



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


M/s. MEDIALOGIC (PVT.) LIMITED
M/s. PAKISTAN BROADCASTERS ASSOCIATION
M/s. BROADCASTERS ADVERTISERS COUNCIL

On complaint filed by
M/S. BOL MEDIA NETWORK, M/S. LABBAIK (PRIVATE) LIMITED,
M/S. BOL ENTERPRISES (PVT) LIMITED

(FILE NO. F. NO: 223/Media/C&TA/CCP/2018)

Date(s) of Hearing: 22-08-2019, 01-09-2020
10-12-2020, 05-01-2021
18-01-2021

Commission: Ms. Bushra Naz Malik 
Member

Mr. Mujtaba Ahmad Lodhi
Member 

Present:

M/s Bol Media Network
M/s Labbaik (Private) Limited
M/s. Bol Enterprises (Pvt) Limited

Mr. Azhar Shamim, Company Secretary
Ms. Naila Naureen, Advocate

M/s. Medialogic (Pvt.) Limited

Barrister Haroon Mumtaz
Cornelius, Lane & Mufti

Mr. Salman Danish
Chief Executive Officer

M/s. Pakistan Broadcasters Association

Barrister Waqqas A. Mir
Axis Law Chambers


M/s. Broadcasters Advertisers Council

Nemo

Pakistan Electronic Media Regulatory
Authority (PEMRA)

Mr. Wakeel Khan,
Director General (Media & Broadcasting)

M/s. Pakistan Advertisers Society

Mr. Qamar Abbas
Executive Director 



ORDER

1. This order shall dispose of the proceedings initiated pursuant to Show Cause Notice No. 04 of 2019, 05 of 2019 and 06 of 2019 dated 1st February, 2019 (hereinafter referred to as the 'SCN's) issued to M/s Pakistan Broadcaster Association (hereinafter referred to as 'PBA' or 'Respondent No 1'), M/s Broadcaster Advertisers Council (hereinafter referred to as 'BAC' or Respondent No 2) and M/s Medialogic (Pvt.) Limited (here in after referred to as 'Medialogic' or Respondent No 3); collectively referred as 'the Respondents' for *prima facie* violation of Section 4 of the Competition Act, 2010 (hereinafter referred to as the 'Act'). The SCN's were issued pursuant to the findings of an enquiry concluded vide Enquiry Report dated 26th October, 2018. Earlier the enquiry was initiated under Section 37(2) of the Competition Act, 2010 (the 'Act') on a complaint filed by M/s Bol Media Network (hereinafter referred to as 'the Complainant No.1'), M/s Labbaik (Pvt) Limited (hereinafter referred to as 'the Complainant No.2') and M/s BOL enterprises (Pvt) Limited (hereinafter referred to as 'the Complainant No.3') (collectively referred to as the 'Complainants') alleging, *inter alia*, that the Respondents have restricted the competition in the market in violation of Section 4 of the Act.

Factual Background

A. Complaint, Enquiry and Show Cause Notice:

2. The Complainant No.1 submitted that it is a world renowned TV network, consisting of diversified platforms, including Television (BOL News and BOL Entertainment), Digital Media (Web, Social Media & Media Apps), Print Media (Newspaper and



✓

Magazines), Cinemas & Movies and Radio. It submitted that M/s Labbaik (Pvt.) Ltd and M/s BOL Enterprises (Pvt.) Ltd are private limited companies registered with Securities and Exchange Commission of Pakistan under the companies' law and are involved in the business of Satellite Television and Broadcasting and are duly licensed to operate Satellite TV channels under the names of "BOL News" and "BOL Entertainment".

3. The Complainant No.1 alleged that the Respondents were acting in violation of Section 4 of the Act by not granting its ratings to the Complainants through their conduct and agreements/arrangement between Medialogic, PBA and PAS. The said arrangements among the Respondents was camouflaged in three agreements. The first agreement ('Agreement 1'), dated 15th July, 2018, was executed between Medialogic and PBA, wherein the Medialogic was restricted to provide services to any other broadcaster than PBA. The Second Agreement ('Agreement 2'), signed in November 2017, was a Joint Venture agreement between PBA and PAS, wherein the creation of BAC was materialized. According to this agreement the broadcasters, who were not the members of PBA, were excluded to be the members of BAC. The Third agreement ('Agreement 3'), dated 5th January, 2018, was executed between BAC and Medialogic, wherein it was agreed upon that BAC shall endorse the services provided by Medialogic being the official industry currency. It was further agreed upon that the BAC approval will be necessary in case Medialogic grants rating to any other customer.

4. The Complainant No.1 alleged that for the above said reasons, the Respondents were in violation of Section(s) 3 and 4 of the Act.



5. Following the complaint, an Enquiry Committee was formed by the Commission under Section 37(2) of the Act on 16 August 2018. The Enquiry Committee forwarded the complaint filed by the Complainants to Medialogic, PBA and BAC. Each of the Respondents submitted their replies to the Enquiry Committee. Pursuant to the interim order passed by the Supreme Court of Pakistan in **CR.O.P 108/2018 in Human Rights Case No. 34069/2018**, which stated that the matter pending in the Competition Commission of Pakistan (Hereinafter 'the Commission') must be resolved within 28 days, the Enquiry was concluded within 28 days of the said interim order and date of hearing was communicated to the Complainants and Respondents.
6. Regarding the Agreement 1, the Enquiry Committee concluded that the Clauses 3.5.1, 3.5.3, 3.5.4 and 10.2 of Agreement 1, *prima facie*, have the object and effect of foreclosing the relevant and allied markets for potential competitors of members of PBA and also amounts to a decision by PBA imposing a restrictive trading condition, in violation of Section 4 (1), read with Sub-section (2) (a) of the Act. It was further held that the conditions for obtaining ratings from Medialogic are different for PBA members as compared to non-PBA members, who are granted ratings only after meeting the criteria set out in Clause 3.5. These dissimilar conditions on equivalent transactions put non-PBA members at a competitive disadvantage. Therefore, in view of the Enquiry Report, Clause 3.5 of Agreement 1 and the conduct of PBA is a violation of Section 4 (1), read with sub-section (2) (f) of the Act.
7. Regarding Agreement 2 it was concluded that *prima facie* the Agreement 2 was designed to restrict entry of and exclude non-PBA members from the JIC/BAC and its anti-competitive effects were exacerbated by Agreement 3 which required approval



- of BAC before Medialogic could grant ratings to any other customer. Therefore, in view of the Enquiry Report, Agreement 2, also amounting to a decision by BAC and PBA, is anti-competitive in terms of Section 4 read with sub-section (2) (a) of the Act.
8. Regarding Agreement 3, it has been held in the Enquiry Report that *prima facie* Clauses 1(f), 2(f) and 3(b) of Agreement 3, amounts to a decision by BAC imposing a restrictive trading condition, which is a violation of Section 4 (1), read with sub-section (2)(a) of the Act. It was also held that by denying ratings to the Complainant, which was on air and has an audience, in effect meant that PBA had divided or shared the market for TV advertisement air time between its member undertakings which was a violation of Section 4 (1), read with Sub-section (2) (b) of the Act.
9. Based on the foregoing, the Enquiry Committee proposed to initiate proceedings against PBA, BAC and Medialogic under Section 30 of the Act.
10. The Competition Commission of Pakistan after considering the *prima facie* findings of the Enquiry Report, deemed it appropriate to initiate proceedings under Section 30 of the Act while providing the parties an opportunity of being heard. The relevant parts of SCNs are reproduced hereunder: the Common relevant parts of the SCNs issued to the Medialogic and PBA are as follows:

6. **WHEREAS**, in terms of the Enquiry Report in general and paragraph 59 in particular, it appears that certain clauses of Agreement 1 (executed between PBA and Medialogic) have the object and effect of foreclosing the relevant and allied markets for potential competitors of Medialogic and PBA's members respectively and amounts to a decision of PBA imposing a restrictive trading



ML.

condition, is prima facie, in violation of subsection (1) of Section 4 read with clause (a) of subsection (2) of Section 4 of the Act; and

7. **WHEREAS**, in terms of the Enquiry Report in general and paragraph 60 in particular, it appears that the conditions for obtaining ratings by Medialogic are different for PBA members as compared to non-PBA members. These dissimilar conditions laid out in clause 3.5 of the Agreement 1 and the conduct of PBA is, prima facie, violation of subsection (1) of Section 4 read with clause (a) of subsection (2) of Section 4 of the Act; and

8. **WHEREAS**, in terms of the Enquiry Report in general and paragraph 67 in particular, it appears that Agreement 2 (executed between Pakistan Advertisers Society and PBA) designed to restrict entry of and exclude non-PBA members from the Joint Industry Committee (JIC)/BAC and its anticompetitive effects are aggravated by Agreement 3 (executed between BAC and Medialogic) which requires approval of BAC before Medialogic can grant ratings to any other customer, is prima facie in contravention of subsection (1) of Section 4 read with clause (a) of subsection (2) of Section 4 of the Act.

Medialogic was separately charged as follows:

9. **WHEREAS**, in terms of the Enquiry Report in general and paragraph 77 in particular, it appears that certain clauses of Agreement 3 (executed between BAC and Medialogic), which also amount to decision by BAC imposing a restrictive trading condition is, prima facie, in violation of Sub-Section (1) of Section 4 read with clause (a) of Sub-Section 2 of Section 4 of the Act.



The PBA was separately charged as follows:

9. **WHEREAS**, in terms of the Enquiry Report in general and paragraph 77 in particular, it appears that PBA by denying ratings to the Complainant, which has divided or shared the market for TV advertisement air time between its members is prima facie, in violation of subsection (1) of Section 4 read with clause (b) of subsection (2) of Section 4 of the Act; and

The relevant extracts of the SCN issued to BAC are reproduced as follows:

6. **WHEREAS**, in terms of the Enquiry Report in general and paragraph 67 in particular, it appears that Agreement 2 (executed between Pakistan Advertisers Society and PBA) designed to restrict entry of and exclude non-PBA members from the Joint Industry Committee (JIC)/BAC and its anticompetitive effects are aggravated by Agreement 3 (executed between BAC and Medialogic) which requires approval of BAC before Medialogic can grant ratings to any other customer, is prima facie in contravention of subsection (1) of Section 4 read with clause (a) of subsection (2) of Section 4 of the Act; and

7. **WHEREAS**, in terms of the Enquiry Report in general and paragraph 77 in particular, it appears that certain clauses of Agreement 3 (executed between BAC and Medialogic), which also amount to decision by BAC imposing a restrictive trading condition is, prima facie, in violation of subsection (1) of Section 4 read with clause (a) of subsection (2) of Section 4 of the Act; and



Handwritten signature

ML.

Medialogic, being an undertaking, and PBA and PAS, being association of undertakings, were directed as follows:

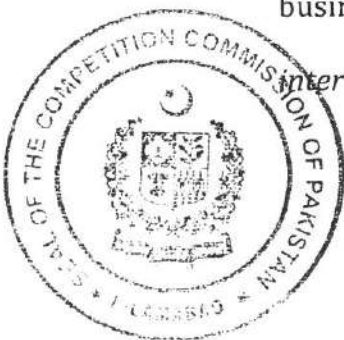
9. is called upon to show cause in writing within fourteen (14) days from the date of receipt of this show cause notice and to appear and place before the Commission, facts and material in support of the contentions and to avail the opportunity of being heard through a duly authorized representative on **February 19, 2019 at the Office of the Commission i.e. 8th Floor South, ISE Towers, 55-B, Jinnah Avenue, Islamabad at 11:30 a.m.** or as soon thereafter convenient to the Commission, and to explain as to why an appropriate order under Section 31 of the Act may not be passed and/or a penalty for the above mentioned violations may not be imposed under Section 38 of the Act.

WRITTEN REPLY, ORAL REPRESENTATION AND HEARING

Pakistan Broadcaster Association (PBA)

11. PBA in its response made the following submissions;

- a. PBA submitted that it entered into an agreement with Medialogic in 2014 with the principal aim of quality assurance and to authenticate the rating data provided by the Medialogic. It was explained that the agreement with Medialogic ensured the authenticity of rating data because individual actors (broadcasters) were reliant on its authentication in order to run their businesses. PBA submitted that by the virtue of the said agreement it could, *inter alia*, ensure quality checks and audit information. It was also admitted



ML.

[Handwritten signature]

that the agreement did contain a clause stating that Medialogic shall provide its services solely to broadcasters having membership of PBA, however, there was nothing anti-competitive about the said clause and the Complainant failed to prove that it is anti-competitive in its Object or Effect.

- b. That the Honourable Supreme Court of Pakistan, as per its order dated 27th September 2018 in Criminal Original Petition No.108/2018 directed the Commission to decide the matter in accordance with law within four weeks. However, the Honourable Supreme Court of Pakistan has now disposed of the matter in following terms:

“With the consent of all the stakeholders, these matters are disposed of in the terms that Bol Media Network shall apply for the subscription from PEMRA, the rating companies follow the regulations and terms and conditions of the license on the basis of which they have been granted their license; as regard the payment to the rating companies, PEMRA shall ensure prompt payments are made and in case of failure of any client to do so, obviously the requisite information shall not be provided to it.”

PBA asserted that from above it was transparent that the regulatory framework and landscape governing the market for provision of services relating to Television Audience Measurement ratings now has fundamentally been changed. Further, the Honourable Supreme Court of Pakistan has made no judicial findings relating to infraction of any law, including Competition Law, by PBA either previously or subsequently to the



ML.

complaint pending before the Commission. It was also asserted that since the matter has been disposed of by the Honourable Supreme Court of Pakistan with the consent of the complainant, no live issue remains in relation to the TAM services, conduct of PBA or its already terminated agreement with Medialogic. On this account it was maintained that there remains no actionable cause for proceeding with the SCN.

- c. The Enquiry Report and the SCN are premised on certain fundamentally erroneous assumptions and misconceived facts. Any credible enquiry by a regulatory agency must consider developments subsequent to the lodging of the initial complaint. Moreover, it was also asserted in the reply that any credible allegation of violation of Competition Law has to be grounded on proper economic and factual context and that is something grossly lacking the present enquiry report as well as the SCN.
- d. Complainant No. 3 has no license from PEMRA to broadcast any TV channel in Pakistan and BOL TV Channel is broadcasted on the license held by Complainant No. 2. No application has been received by PBA from Complainant No. 2 and lack of any TV license held by Complainant No.3 resulted in non-issuance of membership on the part of PBA to Complainant No. 3. Considering the above it is not obvious how the Complainant No1 and 3 are affected by the alleged violation.
- e. The Complaint is only accompanied by a Board Resolution of the Complainant No.2 and does not annex the Board Resolution of other two Complainants. The relevant memorandum and articles of association of the Complainants have



ML.

[Handwritten signature]

not been annexed either and thus fail to establish a chain of authority leading to signatory of Complainant No.1. This rendered the complaint liable to be dismissed.

f. Regarding the PBA's agreement with Medialogic, following defenses have been put forward;

I. Regarding clause 3.5.1 of the Agreement i.e., broadcasters not licensed by PEMRA should not receive rating from Medialogic, it was maintained that the clause was inserted to prevent illegally aired Indian channels from being included in any TAM rating. If the Indian channels (being illegally aired) received TAM ratings then this would distort the local market as well as create incentives from driving advertisements away from channels being legally aired in Pakistan.

II. Regarding clause 3.5.2 i.e., the Broadcasters were prevented from having an interest in a parallel rating company, it was argued that the said clause was inserted to avoid conflict of interest that would distort the market.

III. Regarding clause 3.5.4 i.e., Broadcasters not meeting the above criteria, Medialogic had to seek approval from PBA. It was stated that this was to meet the standards set to ensure compliance and to ensure quality control.

g. Enquiry Report points towards three agreements that involve at least four different actors that operate in the markets. These are PBA, BAC, Medialogic and PAS. It remains unclear whether the Enquiry Report is treating three



ML.

agreements as separate or as one cumulative agreement. If the Enquiry Committee believes that these agreements operate as one agreement then the Enquiry Committee should have proven collusive conduct by all the market actors. If the Enquiry Committee has treated them as separate agreements then the effect of these agreement has to be examined separately in the Relevant Market.

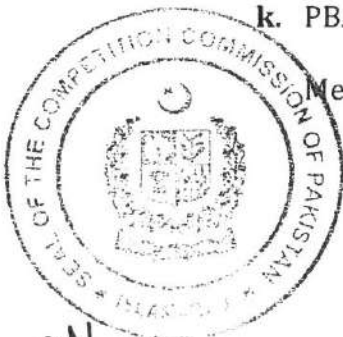
- h.** The Relevant Market has been defined as TAM services in territory of Pakistan, however, it was never shown how competition had been distorted in that market. It was also argued that PBA is not even a player in the relevant market as defined by Enquiry Committee. PBA, Medialogic and BAC all have different incentives. They do not operate in a single market. Since the respondents are not horizontally competing with one another, the action of one of them to foreclose a market do not aid the other. They are not horizontally and vertically linked.
- i.** Regarding the unreasonable withholding of any approval by PBA it was maintained that Enquiry Committee's findings in para 50 of the Enquiry Report are premised on Supreme Court Order dated 09.08.2018. It was argued that the above said order of the Supreme Court was not a judgement as claimed on page 17 of Enquiry Report. The Honourable Supreme Court's observation regarding a civil suit cannot be used to assume that PBA was unreasonably withholding any requisite approvals. It also alleged that the Enquiry Report fails to engage with PBA's freedom of association which is a fundamental right within the Constitution of Pakistan 1973 (the



ML.

constitution'), and an organization is free to adopt lawful means of due diligence to a member before it gains membership of the said organization. PBA further alleged that there was no denial of membership in the first place, and all that PBA asked for was certain information to be supplied and the information required can vary upon the market reputation of an actor asking for membership.

- j. PBA submitted that the Enquiry Report, before alleging violation of Section 4 of the Act, carried out no analysis of how competition was harmed and neither the Complainants provided any figures of what business, if any, they lost out on. The PBA mentioned that Enquiry Report uses a standard termination clause in the PBA-Medialogic Agreement to say that punitive consequences existed in case of violation and it is worth noting that the presence of a termination clause in an agreement that envisages penalties in case of violation does not point to the existence of any anti-competitive object or effect. PBA also submitted that the emails mentioned in the Enquiry Report were an exercise of its right by PBA to inform other market players of its reservations and cannot be used to prove anti-competitive activity. PBA further submitted that market entities that chose to do business with the Complainants did so at their own free will, and PBA only intimated other stakeholders in the market that they need to be extremely careful in dealing with an entity with unclear source of financing and other valid question marks.
- k. PBA raised another objection on Enquiry Report that it alleges the PBA-Medialogic Agreement to have the *object AND effect* of being anti-competitive.



Handwritten signature or mark.

PBA mentioned that only the most pernicious agreements (price fixing, territorial divisions, output restrictions, bid rigging) are anti-competitive by virtue of their object and if the Enquiry Report says that PBA's actions were anti-competitive by *object AND effect* then it must prove effects also since it is not a case of price fixing or other similar well-organized violations of Competition Law. PBA further added that the Competition Law jurisprudence in recent years reflects that restrictions by object should only be found in a limited number of categories and should be reserved for agreements which inherently reveal a sufficient degree of harm to competition and it is important to note that it was only Complainant No. 3 who applied for membership and not Complainant No. 1 & 2. They were simply asked to furnish their valid license, however they refused to provide such basic information. PBA submitted that only Complainant No. 2 held the license to broadcast BOL TV and it never applied for membership with PBA, and the Complainants links with entities such as AXACT, which have faced prosecution, necessitated that requirements of transparency and due disclosure had to be adhered to. There is no prohibition in Competition Law and specifically the Act, against a due diligence process.

- I. PBA alleged that the Enquiry Report has confused the relevant market by lumping it with the 'allied markets' concept. PBA submitted that Competition Law recognizes that dominance in one market can have anti-competitive effects on another market but in those cases the definition of relevant market captures multiple markets or sub-markets, however, Enquiry Report cannot



ML

h

define one relevant market and then point to another market to prove a violation because the violation needs to be situated in a relevant market as defined by the statute itself.

- m. Regarding Prohibited Agreements, PBA submitted that such agreements involve horizontally placed competitors (i.e. at same level in supply chain) engaging in price fixing, market division, output restriction or bid rigging. PBA added that there is nothing in the Agreement between PBA and Medialogic or otherwise on the record to suggest that the object of the said Agreement or any clause thereof is anti-competitive because there is no horizontal price fixing, market division, output restriction or bid rigging. PBA further added that the analysis undertaken by the Enquiry Report alleges both *object AND effect* violations and such an allegation means that the allegation is only in relation to effect since if effects are alleged then they must be proved.
- n. PBA relied on European Commission Guidelines and alleged that since there is no presumption that an agreement can have anti-competitive effects, the Complainants and Enquiry Report must prove that it does and they have failed to do so earlier by giving no evidence of any anti-competitive effect, apart from the situation Complainants find themselves in, because of their own conduct.

Medialogic

12. Medialogic in its response made the following submissions;

- a) Medialogic alleged that the Act is beyond the legislative competence of the Parliament in terms of Article 142 of the Constitution as the Parliament does



ML.

5

not have the power to make laws with respect to any matter not enumerated in the Federal Legislative List provided in the Fourth Schedule. The Fourth Schedule of the Constitution does not contain anything regarding competition, monopoly, unfair trade practices or anything of a similar nature, which makes it a subject of residuary nature and falls within the legislative competence of provincial legislatures under Article 142 (c) of the Constitution.

- b) Medialogic alleged that following the 18th Amendment, disbanding of the Monopoly Control Authority, created under Monopolies and Restrictive Trade Practices Ordinance, 1970 and the formation of the Commission are matters relating to regulatory authorities having both inter-provincial and federation-provincial elements. Such matters need the approval of Council of Common Interests and a failure to take the Competition Act for approval to the Council of Common Interest prior to its enactment and not complying with the requirements of Article 153 and 154 read with Part II of the Fourth Schedule of the Constitution, renders the Act to be struck down as ultra vires the Constitution.
- c) Medialogic contended that the Commission plays the role of an investigator, enquirer, prosecutor, judge, jury and executioner by authorizing an enquiry, undertaking the enquiry, reviewing the enquiry report, deciding to proceed with prosecutions, issuing show cause notices, and deciding whether there has been a violation of the Act, which is contrary to the principles of natural justice and violates the right of fair trial and due process provided in Article 10A of the Constitution.



ML.

2

- d) Mediallogic alleged that allowing the Commission to adjudicate on matters under the Act violates the constitutional principle of separation of powers and independence of judiciary. The members of the Commission are appointed by the Federal Government and are not independent, as required by Article 175(3) of the Constitution. Section 14, 17, 19, 28(a), 30-35, 38 and 41-44 of the Act are unconstitutional because they violate the doctrine of separation of powers since they purport to bestow judicial power of the state on the Commission, a forum wholly appointed by the executive.
- e) Mediallogic alleged that the Competition Act is liable to be struck down since it does not provide a meaningful right to appeal. The appeal to the Supreme Court of Pakistan provided under Section 44 of the Act is ultra vires the constitution because the Parliament cannot by law grant jurisdiction to the Supreme Court when the Constitution does not. Under Item No. 55 of the Federal Legislative List, the parliament is not authorized to enact any law to broaden the jurisdiction of the Supreme Court unless it is expressly authorized by or under the Constitution.
- f) Mediallogic alleged that the power of the Commission under section 34 and 35 of the Act to enter private premises and impound private properties is excessive in the absence of independent adjudication and violates fundamental rights of the citizens. A regulatory authority is only allowed to have the power to interfere with private property rights after it has satisfied an independent tribunal that such powers must be exercised in public interest.



ML.

2

There is no other regulatory authority in Pakistan except for the Commission which has such far reaching and unfettered powers.

g) Medialogic alleged that the complaint filed has only been accompanied by the Board of Resolution of Complainant No.2 and no board resolutions of the other two Complainants or respective Memorandum and Articles of Association have been filed which makes the complaint unauthorized and incompetently filed and is liable to be rejected. It further asserted that it is not clear that the Complainants have a locus standi to file a complaint before the Commission as the Complainants in the Enquiry Report are grouped together as separate entities. It further added that Complainant No.1 &3 have no license from PEMRA to broadcast any television channel in Pakistan and BOL channel is broadcasted through the license of Complainant No.2. No evidence has been provided by the complainants as to how Complainant No. 1 & 3 are legally affiliated with each other, therefore Complainant No. 1 & 3 have no locus standi.

h) Medialogic asserted that there is no substantiated allegation or assertion in the complaint of any contravention of Chapter II of the Act, and no *prima facie* evidence of the same has been provided to the Commission. The Commission needs to form an opinion regarding the merit of the complaint received and it needs to be based on the material that has been provided to the Commission.

It asserted that in the instant matter, there was no material before the Commission that could have justified the ordering of the present enquiry and



ML.

5

it renders the SCN and the preceding Enquiry Report non-actionable, without any basis in law, and liable to be withdrawn.

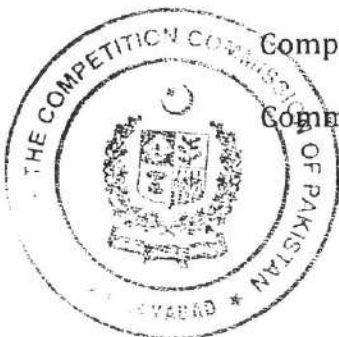
- i) Medialogic alleged that the regulatory framework and landscape governing the market for the provision of TAM services in Pakistan stands fundamentally altered pursuant to the Supreme Court's Final Order in the Supreme Court proceedings. It further added that PEMRA is now the sole regulator for this market, and all prior agreements between stakeholders in the market are redundant and irrelevant and the subject matter of the SCN and the preceding Enquiry Report has been rendered moot and infructuous.
- j) Medialogic asserted that the matter before the Supreme Court was finally disposed of with the consent of all the stakeholders, including the Complainants and no issue in relation to the provision of TAM services in Pakistan remains outstanding. It also added that the agreement between PBA and Medialogic was also terminated on 13-10-18 and the Complainant's own rating company Media Voir (Pvt.) Limited has itself sought registration from PEMRA under the TAM Regulations 2018, and has been granted provisional registration by PEMRA.
- k) Medialogic submitted that the Supreme Court made no judicial finding against them in the Supreme Court proceedings relating to the violation of any law, including Competition Law, either before or after the issuance of SCN and the preceding Enquiry Report. Any interim *prima facie* observations prior to the Final Order are of no legal relevance or consequence. It further added that the SCN and Enquiry Report are vague, lack any specifics and fail to particularize



ML.

any alleged unlawful activity. It asserted that the SCN and Enquiry Report do not identify a relevant market in which Medialogic is a direct competitor of any of the Complainants and fail to provide any valid and cogent reasoning which makes the SCN and Enquiry Report non-actionable and liable to be withdrawn.

- l) Medialogic contended that the Enquiry report discusses 3 different agreements involving at least four entities that operate in different markets and it appears that the Commission is considering them as one agreement since their effects are linked. It added that the Enquiry Committee was required to prove collusive conduct by all 4 different entities, which it fails to do so in the Enquiry Report.
- m) Medialogic submitted that the Respondents are separate entities and do not operate in a single market. It added that since they are not horizontally competing with each other, the actions of any of them to foreclose a market do not aid the others because these entities are not horizontally or vertically linked. The interests of Respondents merely converged to ensure the authenticity of TAM data, which was beneficial for both advertisers and broadcasters and it cannot be classified as collusion.
- n) Medialogic alleged that the Enquiry Committee carried out no economic analysis to demonstrate how competition was harmed before alleging violation(s) of Section 4 of the Act in the Enquiry Report. It contended that the Complainants also failed to provide any data either, and the Enquiry Committee did not have any evidence before it and violated the substantive



ML.

[Handwritten signature]

and procedural law requirement by alleging violation(s) of Section 4 of the Act in the Enquiry Report.

- o) Medialogic contended that the Enquiry Report alleged that the PBA Agreement had both anti-competitive object and effect, and Enquiry Committee is making an effect based violation allegation, but to establish such a violation the Enquiry Committee did not carry out a detailed analysis to determine whether the PBA Agreement was anti-competitive by effect, which was needed in the current matter. Medialogic further added that there can be no presumption that an agreement has anti-competitive effects, the Complainants and Enquiry Committee were required to provide evidence of anti-competitive effects of the PBA Agreement but the Complainants and the Enquiry Report make no mention at all of any negative effects on prices, output, innovation, or the variety or quality of goods and services.

BAC

13. Apart from the earlier correspondence with the Enquiry Committee, BAC did not submit anything in reply to the SCN, nor did anyone appeared on behalf of BAC in the hearings, even after continued attempts of communication by the Commission through hearing notices. Only the SCN was received by BAC, however, it refused to receive the notices served by the Commission. In response to this refusal, the Commission proclaimed the notices in a newspaper, pursuant to Competition Commission (General) Enforcement Regulations, 2007.



h

ML.

Supreme Court Proceedings

14. The Supreme Court of Pakistan in **CR.O.P 108/2018 in Human Rights Case No. 34069/2018** passed the following interim order:

" In order to streamline the matters involving television channels, advertisers, Pakistan Broadcasters Association and the Rating Companies, we direct the PEMRA to take the following steps:

a) *PEMRA shall register all six rating companies in accordance with the terms conditions and requirements of the draft Regulations which have already been made a part of this order shall be duly notified. This exercise shall be completed within one week. Any company which does not seek registration or is not registered without any fault or omission on its part on or before the said date shall cease its business till such time that it gets itself registered with PEMRA in accordance with the procedure prescribed in the afore noted Regulations.*

.....

iv. *The rating companies shall not under any circumstances or for any reason provide such data and information to PBA, advertising agencies, media outlets or any other third party. Any violation of this provision shall entail immediate suspension of business of such a rating company, and such other penalties are specified in the Regulations.*

On the basis of such rating, the advertisers shall be free to choose the channel(s) on which they wish to telecast their advertisements.



ML.

Handwritten signature or mark.

vii. *In order to ensure transparency and preempt any possibility of conflict of interest, it is directed that the designated representative of PBA on the Board of Directors of PEMRA shall not participate in incidents relating to viewership rating or rating companies is discussed, deliberated or decided.*

We specifically prohibit and restrain PBA from entering into any agreement or arrangement with any other company or entity that may have the effect of cartelization, creation of monopoly, anti-competitive behavior, exclusion of any competitor or in any manner affecting free, fair and open competition in the Television Audience Measurement Market.

15. In the final order dated 10-1-2019, the Supreme Court of Pakistan finally held the following:

"With the consent of all the stakeholders, these matters are disposed of in the terms that BOL Media Network shall apply for subscription of PEMRA; the rating companies shall follow the regulations and the terms and conditions of the license on the basis of which they have been granted their license; as regards the payment to the rating companies, PEMRA shall ensure prompt payments are made and in case of failure of any client to do so, obviously the requisite information shall not be provided to it."

ISSUES AND ANALYSIS

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



- a) Whether the agreements/arrangements between Medialogic, PBA and BAC are in violation of Section 4 of the Act?
- b) Whether the Commission has the jurisdiction to take cognizance of this matter, pursuant to the orders passed by the Supreme Court of Pakistan?

Issue No. (i): Whether the agreements/arrangements between Medialogic, PBA and BAC are in violation of Section 4 of the Act?

17. In order to deliberate upon the alleged violation of Section 4 of the Act, we deem it appropriate to evaluate *inter alia*, the following:

- a) *Whether parties to the proceedings 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 there has been any violation of Section 4 of the Act by Medialogic, PBA and BAC through the agreements/arrangements between them?*

Undertakings

18. The definition of 'undertaking' is provided in Section 2 (1)(q) of the Act which states:

"(q) 'undertaking' means any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association of undertakings....."



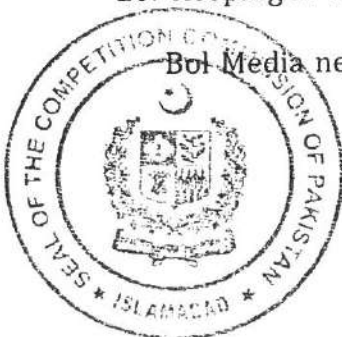
ML.

19. The definition of 'undertaking' has been interpreted by the Commission in many orders, one of them 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:

"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'."

20. Keeping in view the above mentioned definition and interpretation of 'undertaking',

Bol Media network is a media network involved in diversified platforms including



ML.

Television, Print Media, Digital Platforms, Cinema and Movies and Radio, Labbaik (Pvt) Limited and BOL Enterprises (Pvt) Limited are private limited companies registered with Securities and Exchange Commission of Pakistan under the companies law and are involved in the business of Satellite Television and Broadcasting operating Satellite TV channels under the names of "BOL News" and "BOL Entertainment". Therefore, the Complainants fall under the definition of 'undertaking' provided in the Act.

21. As far as the respondents are concerned, PBA in its correspondence with the Enquiry Committee submitted that, it is an association comprising of television and radio broadcasters. The association membership has two categories, namely:

- a) Television Broadcaster: Broadcasters that have acquired ownership and / or are operating Television Channel either through Satellite or Terrestrial.
- b) Radio Broadcaster: Broadcasters that have acquired ownership and / or are operating as Radio Station.

Therefore PBA is a representative body of undertakings engaged in the business of providing TV & Radio broadcasting services and so, PBA is an association of undertakings in terms of Section 2(1)(q) of the Act.

22. The Memorandum of Association of BAC states:

"not-for-profit joint industry body of advertisers, broadcasters and media agencies through their respective associations and societies and any other relevant stakeholder to safeguard their common interest, to promote advertising and media industry and to set high standards of practices and transparency



ML

✓

through various initiatives including but not limited to media research and monitoring, advisory services and self-regulation for the benefit of the advertising and media industry and the public at large."

23. As per Articles of Association of BAC it shall have 15 members and the General Body would have the following composition:

- a) 06 (six) members nominated by PAS;
- b) 06 (six) members nominated by PBA;
- c) A representative of the media houses of Pakistan, nominated by PAS;
- d) A representative of the media houses of Pakistan, nominated by PBA;
- e) A Chairman appointed by the Board of Directors of the Society, provided that the first Chairman shall be Mr. Sarfraz.

24. Based on the foregoing, it appears that BAC consists of members of PBA, PAS & representatives of media buying houses which are all undertakings in terms of Section 2(1)(q) of the Act ,therefore, BAC being a representative association of the broadcasters, advertisers & media buying houses is an association of undertakings in terms of Section 2(1)(q) of the Act.

25. Medialogic is a company engaged in the business of TAM data and rating services in Pakistan and is an undertaking in terms of Section 2(1)(q) of the Act. As we have established that all the parties to the proceedings are undertakings, we now move on to the relevant market in terms of the current matter.



ML.

(Handwritten signature)

Relevant Market

26. 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;

27. 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



ML.

(Handwritten signature)

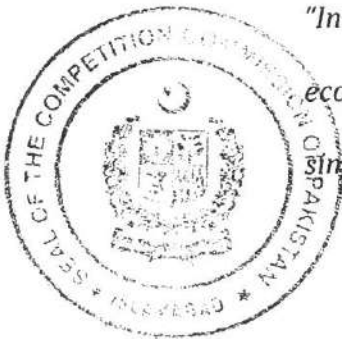
because, in particular, the conditions of competition are appreciably different in those areas.

28. According to the Enquiry Report, the complaint in the instant matter revolves around the provision of TAM data & ratings which are primarily used for the placement of advertisements on broadcast media, i.e. TV channels, by the advertisers mostly using services of advertising agencies. The Enquiry Report referred to AC Nielsen's definition of TAM which states:

"TAM (Television Audience Measurement) is the specialized branch of media research, dedicated to quantifying (size) and qualifying (characteristics) this detailed television audience information. With billions of dollars spent annually on TV programs and commercials, reliable TV audience information is required to evaluate and maximize the effectiveness of this investment. These ratings, if reliable and valid, become the 'common currency' for the market's commercial airtime. Media planners and buyers evaluate the alternative programs offered to best achieve their advertising goals; broadcasters evaluate Page 11 of 28 the program or station's popularity and how much to charge an advertiser for commercials during a program or on a given channel".

29. With regards to TAM data and ratings PBA also submitted the following to the Enquiry Committee:

"In a burgeoning and competitive industry with many broadcasters, the economics for entities wanting to advertise their products/services is quite simple: they will want their products advertised with those broadcasters



ML.

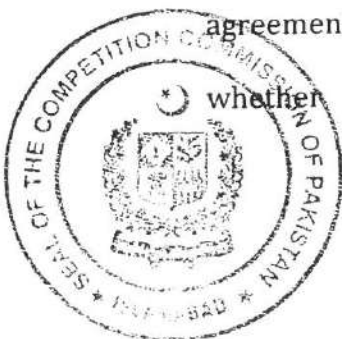
(Handwritten signature)

that are viewed the most by the consumer public. But what dictates choice? How would a rational commercial actor, in the position of a company wanting to advertise its product, decide upon a particular broadcaster? This is where the modern day ratings system, i.e. TAM comes in".

30. PBA and BAC also submitted to the Enquiry Committee that the relevant market in this case is the market for TAM services which involves research dedicated to quantifying (size) and qualifying (characteristics) the detailed television audience information. The relevant geographic market comprises of whole of Pakistan as the conditions of competition for all market participants in terms of TAM data and rating services across Pakistan are homogenous.
31. It is important to note here that the broadcasters sell airtime for advertisement to advertisers on the basis of TAM data and ratings. Therefore, the market for advertising airtime on TV Channels in Pakistan is very closely related to the market for TAM data and ratings.
32. 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 provision of TAM data and ratings to TV Channels all across Pakistan.

Prohibited Agreements

33. After the determination of relevant market, we now proceed to analyze the agreements/arrangements between PBA, BAC and Medialogic to determine whether there has been any violation of Section 4 of the Act. The



ML.

[Handwritten signature]

agreements/arrangement, under analysis, between the concerned parties are as follows:

- a) The agreement between PBA and Medialogic ('Agreement 1')
- b) The agreement between PAS and PBA to form BAC ('Agreement 2')
- c) The agreement between BAC and Medialogic ('Agreement 3')

34. Section 4 of the Act states:

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

(2) Such agreements include, but are not limited to,---

(a) fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any service;

(b) dividing or sharing of markets for goods or services, whether by territories, by volume of sales or purchases, by type of goods or services sold or by any other means;.....

(f) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage; and



ML.

Handwritten signature or mark.

(3) Any agreement entered into in contravention of the provision in subsection (1) shall be void.

35. It is important to note that the three agreements in question need to be analyzed collectively, as according to the Enquiry Report the anti-competitive effects become clearer when the said agreements are looked at collectively, because all three agreements are complimenting each other leading to violation(s) of Section 4 of the Act.

Agreement 1

36. Agreement 1 was signed between PBA and Medialogic on 15th July, 2018 to remain in force till such time the parties decided to terminate it with mutual consent. According to the said agreement, Medialogic was restricted to provide services to any broadcaster other than members of PBA. Clauses 3.5.1, 3.5.3, 3.5.4 and 10.2 have been alleged to have anti-competitive object and effect and are reproduced hereunder:

"3.5 Medialogic shall provide Services to only those broadcasters that are members of PBA. The guidelines for broadcasters to qualify for Medialogic TAM subscription are given below:

3.5.1 The broadcasters must have a valid legal license by PEMRA;

3.5.2 The broadcaster must not have any interest in a parallel ratings company setup, this interest includes ownership, promotion, marketing or



ML

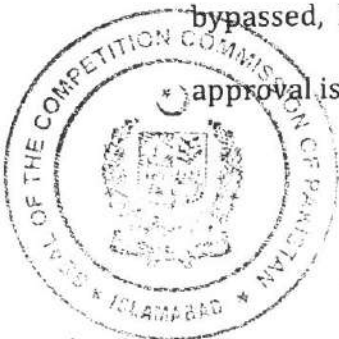
supporting parallel ratings setup on its own electronic or digital media platforms;

3.5.3 The broadcaster must not be having any interest in a parallel industry body claiming to represent the interests of broadcasters;

3.5.4 For any broadcaster not fulfilling the above requirements, Medialogic must seek approval from PBA before issuing ratings data for such broadcasters.....

10.2 PBA can terminate this Agreement immediately, if the Medialogic provides Services to those broadcasters who are not the members of PBA as it will result in an event of default”.

37. Clause 3.5 provides the criteria for obtaining TAM ratings for Medialogic and clause 3.5.4 mentions that for any broadcaster not fulfilling the said criteria, Medialogic must seek approval from PBA to issue their TAM ratings. Medialogic is also threatened with punitive consequences in case of providing TAM ratings to a non-PBA member. These clauses clearly indicate that PBA's approach towards non-PBA members is discriminatory and applies dissimilar conditions as compared to broadcasters who are members of PBA which is a violation of Section 4 read with Subsection (2)(f) of the Act. Regarding Clause 3.5 of Agreement 1, PBA mentioned that these clauses were included to ensure quality control and to ensure that standards set to ensure compliance were not bypassed, however PBA failed to explain how having PBA's membership or approval is going to ensure the same in the instant matter. The anti-competitive



ML.

effects of Agreement 1 will be more exposed when analyzed collectively with the other two agreements.

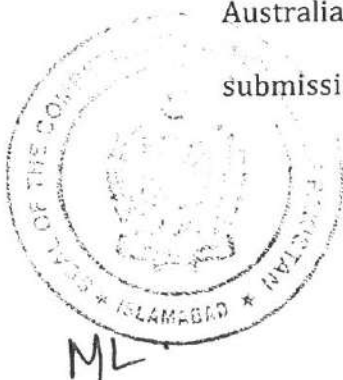
Agreement 2

38. Agreement 2 is a Joint Venture ('JV') agreement between PAS and PBA for the establishment of BAC signed in November 2017 and will continue to be in force until terminated by any of the parties. BAC submitted to the Enquiry Committee that it operates as a non-for-profit body, *inter alia*, to control and manage a transparent TAM and any other media measurement, and to establish a new system for authentically checking the ratings of television channels. Clause 4.1 of JV is alleged to have anti-competitive effects and in violation of section 4 of Act.

39. According to Clause 4.1 of Agreement 2, BAC comprises of:

- a) 06 members nominated by PAS
- b) 06 members nominated by PBA
- c) Representatives of Media Houses of Pakistan, nominated by mutual consent of PBA and PAS and a Chairman appointed by the Board of Directors.

40. BAC submitted to the Enquiry Committee that it is modelled after a Joint Industry Committee ('JIC') which is a globally recognized model for the management of TAM research, in practice in jurisdictions like UK, EU and Australia among others. We are in agreement with the above mentioned submission that this model is indeed one of the three models in vogue for the



management of TAM research and service. The Commission of European Communities in Case No COMP/M.5232 -WPP / TNS mentioned the following:

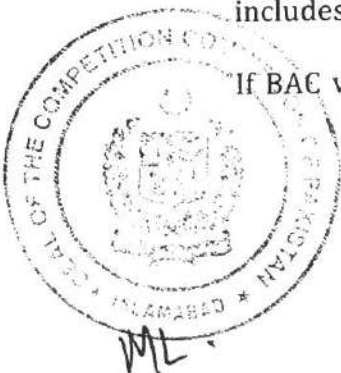
"In each EEA country, the provision of TAM services is based on one of the three basic business models: (i) joint industry committees ("JIC"); (ii) media owner ("MO") model; or (iii) proprietary service ("PS").¹⁷ A JIC is jointly set up by broadcasters, advertiser associations, advertising agencies and media buyers. The JIC selects a single TAM provider and negotiates specifications and terms of supply of data. The MO model is set up by a broadcaster or a group of broadcasters. The MO has the power to select the TAM provider through the organization of a tender. As for the PS model, the TAM service provider itself sets up and operates the TAM service on its own account."

41. However, in addition to the above, the WFA/EACA Guide to the Organization of Television Audience Research ('WFA Guide') opines the following:

"It is also essential that all interested parties have the option to make their views known. Where broadcasters are grouped in several sectors, each should be represented on the committee. In some cases, each broadcaster will be represented individually on the JIC."

42. Looking at Agreement 2, in light of WFA Guide, all interested parties must be included in a JIC and there must be individual representation of each broadcaster on the JIC. However, looking at the constitution of BAC, it only includes members of PBA, PAS and representatives of Media Houses of Pakistan.

If BAC were to follow the best industry practices around the world, non-PBA



members should have been given representation in the JIC, but they are being excluded from it. It is a decision on part of BAC, an association of undertakings, designed to exclude and restrict entry of non-PBA members from BAC, and its anti-competitive effects are exacerbated when read collectively with the other two Agreements. Creating barriers to entry and excluding stakeholders from the market is a violation of Section 4 read with Sub-section (2)(a) of the Act. Reliance is placed **IN THE MATTER OF SHOW CAUSE NOTICE ISSUED TO INSTITUTE OF CHARTERED ACCOUNTANTS OF PAKISTAN (ICAP) (F. NO: 1(52)/ICAP/C&TA/CCP/2012)** in which ICAP issued a directive whereby ICAP prohibited its members and chartered accountant firms from training non-ICAP students. The commission held that:

"we are of the considered view that the July Directive, as well as the October Circular, has effect of preventing, restricting and reducing competition in the relevant market by foreclosing the public practice component of the relevant market for non-ICAP students and raising barriers to entry in the ancillary market for provision of accountancy services, is in violation of Section 4 of the Act and the same are therefore without any legal force."

43. In a similar case of **LDI Operators** the commission held that:

"It must be appreciated that the ICH Agreement places an almost insurmountable barrier to the entry of new players. A potential new entrant first needs a license from PTA to enter the market. On top of it, during the term of the ICH Agreement, which is indefinite, a potential new entrant



ML.

(Handwritten signature)

would also need all the LDI Operators to agree to the entry in terms of the condition laid out in clause 11.2 of the ICH Agreement.”

Agreement 3

44. Agreement 3 is an agreement between BAC and Medialogic entered into on 5th January, 2018 and is valid for a period of 5 years. BAC submitted to the Enquiry Committee that the agreement was entered after a long tender process and it had hired a specialized third party, international technical expert/consultant to oversee and assist the tender process. Agreement 3 was undertaken by BAC to engage Medialogic for the provision of audience measurement, rating and viewership data services. The clauses in question in Agreement 3 are:

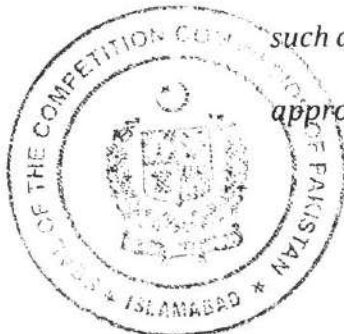
a) *1(f) during the term*

a) Medialogic shall be BAC's exclusive provider of services similar to the Services.

b) BAC shall endorse Medialogic and the Services as being the 'official Industry currency' for the provision of TAM ratings in Pakistan”.

b) *Clause 2(f) Representation and Warranties of Each Party states:*

“During the Term, Medialogic and Kantar shall not contract with any entity (corporate or individual) in furtherance of the Services that conflicts, directly or indirectly, with the interests secured herein other than the Direct Customer Contracts. However, if there arises such a need to contract with any entity, it shall require prior written approval from BAC”.



ML.

[Handwritten signature]

c) *Clause 3(b) states:*

"Provide daily viewership ratings Data through Instar on a daily basis, based on 1,800 meters installed in the main television set of 1,800 households, for the viewing of the following satellite and terrestrial television channels throughout urban areas of Pakistan, including but not limited to Karachi, Lahore, Islamabad and Rawalpindi:

- a) *Geo Tv,*
- b) *ARY Digital,*
- c) *PTV,*
- d) *Hum Tv;*

Or other channels as maybe mutually agreed between BAC and Medialogic.

45. BAC in defense of the agreement mentioned to the Enquiry Committee that the agreement did not prohibit advertisers and broadcasters from availing ratings from other rating companies in Pakistan and does not impose ratings of Medialogic on advertisers and broadcasters who may or may not rely on the same. However, the Commission is of the view that Agreement 3 expressly endorses Medialogic as the "official industry currency" which essentially translates into it being the only acceptable rating acceptable to broadcasters and advertisers alike.



ML .

46. BAC, regarding Clause 2(f) and 3(b) of Agreement 3 submitted to the Enquiry Committee that the agreement did not place any prohibition on Medialogic from continuing its independent contracts with customers for services similar to providing ratings, which were entered into on or before the date of Agreement 3 and although Clause 3(b) requires mutual agreement between BAC and Medialogic before providing viewership ratings to other channels not specified in Agreement 3, but in practice, ratings are already provided to all channels. The Commission is of the view that Clause 2(f) requires Medialogic to seek permission from BAC prior to providing their services who are not BAC's constituent members, which in turn will foreclose the market for broadcasters who are not members of PBA. The Commission is also of the view that if the ratings were provided to all the channels, according to BAC, then why clause 3(b) was included in Agreement 3, that requires mutual consent of BAC and Medialogic. Agreement 3 also serves as a barrier to entry for non-PBA or non-BAC members who are new to the market, as Agreement 3 only allowed Medialogic to continue providing services to those channels who had already entered into an agreement with them before or on the date of Agreement 3 which is a violation of Section 4 (1) read with Sub-Section (2)(a) of the Act. . Reliance is once again placed on **IN THE MATTER OF SHOW CAUSE NOTICE ISSUED TO INSTITUTE OF CHARTERED ACCOUNTANTS OF PAKISTAN**

ICAP (F. NO: 1(52)/ICAP/C&TA/CCP/2012) and LDI Operators.



ML .

5

Collective Analysis of Agreement 1, 2 & 3

47. By looking at the economic side of things, the broadcasters, advertisers and the rating companies are interconnected and rely on each other to run their businesses. The above mentioned three agreements involve the business interests of broadcasters, advertisers and rating companies. Agreement 1 excludes non-PBA members from receiving ratings from Medialogic, and includes an extra criteria for non-PBA members to obtain ratings from Medialogic. Along with that, Medialogic is also threatened with monetary consequences if they were to provide ratings to a non-PBA member without prior approval of PBA. Non-PBA members have also been excluded from being part of BAC (Agreement2), as there is no representation of them in their constitution, and Agreement 3 prohibits Medialogic from providing services to non-PBA or non-BAC members without prior approval from BAC, hence foreclosing the market and creating barriers to entry for non-PBA members and new market entrants.

48. The conduct of PBA and BAC also shows the effects of the three agreements between the Respondents. Medialogic was issuing ratings of Complainant No.1 before the signing of Agreement 1 and Agreement 3, however, it stopped issuing Complainant No.1's ratings after the signing of the said agreements. Complainant No.1 had secured release orders for advertisement through BLITZ Communications and Brainchild Communications (Pvt.) Limited, but those release orders were cancelled by BLITZ Communications and Brainchild Communications as Complainant No.1's ratings were not being issued by



Medialogic as it was not a member of PBA nor did it have the approval of BAC and issuance of ratings by Medialogic which was made a pre-condition in order for those release orders to go through.

49. The Complainants also applied for membership of PBA but it was denied membership and as part of the application process private and sensitive information was demanded from the Complainants. This was discriminatory treatment on part of PBA as no such information had been demanded from other members who had applied for membership and were granted the same. In addition to the above, PBA had also approached Brainchild Communications (Pvt.) Limited and BLITZ Communications and warned them of the Complainants connections with AXACT, who had many criminal cases pending in courts. It is important to notice that the demand of such sensitive information falls within the purview of PEMRA, which is the relevant regulatory authority, which conducts its due diligence on these matters while granting a broadcaster license to operate under PEMRA Ordinance 2002 and PEMRA Rules 2009. Any licensee of PEMRA may be automatically assumed to have fulfilled all the criteria necessary for a broadcaster. The Complainants had also applied for an N.O.C/approval from BAC and BAC had postponed the board meeting in which the said approval was to be given or denied and no further information till date had been received by Medialogic or the Complainants regarding the N.O.C/approval.

50. The conduct of the BAC and PBA clearly show the anti-competitive effects of the ~~three~~ agreements between the Respondents. BAC comprises of major



ML.

[Handwritten signature]

advertising agencies and media houses in Pakistan. Medialogic being endorsed as the “official industry currency” by BAC, the advertisers rely on Medialogic’s ratings to place their advertisements with broadcasters. By denying ratings to non-PBA and non-BAC members, including the Complainants, PBA has divided or shared the market for TV advertisement airtime between its member undertakings which is a violation of Section 4(1), read with Sub-section 4(2)(b) of the Act.

51. Therefore, Clauses 3.5.1, 3.5.3, 3.5.4 and 10.2 of Agreement 1 have the object and effect of foreclosing the relevant and allied markets for potential competitors of PBA’s members and also amounts to a decision by PBA imposing a restrictive trading condition, in violation of Section 4 (1), read with Sub-section (2) (a) of the Act.

52. Clause 3.5 of Agreement 1 applies dissimilar conditions on otherwise equivalent transactions on non-PBA members putting them at a competitive disadvantage and are due to the clauses laid out by PBA through Agreement 1 and also its conduct vis-à-vis the Complainant. Therefore, Clause 3.5 of Agreement 1 and the conduct of PBA is a violation of Section 4 (1), read with sub-section (2) (f) of the Act.

53. Agreement 2 is designed to restrict entry of and exclude non-PBA members from the JIC/BAC and its anticompetitive effects are exacerbated by Agreement 3 which requires approval of BAC before Medialogic can grant ratings to any other customer. Therefore, Agreement 2, also amounting to a decision by BAC and



ML.

[Handwritten signature]

PBA, is anti-competitive in terms of Section 4 read with sub-section (2) (a) of the Act.

54. Clauses 1(f), 2(f) and 3(b) of Agreement 3, also amount to a decision by BAC imposing a restrictive trading condition, which is a violation of Section 4 (1), read with sub-section (2) (a) of the Act.

55. Regarding PBA and BAC who are associations of undertakings, it is imperative to mention that the Commission is cognizant about the existence of trade associations and the positive role which they might play in a market economy. The Commission will reiterate its position previously taken in **2016 CLD 289** and in its Order **in the Matter of Show Cause Notice issued to M/s Pakistan Poultry Association dated 16 August 2010.** The Commission has observed the following:

"We believe that trade associations can play an important role in the development of the sector they represent. The Commission has already observed in its ICAP final order that the most important aim of the association is to develop consensus amongst its members regarding public policies that affect the sector. Associations also engage in activities that increase awareness of industry standards and technologies in the industry. At other times, associations may also serve as a platform to share useful information about the sector such as useful historical pricing data, (which, for instance, might help members to know where their business concerns are less efficient). However, associations must also be extremely careful about what sort of activities may violate competition law. Discussion,



ML.

[Handwritten signature]

deliberation and decisions regarding purely business concerns like current and future pricing, production and marketing are anticompetitive and should be avoided at all costs by the associations. Associations have a responsibility to ensure that their forum is not used as a platform for collusive activities. The rule of thumb is not to allow discussion, deliberations or sharing of sensitive commercial information that may allow members, who are competitors, to coordinate business policy. Ensuring that every, or even one, member has a profitable business is not the job of an association."

IssueNo. (ii): Whether the Commission has the jurisdiction to take cognizance of this matter, pursuant to the orders passed by the Supreme Court of Pakistan?

56. Before getting into the matter of jurisdiction, the Commission deems it pertinent to address two preliminary objections raised by the Respondents.

- a) The Constitutionality of the Commission was questioned by one of the Respondents and it was alleged that the establishment of the Commission is liable to be struck down and therefore the Enquiry Report is a nullity in the eyes of the law. The Commission has cleared its position regarding its constitutionality on many occasions and would like to do the same here. At the outset, it is a matter of record that a three-member bench of the Lahore High Court has upheld the act as being constitutionally valid and has dismissed the challenges assailing the legislative competence of the federation to enact law on competition. (See. **LPG Association of**



Handwritten signature or mark.

Pakistan versus Federation of Pakistan, 2021 CLD 2014). The matter is currently pending adjudication before the Supreme Court of Pakistan. The Commission has held time and again in its previous orders including the **LPG Association of Pakistan and Jamshoro Joint Venture Ltd Order** that it is not for the Commission to address the objections raised as to the constitutionality and validity of the Act. Hence, we proceed on the assumption that the existence of the Commission and the Act under which it exercises power is legal and valid.

- b) As for the objection regarding the initiation of proceedings under Section 30 of the Act, Medialogic objected that there is no substantiated allegation or assertion in the complaint of any contravention of Chapter II of the Act, and no *prima facie* evidence of the same has been provided to the Commission. Medialogic asserted that the Commission needs to form an opinion regarding the merit of the complaint received and it needs to be based on the material that has been provided to the Commission. It must be noted that the Enquiry Report was considered by the Commission. After deliberating on the findings of the Enquiry Report, the Commission formed the opinion that violations on account of PBA, BAC and Medialogic in terms of findings of the Enquiry Report are made out accordingly and it was decided that proceedings must be initiated against the Respondents under Section 30 of the Act for the *Prima facie* violations of Section 4 of the Act as per the findings of the Enquiry Report.



57. The Commission has the mandate and jurisdiction to take cognizance of all the matters relating to competition and Competition Law. The Commission is of the view that the market for the issuance of TAM ratings in the country was an unregulated one at the time and Supreme Court of Pakistan in the matter **CR.O.P 108/2018 in Human Rights Case No. 34069/2018** looked at a completely different aspect in the said matter. The Supreme Court of Pakistan determined that PEMRA has the power under Section 39 "**Power to make rules**" of Pakistan Electronic Media Regulatory Authority Ordinance 2002 to make rules about issuing licenses to companies for the provision of TAM ratings to different Tv channels in the country.

58. On the other hand, the proceedings under the Act in the current matter looked at the aspect of any violation law of Competition Law. The current matter has been put to scrutiny under Section 4 of the Act, to determine whether the different agreements/arrangements between PBA, BAC and Medialogic amount to a violation of Section 4 of the Act, which is purely a Competition Law concern. The Commission is of the view that matters of competition in a certain market fall under the sole Jurisdiction of the Commission and the Commission has full authority to entertain such matters.

59. The Supreme Court of Pakistan, in deciding the afore-mentioned case, issued directions to PEMRA, to regulate and issue licenses to rating companies for the provision of TAM ratings to channels, and the indirect effect of such directions had resolved and rectified the competition concerns that had been raised due to the agreements between Respondents. The grievances of the Complainants had also been resolved indirectly through such directions, however the issue of competition was not directly addressed by the Supreme Court of Pakistan.



ML

60. It must be noted that even if the agreements between the respondents are of no legal effect anymore pursuant to the orders passed by the Supreme Court of Pakistan through a consent decree, the agreements were in effect for a reasonable amount of time and were in violation of the Section 4 of the Act, and the Commission has the authority under the Act to take cognizance of such matters.

61. It must also be noted that Competition Act 2010 is a special law when it comes to matters of Competition. Although **Section 23 of PEMRA Ordinance 2002**, does provide some guidance on the exclusion of Monopolies, the Competition Act 2010 is a special law on this matter as the violations such as Abuse of Dominant Position, Prohibited Agreements, approval and non-approval of Mergers and Acquisitions and Deceptive Marketing Practices are covered in detail under the Act to ensure consumer welfare and a free and open market to all competitors. The same has been established in one of the Commission's earlier orders; **ICH Agreement inter se the LDI Operators** reported as **2012 CLD 767**, wherein the issue of conflict and overriding effect of PTRAs 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.



ML

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.

62. Similarly, the PEMRA Ordinance 2002 contains no provisions that envisage or provide for an enforcement mechanism to remedy anti-competitive practices.

The PEMRA Ordinance 2002, appears to be a special law when it comes to the regulation of, *inter alia*, licensed activities. For alleged anti-competitive practices, Competition Law is the special law for all such purposes and the Commission has the power to take cognizance of such matters. Reliance, in the matter of jurisdiction, is also placed on *In the matter of Pakistan Telecommunication Company Limited, 2019 CLD 116* and *In the matter of Defense Housing Authority Islamabad/Rawalpindi.*

63. In terms of **spillover effect**, the TAM data services are provided to channels which are aired all over Pakistan, and the advertisements shown on such channels also target customers from every part of the country, and has an effect on trade and commerce beyond the boundaries of a province, and the Commission has the

jurisdiction to take cognizance of the matter. Reliance in this regard is being placed upon *LPG Association of Pakistan vs. Federation of Pakistan etc. WP NO. 9518.*



52

Decision and Penalty

64. Although the agreements among the Respondents are in violation of Section 4 (2)(a), 4(2)(b) and 4(2)(f) of the Act, the Commission has decided not to impose any penalties on the Respondents on the fact that the grievances of the Complainants have already been resolved by the Supreme Court through a consent decree and the law regulating the TAM data and ratings has been changed which has changed the landscape of the market. The Commission also gave the Complainants multiple chances to establish if there were any other grievances, apart from the ones resolved through the Supreme Court Order, which the Commission may adjudicate upon, but they failed to do so. However, the Commission is still inclined to issue directions of a prohibitory nature to the Respondents under Section 31(b) of the Act. The Respondents are warned against engaging in any such activities in the future, and if any such activities are repeated, the Commission will be inclined to take strict action against such entities.

65. In the view of foregoing, the Respondents are directed to file commitments with the undertaking that they shall not repeat the violation of the nature identified in this order and shall act in accordance with the law. Also, PBA is directed to confirm the status of BAC and to provide details in respect thereof, as BAC was an entity established as a result of joint venture between PBA and PAS.



ML.

66. Failure to comply with the aforesaid directions and not submitting the commitments within 30 days of issuance of this order shall entail a penalty, in accordance with Section 38 of the Act, on each of the Respondents.

67. These proceedings are disposed of in terms of the above.



(Ms. Bushra Naz Malik)
Member



(Mujtaba Ahmad Lodhi)
Member



Islamabad, the 1st December, 2021