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**COMPETITION IN
TELECOM SECTOR IN PAKISTAN**

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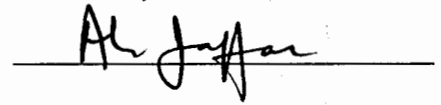
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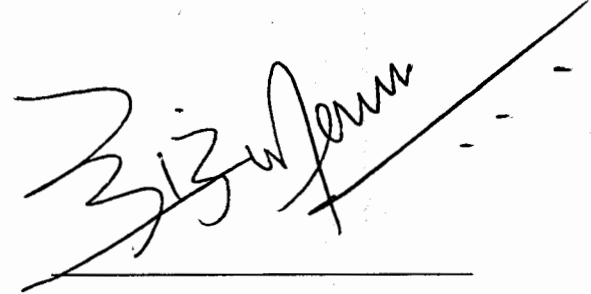
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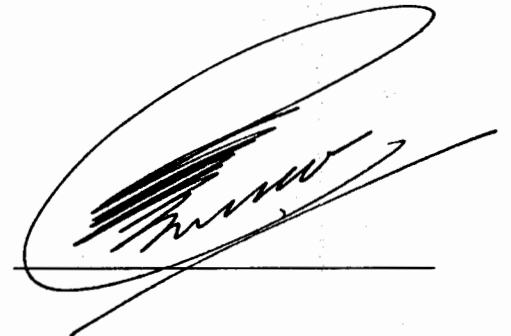
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COMPETITION IN THE TELECOM SECTOR IN PAKISTAN

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Introduction

Liberalization in utility sector has increased the economic growth in the country. Like other countries in all over the world liberalization and deregulations in the telecom sector has drastically improved the economic growth of Pakistan. More specifically privatization and deregulation in telecom sector has given its positive result economically as well as created competitive environment in the telecom industry. The growth in telecom industry after deregulations policy issued by the Government of Pakistan in 2003 can be observed. The issuance of mobile licenses, new entrants in fixed telephony and privatization of Pakistan Telecommunication Company Limited (PTCL) has significantly changed the telecom industry. Such remarkable achievements resulted in provision of telecom service and systems on best quality of services, increase in teledensity and accessibility of cellular and fixed telephony services on very reasonable rates which, could not be imagined without privatization of PTCL and Government policies.

In addition to the provision of telecom services and system by new entrant after obtaining licenses from Pakistan Telecommunication Authority (PTA) has entered into a competitive regime. It would not be wrong to say that after 2003 in Pakistan beside growth in the telecom industry competition came into being in telecom sector.

In fact, in Pakistan, Monopoly Control Authority (MCA) is the only authority, which regulates competition. Unfortunately, the role of MCA in regulating competition in general is not appreciated. In 2002 in Monopoly Control and Restrictive Trade Practices

Ordinance (MRTP) all specific regulators have been given a power to regulate competition to their sector. After deregulations in telecom specifically there is a need to have a specific regulator to regulate competition in its sector like telecom sector. The Pakistan Telecommunication (Re-organization) Act, 1996, under section 3, establishes PTA that has been given power to regulate the competition in telecom sector but as such no comprehensive regulations or rules as to regulate competition in telecom sector are available. Keeping in view the aforementioned development I have selected this topic for LL.M- (ITL) research work so that the problems being faced or to be faced by PTA can be analysed and a way out mechanism be developed to regulate competition. It is hoped that the after completing the thesis which will be based on studying the telecom market, its development in the country and the scope of competition in general, the gap to regulate competition in the sector will be filled.

First chapter relates to the technical part of telecommunications in Pakistan in detail, which includes definition of telecommunication, legal history of telecommunication & its gradually developments in Pakistan, establishment of PTA & its functions, powers and role as sector specific regulator, etc. I will also discuss the tariff regulations issued in 2004 and the mechanism that will be followed by the Authority while determining Significant Market Power in telecom sector.

Second chapter discusses the issue of competition, its definition, scope of competition, various factors that play a cardinal part in competition issues and main features of competition etc. More specifically the issue of competition and its legal

development in Pakistan will be discussed. The relationship of MRTP with sector specific regulator would be a turning point of my research work that will make us clear how specific regulator sector has power to regulate its relevant sector. Lastly, in this chapter I have highlighted and discussed the issue of implication of competition in the relevant market.

Last chapter dealt with the outcome of preceding chapters where I have discussed telecom services matters and talked about as to how competition is determined in various telecom services like card pay phone services, long distance international, local loop, mobile and internet.

Chapter No.1

Legal History of Telecommunication in Pakistan

1.1 Definition of Telecommunication

The word telecommunication is a combination of two words i.e. Tele and Communication. The word Tele in Latin means Distance¹. Tele combining form from Greek far, far off, is often used in naming or designating devices or instruments, usually electrical, which control or direct action of distant apparatus². The word tele is used with other words like Telegraph, Telephone, Telescope³, Teletalk⁴, Teletype⁵, Television⁶, Telex⁷, Telemann⁸, Telemachus⁹, Telemetry¹⁰, and Teleology¹¹ etc. Terminologies those

¹ www.saba.edu.my/cc044.wcdd/history-of-telecommunication.html.

² *Columbia Broadcasting System v. Technicolor Motion Picture Corp.*, 166 F.2d 944, 35 C.C.P.A (Patents) 1019-word and phrases permanent edition vol. 41 St. Paul, Minn. West Publishing Co. at page No.378.

³ a lens, mirror, or other reflecting surface used to form an image of a distant object, together with microscope to enable the observer to examine this image in detail.

⁴ It is an instrument capable of detecting wave splash of other craft, posted on bow of the libellant's tow, which is not adequate substitute for a human lookout.

⁵ It is a machine which simply received information enabling gamblers to ascertain results of horse racing events on which they wager.

⁶ Television and telephony have in common the transmission of voices, for sounds including the voices, which usually accompany the pictures of the person or thing televised.

⁷ In 1958, a system of direct dial teleprinter exchanges, called Telex. Funk & Wagnalls New Encyclopedia, Vol.25 at page No.186.

⁸ Telemann Gerog Philip (1681-1767). German composer, born in Magdeburg, Purssia and died in 1930.

⁹ In Greek methodology, son of Odysseus, king of Ithaca and his wife Penelope.

¹⁰ System that consist in the use of electrical equipment for collecting and transmitting data to a distant station, where they are recorded. One important use of telemetering equipment is the measuring, relaying and recording of physical conditions encountered or produced by high-speed aircraft, rockets and spacecraft.

¹¹ The science or doctrine that attempts to explain the universe in terms of ends or final causes. Teleology is based on the proposition that universe has design and purpose. In Christian theology, teleology represents a basic argument for the existence of God; in that the order and efficiency of the natural world seem not to be accidental.

denote convey and used in telecommunication specifically are described, as under in detail.

1 Telegraph:

Telegraph means writing at a distance. We use the telegraph for sending messages over long distances. The telegraph sends messages as electricity flowing through a wire. The electricity comes from a battery. It is a system of communication employing electrical apparatus to transmit and receive signals in accordance with a code of electrical pulses. Originally the term telegraphy referred to any form of communication over long distance in which messages were transmitted by signs or sounds. According to Ploybius, a Greek historian of the second century BC, the ancient Greek used torch signals in much the same way that navies use semaphore flags. Various combinations of torches were used to represent the letters of the alphabet, and regular torch stations were setup throughout Greece. Attempts to use phenomena associated with electricity in communication began long before the 19th century, but the first practical suggestion for construction of an electric telegraph did not come until 1753: In that year the British surgeon Charls Morrison suggested an instrument that would employ electricity sent over wires for a great distance, with the earth completing the circuit between two points. The first instrument for telegraphic transmission were invented in the U.S by the American inventor Samuel Morse in 1837 and in Great Britain the same year by the British physicist Sir Charles Wheatstone in Collaboration with the British engineer Sir Willaim F. Cooke (1806-79). Modern facsimile telegraph system can be used to transmit and receive instantaneously photograph, maps and graphic and printed material. The term telegraphy

is sufficiently broad and comprehensive to include any apparatus for transmitting messages by means of electric current and signals¹².

The term telegraph has been defined in the Telegraph Act, 1885 ACT XIII of 1885 as amended by Act LXVII of 1976. It means any apparatus, equipment or plant used for transmitting, emitting, making or receiving signs, signals, writing, speech, sound or intelligence of any nature wire, radio or visual or electromagnetic system.

The telegraph Act provides some privileges and powers to the Government as to grant licenses, to take possession of licensed telegraph, to intercept messages, to establish telegraph on land or railway, to responsible for loss of telegraph, to enter on property in order to repair and remove telegraph lines or post, power to recover outstanding dues in respect of telegraph. To extent the jurisdiction of the authority¹³ certain powers were given on the property come under the control of management of Local Authorities¹⁴, to alter position of gas or water pipes or drains. In case of any dispute between telegraph authority and local authority in consequence of the local authority refusing the permission or in consequences of the telegraph authority omitting to comply with a requisition made under the Act had to be determined by the officer appointed by the Federal Government. Under section 4 of the Telegraph Act Federal Government was exclusively empowered to grant a license to any person to establish, maintain or work a telegraph with any part of Pakistan. The Federal Government was empowered to make rules under the Act and published in the official Gazztte subject to such restriction and conditions as it thinks fit

¹² FRUNK & Wagnalls New Encyclopedia

¹³ means director general Pakistan Telegraph and Telephone Department and includes any officer empowered by him to perform all or any of functions of the telegraph authority under the Act.

¹⁴ means any municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Federal Government or any provincial government with the control or management of any municipal or local fund.

the establishment, maintenance and working of wireless telegraph. In case of any breach of license condition the license holder had to be punished with a fine of one thousand rupees. As to discourage the unauthorized use of services various penalties like intrusion in to signal-room, trespass in telegraph office or obstruction, unlawfully attempting to learn contents of messages, intentionally damaging or tempering with telegraph, theft on telegraph line, telegraph officer or the official making away with or altering or unlawfully intercepting or disclosing messages or divulging purport of signals etc were such offences which were addressed in detail and different amount as to penalizes the accused were prescribed.

2. Telephone:

Telegraph wire were expensive. Inventors were trying to find ways to send several messages at the same time, using one electric current wire. In 1876 Alexander Graham Bell, a Scotsman who had gone to live in the United State invented a receiver that made not a single bussing or clicking noise, but several tones noises of different musical pitches. Each of the tone represented a different message. This was the first step towards a telephone receiver, though it was not intended for that purpose. The human voice contains a wide range of tones. The telephone receiver must reproduce at least part of this range in order to make a sound resembling a voice. One day Bell heard a twanging noise coming from his receiver. It was a copy though a poor one, of the noise made by a spring in the next room near the sending apparatus¹⁵. In 1877 he produced the first telephone to transmit and receive the human voice with all its quality and timbre.

¹⁵ New Encyclopedia of Science Vol.14 at page No.1994

The term telephone is defined as an invented device by which the impulse of sound may be transmitted from one end of a line to other and thus a message transmitted by voice of the sender. In general sense the name of telephone applies to any instrument or apparatus, which transmits sound beyond the limits of ordinary audibility but the name of ordinarily is technically and primarily restricted to an instrument or device, which transmits sound by means of electricity and wires similar to telegraphic wires. The exact meaning of the word telephone may vary according to the sense in which it is used and so may refer generally to the art of telephony as an institution or more particularly to the apparatus used in the transmission and reception of telephonic messages and in the latter case may refer either to a particular instrument or the entire system of appliances used in the transmission of telephonic messages¹⁶.

3. Telegraph and Telephone compared and distinguished

Strictly speaking, the telegraph and telephone are different and clearly distinguishable. They may have certain points of resemblance, such as the use of poles and wires and the employment of an electric current and the common object of transmitting intelligence to a distance, but they also have well defined differences, particularly with regard to the character of the terminal instruments and the mode of transmitting messages. This distinction leads to important differences with respect to the manner in which such companies transact business with their patrons and the facilities, which they are required to furnish.

The term telegraph has been held sufficiently broad and comprehensive to include the telephone and in construing statutes the telephone is to be considered a telegraph

¹⁶ Corpus Juris Secundum, by Francis J. Luden and Harold J. Gilbert West publishers Co. Vol.86 at page No. 12-13.

unless express provisions are available under the statute. The term telegraph does not, however, always or necessarily include the telephone, particularly where there is separate legislation relating specifically to telephones.

4. Communication

The word Communication is derived from the word "communicate" which means to impart, bestow or convey, to make so, to give by way of information and this sense it may be equivalent to synonymous with converse, give and make known. The word communication is commonly used to denote the fact that one person has brought an idea to the perception of another and is defined as meeting the act of communicating. It also means intelligences, news that which is communicated or imparted written or verbal messages¹⁷.

The aforementioned discussion resulted out that the word telecommunication may be defined in its literal sense; a telecommunication is a distance communication. Telecommunication is the technique of transmitting a message, from one point or place to another with the typical additional attribute of being bi-directional. In practice it also recognizes that something may be lost in the process; hence the term 'telecommunication' covers all forms of distance communications including radio, telegraphy, television, telephony, data communication and computer networking.

The elements of a telecommunication system are a transmitter, a medium (line) and possibly a channel imposed upon the medium, and a receiver. The transmitter is a device that transforms or encodes the *message* into a physical phenomenon; the *signal*. The transmission medium, by its physical nature, is likely to modify or degrade the signal

¹⁷ Word and Phrases Vol. 8 St. Paul Minn West Publishers at page No.190-191

on its path from the transmitter to the receiver. The receiver has a decoding mechanism capable of recovering the message within certain limits of signal degradation. In some cases, the final "receiver" is the human eye and/or ear (or in some extreme cases other sense organs) and the recovery of the message is done by the brain. Telecommunication can be point-to-point, point-to-multipoint or broadcasting, which is a particular form of point-to-multipoint that goes only from the transmitter to the receivers.

No definition of telecommunication has been given under the Pakistan Telecommunication (Reorganization) Act, 1996 (the "Act"). The reason for non provision of separate definition may be that the term telecommunication include system and service hence, it is defined with word as telecommunication system and services. The definitions provided under the Act are that the telecommunication system is an electrical, electro-magnetic, electronic, optical or optio-electronic system for the emission, conveyance, switching or reception of any intelligence within, or into, or from Pakistan, whether or not that intelligence is subjected to rearrangement, computation or any other process in the course of operation of the system, and includes a cable transmission system, a cable television transmission system and terminal equipment¹⁸.

1.2 Evolution of Telecom Sector in Pakistan

Pakistan like other developed countries adopted philology of privatization rather than controlled by the state. Pakistan Telecommunication Company Limited (PTCL) predecessor of Telephone and Telegraph (T&T) Department and subsequently Pakistan

¹⁸ Section 2 (t) of the Pakistan Telecommunication (Re-organization) Act, 1996

Telecommunication Corporation (PTC) have been put through this process. In late 1990's the beginning of privatization process in the telecom industry was started. Subsequently, legislature passed a Pakistan Telecommunication Corporation Act, 1991 and converted Telegraph & Telephone (T&T) into Pakistan Telecommunication Corporation. To carry out the process further, the Act was passed which apart from establishing the Pakistan Telecommunication Authority (an independent regulatory body) also converted PTC into PTCL, a limited company working on commercial basis, and Special Communication Organization, National Telecommunication Corporation, Frequency Allocation Board, and Pakistan Telecommunication Employees Trust.

1.2.1 Legal frame work in Pakistan

The first legislation which thoroughly dealt with telecommunication in Indian sub-continent was Telegraph Act, 1885. This was supplemented by Wireless Telegraphy Act, 1933. Pakistan adopted both of these legislations.

The decade of 80's saw rapid technological developments and innovations in the telecommunication sector, and the introduction of deregulation and privatisation initiatives globally. There was a strong feeling in a number of countries that a modern and efficient telecommunication infrastructure offered competitive advantages, and opened up doors to economic opportunities. In a world where barriers between countries were being removed, markets were opening up and competition increasing day by day. One of the key competitive advantages a country could enjoy in the situation was to have a modern telecommunication infrastructure. At that time, a number of countries were planning on restructuring of their telecommunication markets in order to keep pace with

6. Expansion of services and fulfilment of pending demand; and
7. Re-defining the role of the government from an operator to that of a regulator.

In pursuance of these goals, private sector operators were introduced in various value added services. Selling off 26% of its equity to a strategic investor and transfer of management control started the privatisation process of PTC. In addition, establishment of necessary regulatory framework was initiated for the sector. The Pakistan Telecommunication (Re-Organization) Ordinance was promulgated in July 1994 that resulted in the establishment of two regulatory agencies:

- The Pakistan Telecommunication Authority (PTA) – to regulate the telecommunication sector, and;
- Frequency Allocation Board – to manage the radio frequency spectrum

Two network operating entities were also created, namely:

- PTCL (Pakistan Telecommunication Company Limited), and;
- NTC (National Telecommunication Corporation)

The telecommunication industry is regulated by the PTA – an autonomous body established under section 3 of the Act, an Act of the Parliament to provide for re-organization and regulation of telecommunication industry in Pakistan, transfer of telecommunication services to private sector and for matters relating to promote

consumers' interest and rapid modernization of telecom systems in Pakistan. The Authority has the following major functions¹⁹:

- i) regulate the establishment operation and maintenance of telecommunication systems and the provision of telecommunication services in Pakistan;
- ii) promote and protect the interests of users of telecommunication services in Pakistan;
- iii) promote the availability of a wide range of high quality, efficient, cost effective and competitive telecommunication services throughout Pakistan;
- iv) promote rapid modernization of telecommunication systems and telecommunication services; and
- v) make recommendations to the Federal Government on policies with respect to international telecommunications, provision of support for participation in international meetings and agreements to be executed in relation to the routing of international traffic and accounting settlements.

PTA has been vested with powers²⁰ by the federal government to effectively perform its functions.

1.3 Telecom Law and Liberalization

¹⁹ Section 4 of the Pakistan Telecommunication (Re-organization) Act, 1996

²⁰ Section 5 of the Pakistan Telecommunication (Re-organization) Act, 1996

Terms legislation and liberalization are contrary to each other. However, law or liberty could not be confined into their own quarters, for a law to be enforceable it must relate to the tolerance of the society at-least to such an extent that citizens are willing to obey it. Countries now a day are adopting universal approach to legislation especially in the field of the trade and commerce, which includes telecommunication--the fastest growing industry, because of frequent innovation in technology and access to it via internet/satellite, etc. The recent trend throughout the world is a move away from state controlled economy towards laissez-faire market. Governments are relaxing their control and handing over these utilities. On one hand they are giving freedom to the industry to find its own place in the open market while on the other hand they have setup regulatory bodies to check that the new born freedom is not abused. Pakistan like most countries has enacted the Act a new legislation, to govern telecommunication industry and under it also established the PTA, a regulatory body. The preamble of the Act is evident to ascertain the concept of liberalization in telecom sector states that the purpose and aim of the Act to re-organize telecommunication system in Pakistan by establishing PTA, Frequency Allocation Board, National Telecommunication Corporation and the Pakistan Telecommunication Employees Trust and regulation of telecommunication industry, transfer of telecommunication services to private sector and for matter connected therewith or incidental thereto.

After the promulgation of the Act, PTA has exclusive jurisdiction to regulate establishment of telecommunication services and system in Pakistan. The Act empowers PTA to regulate the telecomm sector. Section 20(1) of the Act provides that "no person shall establish, maintain or operate any telecommunication system or provide any telecommunication service unless he has obtained a license under this Act". The

Authority established under section 3 read with section 5 (1) of the Act has a sovereignty to exercise all its powers as to ensure effective performance of its functions given by the legislature. Primarily aforementioned provisions of the Act give two approaches as through this legislation process of liberalization in telecom sector by promoting competition has stated and secondly it has force of law to control and regulate anti liberalization/anti competitive situations, which adversely affect the telecom sector/industry.

As stated above, before this Act there were two statutes were enacted one deal with the telegraph and other relate to the wireless telegraphy. Section 58 of the Act provides that the provision of the Act shall have effect notwithstanding anything contained in the Telegraph Act, 1885 (XIII of 1885), the Wireless Telegraph Act, 1933 (XVII of 1933), or any other law containing any provision inconsistent to this Act. Though department of Telephone and telegraph have been ceased to exist but their rules and regulation are very much in operation till today.

Like other developed and developing countries Federal Government to achieve the goals as enshrined under the Act deregulated telecom sector by issuing two police i.e., fixed and cellular mobile in 2003 and 2004 respectively. Both policies are still intact and PTA has awarded several fixed telephony licensee and cellular licenses.

In July 2003 fixed line policy was issued which ended the monopoly of PTCL and introduced two kinds of licenses these are known as Long Distance International (LDI) and Local Loop (LL). PTA awarded approximately 12 LDI operators and 76 LL licenses. While as per cellular policy issued on 2004 four two new licenses were awarded to M/s Telenor and M/s Warid Telecom now the total number of mobile licenses are six in

Pakistan. The issuance of both these policies is a step forward towards liberalization in fixed and wireless telecommunication services.

The objectives of these two policies are difficult to summarize in one word i.e., liberalizations or competition. As not only through these policies competition regime came into being but penetration in teledensity and successive economic growth increased through investment by multinational telecom entrants in Pakistan. The brief objectives of both these policies are as under:

1.3.1 Deregulation Policy - Fixed line Policy- July 2003

The policy is designed to achieve the following objectives:

- a. Increase service choice for customers of telecommunication services at competitive and affordable rates
- b. Promote infrastructure development, especially infrastructure that will increase teledensity and the spread of telecommunication services in all market segments (including voice, data and cellular etc)
- c. Increase private investment in the telecommunication sector and encourage local telecom manufacturing / service industry
- d. Recognizing the challenge to incumbent, minimize exposure to the Government's revenue base in the short term
- e. Accelerate expansion of telecommunication infrastructure to extend telecommunication services to un-served and under-served areas
- f. Liberalize the telecommunication sector by encouraging fair competition amongst service providers

- g. Maintain an effective and well defined regulatory regime that is consistent with international best practices;
- h. Maintain consistency with Pakistan's IT and Internet promotion policy of low prices for bandwidth to make Internet access affordable; and
- i. Safeguard Pakistan's national and security interests²¹.

1.3.2 Cellular Policy-Jan 2004

Telecom sector objectives, as outlined in the Telecom Deregulation policy, the following objectives specific to mobile cellular sector are expected to be achieved through this policy:

- i. Promotion of efficient use of radio spectrum;
- ii. Increased choice for customers of Cellular mobile services at competitive and affordable price;
- iii. Private investment in the cellular mobile sector;
- iv. Recognition of the rights and obligations of mobile cellular operators;
- v. Fair competition amongst mobile and fixed line operators; and
- vi. An effective and well-defined regulatory regime that is consistent with international best practices.²²

Speedy innovations of technology in telecommunication and multidimensional features of technology resulted out with another policy in December 2004 which is known as Broad Band policy, so that penetration of broadband service would be made open for all new entrants as well as exiting telecom operators at cheaper rates which

²¹ Deregulation Policy issued by Government of Pakistan on 13th July, 2003.

²² Mobile Policy issued by Government of Pakistan in 2004.

obviously kick out the monopoly of one operators and effects on better and cheaper quality of services in the value added segment. Such steps are evident to determination and achievement of the Government to liberalize telecom sector in Pakistan. This is an endless process until maturity in telecom sector is realized in respect of quality, access of telecom services, telecom system, affordable pricing, anti-competitive behavior among the operators and economic growth in the country. To meet the targets Federal Government time and again and as and when required issued various policy directives under section 8 of the Act which relates either to the status of NTC as an LDI operators, leased dark fiber optic by NTC in 2005 and establishment of mobile pay phone services in October 2006, etc.

Other tools to regulate a sector like telecommunications are known as regulations. Regulations are the instrument through which regulator regulate its sector. Regulations neither burdensome on the regulator nor on the operators or licensee of that sector but is easy way to enforce legal instrument laying with the operators or the licensees as well as straight forward for operators to know the intention of the regulator in terms of its right and obligations of the regulator. PTA drafted telecommunication service regulation in 2000 but due to various reasons could not be gazette notified. Later on, in 2004 PTA notified twelve telecom service regulations. These regulations were though still enforce yet a process to repeal these regulations in light of new regime i.e., Class Value Added Service licensing regime has been started and in final stages.

Subsequent to the new arrangements made in the policies, there was needed to incorporate some changes in the Act so that PTA would have legal jurisdiction to regulate telecom sector in accordance with the Act. Therefore in order to avoid legal lacunas apart from minor changes in the Act some major issues were inserted/added like Right of way,

Universal Service Funds, Access Promotion Contribution, regulate competition and settlement of disputes. Some amendments in the Act have been incorporated.

1.3.3 Amendments in Pakistan Telecommunication (Re-organization) Act, 1996

Following the issuance of policies there was a need to amend the Act. In 2006, the Parliament passed amended Act. The legislature through amendments inserted some new definition like appropriate government²³, Approved Crypto Apparatus²⁴, Federal Government²⁵, Right of way²⁶ including private and public, Public Authority, public mobile switched network, Research and development funds (R&D)²⁷, scarce resources, Universal Service Fund (USF)²⁸. The function of the Authority, as to regulate arrangements amongst telecommunication service providers of sharing their revenue derived from provision of telecommunication service, ensure effective compliance by licensees with Universal Services Obligations, regulate Access Promotion Contribution, settle disputes between licensees and regulate competition in the telecommunication sector and protect consumer rights²⁹ has been inserted.

In addition to functions some powers of the Authority has also been entrusted which include levy fee and other charges at such rates and in respect of such services as may be fixed by it from time to time not exceeding the limits as specified by the Federal Government, regulate the allocation of revenues from international telephony service, other than revenues from leased circuits, between interconnecting licensees that handle

²³ Section 2(ab) of Pakistan Telecommunication (Re-organization) Act, 1996.

²⁴ Section 2(ac) of Pakistan Telecommunication (Re-organization) Act, 1996.

²⁵ section 2(fa) of Pakistan Telecommunication (Re-organization) Act, 1996.

²⁶ Section 2(ma) (mb) (mc) of Pakistan Telecommunication (Re-organization) Act, 1996

²⁷ section 2(qa) and 33 (c) of Pakistan Telecommunication (Re-organization) Act, 1996.

²⁸ Section 2(xa) and 33(A) of Pakistan Telecommunication (Re-organization) Act, 1996

²⁹ SECTION 4(i)(k)(l)(m) of Pakistan Telecommunication (Re-organization) Act, 1996.

international telephony service and between any such licensee³⁰, fair competition in the telecommunication sector exists and is maintained³¹. From jurisdiction point of view under new amendments decision of the Authority are appealable before the High Court or Tribunal under section 7 of the Act, while in case of any disputed between the licensee and the Authority in respect to modification in terms and condition of the license, the matter will be referred to the High Court or tribunal established by the Federal Government.

As discussed above a complete mechanism to handle and resolve the issue of private and public right, establishment and administration of USF and R&D funds of have been provided.

Under the Act, the Authority has no powers to make rules. The legislature has given this power to Federal Government under section 57 of the Act. In new amendments, some more areas have given to Federal Government to make rules on USF, R&D, anti-competitive issues, Access Promotion Contribution (APC), enforcing national security measure in the telecommunication sector and lawful interception.

1.3.3 Issuance of Significant Market Power (SMP) determination

The increase in number of players in the sector, after deregulation in fixed line and mobile telephony, required the telecom regulator to develop a framework that can prevent operators with Significant Market Power (SMP) from abusing their dominant

³⁰ Section 5(p)(q)(r) of Pakistan Telecommunication (Re-organization) Act, 1996.

³¹ Section 6(e) of Pakistan Telecommunication (Re-organization) Act, 1996.

position. For this purpose, it has to determine which operators have SMP status in the relevant markets.

Rule 17 of the Pakistan Telecommunications Rules, 2000 (the "Rules") empowers PTA to determine operators who have SMP status in the relevant markets. Rule 17 (1) of the Rules states as follows:

"An operator shall be presumed to have significant market power when it has a share of more than twenty-five percent of a particular telecommunication market.

The relevant market for these purposes shall be based on sectoral revenues.

The Authority may, notwithstanding sub-rule (1), determine that an operator with a market share of less than twenty-five per cent of the relevant market has significant market power. It may also determine that an operator with a market share of more than twenty-five per cent of the relevant market does not have significant market power. In each case, the Authority shall take into account the operator's ability to influence market conditions, its turnover relative to size of the relevant market, its control of the means of access to customers, its access to financial resources and its experience in providing telecommunication services and products in the relevant market" (see rule 17(2) of the Rules)."

Further clauses 4.2.3.6 & 4.7.2 of the De-regulation Policy and clause 5.10 of the Cellular Mobile Policy also require PTA to undertake regular review of the telecommunication markets to determine SMP operators in the relevant markets. In order to determine the SMP operators, the regulator has to consider following steps:

1. Identification of the relevant markets, in terms of geographical markets and the product/service markets;

2. Parameters to be used for measuring the total size of the market and the market share of the operators; and
3. the collection of data on the economic activities of the organizations operating in the relevant markets in order to calculate total market size and market shares of the operators.

1. Identification of Relevant Markets

The relevant market is determined with regard to geographical area and products/services offered. Geographic market shall be based on the areas where an operator is authorized to operate under its respective License. In this regards, the PTA has determined the following five types of markets on the basis of products/services offered, these are³²:

- (a) Local Loop (LL) Fixed Line telecommunication market;
- (b) Long Distance & International (LDI) Fixed Line telecommunication market;
- (c) Mobile Cellular telecommunication market;
- (d) Leased Lines market; and
- (e) National Interconnection market.

The operators who have been declared by the telecom regulator as having SMP status in the above-mentioned relevant markets shall meet respective and relevant

³² Pakistan Telecommunication Authority's determination passed vide No.15-46/04(Tariff)/PTA dated 24th August, 2004.

obligations as may be determined by PTA from time to time, which include, but may not be limited to, the following:

- (a) Tariff regulation;
- (b) Publication of Reference Interconnect Offer (RIO);
- (c) Carrier pre-selection;
- (d) Accounting separation; and/or
- (e) Un-bundling of services.

2. Criteria for Measuring Market Size and Market Share

The Rules have given the primary criteria to establish whether an operator has SMP status in the relevant market or not. According to the Rules, an operator shall be presumed to have significant market power when it has a share of more than twenty-five per cent (25%) of the relevant market. The Rules have also provided other factors, on the basis of which PTA may determine that an operator with a market share of less than twenty-five per cent of the relevant market has SMP status, or the operator with a market share of twenty-five per cent or more of the relevant market has not SMP status. PTA, while issuing this Determination, follows the primary criteria of more than twenty-five per cent (25%) share of the relevant market for determination of SMP operators.

3. Calculation of Total Market Size and Market Share in the Relevant Markets

The calculation of total market size and market share of the operators in the relevant market the following parameters were taken into consideration:

- i. LL Fixed Line telecommunication market includes provision of access and call services to customers, whether through wire-line or wire-less (WLL), in the respective telecom Regions. For the purpose of determining the total market size and the market share of a particular operator in LL Fixed Line telecommunication market, only the revenues from the provisions of licensed LL Fixed Line telecommunication services to the subscribers were taken into account. Such revenues may include installation/shifting charges, line rental, call charges, etc. For the avoidance of doubt, interconnection revenue from origination or termination services were not be included in the total revenue base;
- ii. LDI fixed line telecommunication market includes provision of long distance and international call services on national basis. For the purpose of determining the total market size and the market share of a particular operator in LDI Fixed Line telecommunication market, only the revenues from the provisions of licensed LDI Fixed Line telecommunication services were taken into account which include call charges for long distance and international outgoing calls, whether collected from the customers directly or from other operators as transit charges. However, revenues from international incoming calls were not included in the total revenue base;
- iii. Mobile Cellular telecommunication market includes provision of wireless-based telecommunication services, other than WLL, on national basis. For the purpose of determining the total market size and the market share of a particular operator in mobile cellular telecommunication market, only the

revenues from the provisions of licensed mobile cellular telecommunication services to subscribers were considered which include line rental, outgoing airtime, roaming charges, revenue from data services, etc;

- iv. Leased lines market includes provision of domestic and international leased circuits. For the purpose of determining the total market size and the market share of a particular operator in leased line market, only the revenues raised by the operator, regardless of the nature of the customer, from the provisions of leased lines services shall be taken into account. For the purpose of clarification, only the revenues from the original rental or sale by the operator, and not the revenues from reselling of leased lines were be considered;
- v. National interconnection market includes provision of call termination services to other operators (fixed and mobile), for local, long distance, and/or international calls that terminate in the territory of Pakistan. For the purpose of determining the total market size and the market share of a particular operator in the interconnection market, revenues from call termination of all types of calls, (local, long distance and/or international from fixed and mobile networks) that terminate in the territory of Pakistan was taken into account. This calculation included revenues from termination of interconnection traffic received from other networks and a notional value for self-terminated own-network traffic. The notional value for self-terminated own-network was calculated by multiplying the number of calls/minutes terminated on the network by the relevant

interconnection charge for call termination. However, revenue from traffic carried by LDI operators, that merely transport calls and do not terminate them, were included. Moreover, the interconnection revenue shall not include the excess of Access Promotion Contribution over the termination charge received by LL operator on international incoming traffic.

After considering the aforementioned factors it was analyzed and examined that three operators i.e., PTCL, NTC and Special Communication Organization (SCO) were providing LL fixed line services in their licensed territory as prescribed in the license and the Act. At that time SCO had hundred percent (100%) market share in fixed LL telecommunication market of AJK and NAs while PTCL and NTC had market shares of ninety six percent (96%) and four percent (4%) respectively in all telecom Regions. On the other hand SCO had hundred percent market shares 100% in LDI Fixed Line telecommunication market whereas PTCL, NTC had market share of ninety six percent (96%) and four percent (4%) respectively in LDI Fixed Line telecommunication market of Pakistan³³.

M/s Telenor Pakistan (Pvt) Ltd and M/s Warid Telecom Ltd. have been awarded cellular mobile licenses in 2004. Out of six only four operators i.e., PMCL, PTML, Pakcom and Paktel had market shares of sixty three percent (63%), fifteen percent (15%), thirteen percent (13%) and nine percent (9%) respectively in mobile telecommunications market of Pakistan. SCO is providing mobile telecommunication services in AJK & NAs on non-exclusive basis, thus has hundred percent (100%) market share in that market.

In 2004, PTCL and NTC offered leased lines services in Pakistan. PTCL had ninety four percent (94%) of market share, while the remaining six percent (6%) of

³³ *ibid.*

leased lines market is captured by NTC. A total of eight operators were providing interconnection termination services in Pakistan interconnection market, of which two are fixed-line operators and remaining six are mobile operators. In most of the cases, the operators i.e., fixed and mobile had SMP in fixed telecommunication market and mobile telecommunication market had SMP status in national interconnection market as well.

Based upon the above referred PTA consulted all concerned stakeholders and after taking into account their submissions and views issued a SMP determination in August 2004 wherein it declared following operators as SMP in the correspondence markets³⁴:

S. No.	Relevant Markets		SMP Operators
	Product / Service Market	Geographical Market	
1.	Local Loop Fixed Line Telecommunications	All Telecom Regions	PTCL
2.	Local Loop Fixed Line Telecommunications	AJK & NAs	SCO
3.	LDI Fixed-Line Telecommunications	Pakistan	PTCL
4.	LDI Fixed-Line Telecommunications	AJK & NAs	SCO
5.	Leased Lines	Pakistan	PTCL
6.	Mobile Cellular Telecommunications	Pakistan	PMCL
7.	Mobile Cellular Telecommunication	AJK & NAs	SCO

³⁴ Pakistan Telecommunication Authority determinations issued vide No.15-46/04(Tariff)/PTA dated 24th August 2004.

8.	National Interconnection	Pakistan	PTCL and PMCL
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1.2.4 Tariff Regulation, 2004

Since 1996 PTA has been regulating telecom sector and at that time there were no regulations and rules till 2000. PTA, particularly determined tariff through its determination and regulated the sector but after notification of the Rules express provision to determine tariffs were addressed. As per tariff's rules provided under part IV of the Rules fees and charges hereinafter referred to together as the "**Prices**" shall be payable to the Company for the telecommunication services listed in Schedule A to Appendix "C" hereinafter referred to as the "**Basket Services**", and in Schedule B hereinafter referred to as the "**Leased Circuit Services**" set out in Appendix "C" to these rules, which may be modified from time to time in accordance with the provisions of the Act. The Company shall ensure that in each consecutive twelve months period (t) hereinafter referred to as the "**Price Control Period**", the Prices charged for the Basket Services shall be fixed so as to satisfy the criteria in the given formula, under rule 19 of the Rules. Under rule 23 the basket PCF and the leased circuit PCF and the maximum price rebalancing Rate shall has to be determined by PTA for each period of four years. In respect of each Price Control Period comprised in the four years commencing on the 1st July, 1999, the Basket PCF and the Leased Circuit PCF shall be as set out in Schedule 'D' to Appendix 'C' to these rules and the Maximum Price Rebalancing Rate shall be as set out in sub-rule (4) of rule 4 and Schedule 'D' to the Rules. The mechanism of carry forward and resentment of CPI, changes to the basket services and sales or value added taxes are comprehensively provided in rule 20, 21 and 23 of the Rules, respectively. The

company cannot make any change in tariff unless PTA approves hence publication of price is mandatory. However, PTA on the grounds given under rule 24 may disapprove the prices. The grounds on which it may disapprove it are:

- (a) contain material mathematical errors; or
- (b) violate applicable laws, rules or the terms of any telecommunication licenses held by the Company.

But, in case, if PTA does not deliver to PTCL a written disapproval of the proposed prices containing full reasons for the disapproval at least ten days in advance of the day on which the proposed Prices are to become effective, then the prices shall be deemed to be approved.

Undue preference, exercise undue discrimination against particular persons or classes of persons in respect of the prices charged by the company for telecommunication services is prohibited to charge different rates for customers in rural areas than those charged to similar customers in similar situations in urban areas. On the other hand under rule 25(2) of the Rules the company may charge different prices in respect of calls terminating on a fixed line compared with calls terminating on a mobile line only to the extent that changes have been made to the interconnection regime to reflect the principle that calling party pays. The Authority shall determine the permitted differential under this sub-rule after consultation with the company. When the interconnection regime fully reflects the principle that calling party pays then this sub-rule shall cease to apply (see rule 25 of the Rules).

Between periods 2000 to 2004 PTA has issued various determinations on card pay phone tariff, Internet service provider tariffs, Royalty from Data Network operator,

Electronic Service providers etc., which services still continue due to rapid growth of technology and competition in telecom industry. The issue to make a regulation was under consideration since long but formally in 2004 tariff regulations for fixed line services were gazette notified³⁵. These regulations comprise five parts including definition part. The scope of tariff regulation is to determine the tariff for fixed line telephony service, which include local as well as long distance international call charges. Part one of the tariff regulations prescribed Tariff of Non-SMP Operators. The Non-SMP operators are free to set and revise their tariffs at any time and in any manner they like provided that they shall inform the Authority about their proposed tariffs thirty (30) days before the applicability of new tariffs.

Under regulation 3(2) of the tariff regulations the Authority may make amendments to the tariffs of Non-SMP operators where the tariffs are considered to be unfair and burdensome, provided that (i) the Authority on its own, or at the request of the affected consumers may initiate the enquiry to judge whether the tariffs are unfair and burdensome or not; (ii) the burden of proof shall be on the operators and they shall satisfy the Authority that the tariffs are not unfair or burdensome; and (iii) the Authority, while making decision, shall keep in view the cost of operators, affordability of consumers, prices of other operators in similar circumstances, etc. The decision of the Authority in this respect shall be final and binding on the operators.

Part III of the tariff regulations deals with the tariff of SMP operators which includes tariff for Local Loop, Long Distance International, Leased Line tariff, Internet Calls, Sales or value added Taxes. Most importantly for transparency and for the awareness of consumers all fixed lines operators are required to publish their tariff

³⁵ Fixed Line Tariff Resolution Regulation, 2004

manual. All charges information must be provided explicitly of each service along with peak and off peak time. In schedule annexed with the tariff regulations describe installation charges, line rent services, local call licensee for Local Loop licensee and Nation wide call services (NWD), international call services (ICS), and charge other mandatory services which require customers to be received by other operators for NWD and ICS calls for long distance international calls.

Though the tariff regulations are in operation PTA is regulating fixed line tariff through these regulations yet due to competition in the market PTA has granted approval of some rates for example PTCL has reduced its rates.³⁶

1.2.5. Amendments in Pakistan Telecom Rules, 2000

In 2000 the Federal Government issued Pakistan Telecommunication Rules, 2000 (the "Rules") as to provide procedural requirement for regulator so that it may be able to meet the objectives of the Act. The Rules describes a complete mechanism for issuance of license, general condition of the license, tariffs issues, interconnection and any disputes in relation to the interconnection among the parties, and principle to declare telecom operators a significant market operators etc. Before, liberalization of telecom sector there was no need to make any amendments in the rules, but later on in 2004 i.e., after issuance of deregulations policies in fixed and cellular sector it was felt most particularly to amend rules relating to the competition. Liberalizations in any sector lead to the competition hence, a detail mechanism to regulate and determine SMP operators in competitive markets having major shares i.e., 25% of the market as mention in rule, 17 of

³⁶ibid.

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the Rules, observed. For healthy atmosphere of competitive market it is necessary to regulate major operators and restrict them not to adopt any anti-competitive measurements or arrangements which lessen competition directly or indirectly in market. It does not mean that such restrictions are only for major operators but any anticompetitive act which results in lessening competition or harmful for market is prohibited for operators have no major shares as determined under the Rules. An attempt to make some amendments in the Rules was made but still no amendments have yet been made. However, in the light of deregulated scenario some amendments may be required to be incorporated under the Rules. The major changes in rule 17 of the Rules needs to be made as in that rule specific criteria to determine SMP operators is mentioned as on what grounds PTA can declare a telecom operator as SMP operator.

The basic principles to determine relevant market by enjoying economic strength, specification of relevant market both as to product and geography are required to be addressed under the Rules³⁷. In addition to that there must be some factors on the basis of which relevant market operators may be declared as relevant market operators in the market these may be:

- (a) the number of Operators and their market shares;
- (b) pricing behavior by Operators;
- (c) whether, in the opinion of the Authority, the Operator controls Essential Facilities;
- (d) the availability of reasonably substitutable services; and

³⁷ All information contain under 1.2.5 based upon the Draft Amended rules by Ministry of Information Technology in 2004. These amended rules have not yet been notified.

- (e) the nature and extent of barriers to entry.

Besides considering factors of relevant market and its other aspects to declare one as a SMP operators also require that such majors operators must be restricted to adopt any anti-competitive practice in the market. Therefore, this issue is also required to be addressed in the Rules, so PTA imposes some restriction upon major operators in telecom sector for healthy competitive atmosphere in market. These restrictions may be to the extent of agreement among the operators, abuse of dominant positions, restrictions on ownership or control of competing licensees, etc. These factors are discussed as under:

- a. Agreements**

The operators who have major share in the market must avoid to make any agreements which prevents or lessen or likely to prevent or lessen competition in the market. An agreement or arrangement between two or more licensees be presumed to prevent or lessen competition substantially in a market, where the licensees agree or arrange to (i) fix prices or restrict output; (b) co-ordinate separate bids for assets, resources or rights, or for any input into a licensee's service or for the provision of any telecommunication service; (c) restrict competition in relation to the provision of telecommunication service or equipment to specific customers or to competition in specific areas; (d) refuse to do business with a specific supplier, competitor or customer; or (e) otherwise prevent or lessen competition substantially in a market. However, any agreement which does not fall within the above areas is allowed for healthy environment in market.

- b. Abuse of a Dominant Position**

Operators having an SMP status must not engage in such conduct that is an abuse of its dominant position like (i) failure to supply Essential Facilities to a competitor within a reasonable time after a request and on reasonable terms and conditions, where the SMP Operator has such facilities available; (ii) discrimination in the provision of access, interconnection or other services or facilities to other licensees except under circumstances that are objectively justified based on differences in supply conditions, including different costs or a shortage of available facilities or resources; (iii) bundling of services, whereby the SMP Operator requires, as a condition of supplying a service to a competitor, that the competitor acquire another service that it does not require; (iv) offering competitor more favourable terms or conditions that are not justified by cost differences if it acquires another service that it does not require; v) (pre-emptive acquisition or securing of scarce facilities or resources, including rights of way, required by another licensee for the operation of its business, with the effect of denying the use of the facilities or resources to the other licensee; (vi) supplying competitive services at prices below LRIC or such other cost standard as is established by the Authority; (vii) cross-subsidizing from one service to a competitive service with the objective of lessening competition, except where such cross subsidy is specifically approved by the Authority or by approval of tariffs for relevant services; (viii) failure to comply with interconnection obligations; (ix) price squeezing, by an SMP Operator, of the margin of profit available to a competitor that requires wholesale services from the SMP Operator, by increasing the prices for the wholesale services required by that competitor, or decreasing the prices of the retail services in markets where they compete, or both; (x) requiring or inducing a supplier to refrain from selling to a competitor; (xi) adoption of technical specifications for its networks or systems that prevent interoperability with a

network or system of a competitor; (xii) failure to make available to other licensees on a timely basis technical information about Essential Facilities, technical specifications or other commercially relevant information which is required by such other licensees to provide services; (xiii) using information to compete with the competitor where the SMP Operator obtained such information from the competitor for purposes related to interconnection to the SMP Operator or supply of services by the SMP Operator; and (xiv) any other conduct that, in the opinion of the Authority, prevents or lessens or is likely to prevent or lessen competition substantially in a market.

c. Restrictions on Ownership or Control of competing operators

For such operators it is another mandatory requirement that the control of the operators in any manner that results in control in fact, whether directly through ownership of shares or indirectly through an agreement, arrangement or otherwise through an agreement or arrangement involving next of kin must be avoided as this arrangement leads to anti-competitive act. Similarly all mergers, acquisitions, establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, persons is not allowed. In determining whether or not a merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, following factors may be considered:

- a. the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger;

- b. whether the telecommunication business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;
- c. the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;
- d. any barriers to entry into a market, including:
 - (i) tariff and non-tariff barriers to international trade;
 - (ii) regulatory control over entry; and
 - (iii) any effect of the merger or proposed merger on such barriers.
- e. the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;
- f. any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor;
- g. the nature and extent of change and innovation in a relevant market; and
- h. any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

In order to have a jurisdiction in determining and analyzing the issue of competition and restriction on major operators to prevent themselves from such anti activities which lessen the competition in market are required to be address in Rules, so

that PTA may be able to regulate the competition in telecom sector. Currently, though in the amended Act, 2006 PTA has been empowered to regulate competition in the telecom sector and Federal Government under section 57 of the Act is given a mandate to make rules in this regard which are still not yet been issued by the Federal Government.³⁸

1.3. Role of Telecom Regulator in Pakistan

The telecommunication industry is regulated by the PTA, as an autonomous body established under section 3 of the Act. The salient features are to:

- i. regulate the establishment operation and maintenance of telecommunication systems and the provision of telecommunication services in Pakistan;
- ii. promote and protect the interests of users of telecommunication services in Pakistan;
- iii. promote the availability of a wide range of high quality, efficient, cost effective and competitive telecommunication services throughout Pakistan;
- iv. promote rapid modernization of telecommunication systems and telecommunication services;
- v. make recommendations to the Federal Government on policies with respect to international telecommunications, provision of support for participation in international meetings and agreements to be executed in relation to the routing of international traffic and accounting settlements.

³⁸ Pakistan Telecommunication Authority (Re-Organization Act, 1996) (Amended Act) 2006

- vi. Issue regulations for exercising of its powers and performance of its functions
- vii. Grant and renew licenses for any telecommunication system and any telecommunication service on payment of such fees as it may, from time to time, specify;
- viii. Appointment administrator;
- ix. Investigate and adjudicate on complaints and other claims made against licensees arising out of alleged contravention of the provisions of this Act, the rules made and licenses issued hereunder and take action accordingly;
- x. Provide guidelines for, and determine, the terms of inter-connection arrangements between licensees where the parties to those arrangements are unable to agree upon such terms; and
- xi. Settlement of disputes etc.

PTA being a *quasi-judicial* body has jurisdiction to adjudicate matters, conduct hearings, investigate, carried inquires and passes order thereon. It has also a power to make regulations under section 5(2)(o) of the Act for the performance of its function and responsibilities provided under the Act. Role of Regulator in telecom sector plays a cardinal role in implementation of government policies with their fruitful results. To achieve the targets and meets the objectives of legislatures and polices, behavior of the regulator becomes important as it has to make a balance between itself and operators like in Pakistan. The role of a regulator is prominent from its implementation of policies so far issued by Federal Government of Pakistan. Transparencies and non-discriminations in sector specific regulator are such qualitative attributes which lead to success in

liberalization and fair competition in telecom market. These two factors made telecom policies and privatization process of PTCL more than expectation.

Initially PTA drafted telecommunications Regulations in 2000 but due to various reasons could not be gazette notified but later on, in 2004 it had notified twelve regulations these are:³⁹

- i. Amateur Radio Wireless Regulations, 2004;
- ii. Audiotex Service Regulations, 2004;
- iii. Burglar Alarm Service Regulations, 2004;
- iv. Card pay phone service Regulations, 2004;
- v. Fixed line Tariff Regulations, 2004;
- vi. Interconnection Dispute Resolution Regulations, 2004;
- vii. Non-Voice Communication Network Services Regulations, 2004;
- viii. Pakistan Telecommunication Authority (Functions & Powers) Regulations, 2004;
- ix. Regulations regarding Registration of satellite service providers in Pakistan, 2004;
- x. Trunk Radio Services Regulations, 2004;
- xi. Type Approval Regulations, 2004; and
- xii. Vehicle Tracking Service Regulations, 2004

In March 2006 Parliament amended the Act and some obligations and responsibilities as laid down in the policies were added. These are access promotion contribution, Universal Services Regulations and regulate competition in telecom sector

³⁹ www.pta.gov.pk

etc. Before, incorporation and insertion of new clauses in the Act PTA started its work and in 2005 gazette notified following regulations;

- a. Access Promotions Regulations, 2005; and
- b. Number Portability Regulations, 2005;

In 2003 and 2004 PTA implemented telecom deregulation and cellular mobile policies. It made thorough preparations before hand to implement these polices in the shortest possible time and in an open and transparent manner. Stakeholders were consulted to obtain their views for refining different procedures involved in the licensing process. Local consultancies were also arranged to finalize different documents and procedures required for auctioning the spectrum and issuance of licenses. Studies were carried out on important issues including Numbering Plan, Interconnection, Network Interoperability, Universal Service Obligations, Convergence, Technical and Financial Criteria for Evaluating Application, Quality of Service Parameters and Watchdog Arrangements and IP Telephony.

Frequency Allocation Board was directed to arrange frequency spectrum for allocating to new LDI and Local Loop Operators. Accordingly, radio spectrum bands were made available for issuing to prospective licensees (1.9GHz, 450MHz, 479MHz, 3.4-3.6GHz). The available bands were reflected in Information Memorandum (IM). Through IM all information about new licensing regime under deregulation polices were provided to all interested applicants for fixed and cellular licensees.

After due process and thorough examination of applicants (foreign as well local) granted technology neutral local loop and long distance international fixed line telephony service licenses through advertisement in the press. Only 12 LDI licenses for US\$ 500,000 fee each and 76 Local Loop (fixed) for US\$ 10,000 fee each were issued. The

spectrum for Wireless Local Loop (WLL) was allocated through open auction. The 92 licenses for WLL services were issued to the successful bidders. Local Loop and WLL licenses were for the region(s) (total 14 telecom regions).

On the other hand two mobile phones technology neutral licenses were awarded to M/s Telenor and M/s Warid under the cellular mobile policy (four operators already in service). These licenses were issued through open auction for US\$291 million each. Below is the detail of New Licenses:

License Category	Number of Licenses
LDI	12
LL (Fixed)	79
WLL	92
Cellular Mobile	2

a. **Result of Telecom Regulator in Pakistan**

The transparent, non-discriminatory and positive role of PTA made a revolution in telecom sector which brought development in the following segments :⁴⁰

- i. **Investment.** Heavy investment being made by new entrants in development of infrastructure and system rollout. The investment made in telecom sector after liberalization is estimated to be US\$ 1.57 billion. New cellular mobile operators (Warid and Telenor) have invested over US\$ 400 million each for phase-I i.e. during 2004-2005. Existing mobile operators

⁴⁰ PTA Annual Report 2004.

PTA Annual Report 2005 and monthly reports published from time to time by PTA.

plan to invest US\$ 645 million and LDI operators US\$ 76 million during the same period.

- ii. **Economic Growth.** Telecom liberalization process created a positive impact on economy of the country. Share of telecom sector in GDP has increased from 1.5% to 1.8%. This led to GDP Growth to register a landmark figure of 8.3 during the year 2004-2005. The share of telecom industry in GDP Growth is expected to reach 3% in the coming years. Similarly Government revenue from telecom sector has increased to 40%.
- iii. **Employment Opportunities.** New employment opportunities have been created for different categories of professionals and un-skilled peoples. More than 0.47 million jobs have been created. In addition franchises, vendors and distributors of telecom services have generated number of employment opportunities throughout the country.
- iv. **Universal Access.** To improve universal access, the special terms have been included in the license binding the operators to expand their networks in under-served/un-served areas. A universal service fund has also been created to develop infrastructure in such areas. The operators will contribute 1.5% of their revenue towards this fund.
- v. **Healthy Competition.** Healthy Competition has been generated in the market. The competition has made it possible for the people of Pakistan to choose the service of their choice.
- vi. **Tariff Decrease.** As a result of fierce market competition, tariff of different services have drastically reduced. Significant reduction has been

witnessed in the tariff of cellular mobile, fixed line local and international calls.

- vii. **New Technologies.** New entrants have introduced new technologies i.e. WLL, Broadband and Soft Switches etc.
- viii. **Foreign Direct Investment (FDI).** With the completion of de-regulation phase-1 and issuance of two additional cellular phone licenses, the FDI in telecom sector has increased many folds. In 2002 the contribution of telecom sector in total FDI was 1.26%. It has now arisen to 32.2% (Total FDI US\$ 1524 million and FDI in Telecom is 494.4 million).

b. PTA Initiatives for the Success of Liberalization

- i. **Interconnect.** As required by the telecom deregulation policy, PTCL being the SMP operator prepared a Reference Interconnect Offer (RIO) and submitted for the regulator's approval. The RIO contained procedure for the request of interconnection by the operators, response to interconnection requests, dispute resolution, quality of interconnection services, fault rectification, interconnection charges and settlements of accounts etc. In consultation with stakeholders, charges suggested by the SMP operator were rationalized and RIO was approved. For the sake of transparency, the interconnection guideline has been made available on the web and to all the operators.
- ii. **Co-location.** The operators co-locate their facilities to eliminate the requirement of separate space and duplication of infrastructure. A guideline has therefore been prepared and issued to the operators. The co-

location guideline includes charges for different facilities. These charges have been fixed in consultation with stakeholders.

- iii. **Declaration of Significant Market Power (SMP) Status.** In order to ensure that dominant operators do not abuse their position and prevent them from indulging in anti-competitive practices to drive other competitors out of the market, PTCL (the incumbent) and Mobilink (one of the six cellular operator) have been declared SMP. By doing so, PTA has been enabled to regulate their tariff and other business practices to prevent them from indulging in predatory pricing and cross subsidization, etc.⁴¹.
- iv. **WLL Limited Mobility.** The infrastructure of WLL system is same as of cellular mobile phones. However, as per telecom deregulation policy, 2003, the mobility of WLL was to be restricted to one cell only. WLL licensees were of the view that this restriction will impair the quality of their service. Therefore, they requested PTA to relax this condition. On the contrary, cellular mobile phone operators were apprehensive that if mobility of WLL is not limited, it will become a threat for their business. So this becomes a big contentious issue. After exhaustive consultation with stakeholders and detailed deliberations, PTA issued a determination thus amicably resolving an important issue.
- v. **Infrastructure Licensing.** Even after issuance of new licenses, PTCL had virtual monopoly on essential bottleneck facilities including the infrastructure. New LDI operators though entitled to develop the

⁴¹ PTA Determination dated 24th August, 2004.

infrastructure but non of them had a plan for this venture. Therefore, to create competition, infrastructure licensing has been introduced. Infrastructure licensee will develop the infrastructure and lease out the facilities to service providers.

Unprecedented growth of telecom sector during last three years has been made possible primarily due to following:-

a. **Government Policies**

- i. Liberalization of Telecom Sector
- ii. Reduction in Taxes / Duties
- iii. Independent Regulator.

b. **Regulatory Initiatives**

- i. Simple and Liberal Licensing Regime;
- ii. Card Pay Phone Regime for Cellular Mobile Subscribers;
- iii. Reduction in Tariff & Royalties;
- iv. Level Playing Field for all Operators;
- v. Tariff Reduction (As mentioned above)

c. **Challenges for Regulator in Pakistan**

- i. **Mobile Number Portability (MNP).** MNP allows users to retain the same number while switching over to another operator. It enhances fair competition and improves customers service. From technical point of view, it requires central database and individual operators' databases are needed.
- ii. **Rural Communication.** The rural landscape of Pakistan is represented by a population of 89 million residing in 50,588 villages of 100 to approx 7000 inhabitants. Out of the 50,588 villages only 48% of the villages have access to

telecom services. For comparison in India out of 6,07,000 villages approximately 5,20,000 (85%) villages have access to telecom services. There are many options to extend telecom facilities in rural areas which includes WLL, Mobile PCOs, VSAT and IP related technologies. Many countries in the region have adopted successful strategies for development of rural ICT facilities. Mostly it is the private sector that has played a significant role in initiating such ventures. Establishment of tele-centres is an economical option, which has been adopted by India, Philippine, Malaysia, Sri-Lanka, Nepal and Bangladesh etc. We are also planning to launch a project of tele-centres for rural areas. The project will be conducted in collaboration with Zarai Taraqati Bank Limited.

iii. **3G.** 3G is the third generation of cellular mobile phone system. It provides host of value added services, which are not available on 2G or 2.5G. Present deployment status of 3G is as given below: -

- a. 85 million subscribers in 67 Countries
- b. Conversion of Present Systems to 3G
 - i. GSM through Enhanced Data Rates for GSM Evolution (EDGE)
 - ii. CDMA through Replacement of Air Interface (CDMA2000/WCDMA)
- c. 3G Services Expected in Pakistan within next 5 years.
- iv. **Carrier Selection.** Carrier selection arrangement allows subscribers to select desired LDI operator. Each LDI operator will have a specific code. PTCL will be making software and hardware additions in its systems. Carrier selection is an important tool to promote competition among LDI operators which will ultimately benefit the customers.

Chapter No.2

2 History and origin of competition Law

Competition law is almost as old and ubiquitous as commerce itself. The examples of centuries old competition law can be found through out the world. As much of the nineteenth century, competition in America was largely a local affair. The country was so big and transport so poor that companies primarily competed in small local market. It was too costly to transport goods at great distance. State laws rather than national statutes regulated competition. By the second half of the nineteenth century, four railroad lines crossed the continent from coast to coast. For the first time national markets was a real possibility⁴². With the coming of the railroads, it became clear that large companies might be able to control other industries as well. To prevent extreme controversies of economic power, Congress passed the Sherman Act in 1880. It was one of the first national legislation designed to regulate competition.

Prohibition of certain restraints of trade and monopolies existed at common law in England at the time of ratification of the U.S. constitution. Prior to the passage of the Sherman Act in 1880, American courts applying common law generally prohibited contracts among competitors without regard to their reasonableness or effect on

⁴² In 1859 Edwin L. Drake a retired railroad conductor drilled the first commercially successful oil well in the U.S. Three years later Rockefeller entered in oil industry which was full of producers too small to benefit from economies of scale. Production was inefficient and prices varied dramatically indifferent parts of the country. Rockefeller set out to recognize the industry. He began by buying refineries first in Cleveland and then in other cities. By 1870 Rockefeller had achieved his goal but some his tactics were controversial, as when a competitor tried to build an oil pipeline he used every weapon short of violence to stop it. Like he planted stories in the press suggesting the pipes would leak and ruin nearby fields and when the pipe line finished he refused to allow his oil to flow through it. These tactics were frightening, especially in an industry as important oil. What if Rockefeller decided to raise prices unfairly? Or cut of oil altogether? Business Law for new century, 2nd Edition by Jeffrey F. Beatty and Susan S. Samuelson-Chapter No.40 page No.939

competition. A second antitrust statute enacted in 1914, the Federal Trade Commission Act, created FTC as originally enacted, declared unfair methods of competitions are unlawful. Afterwards various legislations were laid down to control cartel and anticompetitive method like the Robinson Patman Act, 1936 applies only to transactions in which commodities or goods involved are sold "for use consumptions or resale in the united states", Hart-Scott-Rodino Antitrust Improvement Act, 1976 requires parties to proposed transactions meeting certain seize of the parties and seize of the transactions tests specified information about such transaction prior to consummation. During the early 1970s, the Chicago School of economics gained wide acceptance. Chicago School adherence concluded that the proper purpose of the antitrust laws is to protect competition, not competitors, for the long term benefits of the consumers⁴³. While the economic theory has developed world wide, the political, cultural and economic history of the United State has created a unique anti trust jurisprudence that stands today as the most developed in the world. It is no surprise, therefore, that many other jurisdictions fashioned their recently enacted competition laws on aspect of the U.S. antitrust laws.

Following the Second World War, in conjunction with the establishment of the Bretton-Woods System the International Monetary Fund and World Bank a comprehensive economic charter was drafted Known as "ITO" Charter or the "Havana Charter" was drafted but never ratified by the major nations. ITO proposed that comprehensive control over price fixing and other anticompetitive conduct, making competition policy and law an integral part of the charter. The incremental alternative to the IT, the GATT process, resulted eventually in establishment of the WTO. The

⁴³ Spurred by Chicago School theories the courts in the late 1970 began to abandon the *per se* approaches to certain type of conduct, resting instead to economic analysis of those practices.

Multilateral Agreement on Trade Related Aspect of Intellectual Property (TRIPS), established within the WTO framework, is the largest and most ambitious attempt to harmonize intellectual property rights on the world scale. The TRIPS has been seen by some as catalyst, or even a possible foundation, for the harmonization of competition laws within the WTO framework⁴⁴. The organization for Economic Cooperation and Development (OECD) in 1999 issued its report on competition issues. Likewise United Nation Conference on trade and development undertakes analysis of competition laws and policies and provides technical assistances. All its policies and rules for control of restrictive business practices in order to encourage competition promote the proper functioning of markets and efficient resource allocation, to provide developing and other countries with technical cooperation in the area of competition policy.

Free and open competition benefits individual consumers and the global community by ensuring lower prices, new and better products and services, and greater consumer choice than occurs under monopoly conditions. In an open market, producers compete to win customers by lowering prices, developing new services that best meet the needs of customers. A competitive market promotes innovation by rewarding producers that invent, develop, and introduce new and innovative products and production processes. The benefits of competition are readily seen in today's telecommunications sector. Dynamic technological change is resulting in new services and systems that provide innovative solutions to communications needs across the globe. As a result, telecommunications is becoming increasingly important to the efficiency and effectiveness of private and public sector institutions. By doing so, the wealth of the

⁴⁴ The WTO working group on the interaction between trade and competition policy continues to consider approaches to the incorporation of competition policy within the WTO framework.

society as a whole is increased. In a competitive environment, businesses that fail to understand and react to consumer needs face the loss of customers and declining profits.

In order to achieve the benefits of competition described above, Government of Pakistan and the regulator established an appropriate policy framework to govern the telecommunications sector. Pakistani telecom market is liberal and over the last two three years an intense competition has been witnessed in various segments of telecom resulting wider choices, lower tariffs and improved services to the telecom users. Government of Pakistan under its liberalized investment policies has also allowed foreign investors up to 100% equity participation and profit repatriation. This also gives foreign telecom operators, right to repatriate their profits to their home countries, with no obligation of reinvestment in the local operations for expansion of networks. However, the local competition is becoming increasingly intense, in addition stringent rollout obligations under the license require continues cash flow in the mobile companies for sustenance. Therefore, there is an inbuilt capacity in the domestic market that stops capital flight from the foreign operators and makes room for re-investments.

2.1 Definition of Competition

The act or process of competing the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms. An active demand by two or more organisms or kinds of organisms for some environmental resource in short supply. The act of competing, as for profit or a prize; rivalry. A test of skill or ability; a contest: *a skating competition*. Rivalry between two or

more businesses striving for the same customer or market. A competitor: *The competition has cornered the market.*

Broadly define competition in market based economies refers to a situation in which firms or sellers independently strive for buyers patronage to achieve particular objective e.g. profit, sales or market share.

A situation in a market in which firm or seller independently strive for the patronage of buyers in order to achieve a particular business, e.g., profits sales/ and or market shares. Competition in this context is often equated with rivalry. Competition rivalry between firms can occur when there are two firms or many firms This rivalry may take place in terms of price, quality, service, or combination of these and other which customers may value.

Competition is viewed as an important process by which firms are forced to become efficient and offer greater choice of products and services at lower price. It gives rise to increase consumer welfare and efficiency. It includes the concept of dynamic efficiency by which firms engage in innovation and foster technological change and progress⁴⁵.

The basic objective of competition is to maintain and encourage in promoting efficient use of resources while protecting the freedom of economic action of various market participants. Competition generally has been viewed as a way of achieving or preserving a number of other objectives as well: pluralism, decentralization of economic decision making, prevention of abuse of economic power, promotion of small business,

⁴⁵ Glossary of industrial organization economics and competition law, compiled by R. S. Khemani, Adjunct Professor, Faculty of Commerce and Business Administration, University of British Columbia, Vancouver, B.C. Canada and D.M. Shapiro, Principal School of Community and Public Affairs, Concordia University, Montreal, P.Q. Canada.

fairness and equity, and other socio-political values. These supplementary objectives tend to vary across jurisdiction and over time, reflecting the changing nature and adaptability of competition policy as it seeks to address current concerns of society⁴⁶.

2.2 Basic Concepts of Competition

2.2.1 Market Definition and its various approaches

The definition of a market is a key issue in competition policy and analysis. It is necessary to define a "Relevant Market" in order to establish whether a firm has a dominant position in that Market. Similarly, in analyzing whether a restrictive agreement among firms has an appreciable effect on reducing competition in a market, it is necessary to define the relevant market then to evaluate the impact of the agreement in that market. Market definition is an initial step in competition analysis. It provides the context in which to evaluate the level of competition and the impact of anti-competitive conduct. There are two aspect of a market- the product, including a service, and the geographic area in which the product is sold. In defining the product, close substitutes are normally included. The analysis of substitutability is generally concluded from the demand side i.e. from the buyer's perspective .

A widely accepted approach to market definition begins with the assumption that there is an abuse of monopoly in the relevant product market. The question is then asked: could the hypothetical monopolist raise the price of the product by a small but significant

⁴⁶ A Framework for the Design and implementation of Competition Law and Policy, by the World Bank Washington D.C and Organization for Economics Co-operation and Development (OECD) Paris

amount and for a non-transitory period? If a sufficient numbers of buyers would switch to other so as to make the price increase unprofitable for the monopolist, those substitutes would be included in a new definition of the market. This analysis will be repeated until the boundaries are set so that substitution does not make the price increase an unprofitable strategy.

The second dimension is the definition of the geographic scope of the market. In defining the geographic boundaries of a product market, the aim is to identify the extent to which the proximity of rival suppliers can impose competitive constraints on the hypothetical monopolist or actual market participant. Again the definition of the geographic scope of the market on an assessment of substitutability in response to product price changes, the definition of product and geographic markets are very relevant for the services that remain most subject to market dominance, particularly local and national long distance services.⁴⁷

2.2.2 Classification of Market Power and Dominate

The perfectly competitive market, which generates productive and allocative efficiency as described above, is a theoretically abstraction and is dependent on certain assumptions.

- **Product homogeneity:** All suppliers sell an identical product. Such products are sometimes known as **commodity products**.
- **Perfect knowledge:** Customers have perfect knowledge of the products being supplied and their prices.
- **Lack of individual market power:** All suppliers and consumers are sufficiently small relative to the total market that none can materially affect the supply or demand in

⁴⁷ Telecommunication Regulations Handbook by Hank Intven and McCarthy Tetrault Module 5.

that market. Under this assumption, consumers can buy as much or as little as they like, while sellers have similar discretion over quantity of output, but neither has power to affect the ruling price.

- **Freedom of entry and exit:** Suppliers can choose at any time to enter or leave the market.
- **Existence of scale economies within the structure:** Each supplier's minimum cost output level (its capacity) is small in relation to the whole market.

Many everyday markets do not possess these features, giving suppliers varying amounts of **market power** to set price levels. The characteristics of perfect competition may be observed in certain markets, however, such as world commodity markets and capital markets (money markets and stock exchanges). Other market structures found in practice include the following.

- *Monopoly*, where there is only one supplier within a market.
- *Monopsony*, the counterpart of monopoly, where there is only one consumer within an industry.
- *Monopolistic competition*, where a number of competing suppliers provide similar but differentiated products, for example branded designer clothes. The market has some characteristics of monopoly in that loyal or committed customers can obtain a given product from only one source, though this is offset by the relative ease of consumer substitution and of market entry.
- *Oligopoly*, or oligopolistic competition, where a market has competitive supply but with a limited number of suppliers. Each has sufficient market share to give it some, though not unlimited, power to set prices. Oligopolists can act strategically by

predicting and gaming one another's moves. They may collude to act like a combined monopoly, though many countries' competition laws make this illegal.

Market failure may be said to exist whenever a market fails to optimize productive efficiency and provide allocative efficiency, as would result under perfect competition. Optimality does not then exist, and there will be one or more redeployments of resource that could make at least one person better off without simultaneously making anyone worse off. The causes of market failure are of high relevance to any regulatory activity, and these will be explored in greater detail in the next chapter. One of the most significant market failures within the telecommunications service industry is that of monopoly, to which we now turn.

A monopoly market structure exists when there is only one supplier to a given market. This structure has been historically the case in the telecommunications services markets of most countries. To survive in the long run, a monopolist has to be able to exclude market entry by other suppliers. It is these entry barriers, which would not exist under perfect competition, that prevent the market from competing away excess profits or remedying inefficient production. Entry barriers may be economic or political in origin. A frequent market entry barrier and cause of monopolistic supply arises from unused economies of scale. If current technology provides ongoing scale economies up to levels of production where a single supplier could supply a whole or large percentage of a market, then at the current level of demand the market will allow no more than one supplier to produce at the minimum point on the cost curve. Under these conditions, there is said to be a natural monopoly.

The law may enforce monopoly, for example with the statutory monopolies enjoyed historically by postal and telecommunications authorities. Governments typically

create statutory monopolies in order to take full control of industries that are seen as so socially or strategically essential that they are not willing to risk the uncertain outcomes that a competitive market might produce. Other forms of legal protection include regulated entry, for example the licensing of authorized practitioners in banking, law and medicine. Patent protection allows the owner of the patent to enjoy monopoly profits for a certain time as a reward for innovation.

It can be shown by straightforward theory that a monopolistic market will not generate allocative efficiency. This arises because a monopolist performs a fundamentally different optimization from that of a supplier in perfect competition. The monopolist can name the price, but having done so must face the demand curve over which it has no control and which will decide its quantity of supply. This leads it to a different equilibrium for profit maximization.⁴⁸

2.2.3 Barriers to Entry

The evaluation of competitive markets and market behavior often focuses on the extent to which one or more firms can introduce and sustain price increases. If it is easy for a new supplier to enter a market and provide a substitute product, then established suppliers will be reluctant to implement significant long-term price increases. Such price increases would invite market entry, which will increase competition. The existence of barriers to market entry will limit this competitive response. There are many types of barriers to entry in different markets. Among the most commonly recognized barriers are:

⁴⁸ Telecommunication Regulation by John Buckley, printed in UK by MPG Books, Bodmin, Cornwall.

- government restrictions such as monopoly franchises or restrictive licensing practices;
- economies of scale (i.e., where per unit production costs fall as output increases, a large established supplier can produce at a lower per unit cost than new entrants);
- high fixed/capital costs; and
- intellectual property rights such as copyright and patent protection (which may affect the availability to a competing supplier of key inputs or outputs).

Multiple barriers to entry may exist in a single telecommunications market. For example, local networks are typically regarded as being characterized by economies of scale. The establishment of a local facilities-based network also requires a large investment in fixed costs. Local telecommunications operators often require government licenses, which may be granted on an exclusive or otherwise restrictive basis. Entry into wireless local networks is also restricted by spectrum scarcity. Certain local telecommunications services may operate on network platforms, which have patent or copyright protection (complicating or preventing the launch of a competing service). In addition to these barriers to entry, it is also possible for a dominant firm to engage in conduct that establishes additional barriers to entry. Refusal to supply essential facilities and refusal to interconnect networks are two classic examples of anti-competitive conduct that an incumbent operator may engage in to discourage or prevent new entry.⁴⁹

2.3 Competition law and its development in Pakistan

⁴⁹ Telecommunication Regulation Handbook by McCarthy Tétrault Module 5.

In the wake of a speedy process of globalization and liberalization, developing countries governments strongly feel the need to have comprehensive legal frameworks where these are non-existent, or to modify existing legislation to deal with anti-competitive practices of domestic and foreign firms. Competition policy is a broad policy area including both competition legislation and other policies such as trade liberalization, privatization and investment policies that foster a culture of competition in an economy. The concentration of economic power in a few hands during the 1960s necessitated the introduction of competition legislation.

The decade of the 1960s was characterised in Pakistan's economic history as an era of high economic growth led by the expansion of the industrial sector. Special incentives were given to the private sector, which consequently grew at an unprecedented rate. This unbridled growth brought, in its wake, the problem of the concentration of wealth in a few hands. In the late 1960s, Z. A. Bhutto's Peoples Party capitalised on popular discontent with this situation and engaged in nationalisation. In fact, the concentration of economic power necessitated the establishment of a competition regime in Pakistan. The Central government circulated a draft Anti-Monopoly and Restrictive Trade Practices Law for public opinion, alongwith the 1969-70 budget. This law was commented upon by the press, chambers of commerce and industry, and the public. In February 1970, the then President and Chief Martial Law Administrator, General Agha Muhammad Yahya Khan, promulgated the "Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance", which came into force on August 17, 1971⁵⁰.

2.3.1 The Monopoly Control and Restrictive Trade Practices law

⁵⁰ Competition law report of the county by Shahruxh Rafi khan

The law spells out the situations which shall be deemed to constitute undue concentration of economic power, unreasonable monopoly power and unreasonably restrictive trade practices. The law prohibits these clearly defined situations and collects information about them, through the process of registration.

The law is split up into six chapters, covering all aspects of the legislation. Chapter I defines various terms used in the law. Chapter II prohibits certain specified situations. Chapter III provides for the creation of a Monopoly Control Authority to administer the law. Chapter IV lays down the functions and powers of the Authority. Chapter V relates to registration and Chapter VI deals with penalties, appeals and other miscellaneous matters. The important provisions of the law are discussed in the succeeding paragraphs.

The law constitutes a statutory authority, the Monopoly Control Authority, to administer the law. The Authority's main functions are to register undertakings, individuals and agreements; to conduct enquiries into the general economic conditions of the country, with particular reference to the concentration of economic power and the existence or growth of monopoly power and restrictive trade practices; and to conduct enquiries in individual cases to give advice to persons or undertakings to determine whether or not a certain course of action is consistent with the provisions of the law.

The authority has discretionary, recommendatory, investigative and legislative powers. To proceed with an enquiry, the authority has the power vested in a civil court under the Code of Civil Procedure, 1908, with respect to certain matters.⁵¹ The authority has also been empowered to make recommendations to the central or provincial

⁵¹ The proceedings before the authority are deemed to be judicial proceeding within the meaning of Sections 193 and 228 of the Pakistan Penal Code. The authority is deemed to be a civil court for the purpose of Section 195 and Chapter XXXV of the Code of Criminal Procedure 1898.

governments with regard to governmental actions that might affect the concentration of economic power, monopolies, or restrictive trade practices. This provision reflects the fact that government actions might have a very important effect on competition. While the government would of course not always be bound by the Authority's recommendations, it would at least be aware of the competitive implications of its actions.

The law empowers the authority to issue general orders amplifying the scope of the law. This was essential to provide the authority with flexibility. Since it is not possible to incorporate all the situations that need to be prohibited in the law, this gives the authority some leverage in circumstances not mentioned clearly in the law. There is always the chance that such discretionary powers could be misused. The law emphasises that the authority should exercise this power only after following procedures that are fair to the affected persons. The authority has the power to prescribe by general order the circumstances in which it will be deemed that undue concentration of economic power or unreasonable monopoly power or unreasonably restrictive trade practices have come about. The authority is required to conduct an enquiry and give a reasonable opportunity to the affected persons to plead their case. The authority notifies its intent to issue a general order in a certain area. Then the authority is required to publish the draft general order in the official gazette for eliciting public opinion. The final order has to be issued after considering objections and suggestions received by the authority from any person or undertaking with respect to the draft general order. The authority is permitted to identify which situations are inconsistent with the law on a case-by-case basis. In the case of a general order, the authority is required to give the affected persons a show-cause notice and an opportunity to be heard. If the authority first proceeds to issue a general order, it

will have to conduct an additional proceeding before issuing an enforceable order against a particular person or firm. The Authority could rely on its general order to resolve general issues about whether a particular kind of practice adversely affects competition in such a subsequent proceeding.

The Authority has other necessary powers to obtain accounts and documents, and for collecting information for the purpose of the Ordinance. The orders of the authority have been specifically related to the situation being investigated, i.e. separate remedies have been provided for situations of concentration of economic power, monopoly power, and restrictive trade practices. The Authority has also been empowered to issue interim orders that are necessary in situations where there is an infringement of the provisions of the law but the issue of a final order is likely to take some time. In this situation, again, the affected persons will be given an opportunity to explain their case before the interim order is passed. The authority has also been empowered to conduct special enquiries on its own initiative, upon a reference from the government or after a public complaint.

The authority has the power to call for information relating to undertakings by a general or special order. It also has the power to make rules to carry out the purposes of the law. It has been provided that the law will not be applicable to government owned undertakings, statutory undertakings or undertakings with which the government is associated in the matter of appointment of their chief executives. Actions taken by undertakings in pursuance of government orders are also outside the jurisdiction of the law. Similarly, the provisions of the law do not govern anything done by a trade union or its members for carrying out the purposes of the trade union. The government has the power to withdraw these exemptions by notification in the Official Gazette.

The broad objectives of the law are to provide measures against:

- a. Undue concentration of individual economic power
- b. Monopoly power
- c. Mergers and Acquisitions
- d. Restrictive trade practices

a. Undue Concentration of Individual Economic Power

The law prohibits the undue concentration of economic power. Any non-public undertaking with assets exceeding 300 million rupees is prohibited by the law.⁵² An undertaking has been defined as 'any concern, institution, establishment or enterprise engaged in the production of goods or in the provision or control of any service'. The law defines control as the power to exercise a controlling influence over the management or the policies of the undertaking, and in relation to shares, the power to exercise a controlling influence over the voting rights attached to such shares. The Monopoly Control Authority has been given the power to vary, by rule, the existing percentage of shareholding or the quantum of the value of assets, which may result in undue concentration of economic power.

b. Monopolies

The law also prohibits the creation or maintenance of unreasonable monopoly power in any market. The market has been defined as the geographic region in which competition in the production or sale of such goods, or the provision of such services, takes place. The law does not set out any particular market share as a criterion for

⁵² In the initial draft the amount was Rs. 10 million (one crore). According to the first amendment made, this amount was increased to Rs. 50 million. Due to inflation, the law constantly needs to be amended.

determining monopoly power of a single firm. The size of a single firm may reflect economies of scale, particularly in a developing country like Pakistan. Accordingly, single firm monopoly power situations have not been prohibited *per se*, but certain situations require registration to determine whether or not they need regulation. The MCA regulates these situations on a case-by-case basis. The law establishes a presumption of unreasonable monopoly power where competing undertakings with a market share of twenty percent or more are interlocked through common management or control, or through common partners, directors, or officers, or where any individual holds twenty percent or more of the stocks in each of the competing undertakings. The prohibition of such cases is aimed at breaking up situations where a family group controls two or more companies in the same market, with a combined market share of twenty percent or more. The law prevents new interlocks by requiring firms to offer additional shares of their undertakings to the public. If the major family groups purchased substantial shares in each others companies, the competition structure of the economy might be impaired and hence such practice is restrained.

The law sets out such instances in which monopoly power may be justified i.e., situations that give rise to monopoly power that contributes substantially to efficiency, technological progress or the growth of exports. However, the law places the onus of establishing such a justification on the person or company concerned. They must show that the otherwise prohibited situation is in fact necessary to achieve one of the benefits mentioned, and that the benefits are not outweighed by the costs of the loss of competition.

The law provides a number of possible remedies for situations of unreasonable monopoly power. These include the termination of interlocks or mergers by the divestiture of shares or of a position as director or officer which is held by an individual or of control or management of the undertaking; the prohibition of proposed acquisition; and limitations on the amount of loans which may be made by a financial institution to any single borrower or to a borrower associated with it, or limits on the investments of financial institutions in associated undertakings.

c. Mergers and Acquisitions

The law also prohibits anti-competitive mergers and acquisitions. Although at the time of the promulgation of the law such situations were not common in Pakistan, this provision has been very helpful in the wake of the current wave of globalisation and liberalisation. Mergers adversely affect consumers by limiting their choice and via their influence over the determination of market prices. The law prohibits the merger of companies and an interlock between them stands prohibited. This is necessary to prevent evasion of the interlock prohibition by the merger of unlawfully interlocked firms. The law prohibits financial institutions from making loans to associated firms on preferential terms. The law does not have any special provision for cross-border abuses. Moreover, as regards competition law, the Authority has not yet entered into any bilateral or regional co-operation agreements.

d. Unreasonably Restrictive Trade Practices

The law defines unreasonably restrictive trade practices as any practice that unreasonably prevents, restrains or lessens competition, and lists a number of practices that are presumed to be restrictive in nature. These include agreements between actual or

potential competitors to fix prices; divide markets; limit production, distribution, technical development or investment; or boycott competitors. It also includes fixing minimum resale prices, which prevent wholesalers or retailers from selling below a certain stipulated price, and tying arrangements, which require a customer to purchase one product in order to obtain a different one. In addition to these practices, the authority may identify others that are found to be unreasonably restrictive. An agreement has been defined to include any arrangement or understanding, whether or not it is in writing, and whether or not it is intended to be legally enforceable. This would mean that unwritten collusive arrangements would fall within the definition of an agreement. This is an important provision because restrictive agreements and arrangements are quite often not settled in writing, but by word of mouth between competitors in social clubs or in more formal settings such as the meetings of Chambers of Commerce and Industry. Sometimes competitors tacitly agree to make one of them a price leader while the others follow his/her prices, as quoted in the press. In this case there is no need for a written agreement.

As in the case of monopoly power, the law sets out the circumstances in which restrictive trade practices may be justified, i.e. practices which contribute substantially to efficiency, technological progress or exports. The onus of establishing such a justification will, of course, be on the person or company involved in the arrangement⁵³.

2.1.1 Relation between Monopoly Control Authority and Pakistan Telecom Regulator

⁵³ Competition law report of the county by Shahrukh Rafi khan.

Since 1995 the introduction of privatization in public sector like in telecommunication and some of the other regulatory authorities dealing with the utilities i.e., National Electric Power Regulatory Authority (NEPRA), Pakistan Telecommunication Authority, Oil and Gas Regulatory Authority (OGRA), Pakistan Electronic Media Regulatory Authority (PEMRA) etc have been empowered to regulate competition in their specific sector. These authorities work independently and only seek advice from the MCA from time to time but they are not legally bound to consult the MCA under section 25 of the MRTPO which, among others points that this ordinance shall not apply to:

*...any undertaking which is owned by a body corporate established by the Government by law or whose Chief Executive is appointed by or with the approval of the Central Government or by a provincial Government, or...to anything done by any person or undertaking in pursuance of any order of the Central Government or a Provincial Government...*⁵⁴

2.4 Application of Competition in telecom sector

2.4.1 Abuse of Market Power

Abuse of a dominant position, or monopolization, is one of the most challenging areas of competition law in both developed and emerging markets. Situations involving

⁵⁴ MRTPO, (1970).

abuse of dominance may range from predatory behavior by firms in isolated local markets for low-technology products to high-tech industries in which access to a network is restricted for anticompetitive purposes.

Abuse of dominance cases may have special importance in transition economies. For example, competition law provisions relating to abuse of dominance may have an important role to play in addressing anticompetitive practices that entrench former state-owned monopoly enterprises. Abuse of dominance provisions may also be useful for easing restrictions on access to distribution systems in local markets.

In cases involving abuse of dominance or monopolization it is essential to ensure that application of the law does not inadvertently curb efficient business practices. It is important to recognize that firms may achieve legitimately a dominant position in a market (for example, through innovation, superior production or distribution methods, or greater entrepreneurial efforts). Moreover, many practices that appear anticompetitive (such as vertical market restraints as tying or exclusive dealing requirements) can serve legitimate pro-competitive purposes in some circumstances.

Competition law provisions regarding abuse of a dominant position typically include several common elements. First, before the law can be applied it is necessary to define the relevant market in which the possible abuse is realized. Second, it is necessary to establish the existence of a dominant position by a firm or group of firms. Third, it is important to identify specific practices that may be harmful to competition and assess their overall effects in the relevant market(s).

The specific content and application of these elements can vary significantly among countries.

Allegations of abuse of a dominant position may sometimes relate to industries that are natural monopolies—those in which a single firm can supply the market at lower costs than two or more independent firms can, usually because of large economies of scale. Such industries may include electricity transmission, natural gas distribution, and, possibly, parts of telecommunications and transportation. In such industries there may be a need to regulate prices. Such regulation might be undertaken either by a specialized agency set up to oversee conduct in the particular industry or by the competition agency itself. But even where there are effective regulatory controls, there may still be a role for competition policy in maximizing the scope for market forces to work and ensuring that regulated firms do not engage in anticompetitive practices in unregulated markets.

Determining whether a firm occupies a dominant position in a market involves two principal steps: defining the relevant product and geographic markets and assessing the degree of dominance exercised by the firm(s) within the market.

In most abuse cases definition of the relevant market is likely to be based on functional characteristics of the product and on consumer behavior. These may include physical characteristics of the product, uses to which the product is suited, and evidence about buyers' willingness to switch from one product to another as relative prices change. Other factors, such as switching costs and parallel price movements that indicate sub-substitutability, also may be relevant. Similarly, defining the relevant geographic market is likely to be based on factors, such as transportation

costs and perishability that limit the ease with which products can be moved over long distances.

The abuse of monopoly cases typically relate to a lessening of competition that has already occurred rather than what may occur as a result of a proposed merger. In abuse cases it is likely that prices will already have been raised above competitive levels. And any further increase will probably result in massive substitution by consumers. Such evidence of substitutability is, however, entirely consistent with the exercise of market power in a properly defined market in an abuse of dominance case. Of course, at the investigation stage it is not certain that an abuse has occurred and that prices are currently above competitive levels, but the investigator should be aware of this possibility.

The greater the market share of an alleged dominant firm, the more likely it is to exercise market power. It is nearly impossible to set out market share thresholds at which a firm can be judged to have or not have significant market power. These practices are abusive when put in place by a dominant firm because the market does not offer alternatives for consumers. However, when there is sufficient competition in the market, such behavior (especially potentially exclusionary acts) may enhance market efficiency and benefit consumers because it is motivated by the need to compete efficiently, not to make anticompetitive profits. Thus because potentially abusive acts and practices can help promote competition, determining whether such practices constitute abuse is among the most difficult tasks facing a competition agency. A thorough economic analysis of the anticompetitive effects of alleged abusive behavior is needed, even when a firm clearly enjoys a dominant position. It is worth noting that in some legal systems there is a presumption that certain practices by dominant firms are inherently

unfair. This approach has the merit of facilitating the design and enforcement of new competition laws. Prices may be high for many reasons, including surges in demand, high unit costs, and exercise of market power. To prevent a dominant firm from abusing its position and charging excessive prices, antitrust enforcers should be more concerned with the reasons that lead to high prices and profits than with the prices themselves. This is partly because it can be difficult and time consuming for a government agency to determine a firm's costs, which must be known to judge whether prices charged are excessive and to set the "right" price. It can be difficult to determine costs when a firm makes only one or a few products; it can be impossible for a firm that produces lots of products.

Price discrimination is the practice of a seller charging different prices according to the profile of the customer and in the absence of appreciable cost differences that might justify different prices. A discriminatory strategy can also involve charging the same price to customers even though there are different costs of supplying them.

Another way of discriminating among customers is to set up discount schemes. Discounts can be restrictive if they become similar to exclusive contracts—that is, if they are granted only to customers that agree not to buy from other competitors, thereby raising barriers to entry. In this case, however, what matters is the exclusive aspect of such contracts (how binding and how lengthy is the exclusivity clause). In fact, the restrictiveness of discount schemes must be analyzed case by case and should be assessed according to the costs they inflict on new entrants and by the disadvantages suffered by consumers.

Predatory pricing is the practice of a dominant firm selling its products at prices so low as to drive competitors out of a market, prevent new entry, and successfully monopolize the market. The cost can be high, but a predator expects

future discounted profits to outweigh present losses and forgone profits. If the firm operates in more than one market, selling its product in some markets at prices below costs may help sustain high cartel prices in others, although supply might be diverted to the market with higher prices.

Predation is condemned not because it results in lower prices now, but because it is likely to lead to reduce output and higher prices in the future. For this to occur other firms must be weak, there must be barriers to reentry into the market so restoration of competition is not possible after existing competitors have exited, and profits to be gained in the postpredation period must outweigh all losses.

Investigating alleged abuses of a dominant position can be among the most challenging and difficult tasks for a competition agency. This is because practices that can qualify as abuses (predatory prices, tie-ins, vertical restraints) can also promote efficiency. Consequently, investigating alleged abuses of a dominant position will require a careful rule-of-reason analysis, in which possible anticompetitive harm is weighed against possible efficiency benefits.⁵⁵

2.4.2 Mergers and its Analysis

Enterprises can combine in several ways. One firm may purchase from another firm all of its outstanding securities, all or some of its operating assets, or a significant share of its outstanding securities. Alternatively, two firms may exchange securities to form one firm. Such transactions may be the result of an agreement between the two enterprises, or the takeover may be unsolicited, unexpected, or even "hostile"—that is,

⁵⁵ A framework for the Design and Implementation of Competition Law and Policy Khmani, R.S World Bank, Organization for Economic Cooperation and Development (Paris) chapter 5 page no. 69.

resisted by the target enterprise. Established practice has been to label any transaction in which two independent actors are combined into one merger, resulting in the strengthening of one actor and the elimination of the other. Standard theoretical analysis of competition describes a range of market structures—from a perfectly competitive market with many competing firms, none of which can influence the market price individually, to an oligopoly, in which the market consists of a few firms, each having some power over the market price but constrained by the rivalry of the others, to a monopoly, in which a single firm sets the price unilaterally. Sometimes market structures become more concentrated over time as a few firms succeed and grow while others fail.

A firm's exercise of market power can harm consumers (and other producers), through higher (rather than competitive) prices, reduced output, and poorer quality products. Competition authorities must identify and control the abuse of market power. The rationale for merger control is simple: it is far better to prevent firms from gaining market power than to attempt to control market power once it exists. Effective merger policy requires a judgment concerning the impact of a merger on competition before the merger has occurred⁵⁶.

Most mergers pose little or no threat to competition in any market. Many simply are investments by firm's with available cash. Mergers may reduce competition, but so slightly or in a market that is so competitive that consumers are not harmed. However, some mergers would seriously harm competition by significantly increasing the probability of exercising market power. These are the transactions that the competition authority seeks to identify and prevent. To understand why, it is useful

⁵⁶ Framework for the Design and Implementation of Competition Law and Policy.

to begin by dividing mergers into three categories based on their likely impact on the competitive process: horizontal, vertical, and conglomerate. Horizontal mergers take place between two firms that are actual or potential competitors—that is, they sell the same products or close substitutes. Vertical mergers take place between firms at different levels in the chain of production—firms that have actual or potential buyer-seller relationships. Finally, conglomerate mergers are neither horizontal nor vertical, that is, the firms neither produce competing products nor are in an actual or potential buyer-seller relationship. Of course, mergers between two multi-product firms may be simultaneously horizontal, vertical, and conglomerate, and each aspect of the merger must be analyzed separately to understand the likely competitive outcome. Furthermore, even when a merger raises competitive concerns in one set of products, it may not in another set. In these situations, it may be possible to solve the competitive problems without having to prevent consummation of the entire merger.

All competition laws identify and prohibit two forms of anticompetitive conduct apart from mergers: abuse of a dominant position by a single firm and certain restrictive agreements by two or more firms. Anticompetitive mergers are those that significantly increase the likelihood of such conduct.

Mergers do not harm competition seriously and are themselves part of the competitive process, competition authorities must examine them quickly, particularly if a decision needs to be made before the merger is consummated. There are two basic stages in merger inquiries. The first is to determine whether the merger raises any competitive concerns. This determination can be achieved without a full analysis, and in most cases the competition authority will

not take further action. But if the possibility of competitive harm is identified, a more complete examination is required. At any stage in the analysis, however, the competition authority may conclude that there is no basis for concern. At that point the investigation should be closed, both to conserve the scarce resources of the agency and to avoid unnecessary delay in completing what could be an efficiency-enhancing transaction.

Most merger control laws are written generally. They declare that mergers are unlawful and should be blocked by the competition authority if they will “substantially harm competition.” It is left to the competition authority to interpret and employ this broad standard. Given that most mergers do not harm competition, the analysis is necessarily complex. Some competition authorities have issued guidelines describing to the public the process that they will use in analyzing mergers, especially horizontal mergers. These are:⁵⁷

- Market definition and description
- Identification of firms that participate in the relevant market and their market shares
- Identification of potential adverse effects from the merger.
- Analysis of ease of market entry.
- Identification of efficiencies that might arise.

2.4.3 Joint Ventures

⁵⁷ Telecommunication Regulation Handbook by McCarthy Tetrault.

There is no standard economic definition of a joint venture. Rather the term is used to describe a range of activities between firms that fall short of a complete merger. Beyond that it is really a matter of precise description rather than definition, for 'joint venture' is really a convenient label for a variety of activities, which may be undertaken in a variety of ways, with a variety of legal consequences". The term is vague enough to include all situations in which two or more persons or companies join forces to achieve some common goal". The term joint venture are a broad range of co- perative business undertakings "ranging from purely contractual collaboration (e.g., horizontal information exchanges, joint advertising arrangements) through the joint ownership or participation in use of existing assets (e.g. sports leagues, patent cross-licenses), to the joint creation of a new enterprise to conduct manufacturing, distribution, or research and development activities" In order to narrow the range of activities under consideration, some authors restrict attention to joint ventures that involve the explicit creation of a new entity. For example, joint ventures involve "the creation of a new business organization which is owned by two or more enterprises". Legal definitions also distinguish different types of joint venture. For example, Bensaid, Encaoua and Winckler note that EC competition law distinguishes between 'co-operative' and 'concentrative' joint ventures. "A joint venture is regarded as concentrative if two criteria are met: first the joint venture must perform on a lasting basis all the functions of an autonomous entity...; second, there must be no coordination of competitive behavior between the parent companies or between parent company and joint venture. ... The Commission ... considers a joint venture to be concentrative where only one parent withdraws from the relevant market provided the other parent effectively plays the leading role in determining the industrial behavior of the joint venture. ... Any joint venture which does not satisfy the two proceeding

requirements is considered as cooperative". These two types of joint venture are treated differently by European competition laws. In Australia, joint ventures are defined under s.4J(a) of the *Trade Practices Act 1974* as "an activity in trade or commerce (i) carried out jointly by two or more persons, whether or not in partnership; or (ii) carried on by a body corporate formed by two or more persons for the purpose of enabling those persons to carry on that activity jointly by means of their joint control, or by means of their ownership of shares in the capital, of that body corporate". In the absence of a clear definition of a joint venture, the economic literature must be approached with some caution. Different researchers will not only consider different aspects of firm behavior with a joint venture, they will also analyse a variety of different institutions under the joint venture rubric. Similar care is necessary in the absence of a clear legal definition.

The potential economic benefits and costs of a joint venture will critically depend on the structure of the joint venture and the terms and conditions included in the joint venture agreement. The relationship between specific clauses in a joint venture agreement and the potential anti-competitive effects of the joint venture may be complex and requires careful analysis. An example is provided by a common form of joint venture that involves the construction of a facility, which is jointly used by the participating firms (e.g. a gas pipeline joint venture). The joint venture partners then compete in a downstream market. The participating firms may be allocated capacity in the joint venture facility in a number of ways.

Anti-competitive effects have dominated in cases: "(1) reduction of potential competition; (2) tendency of parents to stifle what would otherwise be independent future growth of the joint venture or one of the parents; (3) "spill-over" effects with respect to

competition among the parents of a joint venture; and (4) the existence of collateral restrictive agreements.

Joint venture increase competition if a joint venture enables firms that would otherwise have been unable to enter a market to do so, then the joint venture will increase rather than decrease competition. Given the range of difficulties raised by joint venture analysis, it is not surprising that most commentators have offered only vague and poorly defined rules for competition authorities to judge joint ventures. Williamson suggests four principal considerations to be used to judge anticompetitive potential: "(i) whether the joint venture possesses or threatens to possess substantial market power; (ii) whether the joint venturers, individually or collectively possess such power; (iii) whether the joint venturers are competitors; (iv) whether the product of the joint venture is closely related - horizontally or vertically - to those produced by the joint venturers."⁵⁸

⁵⁸ Framework for the Design and Implementation of Competition Law and Policy.

Chapter No. 3

Telecom Market and Competition

In a market-economy where competition exists, suppliers compete with each other to sell goods and products to their customers. Suppliers contend with each other to offer better service, better packages and use qualities of service to attract consumers. In such market, where competition thrives, individual suppliers lack market power and as such can not dictate the tone and shape of the market. Suppliers can only react to the competitive strategies of their competitors in order to stay in business. This serves the public interest and the consumers benefit from this. In the telecommunications, markets are not usually perfect. They are often dominated by big suppliers who use their position to determine the shape of the market and the form of the sector in general. To evaluate the competitiveness of the telecom market, it is important to identify and briefly analyze some of the various pertinent issues that characterize the discourse of competition in the telecom sector. Some of these issues are barriers to entry, market power and dominance, and series of anti-competitive conducts.

Sector-specific regulation typically involves both prospective and retrospective activities. A telecommunications regulator, for example, will often render decisions that establish conditions for firms participating in telecommunications service markets, such as the approval of prices or the terms and conditions for interconnection between operators. Telecommunications regulators are also typically authorized to respond to particular complaints, or to remedy existing or past behavior, which contravenes telecommunications policies or laws. Competition authorities, by contrast, tend to

exercise their powers on a retrospective basis and with a view to correcting problems, which result from actions by particular firms that harm competition.

The types of policies typically adopted by sector-specific regulators can also be contrasted with those of competition authorities. Sector-specific regulation is often unrelated to (and even inconsistent with) the key competition policy goals of facilitating competition and improving economic efficiency. Competition policy is typically directed at preventing market participants from interfering with the operation of competitive market. Traditional telecommunications regulation, on the other hand, often manipulated competitive market circumstances to achieve other public goals.

An example is the prices approved by telecommunications regulators. Most regulators traditionally supported price structures that were very different from prices that would prevail in a competitive market. Telecommunications regulators often supported such price structures in an effort to increase availability of basic telecommunications services. Examples include various types of cross-subsidization, local service by long distance services, residential subscribers by business subscribers and rural subscribers by urban subscribers. These price structures were typically developed in a period of public monopoly supply. These structures are not sustainable in a competitive market. They require adjustment as competition develops.

In Pakistan under section 4(1) (d) of the Act one of the function of PTA is to promote the availability of a wide range of high quality, efficient, cost effective and competitive telecommunication services throughout Pakistan. The responsibility of PTA under section 6(e) of the Act is to encourages, fair competition in the telecommunication

sector. The Rules, 2000 also enables PTA to promote competition while determining the interconnect agreements. However, no sufficient provisions are available under the Rules for regulating competition. The Pakistan Telecommunication Authority (Functions & Powers) Regulations, 2004 (the Regulations) provides that PTA shall promote fair and sustainable competition, so as to provide the best possible deal to the users of telecommunication services in terms of quality, choice and value for money. A licensee, acting individually or collectively with another operator, shall not compete unfairly or drive competitors out of the telecommunication market and shall conduct its business fairly and honestly. In case of any merger a licensee shall give prior written notice to PTA of any proposed merger of its business, in respect of which it has been granted a license, with a business owned by an entity other than the licensee and the Authority shall give its determination on the desirability or otherwise of the proposed merger. Lastly, one of the objectives of Telecom De-regulation Policy is to liberalize the telecommunication sector by encouraging fair competition among service providers.

Since the issuance of said Determination, the telecommunication market has changed considerably regarding its size, scope, diversity and dynamics. Keeping this in view, PTA considered necessary to conduct the market analysis, in consultation with all stakeholders, to ensure that regulations remain appropriate in the light of changing market conditions. As far as the obligations of SMP operators are concerned; the Telecom Rules 2000, Fixed-line Tariff Regulations 2004, the Interconnection Guidelines 2004, the Deregulation Policy, Mobile Policy etc. have identified certain obligations of SMP operators. These include tariff regulations, provision^d of cost-based interconnect rates, publication of Reference Interconnect Offer (RIO), provision of carrier selection to customers, prohibition of anti-competitive conduct etc. Moreover, it is also felt necessary

that these obligations should be placed with respect to each of the identified relevant market. The entire telecom market of Pakistan (including AJK & NAs) can be divided into different relevant markets on the basis of (i) geographical area and (ii) products/ services offered in that particular market segment. Geographic market may continue to be based on the area where an operator is authorized to operate under its respective license. Regarding product/service markets, the Authority first reviews the following already identified five (5) relevant markets (broadly categorized under retail level and wholesale level markets) as to whether these markets should continue to be identified as relevant markets for the purpose of declaring SMP operators:

S.No	Product/Service Market
<i>Retail Level Markets:</i>	
1.	<u>Local Loop Fixed Line Telecommunications Market</u>
2.	LDI Fixed-Line Telecommunications Market
3.	Mobile Cellular Telecommunications Market
<i>Wholesale Level Markets:</i>	
4.	Leased Lines Market
5.	National Interconnection Market

3.1 Local Loop Licensing

Local Loop Fixed-line Telecommunications Market includes provision of access and call services to end-users (whether through PSTN or WLL) in the Region for which the Local Loop license has been granted by the Authority. Geographically, this

product/service market can be further sub-divided into fourteen (14) Regions in Pakistan and (currently) one geographical market in AJK & NAs.

PTA observed that new entrants have emerged in this segment, especially in WLL. However, lack of competition has been observed in this area as business volume of new entrants is very low as compared to PTCL. PTA is of the view that this market should continue to be identified as relevant market for the purpose of declaring SMP operators. The market for AJK & NAs holds the similar characteristics, as currently SCO is the only operator providing such services to the end users.

For the purpose of determining the total market size and the market share of a particular operator in Local Loop Fixed-line Telecommunication Market, only the revenues from the provisions of licensed Local Loop telecommunication services (including WLL) to the subscribers be taken into account. Such revenues may include installation/shifting charges, line rental, call charges, etc. For the avoidance of doubt, interconnection revenues from call termination services shall not be included in the total revenue base.

National Fixed Interconnect Market includes provision of call termination services by all LL operators (PSTN or WLL) for local, long distance, and/or international calls. This product/service market can be further sub-divided into two (2) geographic markets; Pakistan and AJK & NAs markets.

PTA vide its Determination No. 15-46/04(Tariff)/PTA dated 25th August 2004 declared PTCL as SMP operator in National Interconnect Market. Due to limited number of LL (including WLL) connections by new entrants, and considering the current dominance of one (or may be two) networks over this market, the Authority is of the

view that this market should be identified as a relevant market for the purpose of declaring SMP operators. For the purpose of determining the total market size and the market share of a particular operator in the National Fixed Interconnection Market, revenues from call termination of all types of calls, (local, long distance and/or international from fixed as well as mobile networks) that terminate on fixed telephone network shall be taken into account. The calculation shall include the revenues generated from termination of interconnection traffic received from other networks and a value for self-terminated own-network traffic. The value for self-terminated own-network shall be calculated by multiplying the number of call-minutes terminated on the network by the relevant interconnection charge for call termination i.e. metropolitan termination charge. It may be noted that the interconnection revenue shall not include the excess of Access Promotion Contribution over the termination charge received by LL operator on international incoming traffic. Individual Fixed Interconnect Market includes provision of call termination services by a given individual LL operator (PSTN or WLL) for local, long distance, and/or international calls. There is virtually no competition in this market due to the fact that call termination service cannot be provided by any other operator but the owner of the called network and, in this context, each LL operator has monopoly (100% market share) on termination of calls to customers connected to its own network. Therefore, this market should be identified as relevant market for the purpose of declaring SMP operators and each of the LL operators should be determined as SMP operator in this market.

Wholesale broadband access is composed of the wholesale broadband service provided by the network operator to the broadband service operator. Wholesale broadband access service (also know as local loop transmission capacity) means

provision of network access service to broadband service providers, through technical equipment (e.g. splitter and DSLAM), that enhances the throughput capacity. Alternatively, Optical Fiber Access Networks (OFAN) may also be used for the enhanced transmission capacity.

PTCL, in spite of deregulation in the sector, enjoys a considerable competitive advantage in the provision of network access services to other networks. It is not desirable to build several parallel networks, as it is not economically feasible due to high costs and long construction time. Therefore, operators wishing to have access to wholesale broadband networks do not have other alternatives but to lease the same from PTCL. Keeping this in view the Authority intends to identify this market for the purpose of declaring the SMP operators. For the purpose of determining the total market size and the market share, revenues generated from the provisions of access services to broadband service providers shall be taken into consideration.

3.2 Long Distance International Licensing

LDI Fixed-line Telecommunications Market includes provision of long distance and international call services on national basis to end-users. Geographically, this product/service market can be further sub-divided into two (2) markets; Pakistan and AJK & NAs markets.

The Authority, vide its above-referred Determination declared PTCL and SCO as SMP operators in Pakistan and AJK & NAs respectively. With the entrance of new LDI operators in Pakistan market, considerable competition has been experienced from new

LDIs, especially in calling cards segment. However, keeping in view the criteria for measuring the market size for determining SMP, it is expected that still more than 25% of market share belongs to already declared SMP operators. The Authority, therefore, intends to identify this market as relevant market for the purpose of declaring SMP operators. In AJK & NAs, currently the market is not yet opened for this segment and there exists a monopoly of SCO. For this reason, SCO should continue to be declared as SMP operator in this market.

For the purpose of determining the total market size and the market share of a particular operator in LDI Fixed-line Telecommunication Market, only the revenues from the provisions of licensed LDI telecommunication services shall be taken into account. Such revenues may include call charges for long distance and international outgoing calls, whether collected from the customers directly or from other operators (excluding call transit charges). Revenues generated from calling cards shall also be considered while assessing the market share. However, revenues from international incoming calls shall not be included in the total revenue base. Interconnection always comprises of call origination and call termination as well as transit traffic, when traffic is carried through the network of a third party. Call transit service means transmission of switched voice service originating from another telecom network. This includes transmission of traffic through the network of a third party both inside a Telecom Region (i.e. Metropolitan Transit) and between Telecom Regions. A third party means a network operator that conveys switched voice services, which does not originate from or terminate on this operator's network.

In Pakistan, although there are several LDI operators throughout all Telecom Regions, in most cases they have not directly interconnected their networks with other operators due to practical, technical or economic reasons. On the other hand, the Incumbent Operator (PTCL) is interconnected with almost all telecom operators. In this scenario, if an operator wants to provide voice transmission services within a Telecom Region or between Telecom Regions by means of transit services, it must acquire the transit services from PTCL. Considering the current dominance of PTCL over this market, the Authority is of the view that this market should be declared as relevant market for the purpose of declaring SMP operators. For the purpose of determining the total market size and the market share, revenues generated from the provisions of call transit services to other operators shall be taken into consideration.

3.3 Mobile Sector

Mobile Cellular Telecommunications Market includes provision of wireless-based telecommunication services (other than WLL) on national basis. This product/service market can be further sub-divided into two (2) geographic markets; Pakistan and AJK & NAs markets. Previously, the Authority declared PMCL as SMP operator in mobile telecommunication market of Pakistan. The market, with total of six operators, is moving towards competition. However, it is expected that PMCL still holds majority share of this market. The Authority is of the view that the segment is in the state of partial competition and thus should be identified as relevant market for the purpose of declaring SMP operators. Regarding AJK & NAs, four new mobile licenses have been awarded to existing mobile operators of Pakistan i.e. PMCL, PTML, Warid Telecom and Telenor.

However, as the new operators have recently started their operations in AJK & NAs, it is likely that SCO still has majority share in mobile segment of AJK & NAs. Therefore, this market should be declared as relevant market for the purpose of determining SMP operators. For the purpose of determining the total market size and the market share of a particular operator in Mobile Cellular Telecommunications Market, only the revenues from the provisions of licensed mobile telecommunication services to subscribers shall be taken into account. Such revenues may include line rental, outgoing airtime, roaming charges, revenue from data services, etc.

National Mobile Interconnection Market includes provision of call termination services by all mobile operators for local, long distance, and/or international calls. This product/service market can be further sub-divided into two (2) geographic markets; Pakistan and AJK & NAs. PTA vide its Determination No. 15-46/04(Tariff)/PTA dated 25th August 2004 declared Mobilink as SMP in National Interconnect Market. The Authority views this segment as having partial competition and this market should be identified as a relevant market for the purpose of declaring SMP operators. For the purpose of determining the total market size and the market share of a particular operator in the National Mobile Interconnect Market, revenues from call termination of all types of calls, (local, long distance and/or international from fixed and mobile networks) that terminate on mobile telephone network shall be taken into account. The calculation shall include the revenues generated from termination of interconnection traffic received from other networks and a value for self-terminated own-network traffic. The value for self-terminated own-network shall be calculated by multiplying the number of call-minutes terminated on the network by the mobile termination charges.

Individual Mobile Interconnect Market includes provision of call termination service by a given mobile operator to other telecom operators for local, long distance, and/or international calls. There is virtually no competition in this market due to the fact that call termination service cannot be provided by any other operator but the owner of the called network and, in this context, each mobile operator has a monopoly (100% market share) on termination of calls to customers connected to its own network. Therefore, this market should be identified as relevant market for the purpose of declaring SMP operators and each of the mobile operators should be determined as SMP operator in this market.

3.4 Internet Service Providers

A few ISPs have shown their concerns on tariff policies of big ISPs, claiming that their tariffs are below cost. They requested the Authority to declare such operators as SMP operators and prohibit them from using such practices. However, it has been observed that this market is in the state of full competition in Pakistan, with no barriers to entry. The Authority noticed that none of the ISPs holds more than twenty five percent (25%) share of the market. Keeping in view the above, the Authority views this segment as fully competitive and, therefore, this market should not be identified as relevant market for the purpose of declaring SMP operators.

3.5 Card Pay Phone Services

The Authority has often been approached by small payphone operators complaining that some of the big payphone operators have squeezed their margins by offering very low tariffs in the market, jeopardizing their businesses and making it difficult for them to survive. However, it has been noticed that this market consists of large number of operators and is fairly competitive, with no individual operator has more

than 25% of the market share. The Authority believes that the presence of competition in a market generally leads to reduction in price as well as profit margin and some operators may be subject to liquidation/mergers. Keeping this in consideration, the Authority is of the view that this market should not be identified as a relevant market for the purpose of declaring SMP operators.⁵⁹

⁵⁹ All information in this chapter are based upon the consultation paper on PTA website www.pta.gov.pk vide No.15-46/6(CA)/PTA dated 1st August 2006.

Chapter No.4

Conclusion

Specific regulator for one industry not only regulates the essentials of that sector but also requires to observe the market of that sector. This is a new approach in Pakistan. In 1970 only one authority was existed as to restrict anti competitive measures leading to monopoly, restrictive trade practices etc. In 2002 when liberalization and deregulation process was in peak it was felt that the specific regulator must have power to regulate its sector from all aspects e.g., OGRA (Oil and Gas Regulatory Authority), NEPRA (National Electric Power Regulatory Authority), PEMRA (Pakistan Electronic Regulatory Authority) and PTA (Pakistan Telecommunication Authority). As mentioned earlier all regulators have been given a power to regulate competition of their sector. This approach leads to a new development in deregulated areas. Telecom sector is one of the main sectors that successfully implemented policies of the Government of Pakistan issued in 2003 and 2004, respectively. Growth in this sector resulted in competitive services among the telecom operators. As mentioned in first chapter, the mandate given to the PTA is to regulate the establishment and maintenance of telecom services and system in Pakistan. It is a fundamental objective of the legislature but beside this mandate PTA has also given some powers and responsibilities to perform its function and one of its powers is to regulate competition in telecom market. It is a dilemma that without any mechanism, such power has been given to PTA where it can regulate competition in telecom market. The question arises that in absence of such mechanism how PTA can be able to regulate competition in telecom market. There are several issues remain in one's mind that the principles of the competition to prevent anti-competitive

practices require some method, procedures so that these cases or issue may be resolved and regulator take proactive measures to stop anti -competitive practices in the market. If we look towards statutory provisions of the Rules we find that rule 17 of Pakistan Telecommunication Rules. 2000 provides only how⁴ to determine one operator as significant market power in telecom sector. But if we want to find what should be the approach in implementing competition in that sector, the Act and the Rules are silent. In order to resolve this issue we move toward Monopoly Control Authority as to find out a way to address this issue but we see that specific regulator has no place in the MRTPO. These arrangements have made a gap which requires to be filled with a positive concrete solution so that regulator may be able to regulate its sector from all aspects as well as meet all requirements of the legislature.

The importance of this issue can be determined in second chapter where the issue of competition in respect of its implication has been deliberated. The fundamental issue to regulate the competition is to prevent companies from anti-competitive practices and provide healthy environment where new entrant confidently performs and runs its business. Anti-competitive practices are such arrangements which can not be observed easily as it requires due deliberations and expertise to determine and ascertain its effects, which may adversely affect new entrant or weaker in the market. Some attributes to the anti-competition can be in form of mergers either horizontal or vertical, abuse of dominant position, barrier to entry in the market and joint ventures etc. To understand these attribute or arrangements we have to understand the basic concept and analysis in respect of its implications in that sector. We have to assess the said attributes according to its needs and requirements. Principally, basis and

fundamental may not be varied but its implication may differ from sector to sector. Mere basic understanding of this subject would not be sufficient, unless we have a knowledge and expertise to understand its remedial measures or steps as to how a regulator will be able to stop or take some restrictive measure to prevent anti-competitive practices.

We see that PTA has no mechanism except to declare one's as significant market Power (SMP). However, it imposes some restriction through determination and regulation like fixed line tariff regulations, which do not allow SMP operator to charge tariff on its own but requires permission from PTA. In August 2004 PTA passed a determination and declared PTCL, Mobilink and SCO as SMP operators but no such restriction had been imposed on them except in the tariff regulation. In order to address the issue of competition an effort to amend telecom rules was made in 2004, but still it has not yet been finalized. However, in March 2006 the legislature through amendments in the Act empowered Federal Government to make rule for anti-competitive issues. Till today date neither amendments nor any new rules in this regard have been prepared. PTA in 2006 has drafted competition and protection of telecom consumer regulations, where in competition issues have been addressed which are still under process.

What is the outcome of this research? It can easily be understood from the above, we have a regulator to regulate a telecom sector with all powers under the statute but lacks procedural law, which is one of the mandatory requirements for a regulator to regulate its sector. Mere, empowering a regulator would not be sufficient unless it has some procedure or guideline how to implement its mandate given by the

legislature. I reach at the conclusion that PTA is required to have rules or regulations on competition so that it may be able to regulate competition issues in its true letter and spirit. The basic principle along with its procedure to implement competition as well as remedial measures of anticompetitive practices must be available with PTA, so that a healthy atmosphere in this sector may be observed. Time is not far away, it may be in next year or few months, we may observe anti-competitive practices by SMP operators like reduction in tariff, mergers etc., which may lead to anti-competitive practice in telecom sector. Before, facing such situation Federal Government should have to look into this matter and prepare or draft new rules or make some amendments in relevant provisions of competition in existing telecom rules so that telecom regulator may be able to protect telecom market from anti-competitive practices and observe healthy competition in telecom sector in Pakistan.

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