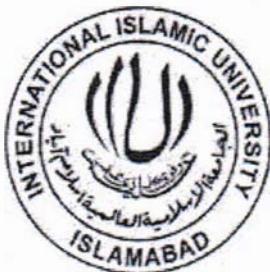


Thesis Topic:

**SIGNIFICANT MARKET POWER
IN TELECOMMUNICATION INDUSTRY OF
PAKISTAN**



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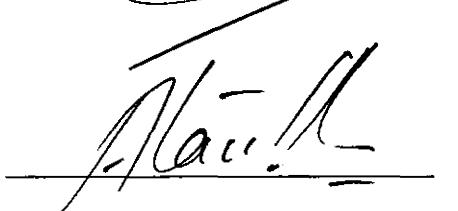
FINAL APPROVAL

It is certified that we have read the dissertation submitted by Muhammad Akif Khan, Registration No.62-FSL/LLMCL/F05 on the topic of 'Significant Market Power in telecommunication industry of Pakistan' in the Faculty of Shariah and Law. We have evaluated the dissertation and found it up to the requirements in its scope and quality by the International Islamic University Islamabad for award of L.L.M. Corporate Law Degree.

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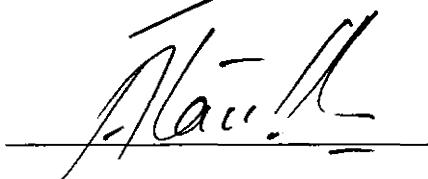
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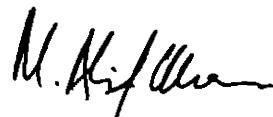

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DECLARATION

I, do hereby declare that this dissertation is original and has never been presented in any other university or institute of learning. I further declare that this thesis has never been copied and any secondary information used has been duly acknowledged in this dissertation.



Muhammad Akif Khan

62-FSL/LLMCL/F05

March, 2012

DEDICATION

This thesis is dedicated to my parents.

ACKNOWLEDGMENT

Praise be to Allah (S.W.T), the most Merciful the Compassionate, the Lord of the universe.

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May Allah (S.W.T) bless them all.

GLOSSARY

CDMA	Code Division Multiple Access
CPP	Calling Party Pays
FAB	Frequency Allocation Board
FP	Foreign Policy
HFC	Hybrid Fibre Cable
LDI	Long-Distance and International
MNP	Mobile number portability
NTC	National Telecommunication Corporation
PCO	Public Call Office
PTET	Pakistan Telecommunication Employees Trust
PTF	Pakistan Telecom Foundation
PEMRA	Pakistan Electronic Media Regulatory Authority
PTT	Pakistan Telegraphs and Telephone (British Post)
PTC	Pakistan Telecom Corporation
PTCL	Pakistan Telecommunication Company Limited
PTA	Pakistan Telecommunication Authority
QoS	Quality of Service
SMP	Significant Market Power
US\$	United States Dollar
WLL	Wireless Local Loop
WTO	World Trade Organization

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FOREWORD

in the model or in ideal form of economic and financial system a perfect competition prevails for the economic good of the society at large. in such system in the long run the firms earn a normal market rate of return.

Evidently, various organisations may have advanced and enhanced technologies and management that could enable them to earn an above-normal rate of return on their incomes and economic activities for an indeterminate length of time. Nevertheless sometimes an organisation of a business attempts to capture buyers and consumers surplus by engaging in illegitimate and by dishonest conduct to monopolize or to dominate a market or by abusing its market power.¹

Historically, the most common obstacle to free entry into markets has been government monopoly grants and patents. Many governments have granted monopolies for the exclusive purpose of collecting government revenue.²

Oligopoly or oligopsony and monopoly are perfect examples of market power its use and abuse in an economic system. Competition under the influence

¹ Winston, Clifford (2006), 'Government Failure vs. Market Failure: Microeconomics Policy Research and Government Performance', Publisher: Brookings Institution Press.

² Muhse, Albert C. (1916), "Trade Organization and Trade Control in China," The American Economics Review, vol. 6, issue 2, 309-323.

of market power or under such illegal environments may perhaps consequently result in industry wide bankruptcy or a monopoly survivor, because an unregulated market economy is expected to extort consumer surplus at the disbursement of total welfare of the society and economic system as a whole.

Chapter 1

Methodology

Methodology of the thesis will address the introduction of the methodology of the research study, followed by the explanation of rational of choosing the topic.

Type of data and data collection process will be elaborated. In this chapter qualitative approach will also be discussed followed by secondary and primary data.

1.1 INTRODUCTION

Research helps in optimizing the research problems by identification and description of new material therefore, it is basically a direction towards an increased knowledge and understanding of the subject chosen for study as an evaluation tool.

“Research is simply gathering the information you need to answer a question and thereby help you solve a problem”.³

³ <http://webcache.googleusercontent.com/search?q=cache:zJg5uW7lrXkJ:www.scribd.com/doc/37460>

Marketing practice is an immense field, where methods of collecting data are obviously complex from other areas of research. As the topic selected here concerns more with the theoretical and foundational aspects rather than mathematical approach of economy and finance.

More precisely the research methodology determines which path is to be employed to investigate a research and provides us the necessary training in choosing methods and research methods help us get an explanation to the research and are concerned with the explanation of the following:

- Why is a particular research study undertaken?
- How did one formulate a research problem?
- What types of data were collected?
- What particular method has been used?
- Why was a particular technique of analysis of data used?

With a better and an effective strategy we can obtain vital information about the various factors which are affecting and which did effect the performance of the project financing in present and future times respectively.

The research data will be collected through the combination of different methods. Using different approaches can be very beneficial in accomplishment of aim of the dissertation. It will enable us to conclude specific point of view regarding different practices carried out in market.

1.2 RATIONAL OF CHOOSING THE TOPIC

A research problem or the topic of research refers to a difficulty which a researcher, community, an industry or a government organization experiences. It calls for a thorough understanding and possible solution of problems which are subject of study.

Over the years of progress and development of the financial market it is important to understand the market behaviour for a prosperous economic system. The rational of choosing the topic is that Pakistan as an emerging economy is facing a lot of problems relating to low investment and very low progress in economic development due to her political and economic instability and war on terrorism.

Lacks of all these factors are coupled with the infrastructure scarcity and absence. In the research study the research will attempt to look into the present available infrastructure facilities and their use and abuse in the market to see

- If any kind of relief is available to the public and if not
- Is the regulatory environment of the country tough enough to keep the market abusers away from market abuse for public welfare and economic good of the country.

This topic is very significant to lay down the lines if there are any deficiencies found in the system as the thesis will attempt to see the regulation and practice of market abuse on an international level as well coupled with Pakistan's prospect.

The researcher has developed a research model for his research that is supported by the theoretical and conceptual frameworks presented by well known authors and researcher throughout the world both in emerging markets and in developed markets.

1.3 DATA COLLECTION

Researcher has adopted an exploratory approach to achieve the objectives of the research since the study is such that necessitates a qualitative approach.

For answering the research question, only secondary data for empirical and theoretical findings is stressed upon. Both primary and secondary data will enhance the focal points and will be used to explain and figure out particular grounds based on the present research.

In this regard use of different legal sources, websites financial and law Journals will help to develop an analytical view on the research work.

1.3.1 Qualitative Approach

Qualitative research reflects an approach that concludes a very specific point of view and conclusion while starting its focus from a very general statement. This differs from quantitative research which attempts to gather data by objective

methods to provide information about relations, comparisons, and predictions and attempts to remove the investigator from the investigation.⁴

The reason of choosing qualitative research is that it is less expensive and it is easy to explore topic in detail and more depth and is more flexible research method. The most common qualitative research methods comprise of the following:

- In-depth interview
- Focus group
- ***Case study*** *
- ***Direct observation****
- Role-play and simulation

* (will be used and focused upon in this study).

1.3.2 Secondary data

Secondary data is collected before primary data as one is general in nature and other is specific for the particular research work.

The secondary data is mainly obtained from published journals, books, article, internet, official website of the institutions. It is not only constructive to discover information to crack problems and to investigate which helps to enhance better understand the problem.

⁴ Smith, J. K. (1983). Quantitative versus interpretive: The problem of conducting social inquiry. In E. House (Ed.), *Philosophy of evaluation* (pp. 27-52). San Francisco: Jossey-Bass.

Important information is extracted from already researched topic in order to achieve answer. It is helpful to begin with secondary data, and only when they are exhausted, proceed with primary data as there are many advantages of using secondary data like good quality and reliability, saving time and money.⁵

1.3.3 Primary data

Primary data will not be used as such due to time constrictions and complexity in getting momentous information from the desired industry. Though in the thesis we are very less likely to collect primary data but it can be utilised if felt necessary in achieving the ultimate aims of the research work.

1.4 SUMMARY

The researcher will generally use secondary data, investigate and analyse the general issues so as to be able to lay down the lines if there are any deficiencies found in the prevailing system as the thesis will attempt to see the regulation and practice of market abuse in telecommunication industry of Pakistan. In the end the researcher will offer explanation and solution for the said problems.

⁵ Ghauri, P. & Gronhaug, K. (2005), Research Methods in Business Studies, 3rd Ed. Prentice Hall. International Islamic Financial Centre. MIF Annual Report (2007), Malaysia.

Chapter 2

Introduction

Before starting the critical analysis of the market power and obligations levied it is important to have insight of what “Market Power” is what are the sources of market power, what are the features of market power, how market power is measured to determine the abuse of the market power in an economy or market.

In this chapter the researcher will focus on the aspects of legislation for prevention of market power in the business and economic industry. In the start of the topic early history of the legislation done for the prevention of the market abuse will be presented. Then the focus will be diverted to different legislations done in different part of the world will be discussed. Case law will be elaborated and in the end of the chapter summary of the international prospect of the legislation to prevent the market abuse will be discussed.

2.1 MARKET POWER

2.1.1 Definition

Section 0.1 of Horizontal Merger Guidelines, defines the market power as follow:

A firm possesses market power when it has "the ability profitably to maintain prices above competitive levels for a significant period of time."⁶

According to Glossary of statistical terms,⁷ Market power identifies the capability of an organisation or institute to elevate and sustain price beyond the echelon that would normally exist under a perfect competition. Market Power is defined as specific practices that are deemed an abuse of such power in the economy and market and effect the specifying obligations of purchasers in relation to supplier and buyers.⁸

In the context of the thesis here market power will be discussed in regards to its abuse. So it is important to define the market abuse of the market power as well in this connection.

Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on market manipulation (market abuse) defined the market abuse

⁶ Section 0.1. Horizontal Merger Guidelines, 1992, Department of Justice USA.

⁷ Glossary of Industrial Organisation Economics and Competition Law, compiled by R. S. Khemani and D. M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, 1993.

⁸ Miloslav Sinfeld (2010), "Abuse of market power – recent developments", http://www.twobirds.com/English/News/Articles/Pages/Czech_Republic_abuse_market_power_recent_developments.aspx [accessed 26th April 2011].

as 'Market abuse may arise in circumstances where investors have been unreasonably disadvantaged, directly or indirectly, by others who have':⁹

- Used information which is not publicly available (insider dealing);
- Distorted the price-setting mechanism of financial instruments;
- Disseminated false or misleading information.'

Market Abuse, defined in section 118 of the Financial Services and Markets Act 2000 of EU and in the Market Abuse Directive,¹⁰ consists primarily of Insider Information and Market Manipulation. However briefly under the influence of market power UK laws define seven types of behaviour that constitute market abuse i.e.

- Insider dealing
- Improper disclosure of inside information
- Misuse of information -
- Manipulating transactions - effecting, or participating
- Manipulating devices
- Disseminating information likely to give a false or misleading impression
- Market distortion

⁹ Directive of the European Parliament and of the Council http://europa.eu/legislation_summaries/internal_market/single_market_services/financial_services_transactions_in_securities/l24035_en.htm.

¹⁰ Market Abuse Directive - UK Implementation.

2.1.2 Sources of Market Power

As we have discussed that market power occurs when a firm has a significant share of the market and it can act and effect the economic activity of the market in the way that is an abuse of market power. Common examples of such practices are

- Setting higher prices
- Offering less choice
- Restricting competition.
- Inefficient allocation of resources.¹¹

Following indicators and market behaviors in the industry define the exercise of market power in an economic system.

- Monopoly
- Market size
- Highly concentrated market with no barriers to entry and exit
- Predatory pricing¹² etc.

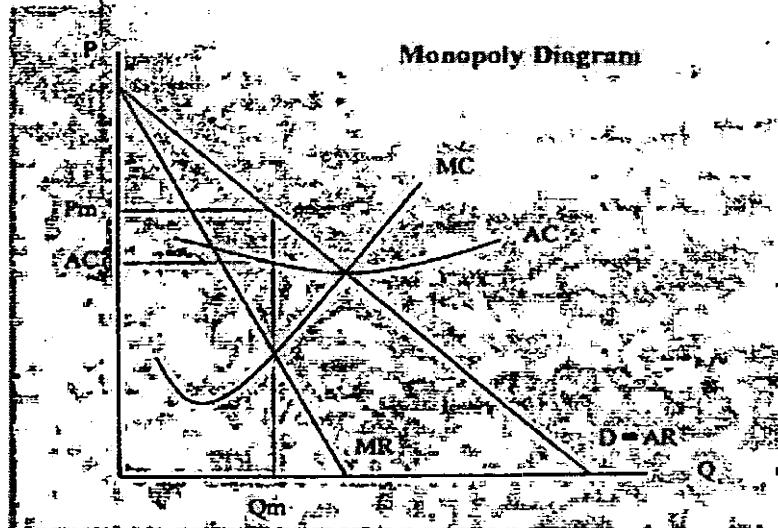
Monopoly

¹¹ <http://www.economicshelp.org/blog/uncategorized/abuse-of-market-power/>.

¹² Weiss, L. W. 1989. Concentration and price. Cambridge, Mass. : MIT Press.

A purchaser will pay extra price if it has no other place to go and obtain the product or goods he is seeking. In the financial and economic market which employ monopolies of any kind in market practice suffer financial crisis in the end at the cost of consumer right violations.¹³

Monopoly Diagram



Most of these disadvantages are, of course, for the consumer and society. Firms benefit from monopoly power because:

1. They can charge higher prices and make more profit than in a competitive market.
2. They can benefit from diseconomies of scale
3. They can use their monopoly profits to invest in research and development and also have resources for if the firm does badly.

Source Diagram:¹⁴

¹³ Richard Posner, .A Statistical Study of Antitrust Law Enforcement., Journal of Law and Economics, October 1970, pp. 365-419.

¹⁴ <http://www.economicshelp.org/blog/economics/are-monopolies-always-bad/>.

Market size

Timothy F. Bresnahan and Peter C. Reiss¹⁵ define the market size as a dimension or capacity of the market to absorb and adjust the buyers according to the needs of buyers. The lower the size less competitive a market is.

Highly concentrated market with no barriers to entry and exit

Bain, J.¹⁶ defines that this practice and function relates to the concept that the firms or an industry distributes the production of products within the industry according to there requirement of profit and ignoring the consumer protection. Tirole¹⁷ notes that an increase in market concentration will result in higher prices and lower consumer welfare.

¹⁵ Timothy F. Bresnahan and Peter C. Reiss (1990), 'Entry in Monopoly Markets,' The Review of Economic Studies, Vol. 57, No. 4 (Oct., 1990), pp. 531-553, Published by: Oxford University Press, <http://www.jstor.org/stable/2298085> [Accessed 26th April 2011].

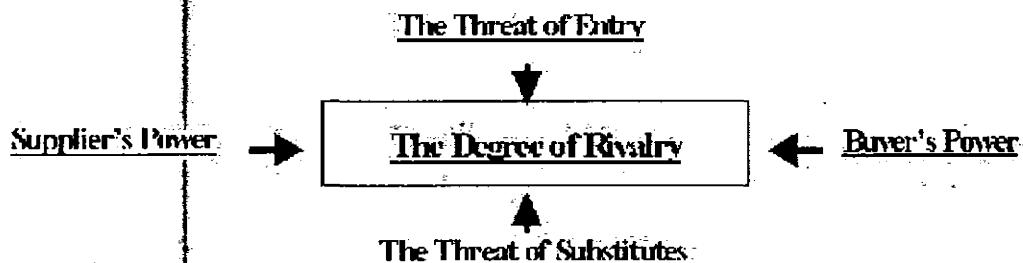
¹⁶ Bain, J. 1956. Barriers to New Competition. Cambridge, Mass.: Harvard Univ. Press. <http://www.mcafee.cc/Papers/PDF/Barriers2Entry.pdf> [Accessed 26th April 2011].

Baker, Jonathan. 2003. "The Case for Antitrust Enforcement." Journal of Economic Perspectives 17 (Fall): 27– 50.

¹⁷ Tirole, J. 1988. The Theory of Industrial Organization. Cambridge, Mass.: MIT Press. [Accessed 26th April 2011].

Sullivan and Sheffrin further explain¹⁸ the concept that there are obstacles in the markets that make it difficult to enter a given market. George Stigler elaborates it further by stating that these obstacles are the cost of production of a unit or product which must be borne by a firm that try to penetrate in a trade but is not borne by firms already in the industry. Franklin M. Fisher explains¹⁹ it further by briefing that "A barrier to entry is anything that prevents entry when entry is socially beneficial." These obstacles and barriers in an economy allow present businesses to earn supernormal earnings without threat of entry by other firms or foreign bodies.²⁰

Figure 5. The Five-Forces Model Proposed by Porter (1980)



¹⁸ Sullivan, Arthur; Steven M. Sheffrin (2003). Economics: Principles in action Upper Saddle River, New Jersey 07458: Pearson Prentice Hall. pp. 153. ISBN 0-13-063085-3.

¹⁹ R. Preston McAfee, Price Discrimination, in 1 ISSUES IN COMPETITION LAW AND POLICY 465 (ABA Section of Antitrust Law 2008)

<http://www.mcafee.cc/Papers/PDF/ABAPriceDiscrimination.pdf>.

²⁰ Robert B. Ekelund, jr., George S. Ford and Thomas Koutsky (2000), 'Market power in Radio Market: an empirical analysis of local and national concentration', Journal of Law and Economics, Vol. 43, No. 1 (April 2000), pp. 157-184 The University of Chicago Press,

[http://www.jstor.org/stable/10.1086/467451.](http://www.jstor.org/stable/10.1086/467451)

Predatory pricing

The practice is exercised to force the competition out of market and earns monopoly profits forever after. Thomas Di Lorenzo²¹, explains this feature as that the firm which exercise 'predatory pricing practice' follow the following steps

Step 1:

They lower the unit price below the average cost of its competitors.

In response

The competitors must then lower their prices below average cost; otherwise they will lose practically their complete market share and will go bankrupt.

Consequences

The competitors lose money on each unit sold

Step 2:

Once it achieve the success in pushing the competition out of the market, predatory firm raises its price to compensate itself for the money it lost while lowering the unit price below the average cost.

2.1.3 Features of Market Power

Vatiero, Massimiliano²² while discussing the features of market power states that the Market power enables the organisations and institutions with the ability to employ in unilateral anti-competitive activities.

²¹ Thomas Di Lorenzo (1992), 'The Myth of Predatory Pricing', Cato Policy Analysis No. 169, <http://www.cato.org/pubs/pas/pa169es.html> [accessed 26th April 2011]

Other features of exercise of market power are the following practices:

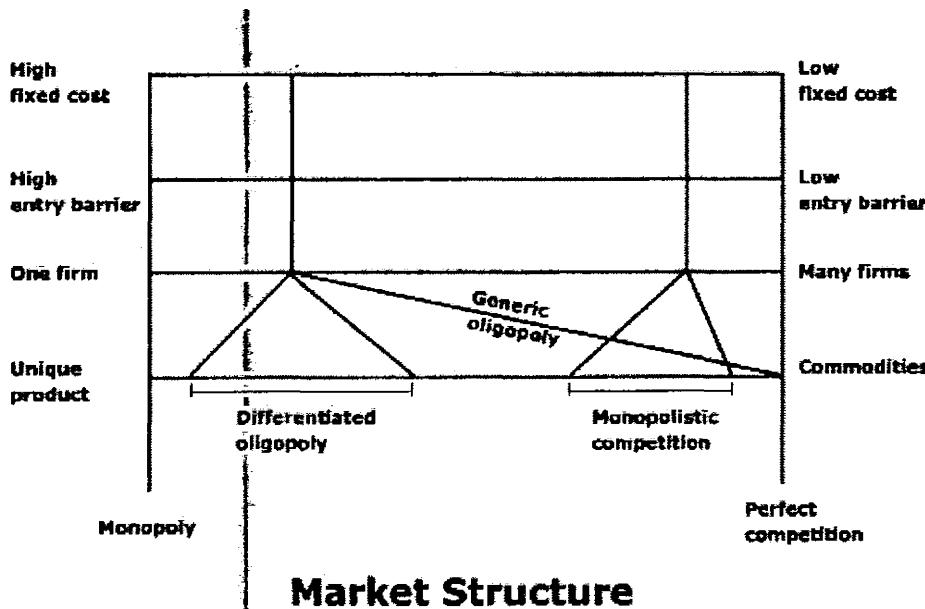
- Cartels (restrict output and set higher prices),
- Dumping (selling product at loss),
- Exclusive dealing (buying from particular buyers or retailers),
- Fixed prices,
- Limit pricing,
- Mergers (when 2 firms join together to form one)
- Refusal to deal with particular vendors by the companies,
- Territorial division,
- Tying of the products (buying of two products together) etc. these features actually avoid and discourage competition in the market.

2.1.4 Measurement of Market Power

Posner²³ states that a measure of market power depends upon the market share of the organisation that is practicing market power and the market price elasticity of demand and the competitive fringe supply elasticity.²⁴

²² Vatiero, Massimiliano (2010), 'The Ordoliberal Notion of Market Power: An Institutionalist Reassessment,' European Competition Journal, Volume 6, Number 3, December 2010, 689-707.
[Accessed 26th April 2011]

²³ Posner, Richard A. (1981), 'The economics of justice', Harvard University Press (Cambridge, Mass.)
<http://getcited.com/cits/PP/1/PUB/102071349>



Source: <http://livingeconomics.org/glossary.asp>

2.1.5 Measure to limit the practice of Market power

Protection of competition is understood as meaning of economic freedom of other market players for effective economic growth and healthy financial system.²⁵

2.2 INTRODUCTION

²⁴ Dennis L. Weisman (2005), 'A GENERALIZED MEASURE OF MARKET POWER', [http://www.kstate.edu/economics/weisman/papers/A%20Generalized%20Measure%20of%20Market%20Power%20\(July%202005\).pdf](http://www.kstate.edu/economics/weisman/papers/A%20Generalized%20Measure%20of%20Market%20Power%20(July%202005).pdf) [Accessed 26th April 2011].

²⁵ Liza Lovdahl Gormsen (2006), 'Article 82 EC: Where are we coming from and where are we going to?' Volume 2 Issue 2 March 2006 [accessed 26th April 2011].

Antitrust laws are designed to and profess to safeguard the consumers from monopoly power. Without a doubt, antitrust is usually believed essential to protecting the free economic, financial and endeavor system.²⁶ But in Godwin v Agassiz²⁷ the Supreme Court denied relief to the plaintiff who had sold his own shares to his detriment after having read a newspaper report stating that the company had stopped operating.

He was ignorant of the information that directors were buying and selling shares on the basis of non public information at their disposal because these transactions were anonymously conducted through the Stock Exchange.²⁸

The history of economic and financial market is evident of scenarios where the consumer's rights were abused in the name of market power. Such classic and epic growths and enormous devastations invited obsessive panics, frights and crashes which left economic systems in devastating effects.

2.3 EARLY HISTORY

Market abuse of misuse of market power is not a new phenomenon. In 'A walk along the Ganges', Dennison Berwick wrote that in 1762 The Company's clerks took gained undue benefits due to their unconcealed military power to trade duty-free for their own benefit and this practice became a flagrant abuse.²⁹

²⁶ Clyde Wayne Crews Jr (1997), 'Antitrust Policy As Corporate Welfare', <http://cei.org/pdf/1615.pdf>

²⁷ (Mass 1933) 186 NE 659.

²⁸ <http://ufh.netd.ac.za/jspui/bitstream/10353/230/10/Chitimira%20thesis%20ch5.pdf>.

²⁹ Clyde Wayne Crews Jr (1997), 'Antitrust Policy As Corporate Welfare', <http://cei.org/pdf/1615.pdf>.

The power of the British flag to avoid customs duty was such that Warren Hastings never saw any other flag when he sailed up the Ganga in 1762. The English merchants could undersell the Bengalis in the Bengali *market*... it was so much so that they could make retailers in general afraid to deal with them... historian Percival Spear in "Master of Bengal, Clive and His India". Profits in such trading activity were averaging between 20 to 30 per cent and up to 75 per cent. During this time period English language gained the word 'loot', Hindi for stolen goods.³⁰

In 1776, Adam Smith referred business numerous times always as negative force in his book 'The Wealth of Nations', gigantic entities whose monopoly power could destabilise the payback of free competition in the economy. Corporations at that time typically used royal charters and extraordinary rights and privileges to guard their immense local and regional monopolies.

And the list goes on in 18th century, like for example Thomas Jefferson also criticized the abuse of royal monopolies in another document of the same year.³¹

³⁰ Dennison Berwick (1986), 'A walk along the Ganges', http://books.google.com/books?id=4DtAPQm3IeoC&pg=PA40&sig=TucGi_Qx4FVZ8UZYQKXITH7AnbY&hl=en#.

³¹ Scott Sernau (2011), 'Social Inequality in a Global Age', 3rd edition, http://books.google.com/books?id=QCMGKckZt9sC&pg=PA202&sig=7tppuhY2seVF89NRqe5wza6q_mU&hl=en#v=onepage&q&f=false.

It was in 19th century when obvious more practical and real progress came in sight through the treaty of Rome on 25th March 1957. This treaty laid the dominating and noticeable groundwork for a general market for competition and economic and social cohesion.

Through Article 3, competitions rules were laid and cartel arrangements and market abuse by dominate actors especially in reference to Article 85 and 91.³² Through article 52 and 58 announcement of free movement of worker any where in the community was made.³³

In next part of the chapter we will take main jurisdictions one by one and see the legislation and progress in the market and economy to avoid Market power.

2.3.1 United States

The United States antitrust law body makes it illegal to practice monopolies or any kind of anti-competitive behavior or in general any act to violate standards of ethical behavior in the market or economic and financial system which leads to unfair business practices or deemed to damage

³² DOBSON, A. (2010), Civil Aviation and European Integration: Creating the Seemingly Impossible SEAM. *JCMS: Journal of Common Market Studies*, 48: 1127–1147. doi: 10.1111/j.1468-5965.2010.02087.x Dundee University.

³³ Avgouleas, E (2005), *The Mechanics and Regulation of Market Abuse: A Legal and Economic Analysis*, Oxford University Press; 2005, <http://fds.oup.com/www.oup.co.uk/pdf/0-19-924452-9.pdf>.

businesses or customers or both. Antitrust laws are intended to encourage competition in the marketplace.³⁴

The 1934 Act was deficient in several respects, for example section 16(a) failed to sufficiently authorize the United States Securities and Exchange Commission³⁵ to convalesce proceeds that were illegitimately obtained by individuals who practiced market abuse in any shape or form in regards if the civil law is not backing the procedure. This function was purely left to a company's own managers, directors and shareholders.

The U.S. Senate which was unswervingly elected by state legislatures initiated Sherman Act to tackle the market abuse.³⁶

In further efforts to resolve³⁷ this dilemma, the United States Securities and Exchange Commission (SEC) introduced a number of anti-fraud provisions through Rule 10b-5 but they nonetheless remained inadequate.³⁸ Rule 14e-3

³⁴ Sullivan, arthur; Steven M. Sheffrin (2003).*Economics: Principles in action*, Upper Saddle River, New Jersey 07458: Pearson Prentice Hall. pp. 173. ISBN 0-13-063085-3.

³⁵ This body was established in 1934 as an independent board to enforce the insider trading prohibition in the United States of America.

³⁶ W. Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (1965).

³⁷ <http://ufh.netd.ac.za/jspui/bitstream/10353/230/10/Chitimira%20thesis%20ch5.pdf>.

³⁸ Sullivan, arthur; Steven M. Sheffrin (2003).*Economics: Principles in action*, Upper Saddle River, New Jersey 07458: Pearson Prentice Hall. pp. 173. ISBN 0-13-063085-3.

was further enacted to correct these flaws, but it was also unsuccessful.³⁹ But over the years now the United States of America trading regulatory framework is arguably the one that was the most adopted and preferred by other countries in regard to market power abuse.⁴⁰

The prevention on any dealing which can be regarding abuse of market abuse in trading and financial market and related offences in the US is by and large accepted by the public, the judiciary and the entire the market participants in that country.⁴¹

Rigorous enforcement and prosecution of such offences are taken very seriously in the region to bring economic justice in the society and avoid economic catastrophes. Regulatory framework of United States shows a momentous, significant and very important effort by the legislature to provide an effective protection against the market abuse.

2.3.2 European Union Laws

The European Parliament and the Council have adopted a directive on insider dealing and market manipulation. It is intended to guarantee the integrity of European financial markets and increase investor confidence. The objective is

³⁹ Arshadi N and Eyssell T H The Law and Finance of Corporate Insider Trading: Theory and Evidence Kluwer Academic Publishers 1993 46.

⁴⁰ Steinberg M I "Insider Trading – A Comparative Perspective" (2002) <http://www.sec.gov> .

⁴¹ Steinberg M I op cit note 1 29.

to create a level playing field for all economic operators in the Member States as part of the effort to combat market abuse.⁴²

- Proposal for a Directive of the European Parliament and of the Council of 22 December 2006 amending Directive 2003/6/EC on insider dealing and market manipulation (market abuse) as regards the implementing powers conferred on the Commission.
- Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions.⁴³
- Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation.
- Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as

⁴²http://europa.eu/legislation_summaries/internal_market/single_market_services/financial_services_transactions_in_securities/l24035_en.htm.

⁴³ Avgouleas, E (2005), The Mechanics and Regulation of Market Abuse: A Legal and Economic Analysis, Oxford University Press; 2005, <http://fds.oup.com/www.oup.co.uk/pdf/0-19-924452-9.pdf>.

regards the fair presentation of investment recommendations and the disclosure of conflicts of interest are fundamental development for avoidance of market abuse.⁴⁴

2.3.3 United Kingdom

After three failed attempts in 1980 with market abuse in special regard with insider dealing reached the statute book in the UK as the Companies Act of 1980 which made it an offence. Under the same efforts Part V of the 1980 Act was reenacted, followed by Company Securities Act 1985 subsequently was amended by the Financial Services Act 1986.⁴⁵

Few highlights of the legislation that made abusive use of market power an offence are as follow:

- The EC Insider Dealing Directive was adopted in 1989⁴⁶ and implemented in the UK by Part V of the Criminal Justice Act 1993. this act categories the following acts as abuse of market power
 - Dealing in price-affected commodities on the basis of inside information
 - Encourage another person to deal; and
 - Disclose inside information to a third party.⁴⁷

⁴⁴http://europa.eu/legislation_summaries/internal_market/single_market_services/financial_services_transactions_in_securities/l24035_en.htm.

⁴⁵ http://www.cityoflondon.gov.uk/NR/rdonlyres/3950D4A4-5792-412C-BA89-1B30827101C7/0/BC_RS_eudirectives_1205_FR.pdf.

⁴⁶ Directive 89/592/EEC of 13 November 1989, OJ 1989 L334/32

- By the virtue of Article 2(1) Insider and Insider Dealing Each Member State was also directed to prohibit any person who by virtue of his membership of the administrative, management or supervisory bodies of the issuer or because of his access to such information due to his employment, profession or duties, possesses inside information from taking advantage of that information which will cause abuse of market abuse.
- The adoption of the Market Abuse Directive in January 2003 made a fundamental land mark in evading the market abuse regime. Commission Directive 2003/124/EC Article 1(1) Market Abuse Directive⁴⁸ and Section 118C, Financial Services and Markets Act 2000 ("FSMA") defined inside information as information which "is not generally available" and The FSA in its Code of Market Conduct categories this act as abuse of market power.⁴⁹

These legal frame works for protecting the consumer and economic market is not complete yet, though efforts are made in the field.

⁴⁷ Avgouleas, E (2005), The Mechanics and Regulation of Market Abuse: A Legal and Economic Analysis, Oxford University Press; 2005, <http://fds.oup.com/www.oup.co.uk/pdf/0-19-924452-9.pdf>

⁴⁸ OJ 2003 L339/70.

⁴⁹ MAR 1.2.12E.

There is no familiar proviso against market exploitation in European market. The regulations show a discrepancy to a great extent and legal ratios fluctuate according to jurisdiction, therefore these differences deform the concept of perfect competition in financial markets.⁵⁰

It is recommended that the measures must also be taken of the emergence of new products and technologies, increasing cross-border trade and the development of interconnected markets.

These developments are likely to increase the opportunities for market manipulation: for example, use of the Internet may intensify the risk of dissemination of bogus, forged or deceiving, ambiguous and ambiguous information.⁵¹

2.4 CASE LAW AND SUMMARY

Consumer protection laws are specially premeditated to make certain and guarantee fair employment of contest and free competition and the free streaming of ingenuous and straightforward information in the economic and financial system.

⁵⁰ Avgouleas, E (2005), The Mechanics and Regulation of Market Abuse: A Legal and Economic Analysis, Oxford University Press; 2005, <http://fds.oup.com/www.oup.co.uk/pdf/0-19-924452-9.pdf>.

⁵¹ http://europa.eu/legislation_summaries/internal_market/single_market_services/financial_services_transactions_in_securities/124035_en.htm.

There are different laws in different jurisdictions of the world which are specially intended to design to avoid economic trends and businesses activities that employ the activities of or indulgence of fraud or specified unfair behaviors into practice from gaining a gain over competitors and may endow with supplementary fortification for the feeble and weak and those not capable to take care of themselves in the market.

As we have discussed earlier in the chapter that the United Kingdom, as member state of the European Union adopted consumer protection directives of the European Union. They have also flourished domestic legislation that originated inside the domain and ambit of other laws like for example law of contract and law of tort etc.

In developed countries and economies monopolies and market abuse have long been a cause of apprehension and administrations have required special measure to protect the consumer.

Especially since the 1960s, in the United States of America and in the European Union efforts have been made to capture the advantages and benefits of competition both in policy and in law. Nevertheless, their on the whole justification and approaches have speckled extensively. For example conventional assumptions of competition law and policy going to pre-World War II days in the US can be classified as generally belonging to the pro-laissez faire discipline, and in continental Europe, to further pro-mixed economy schools.⁵²

⁵² Competition Policy and Law in Pakistan, http://cplaw.cupl.edu.cn/upload//temp_08031111539215.pdf.

In the United States a diversity and verity of legislation has been incorporated to avoid the market abuse in financial and economic market and sector. Both the federal or state levels regulate consumer affairs these efforts by implementing number of regulations from time to time. United state's law have gone through a lot of evolution and changes till this time, when it is considered one of the best laws to protect the consumers in the market against the misuse of market power in different sectors of the financial and economic system.

Example of such regulations and laws are as follow:

- Fair Debt Collection Practices Act
- Fair Credit Reporting Act,
- Truth in Lending Act
- Fair Credit Billing Act and the
- Gramm-Leach-Bliley Act

On the basis of current experience in mutually developed and developing countries and in the older European practice competition in economic and financial sectors is look upon as a self-motivated and dynamic breakthrough. Through this development as competitor entrepreneurs try to find novel revenue opportunities in a financial and economic world that is continuously changing. Through triumphant novelty businesses outweigh their competitor and take over the economic market a little bit. But the prevailing situation is forever in intimidation. Elevated proceeds signify that the trade is vigorous, energetic, active and dynamic.

Competition guiding principle in such conditions ought not to exclude or castigate venture behaviour that may be considered as competent in a self-motivated logic. Even though it does recognize that strategy ought to make certain that the playing field is level for apprentices and new comers.

Inside Europe the principal observation of competition calls for a competition policy that is driven by unambiguous considerations of fairness and impartiality of outcome rather than efficiency alone.

Government policy, as codified in the antitrust laws, can improve consumer welfare by stopping these actions and discouraging other firms from engaging in such behavior⁵³. Government policy in the form of economic regulation can improve economic welfare by setting more efficient prices for the monopoly provider and preventing other firms from entering the market, albeit with adverse incentives for innovation. While firms like power companies, cable television companies and wireless communication companies with large start up costs fall within this category. A company wishing to enter such industries must have the financial ability to spend millions of dollars before starting operations and generating any revenue⁵⁴.

One can cite examples of firms that have conspired or can recognise markets that are subject to scale economies over a wide range of output. Course

⁵³ Winston, Clifford (2006), 'Government Failure vs. Market Failure: Microeconomics Policy Research and Government Performance', Publisher: Brookings Institution Press.

⁵⁴ Krugman & Wells, Microeconomics 2d ed. (Worth 2009).

of action and policies to curb market power can be justified only by evidence that they can and do increase output and thereby raise social welfare.

However, the synopsis that the researcher sketched in progress of the accessible academic support is that such antitrust reforms in the form of policies in the direction of avoidance of monopolisation, mergers, and collusion have done very little to hoist buyer's welfare.

The concept of abuse of market power needs to be grounded in sound economic principles which need to be translated into practical guidelines which help the authorities on the one hand, and the parties to an inquiry on the other, to address the issues that arise in connection with unilateral conduct as clearly and efficiently as possible.

Mario Monti said at Fordham, "we need to ... examine whether current practice is sound from an economic point of view and to enhance transparency and legal certainty."⁵⁵

In chapters ahead we will discuss and proceed with our thesis in the context of market power of telecommunication industry in Pakistan. Although antitrust and economic regulation in the country is motivated by different concerns yet they share a familiar theme in that they mutually seek out to shift a market closer to the competitive model. The theoretical rationalisation for

⁵⁵ Geroski, P. (2005), "What is an abuse of market power?" http://www.competition-commission.org.uk/our_role/cc_lectures/abuse_of_market_190405_chairman_intro.pdf [accessed 26th April 2011].

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antitrust laws and financial parameter does not imply that government intervention is obligatory to restrain market power and improve economic efficiency of the society.

Chapter 3

Key issues, Aim and the object of the study

In this chapter the researcher will discuss the back ground of the topic and in this relation the problem of the research will be identified and will be discussed.

Further the researcher will also discuss the rational of the study and the research question. In the end of the topic aim of the study will be elaborated and object will be determined to achieve the aim of the thesis followed by the summary of the chapter,

3.1 KEY ISSUES

Key issues signify that what are the points which the researcher will be focusing on in his research work. The determination of key issues of any dissertation is very important to guide the research study on constructive and beneficial path.⁵⁶

⁵⁶ Peter H. Bloch and Marsha L. Richins (1983), 'A Theoretical Model for the Study of Product Importance Perceptions', the Journal of Marketing, Vol. 47, No. 3 , pp. 69-81 .

The researcher's main focus is to conclude the dissertation and research on facts rather than having a pre determined idea of advocating some specific market approach. For this purpose through case study the scenario will be assessed, the flaws for which we need to replace the present system will be highlighted along with the benefits, advantages and disadvantages in the present system.

The key issues that will be addressed in this research is to see in detail the exercise of market power, its abuse and legislation to protect not only the consumer but also the industry from it in Pakistan.

3.2 AIM OF THE THESIS

An aim is defined as a purpose or as a process of attempt to accomplish a purpose. In a research work it is very important to keep the focus clear on the aim of the study. This refers toward an intended target that is focused to be achieved. Aim signifies the purpose of the research work. Aim defines the specific points that are anticipated. Aim guides the planned actions⁵⁷. The aim of the research is as follow:

- What is market power?
- What steps are taken to stop the abuse of the power?

⁵⁷ Gary King, Robert O. Keohane and Sidney Verba (1995), 'Review: The Importance of Research Design in Political Science', the American Political Science Review, Vol. 89, No. 2, pp. 475-481.

- What is international stance on the topic?
- What is Pakistan's position on the market abuse in regards to legislation etc?

3.3 OBJECT OF THE THESIS

Object is the root through which aim of the study is to be achieved. it is a way through which outcome or aim will be achieved. Object is the method, approach, efforts or actions which are intended to attain an aim. Objectives are something or routine worked toward achieving the aim or goal.⁵⁸

The object of the research in this thesis will be achieved through case studies and legislation aspect around the world, targeting specially the telecommunication industry of Pakistan.

⁵⁸ Javier Revilla Diez (2000), "The Importance of Public Research Institutes," European Planning Studies, Volume 8, Issue 4, Pages 451 – 463.

Chapter 4

Legislation and Market Power: Pakistan's Perspective

In this chapter the researcher will focus on the aspects of legislation for prevention of market power in the business and economic industry in special prospect of Pakistan's Point of view. In the start of the topic early history of the legislation done for the prevention of the market abuse will be presented. Then the focus will be diverted to different aspects of legislations done in Pakistan and in the end of the chapter summary of the Pakistan's prospect of the legislation to prevent the market abuse will be discussed.

4.1 INTRODUCTION

For approximately two decades by light and less governmental and administrative management on the economic and financial system and by plummeting government ownership in economic sector government of Pakistan has carried out the implicit competition course of action through opening economy and market sector for imports and overseas and foreign investment.

The basic aim of the government to implement the competition laws is very apprehensive to ensure that organisations and business firms and other

kind of undertakings operating in the free market economic and financial system do not confine or deform competition in a manner that avoid the economic sector from performance optimally.⁵⁹

4.2 FEATURES OF AN EFFECTIVE POLICY

An effective competition policy framework involves a multi-faceted set of initiatives, all of which are new to Pakistan. The certainty that competition among accomplishments and activities fabricates the most excellent results for economic and financial system and society on whole and it is pedestal on monetary theory that employs samples and replicas of perfect competition and monopoly and perception of wellbeing and effective competence.

An effective competition law-policy aims at providing equal opportunities for all capable entities to participate in the economy, thereby creating opportunities for entrepreneurship and giving rise to innovation. In doing so, the power of consumer's increases and confidence among domestic and foreign investors is also encouraged. Firms are not only pressured to lower prices, increase the quality, choice and availability of goods and services but also are encouraged to engage in good corporate governance and higher standards of business behavior! The components generally include

- (i) a modern enabling law,
- (ii) Specific rules and regulations to operationalize the law,
- (iii) Guidance for corporate behavior,

⁵⁹ http://www.oup.com/uk/orc/bin/9780199299041/jones&sufrin_ch01.pdf.

- (iv) Education and empowerment of consumers (including producers who are themselves consumers),
- (v) Public policy advocacy and
- (vi) A professional, autonomous institution to enforce the law.

Implementations of these Competition rules search for and endorse effectual and unembroidered competition in the economic and financial market. This does not mean that in a free market economy every industry is left unrestrained and uncontrolled but these laws encourage healthy competition among the market competitors for the whole economy.

It has to be acknowledged and established that the comparatively concentrated market formation that differentiate most developed economies are considered to prompt the preferred altitude of public benefit, i.e. by providing an alternative of goods and services at low prices. Furthermore, in this consideration, the argument is that it is not the job of competition strategy to avert the materialization of monopolies however additional to put off them misusing their authority.

In terms of conventional competition strategy, usual monopolies and concessions present a tricky dilemma. Contested economies and markets are not promising options since it is efficiently more well-organized for a sole institute to have a monopoly in order to keep away from replication and wasted investment.

A typical point of view in favour of an expected monopoly is

- (i) That expenditure and expenses are reduced;
- (ii) That zero rivalry in market means less money on endorsement and sponsorships; and
- (iii) That more money is accessible to be exhausted on novelty and on product expansion. Paradigm of natural monopolies and concessions as affirmed previously are the utilities for example, water, electricity, gas and railway transport infrastructure.⁶⁰

4.3 PAKISTAN'S LAW

The first wave of market interest of investment in private sector led leaning reorganization and transformation of economic sector. This dedicated effort led Pakistan to a pathway towards expansion and development that is continuing through the 1990s till date which started gathering steam in the late 1980s. This development contributed a lot to government's efforts towards greater economic development.

The improved and increased function of economic market indications in resource allotment has shaped instantaneous dividends in the structure of

⁶⁰ Pakistan (2009), 'Public Monopolies, Concessions and Competition Law and Policy' Intergovernmental Group of Experts on Competition Law and Policy, http://www.unctad.org/sections/wcmu/docs/ciclp2009_s2_pa_en.pdf.

augmented business bustle and higher rates of economic growth, development and expansion.

To assemble the confrontation of upholding and sustaining an optimistic economy in ever increasingly globalized world, there is bigger acknowledgment that is persistent for efficiency and productivity, boosts and improved competitiveness must come from superior trade processes, advanced technology contented of investment and strengthened human resources.⁶¹

4.3.1 Early History

In 1947 after her independence like many other infrastructure facilities Pakistan's Telecom sector/industry was also inherited from the British Post Telegraph & Telephone [PTT] division. In 1962 this PTT Department annulment into

- Telephone & Telegraph Department and the
- Postal Departments.

Further re-organization was witnessed in 1991 when through the PTC Act 1991 the telecom sector was divided into

- Public sector and
- Private sector companies.

This initiated where the Pakistan Telecommunication Corporation (PTC) had no experience base consequently licenses were granted for non-basic services. According to the PTC Act 1991, T&T department was merged into Pakistan

⁶¹ Competition Policy and Law in Pakistan,
http://cplaw.cupl.edu.cn/upload/temp_08031111539215.pdf.

Telecommunication Corporation and its function was to provide basic telecommunication services.

Similarly another major highlight was accomplished by the introduction of a new legal framework in the form of Pakistan Telecommunication Ordinance in October 1996. Now the Ministry of Communications is accountable for strategy and sector securitization and divided the PTC in five departments.

PTA	Regulator of the telecom industry
FAB	Allocator frequency spectrum and monitoring
NTC	Service provider of telecom services to public sector
PTET	Trust to care the problems of the employees of the PTCL
PTCL	A public sector Company

PTCL provided domestic and international telecommunication services and 95% of the assets and liabilities of PTC were transferred to PTCL and the rest of 5% were divided in other four divisions.⁶²

The focus for the overtur of competition strategy in Pakistan is facilitating the law and organization of a novel self-directed and independent organization. According to an approximation there are currently more than 100 countries that have ratified competition law-policies. According to these figures in the 1990s

⁶² Hussain, I. 2005, e-banking. The News. 20-5-2005. <http://www.jang.com.pk/thenews/may2005-daily/20-05-2005/business/b1.htm>[Accessed 6th May 2011] also see Muhammad Tahir and Muhammad Umar (2007), "Boom of Telecom Sector in Pakistan and Its Impacts on Pakistani Culture",

[http://www.bth.se/fou/cuppsats.nsf/all/e6677b831b87c354c125736300055ce2/\\$file/thelast.pdf](http://www.bth.se/fou/cuppsats.nsf/all/e6677b831b87c354c125736300055ce2/$file/thelast.pdf)

single-handedly under the trance of changing domestic or international financial and economic situations there are additional more than 70 transitional market economies enacted novel or considerably toughen accessible competition law.

Earlier to the Competition Ordinance, 2007, Pakistan had an anti-monopoly regulation namely 'Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance' (MRTPO) 1970. The Monopoly Control Authority (MCA) was the association to direct this regulation.

In speedy shifting of universal and general trade and industry atmosphere, the 'Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance' 1970 was insufficient to tackle economic and market competition matters efficiently. This was for the reason that:

- i) The 1970's regulation was out of date for a modernizing and swiftly renovating market economy;
- ii) Owing to more than a few restrictions in the ruling, the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance was not competent to assemble the opportunity of businesses and the customers at large;
- iii) The first generation of restructuring that free up the financial system and expectant the private sector made compulsory a competition guideline and agenda that possibly will encourage, endorse and defend competition and modernization.

4.3.2 Transformation of state to private ownership

Economical, fiscal and monetary associations commenced in the 1990s and economic acceleration caused in the early part of the decade is taking a range of trails but through a view of improved performance surrounded by the framework of unbolted, competitive markets.

The transformation of state to private ownership in industry led to broad sweeping reforms. Which have commenced an era of sturdy and strong private segment led growth. Steady pace is being prepared to promote and accelerate the competition and private possession in many utilities especially with the telecommunications industry taking most important and prominent lead in this approach. This business is virtually completely in private hands and ownership as is further more than three quarters.

4.3.3 Pressures of Global market

In acknowledgment of the requirement for advanced rates of efficiency all the way through the economy Pakistan's strategy creators are enthusiastically intensifying and getting higher reorganization to additional original and further multifaceted vicinities. Especially in areas where market power is naturally vested with private institutions such as in some dimensions of the utility sector, rules limiting use of that market power are established through licensing and enforcement of the license conditions by the sector's regulators.

As a key inventiveness in this regard, the Government is pursuing a novel unambiguous competition strategy structure. Prevailing current positions by a few firms characterize and tell much of the economy and in recent years there have been a number of explorations into suspected cases of anti-competitive

routines on the part of private firms. In particular in primary sectors this have principally taken the appearance of horizontal and vertical agreements for example cement, sugar, vegetable ghee, fertilizers but moreover in a number of industrialized production such as automobiles and auto parts.

It is important to note that the factors restraining competition at home have become gradually more imperative the case for a most advantageous and favorable competition strategy has become stronger in current years. For a healthy economic system it is very vital that increase in efficiency and productivity have to come from enhanced business progression. At the similar time as the private sector became gradually more exposed to the demands and difficulties of the global market due to random and effective progression in knowledge, advanced content of investment and reinforced human resources.

4.3.4 “Second generation” reforms

The “second generation” reforms for competitor market include as a main focus which stress the elements of

- Bring in novel and more effective rules for market supremacy and
- Establishment of self-directed and self ruling organizations to enforce these rules in the market.

These rules aim to spotlighting the

- Enhanced and reinforced transparency and
- Prudential performance on the part of firms working in the commercial segment.

4.4 THE OBJECTIVE OF COMPETITION POLICY

The competition policy mainly focuses on and in accomplishing the authority of customers' increased assurance amongst domestic and foreign investors'. In economic and financial markets organisations and firms are under a lot of pressures and impressions to meet the market expectations they are not only under high strains to

- Lesser values of the products,
- The better, enhanced quality, choice and availability of goods and services but they are also
- Encouraged to employ in good commercial ascendancy and superior and advance values of commerce activities.

The objective of competition policy is to promote and encourage a strong competition culture right through the economic sector. The policy also targets

- The option of equal prospect for all practicable and feasible bodies and organisations to contribute and take part in the financial and economic activity.
- The opportunities of private enterprise and entrepreneurship and by this mean fertile ground for
 - Modernization,
 - Skills expansion and
 - Product diversification.

4.5 MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ORDINANCE, 1970

In 1963 the government of Pakistan, initiated an effort to promote the competition laws in Pakistan set up an anti-Cartel laws study group, which projected the enactment of Monopolies And Restrictive Trade Practices Ordinance 1970. The Authority's main functions were to register undertakings, individuals and agreements; to conduct inquiries into the general economic conditions of the country, with particular reference to the concentration of economic power and the existence of (or increase in) monopoly power and restrictive trade practices; to conduct inquiries in specific cases; and to give advice to individuals or undertakings on whether or not a certain course of action was consistent with the provisions of the law.

The prohibition and prevention of undue concentration of economic power and unreasonable monopoly power is undesirable for a healthy economic sector and should be restrictive trade practices in the financial market.

Such unreasonable monopoly practices for example the following are prohibited under Pakistan's Monopolies and Restrictive Trade Practices Ordinance 1970:

Where there exist

- Relationship, undertaking through any kind of association where two or more competitors in the any market (same)
 - Produce,
 - Supply,

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- Distribute or
- Provide together through a common or under common understanding or contract not less than one third of the total goods or services to create monopoly or difficulty for other participants to enter the market.
- Act that is being done likely to create monopoly power or lesser competition in any market including
 - Any acquisition
 - Any undertaking, or
 - Any merger of undertakings or undertakings of the stock or assets
- Any grant of loan by any financial institution like banks or insurance companies to any of the associated on
 - Greater or
 - On terms more favourable than for loans made available to other undertakings in comparable situations.
- Any kind of relationship, acquisition, merger or loan that have any say significantly to the effect the effectiveness and efficiency of the production or distribution of any kind of products including goods and services

- Or where such efficiency or promotion could not realistically be achieved through less restrictive of competition
- Or any kind of benefits that may be accomplished through such efficiency or endorsement evidently outweigh the adverse effect of the absence or reduction of competition
- Any form of unreasonably restrictive trade practices:- (1) Unreasonably restrictive trade practice between actual or prospective competitors for the rationale for fixing the
 - Purchase or
 - Selling prices or
 - Imposing any other restrictive trading conditions
 - Limiting the quantity or the means of production, distribution or sale
 - Limiting technical development or investment or
 - Using the means of boycott which causes undue concentration of economic power or unreasonable monopoly power.⁶³

⁶³ MONOPOLIES AND RESTRICTIVE TRADE PRACTICES (CONTROL AND PREVENTION) ORDINANCE, 1970, ORDINANCE NO. V OF 1970

4.6 COMPETITION COMMISSION OF PAKISTAN

The Competition Commission of Pakistan (CCP) was established on 2 October 2007 under the Competition Ordinance, 2007, which was re promulgated in November 2009. Subsequent to receiving endorsement, Competition Ordinance 2007 in the end transformed into Competition Act 2010. Primary intend of this directive was to provide officially authorized configuration to bring into being a financial monetary and commerce environment hold up on well-built rivalry of open market for

- Enhancing and improved financial and economic efficiency,
- Escalating competitiveness and protecting clientele from anti-competitive acts and performances.

The Competition Commission of Pakistan is a self-governing quasi-regulatory, quasi-judicial association that facilitates and guarantees hale and hearty market competition between corporations for the advantage of the financial system.

The Commission forbids mistreatment and maltreatment of an overriding arrangement in the market for example

<http://www.globalcompetitionforum.org/regions/asia/pakistan/ATT01665.pdf> [accessed 6th May 2011].

- Certain types of anti-competitive contracts and,
- Deceptive market practices.

Furthermore it also evaluates processes of mergers of undertakings that possibly will lay foundation in a noteworthy reduction of competition. The Commission among its sponsorship and supports efforts looks for promotion and deliberate observance and expands and fires a 'competition ethnicity' in the economic sector.

Foremost aim of this regulation was to supply for a legal structure to generate an economic and business atmosphere supported on strong rivalry of market for improving financial and economic efficiency, mounting competitiveness and shielding customers from anti-competitive performances.⁶⁴

4.6.1 Implementation measures

The Ministry of Finance and the MCA worked with the World Bank and the Department for International Development (DFID), UK. Akin to rationalization of "second generation reorganization" inventiveness the Government of Pakistan therefore commenced a program to expand Competition strategy. Towards this end and as an effect of these efforts, Competition Ordinance, 2007 replaced the MRTPO.

Before the promulgation of the Competition Ordinance, 2007, the performance of MCA was largely ineffective for nearly 25 years following its

⁶⁴ http://www.cc.gov.pk/index.php?option=com_content&view=article&id=59&Itemid=115.

establishment. Competition Ordinance, 2007 is part of the broader competition policy framework of the Government of Pakistan through which it endeavors to engender free competition in all spheres of commercial and economic activity.⁶⁵

The Competition Act, 2010 reflects on the modern trade and industry veracity as well as accurate the shortage of the MRTPO related to definitional aspects, coverage, penalties, and other procedural matters. In line with contemporary competition regimes the regulation takes on a "carrot and stick" methodology. These laws provide for higher fines combined with imprisonment for non-compliance; on the other hand, the carrot is sweetened with sophisticated leniency provisions that may eventually lead to no fines and imprisonment, subject to certain conditions. To maintain high standard of evidence for unearthing secret cartels, the Competition Commission has legal powers to conduct searches and inspections.⁶⁶

4.6.2 Dominant Position

Pursuant to definitions section 2 (e) of the Competition Act 'dominant position' of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent.⁶⁷

⁶⁵ Gist of an Article by MUHAMMAD FARRUKH NOUMAN, last viewed on 19th September at <http://www.scribd.com/doc/21028435/Competition-Commission-of-Pakistan>.

⁶⁶ http://www.cc.gov.pk/index.php?option=com_content&view=article&id=59&Itemid=115.

⁶⁷ Section 2(e) of Competition Act 2010.

While as per section 2 (k) of the Competition Act, the term 'relevant market' means the market which shall be determined by the Commission with reference to a product market and a geographic market and a product market comprises of all those products or services which are regarded as interchangeable or Substitutable by the consumers by reason of the products' characteristics, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently geographic areas because, in particular the conditions of competition are appreciably different in those areas.⁶⁸

4.6.3 Abuse of dominant position

Competition Act as per its section 3 defines abuse of dominant position as follows:

Abuse of dominant position.---(I) No person shall abuse dominant position.

(2) An abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restrict, reduce or distort competition in the relevant market.

(3) The expression "practices" referred to in subsection (2) shall include, but are not limited to---

⁶⁸ Section 2(k) of Competition Act 2010.

- (a) limiting production, sales and unreasonable increases in price or other unfair trading conditions;
- (b) price discrimination by charging different prices for the same goods or services from different customers in the absence of objective justifications that may justify different prices;
- (c) tie-ins, where the sale of goods or service is made conditional on the purchase of other goods or services;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of the contracts;
- (e) applying dissimilar conditions to equivalent transactions on other parties, placing them at a competitive disadvantage;
- (f) predatory pricing driving competitors out of a market, prevent new entry, and monopolize the market;
- (g) boycotting or excluding any other undertaking from the production, distribution or sale of any goods or the provision of any service; or
- (h) refusing to deal.⁶⁹

The CCP is delegated with the consciousness of barring commercial enterprises from unduly using their central position in the market through immoral

⁶⁹ Section 3 of Competition Act 2010

practices such as limiting production, price discrimination and so on. The popular CCP cases include decisions regarding fines to be imposed on the cement and liquefied petroleum gas sector. The CCP has also given its judgment in the case of the cartelisation in the sugar industry but the Sindh High Court has disallowed it from making its findings public.

Under the Competition Act, if a party is dissatisfied with the decision of CCP, it may file an appeal before the Appellate Tribunal, and in case of impugning the Appellate Tribunal's judgment, an appeal can be made in the Supreme Court. The law also makes it mandatory for the tribunal to pass its judgment within six months time period.

According to the Competition Act, CCP can impose a penalty of up to Rs75 million, or 10 per cent, of the annual turnover of the company (whichever is higher) once a party is convicted for abusing their dominant position in the market.⁷⁰

4.6.4 Overriding Law

Section 59 of the Competition Act, 2010 provides as follows:

“Act to override other laws.—The provisions of this Act shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force”.⁷¹

⁷⁰ <http://tribune.com.pk/story/59442/pakistan-enacts-anti-trust-law/>.

⁷¹ Section 59 of the Competition Act, 2010.

4.6.5 Case Law

Competition Commission taking notice of media reports regarding an unprecedented hike in prices of poultry products and possible cartelization, initiated a suo motu enquiry under S.37(1) of the competition Ordinance, 2010. Commission appointed Enquiry Officers to conduct an enquiry into possible violation of Ss.3 & 4 of competition Ordinance, 2010. Enquiry Officers reported that there were *prima facie* violation of S.4 of the competition Ordinance, 2010 and recommended that proceedings under S.30 of the Ordinance could be initiated against the Poultry Association. Enquiry report alleged collusive conduct in terms of price fixing and production of various poultry goods. Ethos behind trade association was to provide representation to industry people in dealing with the Government and to improve general industry progress; it was not a platform to discuss and make decisions related to business. Anti-competitive practices including collusion, had taken place in the market for perishable items. Decision of Association to reduce bird population by culling it early, as a collective measure, was anti-competitive in object and was in violation of S.4(1)(2)(a)(c) of competition Ordinance, 2010 and it was not necessary to prove a series of individual decisions regarding price or rates when the mechanism of determining those prices or rates was abundantly clear. Existence of a mechanism a formula or target price, was enough to prove the existence of a price fixing decision. Distinct violation of S.4 of competition Ordinance, 2010 was found by a single Association in five different relevant markets, which was an unprecedented situation in terms of scope of anti-competitiveness by a single entity. In view of

such violation a penalty of rupees 10 million was imposed for each instance of collusive activities in the different relevant markets amounting to a total of Rupees 50 million.

Also, CCP took suo motto notice of the advertisements of CMPak where under its '8 Anay per call' offer was advertised on various media channels, in which, it was publicized that, the users of ZONG network can now call to one number of any network at '8 Anay per call' and they can change that number anytime. People claim of simplicity and yet give you half the truth. Only ZONG gives you the full truth at half the price. Now make calls to any other mobile network for 8 aanay i.e. 50 paisas per call and you can change that number any time you want. You will have to pay 40 paisas extra for the first minute only. CMPak was asked vide letters dated September 4, 2008 and October 7, 2008 to provide the details of the advertisement of the Offer, in order to verify that no misleading information is given to consumers through the aired advertisement. CMPak through its letter dated October 13, 2008 submitted the following information along with the script of the advertisement:

- a. ...'8 Anay per call' is an offer on our package '12 Anay'. The offer can be subscribed by dialing 907;
- b. The '8 Anay' offer allows customers to call one (1) number of any other GSM operators of Pakistan for 50 paisas per 30 seconds;
- c. Call set up charges of 40 paisas is charged per call;
- d. PKR 15 + tax are charged for each addition or modification of offer number.

The Office of Fair Trading (the 'OFT') of CCP found that the information provided by CMPak relating to '8 Anay per call' offer was not in conformity with the advertisements. Since, CMPak *prima facie* appeared to be distributing false or misleading information to customers/consumers and does not appear to disclose clearly to customers/consumers the true terms and conditions of the '8 Anay per call' offer; therefore, a Show Cause Notice was issued on January 13, 2009; to CMPak, *inter alia* in terms of the following: WHEREAS, the Undertaking has also submitted the script of the advertisement along with their reply dated October 13, 2008, the details of '8 Anay per call' offer provided in the reply of the Undertaking and information in the script of the advertisement aired on various TV channels are not in conformity with each other thus such advertisement *prima facie* appears to be distributing false or misleading information to customers/consumers lacking a reasonable basis related to the price, character and/or suitability for use of the product advertised in terms of clause (b) sub-section (2) of Section 10 of the Ordinance as:

- a. there is no mention of the duration of call, on which '8 Anay' will be charged by the Undertaking in the script of the advertisement;
- b. there is no condition in the script that '8 Anay per call' offer is valid only on '12 Anay' package;
- c. there is no mentioning in the script that PKR 15 + tax will be charged for each addition or modification of offer number;
- d. the last slide attached with the script is flashed on the TV for not more than 2 seconds, which does not appear to be a reasonable time to inform

the customers about the important feature of the package i.e., 8 Anay (50 paisas) to be billed for a call of 30 second duration.

WHEREAS in view of the foregoing the Commission is satisfied that there has been or is likely to be a violation of subsection (1) of Section 10 of the Ordinance in terms of clauses (a) & (b) of sub-section (2) of Section 10 of the Ordinance; It was also alleged in the Show Cause Notice that, the advertisement *prima facie* appears to be distributing false or misleading information to customers/consumers, lacking a reasonable basis related to the price, character and/or suitability for use of the product advertised in terms of clause (b) sub-section (2) of Section 10 of the Ordinance.⁷²

4.7 FUTURE PROSPECTS

As global markets have become more close to each other and this is due to punctual, effortless and easily reached communication modes like Telecommunication. Telecom industry has altered its shape through the years because of development and progress in the field of communication.

We have seen that telecom market in Pakistan has emerged as a fast growing industry during the past few years. Presently Pakistan has emerged as a very promising and as one of the most progressive country where the number of mobile phone subscribers has reached over 40 million. For this raison d'être number of companies are being paying attention and getting involved in to the

⁷² <http://www.cc.gov.pk/images/Downloads/ZONG%20-%20Order%20-%202029-09-09%20.pdf>.

investment in this part of the market.⁷³ A wide range of hard work is required to eliminate

- redundant barriers to entry,
- Free enterprise practices and
- Free exit created by
- deficiently planned policy and course of action and by
- Anti-competitive commerce practices by market.

Policy is a mean of encouragement for a commerce atmosphere which

- Perk up efficiencies,
- Show the way to distribution of resources in the most excellent manner
- and
- Prevents the abuse of market power through competition.

Therefore for a better achievement of an unequivocal competition policy to achieve the ultimate goal we will need to stay away from

⁷³ Butt, S.A, (2006). 'Pakistan telecom authority',

http://www.pta.gov.pk/index2.php?option=com_content&do_pdf=1&id=831 [Accessed 10 April 2011]

also see Muhammad Tahir and Muhammad Umar (2007). "Boom of Telecom Sector in Pakistan and Its Impacts on Pakistani Culture",

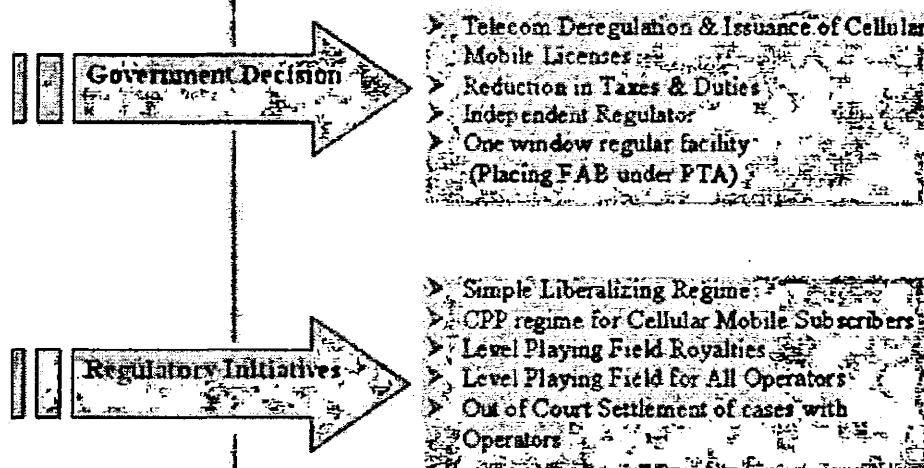
[http://www.bth.se/fou/cuppsats.nsf/all/e6677b831b87c354c125736300055ce2/\\$file/thelast.pdf](http://www.bth.se/fou/cuppsats.nsf/all/e6677b831b87c354c125736300055ce2/$file/thelast.pdf)

- (i) Measures that may pretend pointless operations or observance costs on firms,
- (ii) Becoming an obstruction to advantageous mergers and acquisitions, and
- (iii) Superfluous limitations on ground-breaking horizontal and vertical arrangements among market participants.⁷⁴

The development and encouragement of effectual competition in the country by an efficient and effectual competition will enhance the economy and market, the same can only be achieved if the Competition Commission works in liaison with the other regulatory authorities like Pakistan Telecommunication Authority, in case of the telecommunication Industry, so as to avoid any conflict in the regulatory regime and at the same time having a unified but well defined and bifurcated general and specific regulators, which will go on to ensure a perfect competitive environment and will discourage all the anti competitive elements in the market.

⁷⁴ Pakistan (2009), 'Public Monopolies, Concessions and Competition Law and Policy' Intergovernmental Group of Experts on Competition Law and Policy,
http://www.unctad.org/sections/wcmu/docs/ciclp2009_s2_pa_en.pdf.

Figure 3: Drivers boosting cellular growth



Source: (Pasha 2005)

In next chapter the researcher will completely focus on the nexus of the thesis that is related with the competition law in telecommunication industry.

Chapter 5

SMP or Significant Market Power: Case

Study of Telecommunication Industry in

Pakistan

In this chapter the researcher will focus on the aspects of legislation for prevention of market power in the particular telecommunication industry of Pakistan. Different aspect like features of legislation, size of the industry, participants of the industry etc will be elaborated and in the end, summary of the chapter will be discussed.

5.1 TELECOMMUNICATION

Carne anticipated the definition of telecommunication as follow: Telecommunication means communication from afar; it is the action of communicating-at distance. In the broadest sense, it can include several ways of communicating (letters, telegraphs, telephone, etc); however, it is customary to associate it only with electronic communication systems such as telephone, data

communication, radio, and television.⁷⁵ Similarly Charp and Hines also attempted to illustrate communication as the method by which we exchange sounds, signals, pictures and languages between people and places.⁷⁶

Valance portray the industry intensely: "In the last few years, the telecommunications industry has begun to merge with the communications service industry which, in turn, has converged with information service and entertainment service to produce the hydra-headed information technology or IT industry. An exciting combination of customer demand, increasing competition and advancing technology has created a fast-moving industry, which is constantly transforming itself in the development of new areas of business".⁷⁷

⁷⁵ Goro Oba, 'What is telecommunication?', The Department of Telecommunication, Michigan State University,

http://74.125.155.132/scholar?q=cache:onCTjNDLlroJ:scholar.google.com/+what+is+Telecommunication&hl=en&as_sdt=0.5 , [accessed 6th May 2011], also see Carne, E.B. (1995). *Telecommunications primer: signals building blocks and networks*. Upper Saddle River, NJ: Prentice Hall PTR.

⁷⁶ Charp, S. & Hines, I.J. (1985). *Telecommunications Fundamentals*. Arlington, VA: Bell Atlantic Company. Also see Goro Oba, 'What is telecommunication?', The Department of Telecommunication, Michigan State University,

http://74.125.155.132/scholar?q=cache:onCTjNDLlroJ:scholar.google.com/+what+is+Telecommunication&hl=en&as_sdt=0.5 , [accessed 6th May 2011].

⁷⁷ Vallance, I.D.T. (1993). *Global strategy*. Davis, D.E.N., Hilsum, C. & Rudge, A.W. (Ed.).

Communications after AD 2000. London: Chapman & Hall. Also see Goro Oba, 'What is telecommunication?', The Department of Telecommunication, Michigan State University,

http://74.125.155.132/scholar?q=cache:onCTjNDLlroJ:scholar.google.com/+what+is+Telecommunication&hl=en&as_sdt=0.5

5.2 INTRODUCTION

The management working in Pakistan market searches for alternates to encourage and endorse an economic and financial system which seeks to promote progress and develop the welfare of the society by shielding and encouraging a healthy competition in the economic system.

The government is taking Pakistan's telecom prospect acutely and has deregulated the industry. As an effect scores of new private entrants are gearing up to provide service.⁷⁸ Therefore, the private and public obstructions to competition⁷⁹ in the market are required to be prohibited from hampering the financial and economic sector towards the path of development.

This process in its nature gives assurance for maximization of customer and manufacturer wellbeing in a dynamic framework working in the economy. Hence for this purpose the Competition laws, regulation and policy along with its regulatory framework is very vital as it will support an atmosphere in which entry, and growth is promoted and anti-competitive behavior by all market participants

tion&hl=en&as_sdt=0.5 , [accessed 6th May 2011].

⁷⁸ Bloomberg Business (2005), 'Pakistan: Birth of a Telecom Revolution'
http://www.businessweek.com/magazine/content/05_05/b3918096.htm [accessed 6th May 2011].

⁷⁹ Pakistan (2009), 'Public Monopolies, Concessions and Competition Law and Policy'
Intergovernmental Group of Experts on Competition Law and Policy,
http://www.unctad.org/sections/wcmu/docs/ciclp2009_s2_pa_en.pdf.

is prevented. This will also restrain the market abuse of the dominant organizations.⁸⁰

From a realistic point of view, the rapidity of industrial revolution in Information and Communication Technology i.e. ICT in current years has to a great extent reinforced the view and stand point of importance of significant market power and obligations towards it both by regulators and the participants of the market.⁸¹ In the case of telecommunications the fixed land lines had been laid by the government itself through its Telegraph Department.

On the other hand with the introduction of mobiles, cellular phones and the internet in the market the competition in the market has become more concentrated. In perception after the fact it is an open fact that this disintegration of the government monopoly in telecommunications was driven by the demonstration of technology and the desire on the part of the management to make the industry more competitive.⁸²

⁸⁰ Competition Policy and Law in Pakistan,
http://cplaw.cupl.edu.cn/upload//temp_08031111539215.pdf.

⁸¹ Pakistan (2009), 'Public Monopolies, Concessions and Competition Law and Policy' Intergovernmental Group of Experts on Competition Law and Policy,
http://www.unctad.org/sections/wcmu/docs/ciclp2009_s2_pa_en.pdf.

⁸² Pakistan (2009), 'Public Monopolies, Concessions and Competition Law and Policy' Intergovernmental Group of Experts on Competition Law and Policy,
http://www.unctad.org/sections/wcmu/docs/ciclp2009_s2_pa_en.pdf.

5.3 SIGNIFICANT MARKET POWER

As defined in the earlier chapter that the market power is defined as an ability of the firm or organization to maintain profitably or to maintain prices above competitive levels, for a significant period of time.⁸³ Similarly the Glossary of statistical terms⁸⁴ defined Market power as the ability of an organization or institute to elevate and sustain price beyond the echelon that would normally exist under a perfect competition. Therefore it is a specific practice that is deemed an abuse of such power in the economy and market and effects the specifying obligations of purchasers in relation to supplier and buyers.⁸⁵

Robert Pitofsky⁸⁶, states that 'Having a dominant market share, however, is *not* sufficient for being able to exercise market power'.

5.3.1 THE SMP TEST

⁸³ Section 0.1. Horizontal Merger Guidelines, 1992, Department of Justice USA.

⁸⁴ Glossary of Industrial Organisation Economics and Competition Law, compiled by R. S. Khemani and D. M. Shapiro, commissioned by the Directorate for Financial, Fiscal and Enterprise Affairs, OECD, 1993.

⁸⁵ Miloslav Sinfeld (2010), "Abuse of market power – recent developments", http://www.twobirds.com/English/News/Articles/Pages/Czech_Republic_abuse_market_power_recent_developments.aspx [accessed 26th April 2011].

⁸⁶ New Definitions of Relevant Market and the Assault on Antitrust", *Columbia Law Review*, 90(7), 1990

The deliberation of SMP is set originally in requisites of market share in the sectoral revenues under Rule 17 of the Pakistan Telecommunication Rules 2000 ("The Rules"). A presupposition of market that gives augment the SMP is 25% of share of activity in a particular telecommunication market. The Pakistan Telecommunication Authority while determining

- That an operator with a market share of *more than* twenty five percent of the relevant market does not have SMP.
- That an operator with a market share of *less than* twenty five percent of the relevant market has SMP

Takes into account the following:

- The operator's accountability to manipulate the market conditions,
- Revenue and proceeds relative to the size of the pertinent market sector,
- Organizational control on the resources of access to customers,
- Availability and access to the available economic and financial resources and
- Experience of the organisation in providing telecommunication services and products in the related market sector.

Although the SMP test is not a starting point for application of anti-competitive behaviour in the market but it is a structure for the relevance of explicit and unambiguous regulations and policies to be adopted by the market participants.

This practice is to ensure fair terms for interconnection and competition for other operators and their clientele in the sector.⁸⁷

5.3.2 Origin of Significant Market Power

The concept of Significant Market Power was introduced by the European Commission to convey and regulate the component of *ex ante* directive to competition policy in telecommunications. The concept of SMP has since been adopted in many jurisdictions⁸⁸ some of which we have discussed in the previous chapter.

5.3.3 Size of the industry

Addressing the inaugural ceremony of 5th Information and Communications Technology Exhibition and Conference, Connect 2010 at the Karachi Expo Centre, Adviser to the Prime Minister on Information Technology, Sardar Latif Khan Khosa said that By 2010 in general the size of overall Information and Communication Technology industry in Pakistan has risen above \$12 billion, including \$1 billion under foreign direct investment (FDI).⁸⁹

The above figures show the importance and extent to which market participants are present in the Pakistan's telecommunication market. For the very reason to

⁸⁷Pakistan Telecommunication Authority, http://www.ispак.pk/Downloads/SMP_July_2010.pdf

⁸⁸ ICT regulation Toolkit, definition of Market Power http://www.ictregulationtoolkit.org/en/Section_1711.html, [accessed 3rd May 2011].

⁸⁹ Mehwish Khan, (2010), 'Size of Pakistan's ICT Industry Rises to \$ 12 Billion', <http://propakistani.pk/2010/05/10/size-pakistan-ict-industry-rises-12-billion/> [accessed 3rd May 2011].

keep the market balance and a healthy competition in the market for the protection of the consumers the telecommunication division that is the part of ministry of information technology Pakistan laid down policy directives for the following purpose.⁹⁰

Figure 20: Additional sources of government revenue

Revenue source	Payment rate
Royalty	0.5% revenue
R&D fund	0.5% of revenues
USO fund	1.5% of revenues
Import taxes	Various
Corporation tax	0.5% of revenues (minimum income payment)
Spectrum administration fees	75% of the total annual budget of Frequency Allocation Board is recovered from cellular mobile operators

Source: Mobile operators and GSMA data

5.3.4 Object of SMP

The competition law is meant to protect the interests of consumers and users of telecommunication services. This law where requires that minimum level of competition should be in the market, also requires that the big players should be regulated in such a manner that they are not at liberty to change the market dynamics according to their own will and pleasure, as without having any such check on them they will be in a position to distort the whole market.

⁹⁰ <http://telecompk.net/2007/10/23/revenues-from-telecom-sector-in-pakistan/>.

Moreover, they can take the market to such point where new entrants cannot either survive or sometimes are not in a position to enter the market even. Under the existing regulatory framework of Pakistan Telecommunication Authority is under statutory obligations, to serve the consumers and provide modern telecommunication facilities in the country.⁹¹

5.3.5 Purpose of SMP

Furthermore the function of the competition law is not limited due to the diversity of the communication industry for example few of the features are as follow:

- To check the tariff
- To declare operators as Significant Market Power
- To analyse the level of competition in the market
- Pakistan Telecommunication Authority is required to acquire information to establish whether SMP market participants and operators are getting themselves drawn in the anti-competitive practices or not.⁹²

⁹¹ Aurangzeb Mehmood "PRICE WAR IN TELECOM SECTOR AND THE ROLE OF REGULATOR",

http://www.pta.gov.pk/index.php?cur_t=vttext&option=com_content&task=view&id=283&scid=150&Itemid=1 [accessed 3rd May 2011].

⁹² Aurangzeb Mehmood "PRICE WAR IN TELECOM SECTOR AND THE ROLE OF REGULATOR",

http://www.pta.gov.pk/index.php?cur_t=vttext&option=com_content&task=view&id=283&scid=150&Itemid=1 [accessed 3rd May 2011].

5.3.6 Steps taken by PTA for Significant Market Power

The process of deregulation signifies the removal or sweeping statement of administration and managerial regulations and conventions that restrain the maneuvering of market forces.⁹³ Pakistan Telecommunication Authority on behalf of this rationale i.e. deregulating the economy and establishing competition has liberalized entry into the telecommunication industry. In perception after the fact it is an open fact that this disintegration of the government monopoly in telecommunications was driven by the demonstration of technology and the desire on the part of the management to make the industry more competitive⁹⁴ as this industry had previously been a statutory monopoly.

The inducement of many promotions has been endorsed by PTA during past decay for example introduction of:

- Policy to reduce mobile network operators' input cost and to induce impetus of growth of the industry in Pakistan.
- Introduction of Calling Party Pays (CPP) regime in year 2001.

⁹³ Sullivan, Arthur; Sheffrin, Steven M. (January 2002). *Economics: Principles in Action*. New Jersey: Pearson Prentice Hall. ISBN 0-13-063085-3. [accessed 3rd May 2011].

⁹⁴ Pakistan (2009), 'Public Monopolies, Concessions and Competition Law and Policy' Intergovernmental Group of Experts on Competition Law and Policy, http://www.unctad.org/sections/wcmu/docs/ciclp2009_s2_pa_en.pdf.

- Cutting of annual royalty from 1.5% to 0.5% of annual royalty for new entrants.⁹⁵

Pakistan Telecommunication Authority broadly scrutinize and evaluates the entire telecom market and after this evaluation concludes that if there is not enough or sufficient competition in the market.

Under the same process

- PTCL,
- Mobilink, and
- SCO have been given the Significant Market Power status.

Such operators, the dominant players of SMP which acquire such status are sedated under definite limitations and boundaries by Pakistan Telecommunication Authority as interim procedures.⁹⁶ Few important market participants have contributed significantly in the market development like

- Mobilink was created by the Pakistan Mobile Communications Limited in August 1994.

⁹⁵ Annual Report 2003-04, 2005. Pakistan Telecommunication Authority, http://pta.ires.com/index.php?option=com_content&task=view&id=361&Itemid=110 [Accessed 6th April 2007].

⁹⁶ Aurangzeb Mehmood "PRICE WAR IN TELECOM SECTOR AND THE ROLE OF REGULATOR",

http://www.pta.gov.pk/index.php?cur_t=vttext&option=com_content&task=view&id=283&scid=150&Itemid=1 [accessed 3rd May 2011].

- Ufone was created by Pak Telecom Mobile in January 2001
- Instaphone brand (owned by Pakcom Ltd).
- Paktel, which began in October 1990,
- Warid Telecom started in 2004.
- Telenor in March 2004 started its networking.⁹⁷

In 2003, Pakistan opened the telecom market to private operators in the sector of fixed line and cellular as well. Telecom regulator also introduces wireless local loop technology in the country.

Due to these regulatory policies, competition occurred in all the segments of the telecom industry and resulted in lower tariffs and cheaper handsets. Due to this, Pakistani people jumped on to the cellular services.⁹⁸

5.3.7 Obligations on SMP(s)

It is very vital that Significant Market Power shall be taken under strict control and certain prohibitions to avoid the abuse of their overriding positions through anticompetitive conduct.

⁹⁷ PTCL Agenda, 2004. Pakistan Telecommunication Corporation Limited.

<http://www.privatisation.gov.pk/telecom/TEASWEB2.PDF> [Accessed 6th May 2011].

⁹⁸ Sargana, M.A. (2006), "Recent Growth trends in the telecom sector of Pakistan", http://www.pta.gov.pk/index.php?option=com_content&task=view&id=706&scid=150&Itemid=1&bold=sargana [Accessed 6th May 2011].

Therefore the entire market participants of telecom market industry that are acknowledged as Significant Market Power are obligatory to discharge definite supplementary necessities proposed by the supervisory body.

Few of these responsibilities are as follow:

- The obligatory and compulsory publication of Reference Interconnection Offer (RIO) featuring the services and tariffs they provide to other Licensed operators;
- Carrier pre-selection;
- Accounting separation requirements;
- Tariff and price regulation by Pakistan Telecommunication Authority etc.⁹⁹

5.3.8 Reasons for obligations on SMP

The appropriate purpose of introduction of competition regulations in the market is backing up the new market players. This is to enable the participants who are in the situation of taking off to have

- Suitable and appropriate chances
- Open prospects for competition opportunity

⁹⁹ Aurangzeb Mehmood "PRICE WAR IN TELECOM SECTOR AND THE ROLE OF REGULATOR",

http://www.pta.gov.pk/index.php?cur_t=vttext&option=com_content&task=view&id=283&scid=150&Itemid=1 [accessed 3rd May 2011].

to commence and offer their services in an encouraging and favorable atmosphere. This will provide and act as a level playing field for all the market players to exercise their expertise in free economic sector.

This is very understandable that the enterprises companies who are doing business for the last ten to fifteen years encompass plenty of assets and capital in the form of profit as against their investment during these years of business; consequently they are in position and have the economic bargain agendas to sell their services at throw away prices.

The intent and purpose of such acts are very clear as they are not to recompense the consumer or clients but the purpose behind such market tactic is to take advantage of and drench the market as much as achievable for the innovative telecom operators.

Under the Act it is the responsibility of the Pakistan Telecommunication Authority to accordingly look after the privileges of the licensees. The new licensees who enter the market pay enormous revenues to the government in terms of license fees therefore; this enables them to have a valid right against Pakistan Telecommunication Authority to be duly sheltered by giving them a level playing field and by safeguarding them against and prohibiting the operators who tend to indulge in such practices which are commonly termed as anti-competitive.

5.3.9 Market Power

As discussed earlier, market power demonstrates the ability of an enterprise or organisation to raise prices above competitive levels,

Significant Market Power in Telecommunication Industry of Pakistan

- Exclusive of rapidly losing a substantial portion of its business to existing rivals or firms that become rivals as a result of the price increase.

Market power is only damaging if the firm apprehensive exercises its influence.

Exercise of such Market power by organisations with significant market power or dominance for enhancing their position in the market can result in

- Customer requirements,
- Engender competence
- Causes effectiveness losses, and
- Harm the public interest
- Apply strategic plans to reduce competition in the market.¹⁰⁰

5.4 PTA: THE REGULATOR

In 1996 Pakistan Telecommunication Authority was established by the Federal Government through an enactment called as Pakistan Telecommunication Re-organization Act.

Pakistan Telecommunication Division had remained a monopoly for a very long time. However, this industry has been liberalized with the declaration of

¹⁰⁰ ICT regulation Toolkit, definition of Market Power <http://www.ictregulationtoolkit.org/en/Section.1711.html>, [accessed 3rd May 2011].

Deregulation Policy on 13th July 2003 and exclusivity of PTCL in basic telephony has been abolished. So far Pakistan Telecommunication Authority (PTA) has issued 12 LDI and 76 LL licenses in addition to 92 WLL licenses. Similarly, PTA has also issued 2 new mobile service licenses to international companies through open auction. New telecom operators have contributed over Rs. 30 billion in deregulation process.

With all this, telecom industry of Pakistan is now open for competition. Impact of telecom liberalization, as was thought, has been tremendous. Access to telecom facilities for common man has been increased dramatically, in addition to improvement in quality of telecom services, prices of services has decreased tremendously. PTA has always been ensuring that all the telecom operators including newly licensed should be provided with level playing field.¹⁰¹

The legislation outlined the following functions of Pakistan Telecommunication Authority

- To regulate the establishment,
- To operate and maintenance of telecommunication system
- Maneuvering the provision of telecommunication services in Pakistan;

¹⁰¹ Muhammad Arif Sargana (2005),

http://www.pta.gov.pk/index2.php?option=com_content&do_pdf=1&id=587, [accessed 6th May 2011].

- Encourage and look after the interests of users of telecommunication services in Pakistan;
- Endorse the accessibility of a wide range of
 - High quality,
 - Efficient,
 - Cost effective and competitive telecommunication services throughout Pakistan;

Promote rapid transformation of telecommunication systems and telecommunication services.¹⁰² The regulatory body in the telecom industry, among other mandates, has to perform the following functions as well:

- To promote and protect the interest of the users in Pakistan and to ensure the protection of the rights of the licensees.¹⁰³
- Make recommendation to the federal government on the international telecommunication policies.

¹⁰² Bilal Sarwari, "Pakistan Telecommunication Authority (PTA)",

<http://www.paktelecom.net/pakistan-telecom-news/pakistan-telecommunication-authority-ptा/>

[accessed 3rd May 2011].

¹⁰³ Aurangzeb Mehmood "PRICE WAR IN TELECOM SECTOR AND THE ROLE OF REGULATOR",

http://www.pta.gov.pk/index.php?cur_t=vttext&option=com_content&task=view&id=283&scid=150&Itemid=1 [accessed 3rd May 2011].

- To grant licenses to any telecommunication system and service upon the payment of fee that is specified from time to time, and renewal of such system and services.
- Investigate the complaints, arising upon the disregard of the provisions of the Act
- Provide guidelines to the licensees, where they are unable to agree upon the terms of the agreement.
- Settlements of the disputes.¹⁰⁴

5.4.1 Functions of the Authority

Pursuant to section 4 of the Act, the Authority performs the following functions it

- (a) regulate the establishment, operation and maintenance of telecommunication systems and the provision of telecommunication services in Pakistan.
- (b) receive and expeditiously dispose of applications for the use of radio-frequency spectrum;

¹⁰⁴ M Khurram Saddiqi, "competition in telecom sector in Pakistan", dissertation for the partial fulfillment of LLM Trad law.

- (c) promote and protect the interests of users of telecommunication services in Pakistan;
- (d) promote the availability of a wide range of high quality, efficient, cost effective and competitive telecommunication services throughout Pakistan;
- (e) promote rapid modernization of telecommunication systems and telecommunication services;
- (f) investigate and adjudicate on complaints and other claims made against licensees arising out of alleged contraventions of the provisions of this Act, the rules made and licences issued thereunder and take action accordingly;
- (g) 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; and
- (h) perform such other functions as the Federal Government may, from time to time, assign to it.

5.4.2 Powers of the Authority

Pakistan Telecommunication Authority have exclusive powers to

- (a) grant and renew licences for any telecommunication system and any telecommunication service on payment of such fees as it may, from time to time, specify;
- (b) monitor and enforce licences;

- (c) receive applications for the use of radio frequency spectrum and, subject, where applicable, to grant of licences under clause (a), refer such applications to the Board for assignment of spectrum within a period of thirty days;
- (d) modify licences or conditions thereof in accordance with section 21 of section 22;
- (e) establish or modify accounting procedure for licences and regulate tariffs for telecommunication service in accordance with sections 25 and 26;
- (f) regulate the transfer of licences;
- (g) prescribe standards for telecommunication equipment and terminal equipment, certify compliance of such equipment with prescribed standards, and issue approvals of terminal equipment and of approved installers under section 29;
- (h) 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;
- (i) carry out inspections of telecommunication equipment and any premises owned or occupied by the licencees and summon any person for investigation and an enquiry;
- (j) appoint an Administrator in circumstances provided in section 23;
- (k) develop national telecommunication numbering plans;

- (i) collect information with respect to telecommunications within and outside Pakistan and review the impact thereof;
- (m) enter into contracts;
- (n) acquire, lease, encumber, dispose of, exchange, vest or otherwise deal with any moveable or immovable property or any interest therein; and
- (o) issue regulations for exercising its powers and performance of its functions.¹⁰⁵

5.4.3 Responsibilities of the Authority

In exercising its functions and powers under this Act, the Authority ensures the following -

- (a) rights of licensees are duly protected;
- (b) all of its decisions and determinations are made promptly, in an open equitable, nondiscriminatory, consistent and transparent manner;
- (c) all applications made to it are disposed of expeditiously;
- (d) the persons affected by its decisions or determinations are given a due notice thereof and provided with an opportunity of being heard;
- (e) it encourages, except subject to the exclusive right of the Company in basic telephone service, fair competition in the telecommunication industry; and
- (f) the interest of users of telecommunication services are duly safeguarded and protected.¹⁰⁶

¹⁰⁵ Pakistan Telecommunication (Re-organization)Act, 1996 section 5.

¹⁰⁶ Pakistan Telecommunication (Re-organization)Act, 1996 section 6.

Conclusion

In this chapter the researcher will present the conclusion along with recommendations.

6.1 CONCLUSION

PTA is responsible to ensure the subsistence and upholding of fair competition in the telecommunication industry. The Competition Act, prohibits the abuse of a dominant position by an undertaking, simultaneously proscribing agreements between and amongst undertakings which *inter alia* alter market conditions artificially as all the anti-competitive practices comes within the radar of the general competition law. Undertakings are not allowed to enter into deceptive market practices which are detrimental to the interests of other undertakings. Mergers and acquisitions have to be approved by the Competition Commission of Pakistan in accordance with the Competition Act and the rules and regulations framed there under from time to time. The telecommunication industry in Pakistan underwent deregulation pursuant to the De-Regulation Policy for the Telecommunication Industry. All the services in the industry are provided

to increase the options available to the customers at competitive and affordable rates by encouraging fair competition amongst service providers.¹⁰⁷

Analysis of Pakistan Telecommunication Re- Organisation Act 1996 and Competition Act 2010

The Competition Act seeks to ensure free competition for commercial and economic activities and aims at protecting consumers from monopolisation, cartelisation and other harmful practices.¹⁰⁸ A high economic activity in the telecom industry of Pakistan has reshaped the industry's key investment prospects and market liberalization. However both PTA and CCP have certain areas to look into and scan all the financial and economic activity taking place therein. We will broadly divide those into three major areas as follows:

In the **FIRST CATEGORY**, we consider the (i) tariff or price determination and/or (ii) determination of SMP status of a telecom industry having 25% or more of the market share (but less than 40%) in the telecom industry. In the instant case, there are no two opinions, as it is the sole jurisdiction of PTA who determines and implements the same. The said price regulation or SMP determination is followed by compulsory issuance of RIO and Account Separation etc. as discussed in detail in 5.3.7.

¹⁰⁷ By Rizvi, Isa, Afridi & Angell, 'Telecommunications Regulation PAKISTAN' <https://docs.google.com/viewer?a=v&q=cache:9vRbpzJjniYJ:www.lexmundi.com/>.

¹⁰⁸ Presidential spokesman, Farhatullah Babar, <http://tribune.com.pk/story/59442/pakistan-enacts-anti-trust-law/>.

In the **SECOND CATEGORY**, we take into account certain anti-competitive practices like cartelization, collusive activities, abuse of dominant position, price-fixing, publicizing false or misleading information and tie-ins etc. (as provided in 4.6.3) and are of the view that the same falls within the ambit of CCP. The same is also glaring from the fact that CCP has in its numerous decisions like blackberry case and those mentioned in 4.6.5 exercises its broad powers over the same.

In the **THIRD CATEGORY**, which is the **GREY AREA** we consider a situation that if a telecom industry which may or may not (as 25% criteria is not the rule of thumb) have been declared as SMP by PTA acquires a market share of more than 40%, it will undoubtedly come under the ambit of CCP and it may be declared as an industry having a Dominant Position. In the instant case PTA, though continues to be the industrial (telecom) regulator and will continue to fix the tariff etc. but it is further to be noted that the Telecom Rules 2000 will not sustain before the Competition Act, 2010 as the said Act has overriding powers over all the laws in force. This situation may lead a particular industry to a scenario where both the regulators come into play at the same time and thereby causing a tug of war between the said two regulators. It may ultimately result in the industry being subject to no regulator, hence no anti-competitive check of its financial and economic activities as one industry cannot be answerable to two regulators for one activity. The rationale of competition policy is

consequently needed to be changed with the changing environment and requirement to go with and for the pursuit of greater efficiency in the economy and of making Pakistan a more internationally competitive economy.¹⁰⁹ Lack or absence of competition policy or lack or absence of control of Significant Market Power or of Dominant Position leads to Market failure. Market failures can be sighted as set-up where persons pursuit of wholesome self-interest show the way to consequences that are not proficient and that are not efficient.¹¹⁰ Control of Significant Market Power ensures the effective functioning of communications markets. The aim is to ensure that consumers have access to competitive, technically advanced communications services that are of good quality and affordable.¹¹¹

RECOMMENDATION: The Grey Area (as discussed above) can be avoided if both the regulators devise a joint strategy by amending its rules and come up with either a joint team to work out, probe, investigate, decide the overlapping areas of the industry and where the said overlapping is inevitable it shall be redressed by having equal number of members from each of the regulators (CCP and PTA) and in case of

¹⁰⁹ Pakistan (2009). 'Public Monopolies, Concessions and Competition Law and Policy' Intergovernmental Group of Experts on Competition Law and Policy, http://www.unctad.org/sections/wcmu/docs/ciclp2009_s2_pa_en.pdf.

¹¹⁰ John O. Ledyard (2008). "market failure," *The New Palgrave Dictionary of Economics*, 2nd Ed. Abstract.

¹¹¹ http://www.ficora.fi/attachments/englantiaiv/1156489126698/Significant_market_power.pdf.

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dispute CCP being the general regulator and having much wide powers shall be given preference.

A high economic activity in the telecom industry of Pakistan has reshaped the industry's key investment prospects and market liberalization. The regulatory environment and government policies helped in bringing a major chunk of foreign investment in the country.

It has also created ecstasy amongst trade and industry supervisors of the state who look forward to additional investment and employment in this industry.

The aim of competition laws in any jurisdiction is incorporated to promote competitiveness and encourage open market, while protecting the interests of the competitors within the open market. Protection against abuse of market power encourages the markets participants to avail of opportunities and prevent market dominance by few or one. Effective competition laws in general encourage foreign investment, emerging entrepreneurs and market effectiveness on whole. Article 18 of constitution of Islamic Republic of Pakistan provides that every citizen shall have the right to enter upon any lawful profession or occupation and to conduct any lawful trade or business, and nothing shall prevent regulation of such trade, commerce or industry in the interest of free competition in the country.

The Government of Pakistan seeks to promote sustainable economic development and improve the well-being of all citizens by protecting and promoting competition in the economy. Private and public barriers to competition

need to be prevented from hindering the development path, so as to guarantee maximization of consumer and producer welfare in a dynamic framework. Competition policy and its regulatory framework will support an environment in which entry, and growth is fostered, anti-competitive behavior by all firms is prevented, and abuse of market power by dominant firms is restrained.¹¹² The crucial objective of Competition Act is to enhance economic efficiency and to protect consumers from anti competitive behavior. Briefly, the law prohibits situations which tend to lessen competition such as actions constituting an abuse of market dominance, competition restricting agreements and deceptive market practices. Although essentially an enabling law, it briefly sets out procedures relating to review of mergers and acquisitions, enquiries, imposition of penalties, grant of leniency and other essential aspects of law enforcement. A competitive market benefits consumers by enabling them to obtain best value, and the economic performance generally by improving efficiency.¹¹³

¹¹² http://www.competitionlaw.cn/upload/temp_08031111539215.pdf.

¹¹³ <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/Business/19-Mar-2011/Competition-law-enforcement-critical-for-consumers>.

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