comes under the umbrella of abuse of dominant position.

54. From the facts available on the record, DHA-I's management holds a dominant position in the relevant market. Further, it has already granted ROW to PTCL, Transworld, Wateen and its very own subsidiary DHAI Teleman for providing (G-PON) and allied CIT service to the residents of DHA-I. The residents of DHA-I have the limited option of choosing amongst these service providers. In order, to dissect alleged monopolistic practices by DHA-I, it is important to look at the concept of ROW in purview of the relevant statute. Followed by a comparison of ROW charges assigned to existing service providers and Nayatel.

55. Section 27-A of PTRA provides that every licensee shall have the right to share any Public or Private Right of Way for the purpose of the installation or maintenance of its telecommunication equipment or for the purpose of establishing or maintaining its telecommunication system. For a licensee to enjoy the rights granted under Section 27-A, a request to the owner of such Right of Way is required to be made for approval of the mode of execution of the works it proposes to undertake. This right is not granted as of right to the licensee but is subject to the approval of the owner of the land in question. In the present case, the owner of the land is DHA-I, therefore, any licensee wishing to use DHA-I's ROW may do so upon approval being granted to it. However, Section 27-A also require that the amount paid by the licensee shall be of a reasonable amount assessed by the public authority taking all the relevant factors into account such as, applicable laws of the public authority and the relevant laws applicable to the district in which such Right of Way is situated. The law also encourages mutual agreement between the parties as to the determination of the fee in question for the ROW.

56. To build further upon the Right of Way provided Section 27-A of PTRA, the Ministry of Information Technology and Telecommunication issued a policy directive, on 9th October 2020, called the "Public and Private Right of Way Policy Directive" ('the Policy Directive'). Section 7 (c) of the Policy Directive states the following directions towards the public authority:

> *"The Public Authority shall not discriminate any licensee towards charging of right way fee and there shall not be any differential or preferential treatment in right of way fee for any type of licensees including other utility service providers and those wholly or partially owned by the Federal or Provincial Government or the Pubic Authority."*

57. As, in the instant matter the public authority is DHA-I, whereas the licensee seeking the ROW is Nayatel. Before indulging in the reasonableness of the ROW proposed by DHA-I, it is vital to note that the already existing service providers are on cost sharing basis with DHA-I as reflected in DHA-I's reply dated 25 October 2019 rather than on a revenue sharing basis. DHA-I has insisted that ROW is not uniform for all service providers and is dependent on several factors such as strength, services and timely approach of the service provider. In their afore-referred reply dated 25 October 2019 DHA-I has annexed the Agreement that they have executed with PTCL. The agreement is dated 14 December 2018. The ROW charges that PTCL would pay under the Agreement is Rs. 600 per meter. It is noteworthy that the charges agreed with PTCL are less than the one offered to Nayatel. PTCL is the national telecommunication company of Pakistan, primarily owned by the State (62%). It has a net revenue of Rs. 31.83 Billion as per the statistics of 2020. On the other hand Nayatel is a private limited company founded in 2004 with its operations in only a few major cities across Pakistan. Nayatel has alleged that DHA-I has proposed the charges of Rs.700 per meter for 10 years which is unacceptably extravagant. Nayatel upon request of the Commission has also provided ROW charges, in different areas of twin cities in comparison to DHA-I; Nayatel is providing services in Bahria Town (5% on cable and TV and 2% on internet) on revenue sharing basis. 50,000 annually for Airport housing society and Rs.150,000/- for National Police Foundation. Whereas in Islamabad they are paying Rs.25,000/- per sector annually (one sector of Islamabad (1.6 km x 1.6 km, requires around 30 km of civil works). It is important to show, for comparison, the difference between

the prices charged by authorities granting ROW in different areas. Even if we take the example of Islamabad only, the charges are 25,000/- annually per sector, requiring 30km of civil works per sector. The cost per kilometre in one sector of Islamabad is Rs. 833/-. On the hand DHA-I was asking for a price of Rs. 700 per meter or Rs.7,00,000/- per kilometre, which is extravagant in comparison to the ones charged in different sectors of Islamabad. It is only unexplained as to why DHA was insisting on a higher rate during negotiations with Nayatel and agreed to allow PTCL at a lower rate.

58. In this regard we note that where a dominant undertaking takes advantage of its dominant position and uses it as a bargaining tool to induce customers to accept certain trading conditions of its choice, such a practice comes under the umbrella of exclusionary practices and such practices are strictly prohibited under Section 3(1) read together with Section 3(3)(g) of the Act. DHA-I has failed to explain any logic as to why there has been a disparity between the charges offered to Nayatel and other incumbents, which amounts to discrimination and application of dissimilar conditions to the same transaction, under Section 3 (1), read with subsection 3(e) of the Act.

59. As mentioned before, the proposed charges of PKR 700 per meter by DHA-I to Nayatel amount to 'constructive refusal to supply', which is prohibited under Section 3(1) read with subsection 3(h) of the Act. The Refusal to deal or refusal to supply is a behaviour in which a dominant undertaking refuses to sell, supply, or grant access to another firm, or is willing to sell only at a price that is considered 'too high', or is willing to sell, supply or grant access only under such conditions that are unacceptable. In addition, refusal can also take the form causing undue delay or otherwise imposing of unreasonable conditions in return for the supply. This is considered 'constructive refusal to supply'. In this regard, we place reliance on **Guidance on its enforcement priorities in applying Article 82 (102) of the TFEU, (2009) OJ C 45/7** issued by the European Commission and Para 95 of the **Notice on the application of the Competition Rules to access agreements in the telecommunications sector, (1998) OJ C 265/02** issued by the European Commission and EU Commission's Decision dated 16 September 1998, **Case COMP/35.134 in the matter of Trans-Atlantic Conference Agreement (TAC),**

(1999) OJ L 95 and EU Commission's decision of 25 July 2001, **COMP/C-1/36.915, Deutsche Post – Interception of cross-border mail, (2001) O.J. L 331/40**.

60. When DHA-I invited Nayatel for a meeting to offer them to use the ROW, the corridors must have had space available to lay another duct to accommodate Nayatel's FTTH infrastructure. However, Nayatel had requested DHA-I to treat the former in accordance with the terms and conditions offered to other service providers, which was not entertained by DHA-I due to multiple reasons including *inter alia* non-availability of space. We are also cognizant of the fact that reason of lack of additional space left for excavation and laying of cables by DHA-I was presented in a letter dated 7 March 2011, however since that time, DHA-I has given space for the laying of cables to Wateen and Transworld who have been operating in DHA-1 Phase 1 and Phase 2, based upon which we are of the view that enough space was available to accommodate one or more CIT service providers in the relevant market. However, the conduct of DHA-I, as highlighted above, is preventing Nayatel, to invest in the relevant market and provide the residents with the substitutes/alternatives. Reliance can be placed on **"In The Matter Of Show Cause Notice Issued to Pakistan Bahria Town (PVT.) Limited".** In the aforementioned case, The Commission held that:

> *"When Bahria Town asked Nayatel to quote the revenue share percentage, the utility corridors must have space available to lay another duct to accommodate Nayatel's FTTH infrastructure. However, when Nayatel offered to match the percentage that is being paid by PTCL, Bahria Town refused Nayatel on the ground that it had repaired its footpath and all the space available has been taken by PTCL, which was allotted back in 2003. In line with the earlier stance of Bahria Town to grant Right of Way on the basis of revenue sharing percentage, it appears that there is enough space to accommodate one or more CIT service providers in the relevant market. However, the conduct of the management of Bahria Town is preventing new entrants, including Nayatel, to invest in the relevant market and provide the resident with substitute/alternate service provider(s). The Commission held Bahria Town to have abused its dominant position in the relevant market".*

61. Similarly, **In The Matter of Show Cause Notices Issued to Wateen Telecom (Pvt.) Limited & Defence Housing Authority,** the Commission emphasized that lack of space or damage to the infrastructure should not be used as an excuse to give preferential treatment to a specific internet service provider or to discriminate against a certain internet service provider by creating barriers to entry in the market. The Commission stated:

"Wateen claimed that if DHA were to allow other service providers to keep on digging and excavating the soil for the deployment of fibre then this will be extremely hazardous for all the residents of DHA and further funds will be wasted for the same exercise. Wateen has incurred high investment costs and in consideration of that exclusivity must be retained. The Commission does not propagate duplication of resources; other service providers would only be willing to lay down infrastructure if the project is financially feasible and bankable. If this is not the case, as Wateen claims, then based on the assumption that economic agents behave rationally, other service providers would be deterred from repeating the exercise of deploying infrastructure unless they have a competitive advantage in doing so. DHA is cautioned not to create any entry barriers through imposition of unreasonable terms and conditions or charges for such service providers and restrict its role to grant of ordinary necessary approvals with respect to Right of Way. Furthermore, DHA is directed to provide Right of Way without any discrimination to all service providers."

62. Based on the above, we are of the considered opinion that the proprietary rights arising from a utility corridor serving public purposes, whether owned or managed by the municipality or a private entity, are essential public utility corridors. The conduct of the management of DHA-I is adversely affecting competition in the provision of CIT services within the relevant market. DHA-I has also failed to provide any rational commercial or objective justification in terms of efficiency gains for its exclusionary and anti-competitive conduct under review. Furthermore, it is discouraging investors to the consumer's detriment and proliferation of CIT services which in turn is affecting the national economy as well as the competition *inter se* other service providers including *inter alia* DHAI Teleman, PTCL, Wateen and Transworld, which is prohibited under the Act. Accordingly, we are of the firm view that DHA-I has abused its dominant position in terms of Section 3(1) read with Sections 3(3)(e), (g) and (h) of the Act.

DECISION AND PENALTY

63. Based on the above, we hold that DHA-I has abused its dominant position in the relevant market. However, keeping in view all circumstances and with a view to give a chance to DHA-I to correct its behavior, we are inclined not to impose any penalty at this time.

64. In order to maintain level playing field in the relevant market, we hereby direct DHA-I to offer Nayatel, within 90 calendar days from the date of this order, to use the ROW

for its services in DHA-I on terms and conditions which are no less favorable than the terms and conditions being offered to incumbent service providers including DHA Teleman and PTCL.

65. We are inclined to give a chance to DHA-I to correct their behavior as doing so is fundamental to restoring competition in the relevant market which is the letter and spirit of the Act that we are mandated to enforce. In the circumstances of this case, merely imposing a penalty without accompanying change in behavior is unlikely to yield any positive outcome for competition.

66. In case, however, DHA-I does not comply, it shall be liable to pay PKR 2 Million for violating Section 3 of the Act in addition to appropriate penalties for non-compliance under Section 38 of the Act. DHA-I is further cautioned not to engage in anti-competitive behavior in the future as doing so may lead to severe penalties and remedies under the Act.

67. DHA-I is further directed to file a compliance report before the Registrar of the Commission no later than 7 (seven) days from the date such offer is made to Nayatel in accordance with direction in para 64 above.

68. Ordered accordingly.

(Ms. Shaista Bano)
Member

(Ms. Bushra Naz Malik)
Member

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN * ISLAMABAD *

ISLAMABAD, THE 3rd DAY OF JUNE 2021