COMPETITION LAW V. SECTOR SPECIFIC REGULATION:

WHAT WORKS BETTER?

(WITH SPECIAL REFERENCE TO PAKISTAN'S TELECOM INDUSTRY)

by

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LIST OF ABBREVIATIONS

3G	3rd Generation
ABA	Australian Broadcasting Authority
ACA	Australian Communications Authority
ACCC	Australian Competition and Consumer Commission
ACIF	Australian Communications Industry Forum
ACMA	Australian Communications and Media Authority
AGIMO	Australian Government Information Office
AMPS	Advanced Mobile Phone System/Service
APC	Access Promotion Contribution
ARE	Autoridade de Regulamentação Economica
Austel	Australian Telecommunications Authority
BoC	Bureau of Competition
BSC	Broadcasting Standards Commission
BT	British Telecom
CCI	Competition Commission of India
CCP	Competition Commission of Pakistan
CDG	Competition Directorate General
CLI	Calling Line Identity
CPC	The Civil Procedure Code, 1908
CPP	Calling Party Pays (regime)
C-VAS	Class Value Added Services
D-AMPS	Digital Advanced Mobile Phone System/Service
DCITA	Department of Communications, Information Technology and the Arts
DG InfoSoc	The Information Society and Media Directorate-General
DIR Act	Dairy Industry Restructuring Act, 2001
DoJ	Department of Justice
EIR Act	Electricity Industry Reform Act, 1998
EU	European Union
FAB	Frequency Allocation Board
FCC	Federal Communications Commission
FDI	Foreign Direct Investment
FTC	Federal Trade Commission
GGO	Governor General's Order
GMPCS	Global Mobile Personal Communication by Satellite
GPO	General Post Office
GSM	Global System for Mobile Communication Group System Mobile (Earlier)
GTL	General Telecommunications Law
HHI	Herfindahl-Hirschman Index
ICT	Information and Communications Technologies
ICTI	Institute of Communications and Information Technology
IDA	Infocomm Development Authority
INDOTEL	Instituto Nacional de Telecomunicaciones
IPRs	Intellectual Property Rights
IPT	Internet Protocol Telephony
IT	Information Technology

ITC	Independent Television Commission
KSO	Kiwi Share Obligations
LDI	Long Distance & International
LL	Local Loop
MIC	Monopolies Inquiry Commission
MCA	Monopoly Control Authority
MoIT	Ministry of Information Technology (Information Technology & Telecommunications Division), Government of Pakistan
MNO	Mobile Network Operator
MNP	Mobile Number Portability
MPP	Mobile Party Pays (regime)
MRTPA	The Monopolies and Restrictive Trade Practices Act, 1969
MRTPO	The Monopolies and Restrictive Trade Practices Ordinance, 1970
MTV	Mobile Tele Vision
MVNO	Mobile Virtual Network Operator
NCAs	National Competition Authorities
NCB	National Computer Board
NDPB	Non-Departmental Public Body
NEPRA	National Electric Power Regulatory Authority
NGN	Next Generation Network
NRAs	National Regulatory Authorities
NTC	National Telecommunication Corporation
Ofcom	Office of Communications
Oftel	Office of Telecommunications
OGRA	Oil and Gas Regulatory Authority
PEMRA	Pakistan Electronic Media Regulatory Authority
PTA	Pakistan Telecommunication Authority
PTC	Pakistan Telecommunication Corporation
PTCL	Pakistan Telecommunication Company Limited
PTML	Pak Telecom Mobile Limited
PTT	Posts, Telegraph and Telephone
PUCs	Public Utility Commissions
RA	Radiocommunications Agency
R&D	Research and Development
R&DF Policy	Research and Development Fund Policy
RIO	Reference Interconnect Offer
SMP	Significant Market Power
SPA	Spectrum Management Agency
TAS	Telecommunications Authority of Singapore
TDC	Transitional and Developing Country
TDSAT	Telecom Disputes Settlement and Appellate Tribunal
TIO	Telecommunications Industry Ombudsman
TP	Trade Practices
TPA	The Trade Practices Act, 1974
TRAI	Telecommunications Regulatory Authority of India
TV	Television
UK	United Kingdom
UMTS	Universal Mobile Telecommunications System
US	United States (of America)

USF	Universal Service Fund
USO	Universal Service Obligation
US$	US Dollar
WB	Wireless Board
Wi-Fi	Wireless Fidelity
Wi Max	Worldwide Interoperability for Microwave Access
WLL	Wireless Local Loop
WTO	World Trade Organization

LIST OF CASES

i. The Supreme Court, Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4, (1958).

ii. Verizon Communications Inc. v Law Offices of Curtis v Trinko, LLP: 540 U.S. 682, (2004).

DECLARATION

This is hereby declared that this Thesis has not been copied from any source. This is further declared that this research has entirely been done on the basis of my personal efforts made under sincere guidance/advice of my worthy supervisor. No portion of work substantially presented herein has been submitted in support of any application for any other degree or qualification of this University or any other university or institute of learning.

DEDICATION

With great humility and respect

I dedicate this humble attempt of mine

to

My Respected Parents;

Mr. & Mrs. Sardar Aman Ullah Khan

wherefor I do not find any single word in English dictionary

to express my deepest gratitude

for their unstinted affection and all time support.

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ABSTRACT

COMPETITION LAW V. SECTOR SPECIFIC REGULATION: WHAT WORKS BETTER? (WITH SPECIAL REFERENCE TO PAKISTAN'S TELECOM INDUSTRY)

by

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Chair: Mr. Niaz Hussain Brohi Esq.

This study attempts to highlight significance of competition, its objectives, means to foster it; and to provide an insight of Competition Law and Policy and presents an epigrammatic portrayal of its application through Competition Authorities in terms of different jurisdictions' approaches towards it. It also examines the competition in telecommunications sector, while advocating the significance of Sector Specific Regulation. Furthermore, it enlightens the legal and regulatory frameworks of seven model jurisdictions; Australia, EU, India, Pakistan, New Zealand, UK and US, regarding application of Competition Law and Policy and endorsement of dynamic competition in telecommunications by means of Sector Specific Regulation. As a case study, Pakistan's endeavors for the implementation of competition regime, with special reference to telecommunications sector/industry has critically been analyzed. This has also been examined that certain jurisdictional friction issues/conflicts may arise in an event the different Authorities may be competent enough to deal with the same matter in principle. Besides, pursuant to certain potential overlaps, the core need

and significance of interface between the Competition Authority and Sector Specific Regulator has also been dilated upon in detail. The implementation of Competition Law in Pakistan has also been assayed and a detailed analysis of upheavals in course of its development has also been made. I have also attempted to evaluate, in the pages to come, with special reference to Pakistan, and in terms of fostering competition in telecom sector/industry, as to whether following a Competition Law is a desirable option or Sector Specific Regulation should better be resorted to. Furthermore, I have also examined that though there could fairly be a reasonable number of options concerning the allocation of responsibility matrix between the Sector Specific Regulator and the Competition Authority in Pakistan, yet when the Competition Authority and the Sector Specific Regulator have overlapping jurisdiction, whether coordination mechanisms may be useful in alleviating jurisdictional frictions and creating cohesive and congenial governance of matters; and if or when coordination mechanisms may not be able to resolve problems of overlapping jurisdiction effectively, whether any judicial intervention may, sometimes, be necessary or not. What's more, it has also been appraised as to whether the competition in Pakistan's telecom sector/industry is being carried out by the Telecom Sector Specific Regulator; Pakistan Telecommunications Authority (**PTA**) successfully and progressively or not; and especially as to whether the PTA should work under the surveillance of Competition Authority; the Competition Commission of Pakistan (**CCP**) or PTA alone may, with its own industry knowledge, may foster effective competitive milieu in the telecommunications industry of Pakistan. Most importantly, it has also been analyzed as to what could be done to further promote, develop and make the telecom sector/industry in Pakistan, more competitive and progressive considering myriad international models. This Thesis concludes with carefully looking at the prospects of

telecom industry of Pakistan in terms of governance of competition by Sector Specific Regulations, and whilst alluding to some vital success factors, positing a robust and practical way forward for Pakistan, wherein probability of a hybrid system has also adequately been weighed. To recapitulating the discussion made in this Thesis, the desirable way forward for Pakistan is attempted to be propounded that CCP should foster economy-based competition, whereas PTA should cater for competition in the Telecom sector/industry of Pakistan. However, to avert jurisdictional frictions issues, there should be desirable interface between the CCP and PTA, which would not only help achieving core objectives of competition; increased economic efficiency, competitiveness, productivity, innovation and consumer welfare, but would also assist ensuring progress and prosperity in the economy of Pakistan generally and its telecom sector/industry particularly.

CHAPTER - 1

INTRODUCTION

A dynamic, progressive, business friendly but competitive environment, underpinned by sound Competition Law and Policy, is a cardinal trait of an affluent market economy. The benefits that emanate from competition may include, competitiveness, increased economic efficiency, productivity, innovation and consumer welfare.

A perfectly competitive market is one wherein there could be a handsome number of purchases and sellers, whereas the product or service is homogenous and there should be no barriers so far as the entry and exit is concerned. Sellers can come onto, and leave, the market freely. The result of this state of affairs is that each seller is insignificant in relation to the market as a whole and has no influence on the product's price. Consequently, sellers are described as price-takers, not price-makers.[1]

One of the benefits of competitive markets includes: that the marginal cost of production is equal to the price of product or service equal to the marginal costs of production.[2]

When both the market price and the marginal cost of production get equal to each other, the well being of the consumer is stated to be maximized, which may result into allocative and productive efficiency. This is settled doctrine of economics that competitive milieu gives birth to many desirable off springs, the most brawny whereof is pareto efficiency; meaning thereby in conditions of perfect competition, products and services are consumer oriented, i.e. produced of the type and quantity desired thereby. An economy wherein none could be made better off without making

[1] Alison Jones and Brenda Sufrin, "EC Competition Law", *Text, Cases and Materials*, 8.
[2] The marginal cost of production is the cost of producing one more unit of the good or service in question. "Cost" includes a reasonable return on capital.

someone else worse off, and the prices are equal to the marginal costs of production, is attributed to be allocatively efficient and progressive.

The monopolized market is polar opposite of competitive market; in monopolized market, number of buyers could be handsome but the seller would be only one. So far as the monopolization of any market is concerned, there could be hell of reasons, which may include but not be limited to government policy or as a sequel to ownership of Intellectual Property Rights (IPRs). In a monopolistic state of affairs, the monopolists may charge prices exceeding to the marginal costs, which may lead consumers/subscribers to buy products and services valued thereby less than that of the monopolist, sequeling inefficient allocation of resources in society. This loss may be termed as the "deadweight loss of monopoly".

Monopolists do tend produce less of their goods and render services than that of what is demanded by the consumers; hence the need for Competition Law and Policy for the developing economies is drastically significant. "The intensity of competition in some developing countries markets is low; hence it is not easy to access the market and the number of players is limited, with large concentration."[3]

The factors including but not be limited to entry barriers, anti competitive practices, less development, high concentration, and small size of market may ensue conditions wherein anticompetitive practices do flourish. Therefore, "Strong Competition Policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies."[4]

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[3] Ajit Singh, "Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions", *G-24 Discussion Paper Series*, (Harvard: United Nations Center for International Development, 2002), http://www.unctad.org/en/docs/gdsmdpbg2418_en.pdf, (Last accessed May 12, 2007).

[4] Joseph E. Stiglitz, "Competing Over Competition Policy", (2001), http://www.projectsyndicate.org/commentary/stiglitz, (Last accessed May 13, 2007).

Product and Service Efficiency could be serialized to be second benefit of an ideal competitive market: wherein products would be produced and services would be rendered at the lowest possible cost. When a perfect competition state is postulated, the firms/producers whose prices are higher than those of others are abandoned by the subscriber/consumer. Such firms/producers will only be able to maintain their presence in the market, if they provide necessary incentives to the consumer/subscriber (one should though bear in mind that "cost" includes a reasonable return on the investment made). As a result, prices tend to trickle down to equal marginal costs.

Innovation is another incentive or off shot of competitiveness in the markets. Whosoever intends to increase market share and to entre into new markets has to be innovative and to incentivise the consumer/subscriber by offering innovative products and services.

Consumer welfare is another major benefit of regulatory reforms and competition application which results in reduction of prices for products and services such as telecommunication, health care, transport, electricity and sanitation, and increase in choice and quality of product and service; whereby the cost structure of exporting and upstream sectors to improve competitiveness also gets reduced; and a lack of innovation so far as the supply chain of the economy is concerned is duly addressed, resulting in reduction of national vulnerability to economic shocks eventually. However, at the same time, concerns about costs to workers in restructuring sectors, the quality of new jobs in terms of security and benefits, and consumer protection must not be overlooked.[5]

[5] A. R. Kemal, "Regulatory Framework in Pakistan", *The Pakistan Development Review*, 41:4 Part I, (Winter 2002), 319–332.

The establishment of the competitive markets, wherein the prices are to be determined by the market forces may be one of the core objectives of reformation process of an economy. A welcome analyst; Moises Naim, pointed out "the prices under competition foster a better allocation of resources to meet consumer demands than do monopoly prices."[6]

In addition to provisioning of quality services against cheaper price to consumer, this is, in fact, competition which helps development of infrastructure in far flung areas. However, adequate Sector Specific and Competition Law measures may be needed to avert uncalled for practices, like collusion, in-equal treatment etc., in absence whereof the bigger fish may swallow the smaller fish, which may eliminate potential for investment.[7]

A famous WTO expert; Angus Henderson deduced, "in order to attract investment, developing countries may need to do more than their developed countries' counterparts do in ensuring that effective measures are in place to address anticompetitive practices engaged in by government-owned major suppliers."[8]

This is competition, whereby not only economic growth is geared, but it results in service and product efficiency, whereby the prices get lower, and product and service choices may also get accelerated which may not only help the consumers

[6] M. Naim, J. S. Tulchin, "Competition Policy, Deregulation, and Modernization in Latin America", (London: Lynn Reinner Publishers, 1999).

[7] Muhammad Khalil Shahid, Tang Shou-Lian, and Chunmei Liu, "Competition And Liberalization Policies And Regulations For Telecommunications Industries In China And Pakistan: A Comparative Analysis", *International Journal of Management Science and Engineering Management*, 2, (Beijing: School of Economics and Management, BUPT), (World Academic Press, World Academic Union), (ISSN 1750-9653, England, UK, 2007), 268-277, http://www.worldacademicunion.com/journal/MSEM/msemVol02No04paper03.pdf, (Last accessed July 22, 2009).

[8] A. Henderson, I. Gentlea, E. Ball, "WTO Principles and Telecommunications in Developing Nations: Challenges and Consequences of Accession", *Telecommunications Policy*, 29, (2005), 205–221.

but also the business community, since it ensures level playing field for them and incentivize innovation and progress.[9]

Specifically illuminating in terms of "Competition Law", which "insinuates to a set of rules and disciplines relating to controlling and preventing intra-firm agreements and/or practices which hamper competition and ensue abuse of dominant position."[10] It is a mechanism whereby creation of competitive, productive and producer-consumer oriented market may be possible. The paradigmatic competitive market is atomistic.

The core objective of the Competition Law and Policy is to foster interests of the society in general, in terms of allowing buyers to have wide and inexpensive choice of products and services to satisfy their needs and to work for equal good of the business segment of the society as well in order to help deciding them as to what and how to produce quality and cheaper products and render the services demanded by the purchasing segment of the society.

The Competition Law and Policy and Sector Specific Regulation are basically meant for offsetting the elements which may hamper competition by means of cartels, hoarding, artificial shortages, and reduction in productivity, whereby some people fail to get the desired things at reasonable price whereas a limited circle could get the needful and that too at an inflated rate.

The monopoly forces always tend to take steps which may help perpetuating their economic, and eliminating the competition elements from the market whereby the degree of competition in a market naturally gets reduced which is convincingly detrimental to the interests of the consumer. There is little scope of economic

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[9] Vinod Dhall, "Inaugural Address: AIAI Seminar", (Mumbai, December 10, 2005), http://www.competition-commission-india.nic.in/speeches_articles_presentations/7-Presentation%20at%20FICCI,%20Bhopal,%2013%20Feb06.pdf, (Last accessed April 4, 2009).

[10] Ahmad Khan, "Lectures on Competition Law and Policy", (Islamabad: International Islamic University, September 2005).

opportunities in the markets having non-competitive tendencies, and capital is saturated in the hand of a few people which is counter productive for the economy.

Privatizations is progressive phenomenon as formerly Russian President; Michael Gorbachaouv is reported to have once said "private cow milks more than a public cow", but the privatization programs should be very well conceived and implemented whereby the assets of an economy against reasonable amount of money get transferred into dynamic hands, who strive to get the companies grow; hence contribute positively to the economy.

This is equally important that the Government's schemes, policies and designs should be well planned converging on economic cycle let going, and should be able to remove any uncalled for impediments in the way of economic growth of the country. The ownership of certain economic assets, especially public utility service provisioning entities, like power, sanitation, health, and community services etc., and management thereof by the Government in the core interests of the public at large may be desirable, but generally speaking the Government should get away from ownership, management and control of general business entities, which may otherwise diminish economic activity or give monopoly powers thereto, and to cater for certain situations, the Competition Law and Policy may come forward to play a pivotal role meant for them.

The Competition Law generally prohibits unfair trade practices, anticompetitive practices or abuse of monopoly powers. The Competition Policy is much more extensive, as it intends to prevent any harm to society at large by any means of any anti-competitive activities, commissions, strategies or collusive designs. The country reaps macro-economic fruits, whose Competition Law and Policy are sound and dynamic. This is the reason that there is a tendency of legal and regulatory

reformation in the developing countries striving to grow economically, and the enactment of progressive, well conceived, effective and dynamic Competition Law, well supported with kindred Policies is the corner stone in order to achieve the core objective of economic development.[11]

The Competition Law and Policy be on one side, the significance of Sector Specific Regulation and existence of Sector Specific Regulator, out of two most common arguments of equity considerations and market failure cannot be overruled. If the economies of scale exist in an activity, the entire demand of a market at reasonably fair price can be satisfied by a single player, but in that case the monopolistic power of the firm will have to be restrained through regulation to ensure potential improvement in production efficiency.[12]

Besides these, various regulations directly impact the market dynamics like entry, exit, pricing, competitive structure etc. One may reap the desirable fruit of intended objectives by means of effective implementation of the Sector Specific Regulations, which otherwise may prove out to be counter productive for motley factors.[13] First, economic regulation may require information on the cost and demand structure of an industry, to which the Sector Specific Regulators typically do not have any access. Second, producers find it very difficult to comply with the rules which are quite complex and technical. Moreover, the actions to improve compliance may at times be uncoordinated and asystematic. Third, regulations are sometimes used to influence private gains rather than to correct market failure. The regulatory instruments such as quotas, licenses, and subsidies have been used in Pakistan, and

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[11] Ahmad Khan, "Competition Policy and Law: Conceptual Basis, Legal and Institutional Designing", *The World Trade Review*, Issue 5: 1-15 March, (Islamabad, 2002).

[12] Boylaud, O., and G. Nicoletti, "Regulation, Market Structure and Performance in Telecommunications", *OECD Economics Department Working Paper No. 237*, (Paris, 2000).

[13] J. Guasch Luis, and Robert W. Hahn, "The Costs and Benefits of Regulation: Implications for Developing Countries", *The World Bank Research Observer*, 14:1, (1999), 137–158.

elsewhere, to channel significant amount of wealth to influential groups in the society. Therefore, all those regulation which are out dated, counter productive, ineffective, or may create unnecessary barriers should be revised and replaced with the dynamic and modern ones. The hidden costs of inefficient regulation are so high that failure to reform can place the entire economy at great disadvantage, requiring protectionist policies, heavy subsidies, and other forms of support.[14]

Nevertheless, trade liberalizations, fostering of competition and reformation of Competition and Sector Specific Institutions are mutually supportive and economic development and progress generally ensues therefrom. It is quite obvious that in case of natural monopolies, injection of more competition by introduction of additional firms into market would be counter-productive. In such activities, regulations may be necessary to curb the monopolistic exploitation. However, close regulation of investment and other decisions of the firms may leave very little room for improving the levels of efficiency. Regulation may be detrimental to growth of productivity unless is fairly efficient; if the regulators pursue inconsistent policies, the producers would be unable to take decisions in accordance with the market conditions in time. The transparency of regulatory process is essential and promotes efficiency. If the regulation is done through accounting conventions such as cost-plus formula or the guaranteed rates of return, there will hardly be any incentives for reducing the cost of production.[15]

A notable economic analyst; Chen argues that uncertainty at the decision making stage breaks down the equivalence of price and quantity as instruments of control.[16]

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[14] Kemal, *The Pakistan Development Review*, 319–332.
[15] Ibid.
[16] P. Chen, "Prices v. Quantities, and Delegating Pricing Authority to a Monopolist", *Review of Economic Studies*, 57, (1990), 521–529.

Other renowned economists; Fraja and Iossa believe that "break-down is due to the presence of both asymmetry of information and the competitive fringe: without either of them price and quantity regulation are equivalent". While it is possible to devise a regulatory mechanism such as a price cap, yielding both lower prices and stronger incentives for cost reduction, Fraja and Iossa also suggest that by setting the "output floor", regulators must ensure that there are improvements in the efficiency levels.[17]

A celebrated economist; Stigler points out that the regulatory capture would shape policy outcomes depending on how the interest groups' influence evolves over time and the regulatory institutions are able to ward off their influence.[18]

The regulatory institutions all over the world go through a life-cycle starting out as vigorous, imaginative, and enthusiastic protagonists of the public interest, but over time they gradually become devitalized with limited perspective, indulge in routine and bureaucratic policies and procedures, and increasingly become protective of the interests of the companies they are supposed to regulate. The influence of interest groups increases over time, collusions are formed, and they are quite costly to the society.[19]

Out of the close relationship with industry, the Sector Specific Regulators get information which can be socially useful, but they may tend to use this information and discretionary powers to get bribes or future job opportunities in the industry.[20]

This has, however, been proven, pursuant to the detailed analysis and experiments that more the regulation may be heavier, there may be more chances of

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[17] De Fraja, Gianni, and Elisabetta Iossa, "Price Caps and Output Floors: A Comparison of Simple Regulatory Rules", *The Economic Journal, 108*, (1998), 1404–1421.
[18] G. Stigler, "The Theory of Economic Regulation", *Bell Journal of Economics*, 2, (1971), 3–21.
[19] A. Lierson, "Interest Groups in Administration", F. Morstein Marx, (ed.) *Elements of Public Administration*, (New York: Prentice Hall, 1949).
[20] J. J. Laffont, and J. Tirole, "A Theory of Incentives in Regulation and Procurement", (Cambridge: MIT Press, 1993).

corruption, and wide scale economic backlash, but this may be dissociated from so far as the quality of products and services are concerned.[21]

Should the Sector Specific Regulations become inefficient, they should either be lifted or reformed so that the intended objectives are truly realized. The reformation process should focus on the framing of Competition Law and Sector Specific Regulation in such a way which may ensure productive and dynamic institutional designs therefor in order to make the instruments flexible, progressive, market oriented and simple.[22]

From the above discussion, this may convincingly be understood that young and developing countries do direly need Competition Law and Policies, but minimum basic, stable and progressive institutional background in advance should be in place, as without solid institutional background, the chances of success in applying a state Competition Policy may get bleak; hence one may postulate that institutional development is condition precedent for application of Competition Law and Policy.

However, if the legal framework and enforcement mechanism of any country is weak and unpredictable, State organs are weak, slow or corrupt, adding competition legislation may probably lead to further confusion and unpredictability in the business climate. In such a milieu, the introduction of Competition Law and Policy will not solve problems, instead it may prove out to be counter productive, and can worsen the institutional background, making investments flow away from such country. Everyone seems to have consensus on the menu the young and developing countries should resort to in pursuit of growth, progress and development, but one obviously

[21] Fred S. McChesney, "Rent Extraction and Rent Creation in the Economic Theory of Regulation", *Journal of Legal Studies*, 16, (1987), 101–118 also Shleifer, Andrei and Robert W. Vishny, "Corruption", *Quarterly Journal of Economics*, CVIII, (1993), 599–617.
[22] Kemal, *The Pakistan Development Review*, 319–332.

cannot eat all the courses at the same time without risk of severe indigestion, hence should follow an order.

Setting of priorities is very crucial, and certain policies, factors and conditions are conditions precedent for Competition Law and Policy to root and to prove out to be productive and progressive. The rush or/and lack of patience may lead to untoward situations and undesirable repercussions. The menu for economic development and growth of any young and developing country is a big one, and resort to courses one by one, and that too in the proper order is the desirable policy. The Competition Law and Policy may, however, not be the principal course in the big menu; it should even be considered as the dessert at the end of meal.[23]

Specifically elucidating in terms of telecommunications industry, this may be observed in many jurisdictions, such as the Asian, Middle Eastern and Northern African economies, Competition Law and Policy may relatively be an undeveloped or underdeveloped discipline, consequent whereto the operating players, enforcement agencies and even the Courts may be less mature to handle the matters pertaining to Competition Law and Policy; hence all foreign investors may be titling towards assurance of existence of Sector Specific Regulation and effective Sector Specific Regulator.[24]

However, competition has very important role to play in relation to development of the telecommunications sector. Technological developments are evidence of the facts that the mobile, alternative fixed line (i.e. cable), broadband access services, and IP technologies, for instance, are emerging and evolving to become certain sources of competition to incumbent telecommunications operators/service providers; hence when incumbent operators are subject to market

[23] Francisco Marcos1, "Do Developing Countries Need Competition Laws and Policy?"
[24] Ian Walden and John Angel, *Telecommunications Law and Regulations*, 2nd edn., (London: Oxford University Press), 19.

forces, the consumer/subscriber, out of decrease in tariffs, diversification in services and products and enhanced quality of services and products, naturally does derive benefits.

Nevertheless, there are myriad approaches towards the promotion and development of competition in the telecom industry. One of such approach, in terms of competition, is that there should be a Converged Regulator, to oversee a broader range of connected categories of services, telecom, data, media and IT, for instance, while the second approach is that there should be a Multi Sectoral Regulatory Authority, which may encompass myriad industry sectors which may be considered public utility sectors such as water, telecommunications, sever, electricity etc. whereas third approach is that the Competition Law should be applied for fostering competition in the telecom sector, though the Competition Authority may be a source of aid and support to the Sector Specific Regulator by means of enforcing competition rules, where they are violated, provisioning of invaluable advice concerning, and advocating for, the most effective means for initiating and sustaining competition in Telecom.

The above three approaches apart, the two most common approaches on the other hand, in terms of governing and fostering competition in Telecom sector are, however, that there should be a Sector Specific Regulator for every specific sector; Telecom, for instance, it could also be observed that in transforming the telecommunications sector into a core segment of a country's economy, competition has obviated the justification for many facets of Sector Specific Regulations, whereas last but not the least welcome approach propagates for the co-existence of both the Sector Specific Regulator and the Competition Authority, however the latter should cater for the overall economy based competition of a jurisdiction only, and Sector

Specific Competition should be regulated by the Sector Specific Regulator under the governing Sector Specific Regulations. Nevertheless, there must be desirable interface between the Competition Authority and the Sector Specific Regulator for mutual beneficial relationship therebetween and to avert overlapping jurisdictions. Therefore, in the forthcoming pages, it has been attempted to evaluate as to whether is it the Sector Specific Regulation or Competition Law, which has a pivotal and/or decisive role to play in fostering the competition in a jurisdiction; resulting in achievement of ultimate objectives; increased economic efficiency, development, growth and consumer/subscriber welfare, and particularly what way forward is desirable for Pakistan.

However, from the above brief discussion, one may be able to make a postulation that, in addition to socio-political stability, the simple, effective and flexible Competition Law and Policy, active competition advocacy for economy wide competition alongwith dynamic and progressive Telecom Sector Specific Regulation simultaneously can not only be stalwart catalysts for growth in telecom sector but also for an invincible and successful economic restructuring and reformation of a developing country, like Pakistan.

CHAPTER - 2

COMPETITION LAW AND POLICY

Competition Law is a set of rules and disciplines maintained by the governments relating either to agreements between firms that restrict competition or to abuse of a dominant position for efficient resource allocation and thereby the maximization of national welfare, by ensuring that the competition process is not distorted or impeded through the abuse of dominant positions or competition-restricting agreements between competitors that are detrimental to social welfare. The Competition Policy, on the other hand, has a much broader domain. It comprises the set of measures and instruments used by governments that determine the "conditions of competition" that reign on their markets. Antitrust or Competition Law is a component of Competition Policy.[25]

A key distinction between Competition Law and Competition Policy is that the latter pertains to both private and government actions, whereas Antitrust Rules/Competition Law pertain to the behavior of private entities (firms). When corporations need to compete for the money and loyalty of consumers, the consumers tend to gain. When consumers are given little or no choice in purchasing goods or services, the only winner is the corporation/firm who manages to limit those consumer choices. The division of markets, the creation of monopolies and cartels, the fixing of prices or the creation of barriers to trade, all affect the consumer most severely. The targets of Competition Policy are, therefore, market activities by firms (such as market power and its abuse) that clash with the dual aims of maximizing

[25] http://www.worldtradereview.com/webpage.asp?wID=167, (Last accessed August 14, 2009).

consumer welfare and overall economic efficiency. These activities include dominant market power and its abuse. Dominant market power exists where a single corporation or a combination of corporations has power to influence price or supply irrespective of the activities of other corporations.[26]

A dominant position may be created or maintained by carrying out one, or more, of the following acts:

- Tight selling: forcing the purchaser to buy more than required or unwanted supplementary goods;
- Resale price maintenance limiting the purchasers' ability to fix margins and compete with other sellers of the same products;
- Mergers, acquisitions, and joint ventures: using such activities to create a monopoly position where previously competition existed between the two firms;
- Exclusive dealings: creating market segmentation;
- Reciprocal exclusivity: whereby the purchaser agreeing to buy and sell goods of a single supplier;
- Refusal to deal: whereby the purchaser is prohibited to replace goods from a competing supplier;
- Differential pricing: whereby supplier charges different prices to different purchasers irrespective of the quality or quantity ordered;
- Predatory pricing with the express aim of driving a competitor out of business; and

[26] Ibid.

- Transfer pricing amongst affiliates/associated undertakings.[27]

This Chapter is aimed to provide an epigrammatic portrayal of pertinent jurisdictions that have applied Competition Law and Policy in accordance with their respective approaches towards it, while expounding their significant and peculiar features, so as to how they have fostered competition by invoking their peculiar respective competition regime.

2.1 DESIGN OF COMPETITION LAW AND POLICY AND COMPETITION AUTHORITY

2.1.1 Competition Law

Improvement of economic efficiency whereby the consumer may be able to get diversified choice of desirable products and services of good quality at fairly reasonable price is one of the core objectives of introduction of the Competition Law. The sustainability of competition can ensure these benefits to the consumer. Restrain of economic agents to distort competitive structure of market through undesirably trade practices, cartels, monopoly, and anticompetitive practices is another specific objective of the Competition Law and Policy. Therefore the mandate of the Competition Law and Policy is to control horizontal and vertical agreements and collusive practices between the market forces.

There may, however, be a scenario wherein a player may grow so bigger that it may become a crocodile for the rest of the players, therefore the Competition Law and Policy should also be able to cater for such type of scenario and to envisage safeguards for smaller and younger players.

[27] Khan, *The World Trade Review*, (2002).

So far as the mergers are concerned, certain players may decide to merge for enhancement in efficiency, which may be catalyst for fostering competition whereby the consumers may be benefitted, but some mergers and acquisition may be anticompetitive whereby the bigger fish try to swallow the smaller one and to achieve an artificial dominance or monopoly on higher grade.

On the other hand there may be a scenario wherein certain mergers may result in consolidation of the market wherein the players may become lesser in number and may interact more easily and progressively, and may form cartels, which naturally is detrimental to the interests of the consumer. The Competition Law and Policy should cater for all such situations and should function to foster and safeguard competitive structure of the relevant market.

The Competition Law being an indispensable segment of an economic constitution of a market should cater for all commercial entities and commercial transactions; obviously without certain fair exceptions which a law may provide. There should be both structural (catering for merger, acquisition, monopoly etc.) and behavioral provisions (collusive practices, bid rigging, market sharing territorial arrangements etc.) in the Competition Law.

The mandate of Competition Law should be "general law of general applicability", catering for all types of commercial transactions and all types of commercial enterprises, whether public or private with certain sound exceptions backed by rationale.[28]

[28] Ibid.

2.1.2 Competition Policy

Competition Policy may denote for the measures, which may affect directly the market structure and enterprises' behaviors playing in that very market. There may be no second opinion on the count that the core goal of the Competition Policy is to foster and preserve market competitive structure by means of efficient allocation of resources in that market. There is also general consensus on the score that ensuring availability of lower prices against higher quality of diversified products and services is the prime objective of the scheme.

Competition Policy, in fact, is uniformly applied in a relevant market in order to foster general competition scheme.[29]

2.1.3 Competition Authority

The Competition Law envisages a neutral, effective, progressive, sound and dynamic Competition Authority, whose mandate should be very clear in the very Competition Law. The Courts are also involved in certain countries in order to enforce Competition Law, and the Competition Authority may at times be required to get Courts' orders executed. This is, however, a common phenomenon that the Competition Authorities' orders are appealable before the Courts. However, this is recommendable that the competition being a sophisticated subject involving specialized nature of transactions, warrants specialized Tribunals/Courts in order to adjudicate appellate matters productively, as one can convincingly understand that more predictable, consistent, speedy, and fair trial and judgment from the duly trained

[29] "Public Awareness on Competition Law & Policy", (New Delhi, Competition Commission of India), 110 003, http://www.competition-commission-india.nic.in/speeches_articles_presentations/Public%20Awareness%20on%20Competition%20Law.pdf , (Last accessed August 21, 2008).

and specialized adjudicators, who are able to adopt procedures, and mechanism of evidence compatible to competition cases, may be expected.[30]

The Competition Authority should also be mandated to make a general public awareness campaigns by means of floating an information or explanatory memorandum, especially in developing and transition markets. The Competition Authority should also make public hearings as far as the confidentiality scenario in the Competition Law permits. Besides, the publication of orders, determinations, and decisions may also serve as an aid in creating public awareness.

The Competition Laws are generally enacted in sparse and general terms; wherefor the Competition Authority may also carefully promulgate certain guidelines designed for the market to observe them in order to foster the competition and to achieve the aims and objectives of competition. The Competition Authority may organize certain seminars to let general public know what the Competition Law and Policy is and how is the same useful for both the consumer and business communities. Press conferences may also be another effective measure for development of relationship with press which may help dissemination of awareness of Competition Law, Competition Policy and the Competition Authority in the public more rapidly.

The Competition Authority may also invite relevant stakeholders from the given market; academics, technical segment, including but not be limited to private lawyers, economists etc., as well as students' community for making them aware of the scheme and essence of the Competition Law. Competition enforcement may

[30] Khan, *The World Trade Review*, (2002).

become easier and effective when community and market segments may be able to understand the whole scheme.[31]

The capacity building and training of the personnel of the Competition Authority is more important than anything else. There should be liaison of a Competition Authority with other like authorities in the international arena, rather formal and consistent exchange programs should be facilitated so that they may learn from each other's experiences and mistakes even. Competition Policy in relation to more focused and dire need areas of economy is not less important whereby the Government and govt. officials at all levels should also be approached by the Competition Authorities to have more dynamic and effective national economic policies which naturally have direct nexus with the competition milieu in the market.[32]

This is expected that by the end of 2010, the Competition Authorities around the world would be more than 120, however one may fairly understand that all of them may not be equally well equipped by all means, as a few would be experienced and have virtually attained the status of grandfather and fathers whereas a few may be new babes. Besides, there are versatility of economic, political and environment conditions of myriad markets, hence rules effectively applied in one market may not exactly fit in the other market, hence "one size fits for all" may not be the appropriate strategy. Likewise, out of global squeezing of markets, any anticompetitive practices in a market may have impact on other neighboring market; hence in order to cater for this dimension, the Competition Authority should be well equipped so far as internal

[31] "Public Awareness on Competition Law & Policy", http://www.competition-commission-india.nic.in/speeches_articles_presentations/Public%20Awareness%20on%20Competition%20Law.pdf , (Last accessed August 21, 2008).
[32] Ibid.

market dynamics, best practices, and viable solutions in different situations are concerned.[33]

2.2 COMPLEX INTERPLAY TO ACHIEVE OBJECTIVES

The scheme of competition, in fact, is a complex interplay of development and application of Competition Law and Policy, the constitution of Competition Authorities and enforcement thereby, under the powers and functions thereof granted under the Competition Law.

Amongst the considerations that drive Competition Policy are:

- Consumer welfare, Public interest, Producer welfare (particularly anti-competitive mergers and acquisitions to make them globally competitive); and
- Overall aggregate welfare (often diluting consumer's aspect of Competition Policy), Response to outside pressure, and need to regulate mergers: both domestic as well as cross-border mergers and acquisitions.[34]

In certain countries, people may be allowed to resort to private actions before the appropriate forum or Court for redressal of injury or harm caused thereto from contravention of the Competition Law, which have two main benefits: public enforcement of Competition Law is supplemented and the Competition Authorities may be absolved from taking *suo moto* action for/on behalf of private parties.

The Competition Authority should be empowered by the Competition Law to prohibit the conduct or redress the harm from it, and to impose fines on enterprises

[33] Vinod Dhall, "Competition Policy, Development and the Multilateral Trading System", *WTO/UNESCAP/ASCI Regional Seminar for Asia and Pacific Economies*, (Hyderabad, 2004).
[34] "Public Awareness on Competition Law & Policy", http://www.competition-commission-india.nic.in/speeches_articles_presentations/Public%20Awareness%20on%20Competition%20Law.pdf , (Last accessed August 21, 2008).

guilty of anticompetitive practices, cartels, monopolization etc. The amount of fine should be larger than the gain attained by guilty, so that the same may serve as real deterrent. The Competition Authority should also have powers to grant interim injunctions and suspend operations on orders under challenge.

The Competition Authority should be empowered to search any place, summon any persons and call for record needed to investigate any matter backed by sanctions in case of any obstruction or non compliance, and should also be authorized to give advance ruling for planned courses of actions of enterprises However, it needs to be ensured that the officials of the Competition Authority should not abuse the information and record obtained during the course of discharge of their official duties by any means.[35]

2.3 DESIRABLE APPROACH — BALANCED COURSE

The Competition Law and Policy are though meant to foster competition in the market, yet it may, sometimes, lead to two opposite directions, and the Competition Law and Policy themselves should have safeguards to prevent the same. Likewise, the Competition Law and Competition Authority may be captured by the market they regulate, or they may become heavy handed or overzealous to implement the Law in such a stringency which may otherwise give way to untoward situations.

In order to avert problems, the Competition Authority should: be neutral, be staffed with competent human resources, be open to scrutiny, have limits on its discretion and its orders should be made subject to challenge before a neutral forum. In broad sense, the Competition Authority must have institutional prerequisites,

[35] Ibid.

research capability, administrative legitimacy, and access to information needed. The Competition Authority must also have, dignified and powerful status, well defined powers, functions and responsibilities, autonomy and congenial relationship with Sector Specific Regulators.[36]

2.4 APPLICATION OF COMPETITION LAW AND POLICY IN SUNDRY JURISDICTIONS

The design of Competition Law and Policy and its application in Australia, EU, India, New Zealand, Pakistan, UK and US as model jurisdictions have been chosen for analysis hereinbelow.

I. Australia

The Trade Practices Act, 1974 (**TPA**) is the primary legislation governing Competition Laws in Australia. The aim of the TPA is "to enhance the welfare of Australians through fostering of competition and fair trading and provision for consumer protection".[37] The primary subjects under TPA include but not be limited to competition, access to services, price fixing, re-sale price fixation, mergers, abuse of market power and consumer protection. The Australian Competition and Consumer Commission (**ACCC**) is the Competition Authority, head by a chairman, deputy chair and five full-time commissioners. The ACCC is mandated to foster competition and ensure compliance of the TPA. Following an extensive review of the TPA, certain cardinal amendments have also been made therein. Any merger inside or outside Australia, which hampers or lessen the competition in a market is prohibited. No mandatory pre-merger notification process is envisaged however. An amendment in TPA has, however, been made whereby a voluntary formal clearance process seeking

[36] Ibid.
[37] Khan, "Lectures on Competition Law and Policy".

clearance from ACCC regarding merger has been envisaged. Cartel-type conduct is prohibited under TPA, however, a leniency policy regarding cartel has also been enshrined. TPA empowers the ACCC to impose hefty pecuniary penalty for each contravention of the antitrust provisions of the TPA.[38]

II. EU Framework for Competition Law

The shortage of labor as well as commodities was observed consequent to great plagues across Europe in the late medieval period. "There was such a scarcity of laborers that women and even small children could be seen at the plough and leading the wagons."[39]

Various statutes aimed at fixation of both prices and wages at pre-plague levels were introduced so that labor drainage may be prevented which would have damaged the whole economic cycle. The Statute of Laborers, 1349 was introduced which envisaged multiple penalties for the overcharging merchants and damages were to be paid thereby to the injured parties.[40]

Times went on changing and improving the market conditions and corresponding improvements in governing legislations. This is worth observing that all market transactions/entities engaged in commercial transactions do fall under the scope of operative EU Framework for Competition Law, however, certain exceptions have explicitly been identified. Abuse of market dominance, restrictive practices/agreements with anti-competitive objects or effects, and anti-competitive concentrations are covered under the framework.

All mergers, irrespective of the head/registered offices of the merging companies and activities or production facilities, impeding effective competition in

[38] Ibid.
[39] M. Keen, *Medieval Europe*, (London, Penguin Books, 1968), 234.
[40] H. N. Haxell, "The Development of Competition Law", *Introduction to Competition Law*, (London: Sweet & Maxwell, 1959), 3.

EU by creating or strengthening a dominant player are prohibited under the framework unless and until corrective actions have been taken by the merging parties. The Law, however, adopts a "carrot and stick" approach, whereby leniency may be available to the first company, which has provided decisive evidence regarding existence of a cartel. In case of non grant of leniency even, the Commission is competent to reduce quantum of fines for an entity if any evidence provided thereby in Commission's discretion substantially adds value to any investigation process.[41]

Nevertheless, when one analyses the EU Directives, he comes to the deduction that the same are treated to be binding rules which all member states are obliged to get them implemented on a national level, wherefor, subject to market maturity level, and the legislative framework, some members states need to make legislative changes in their jurisdictions, and some need to resort to slow shift transformation. One may postulate though, that the EU model may exactly not be implemented in transition or developing economies, yet certain core principles underpinned by this model enumerated hereinbelow may be derived therefrom to form a viable and an effective legislative national framework:

- establishment of an independent and modern regulator;
- existence of an efficient mechanism to challenge decisions/orders/determination/verdicts of the Regulator;
- application of regulation transparently, equally and objectively;
- "Two-tier" regulation, where the activities of operators with significant market power are held to greater regulatory supervision;
- resort to technology neutral approach;
- reducing market access barriers;

[41] Khan, "Lectures on Competition Law and Policy".

- avoiding over-regulation and ensuring progressive reduction of unnecessary regulation upon the existence of effective competition;
- engaging in open, transparent and thorough consultative process prior to the issuance of any regulation that would impact the relevant market; and
- reducing bureaucratic processes in an effort to reduce costs and streamline processes where possible.

III. India

The efforts for enactment of an anti-monopoly law, in India, was initiated in 1964 when the Monopolies Inquiry Commission (**MIC**) was appointed by the Government to probe into the scenario of concentration of economic power in the hands of private parties, and the existence of restrictive trade and monopolistic practices, in crucial sectors of economy, though Agriculture was excluded. A Report by MIC annexing The Monopolies and Restrictive Trade Practices Bill, 1965 therewith, was submitted, got assent of the President on December 27, 1969, and became effective on June 1, 1970 in the form of The Monopolies and Restrictive Trade Practices Act, 1969 (**MRTPA**).[42]

The era wherein MRTPA got enacted was, in fact, era of licenses, permits and controls. The MRTPA envisaged a Commission to oversee execution and implementation of MRTPA, and the Civil Procedure Code, 1908 (**CPC**) was made fully applicable to meet the ends of justice in any proceeding under MRTPA. The Commission, however, was just empowered to direct the guilty to "cease and desist" from the alleged unfair, monopolistic or restrictive trade practices. Various amendments from time to time were made in the MRTPA, consequently the most

[42] Anurag K. Agarwal, "Competition Law in India: Need to Go Slow and Steady", (Ahmadabad: Indian Institute of Management), 3.

cardinal wherein was addition of Trade Practices (**UTP**) Enquiries \ and in 1991 and the chapter dealing with Acquisition and Merger was omitted from the MRTPA in addition to grant of power to the Commission to give compensation to an aggrieved petitioner, in an event, the regular enquiry proceeding of Unfair Trade Practice Enquiry or Restrictive Trade Practice Enquiry were sub judice. Delhi has all along be the seat of Commission headed by a judicial person. A right of appeal against orders of the Commission before the Supreme Court of India or alternatively invoking Writ jurisdiction of High Court was also envisaged in MRTPA.

The investigating wing of the Commission was empowered to take *suo motu* actions under Section 11(2) of the MRTPA, and had all along been independent of the Commission. An Annual Report through the administrative Ministry was also used to be submitted by the Commission to the Indian Parliament. The Consolidated Fund of India was the source of compensation, salaries, perks, allowances and other financial benefits including pension etc. of the staff of the Commission.

Section 3 of the MRTPA subsequently excluded all state/government owned, controlled or managed enterprises/entities, undertaking owned by co-operative societies, financial institutions and trade unions from the purview of the MRTPA, initially which was included in the purview initially.[43]

Competition regime kept on refinement, and in 2003, the Competition Act was passed by the Indian Parliament which though got assent from the President on January 13, 2003, yet it came to be known as the Competition Act, 2002 (the "**Competition Act**"), which repealed the MRTPA. Competition Commission of India (**CCI**), as a body corporate, headed by a Chairperson, having ten members in addition to Chairman, one Secretary to look after administrative and financial matters, one

[43] "Public Awareness on Competition Law & Policy", http://www.competition-commission-india.nic.in/speeches_articles_presentations/Public%20Awareness%20on%20Competition%20Law.pdf , (Last accessed August 21, 2008).

Director General and one Registrar and for assistance of CCI in relation to investigation and adjudication, and having multiple benches, especially one bench at head office to exclusively deal with Acquisitions and Mergers, was established consequent to the Competition Act to serve as Competition Authority in relation to enforcement of Competition Law and Policy, to eradicate anti competitive practices, and to foster competition in the Indian market.

Pursuant to the Competition Act, every producer of goods and every renderer of services doth fall under the jurisdiction of the CCI, which has also been empowered to play a role of advisory body to the Central government in relation to issues pertaining Competition Law and Policy, though whose opinion is persuasive and not binding on the Government.

On receipt of complaints from individuals and enterprises by the CCI, the Director General is supposed to get them investigated. The person aggrieved by the orders of the CCI can challenge the same in appeal, whereas Writ also lies. Unlike MRTPA, separate provisions for "review" and "rectification" under Sections 37 and 38 have been envisaged in the Competition Act. In consonance to EU and Australian models, anticompetitive practices committed overseas, but having impact on Indian market has also been covered under the Competition Act. For this, the CCI, with the approval of the Central government, has the mandate to enter into memorandum of understanding and other arrangements with international Competition Authorities to get the Competition Act enforced by way of globally accepted "effect theory". Unlike MRTPA, the Competition Act, empowers CCI to not only direct "cease and desist" but can impose hefty fines in case of contravention of the Competition Act, and can initiate "contempt proceedings" and can impose penalties on non compliance of the CCI's orders. Certain concepts, like "Cartel", "Predatory Price", "relevant product

market" "relevant market", categorically find place in the Competition Act, which were alien for MRTPA. However, legal monopolies concerning IPRs and commerce arising out of export of service and products to foster export have been ousted from the purview of the CCI. In addition to private lawyers, the Competition Act also allows representation of parties through/by the cost and works accountants, chartered accounts, and the company secretaries.[44]

IV. New Zealand

In New Zealand, the Commerce Act, 1986 ("the **"Commerce Act"**) is the governing statute, which postulates a Commerce Commission, comprising of a Governor-General (the "**GG**") on the recommendation of the Minister of Commerce and other Commissioners, as a primary Competition Authority, which is independent and autonomous body in carrying out purposes of the Commerce Act. One member of the Commerce Commission essentially needs to be a barrister or solicitor, whereas the GG appoints, on the recommendation of the Minister of Communications, two Cease and Desist Commissioners, who essentially need to be barristers or solicitors (who are supposed to adjudicate decease and desist applications) alongwith a Telecommunications Commissioner, pursuant to the Telecommunications Act. The Associate Members may be appointed by the Minister of Commerce. The legislation pertaining to the dairy under the Dairy Industry Restructuring Act, 2001 **(DIR Act)**, electricity industries under Electricity Industry Reform Act, 1998 **(EIR Act)** and under Part 4A of the Commerce Act in relation to Electricity Lines Businesses) and the telecommunications under the Telecommunications Act 2001 are also enforced by the Commerce Commission.[45]

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[44] Ibid.

[45] "Overview of Commerce Commission", http://www.comcom.govt.nz/TheCommission/Overview.aspx, (Last accessed January 8, 2009).

V. Pakistan

Like many other developing countries, monopolies in Pakistan also emerged as a result of large scale production techniques of the limited domestic markets and transplantation of modern technology characterized by inadequate purchasing power of the consumer.[46]

The government all over the world until the mid-1970s, used to intervene in markets on the pretext of decreasing cost industries, equity considerations and market failure arising from externalities, and in order to maximize social welfare.

The private sector activities in Pakistan, where its role has all along been dominant, except in 1970,[47] has throughout been regulated by means of myriad controls and checks on price, entry, exit, import, investment, credit, foreign exchange etc. in order to ensure private sector allocations pursuant to the national priorities,[48] but these objectives could rarely be achieved, owing to nepotism, discrimination, bureaucracy and corruption.[49]

Consequent to government failure, de-regulation and privatization scheme were resorted to, in pursuit of higher levels of productivity and efficiency and efficient allocation of resources. However, the experience of Pakistan with regard to privatization is mixed.[50]

The experience of de-regulation and privatization in myriad developed countries has been productive, but in Pakistan except in banking and

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[46] "An Explanatory Memorandum on the Law on Regulation and Prevention of Monopolies and Cartels", (Islamabad: Ministry of Finance, Government of Pakistan), 1.

[47] Banks, insurance companies, chemicals, light and heavy engineering, petro-chemicals, petroleum refining, vegetable ghee and cement were exclusively in the public sector in 1970s. Only in 1980 and afterwards was the private sector allowed to invest in these industries.

[48] *Pakistan Economic Survey*, (Islamabad: Ministry of Finance, 1984).

[49] Kemal, *The Pakistan Development Review*, 319–332.

[50] Mitsuhiro Kagami, "Privatization and Deregulation: The Case of Japan", In Mitsuhiro Kagami and Masatsugu Tsuji (eds.) *Privatization, Deregulation and Institutional Framework*, (Japan: Institute of Development Economies, 1999).

telecommunications sectors, the desired objectives in other sectors, especially in manufacturing sectors could not be achieved.[51]

This is unfortunate that in developing countries competition related legislation is either non existent or ineffective. The public awareness on that count is also too poor.[52]

In late sixties, the need for anti-monopoly law was felt in Pakistan, when private sector was at its boom and the government was incentivizing the same by all means, sequeling whereof a gigantic and unregulated economic cluster appeared on the face of Pakistan's economy, which not only adversely effected the consumer but the business as well, whereupon Government thought to take immediate and appropriate corrective measures.[53]

The government of Pakistan drafted out a draft Anti-monopoly and Restrictive Trade Practices Law and floated the same for public opinion, when budget for financial year 1969-70 was announced. All segments of society, including but not be limited to lawyers, academics, business community, consumers' segments, and press widely commented on it, pursuant whereof many invaluable suggestions were made, considering which, The Monopolies and Restrictive Trade Practices Ordinance, 1970 (**MRTPO**), in February 26, 1970 was promulgated.[54]

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[51] A. R. Kemal, "Why Regulate a Privatized Firm?", *The Pakistan Development Review*: 25:4, (Islamabad, 1996), 649–656, and A. R. Kemal, "Privatization in Pakistan—Effects and Restructuring", *Pakistan Institute of Development Economics*, (Islamabad, 1999).

[52] Kemal, *The Pakistan Development Review*, 319–332.

[53] Article 38 of the Constitution of Islamic Republic of Pakistan makes it incumbent upon the State, i.e. the Federation, to inter alia, secure the well being of the people by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest; Sub Article 2 of Article 151 stipulates that Parliament may impose such restrictions on the freedom of trade, commerce or intercourse between one province and another or within any part of Pakistan as may be required in the public interest.

[54] "An Explanatory Memorandum on the Law on Regulation and Prevention of Monopolies and Cartels", 1.

MRTPO became effective on August 17, 1971. On the same day, the Monopoly Control Authority (**MCA**), under Section 8 of the MRTPO, was constituted and made effective in order to implement the provisions of the MRTPO.

The mandate of the MCA was to assist the Government to frame progressive and dynamic Competition Policy and to curb unreasonably restrictive trade practices, growth of unreasonably monopoly power and undue concentration of economic power.[55]

MCA had to face many problems, one of the basic causes whereof was that general masses were unaware of the existence of the Competition Law in the form of MRTPO and the Competition Authority in shape of MCA. Out of no resources in public, MCA had to take *suo moto* actions and to rely on the information provided by the accused segment.

Besides, state monopolies and various services including real estate, storage, communication, medical, construction, legal, money changing, processing, indenting, accounting and education in addition to single firm monopoly were ousted from the jurisdiction of the MRTPO, 1970. The enforcement mechanism was also too poor to be implemented. What's more, the penalties, which MCA could impose and that too only on account of non compliance of its orders were too meager; a one time penalty of upto PKR. 100,000 (US$ 1250) only and PKR. 10,000 (US$ 125) per day only in case of continuous default, used to encourage the business segment to breach the law, get the multiplied advantages, and pay meager fine.[56]

The globally accepted concepts of leniency or a reprieve did not find place in MRTPO, sequeling ineffectiveness of the MCA. The MCA had to face many other problems as well, including but not be limited to, massive funding shortfall,

[55] Khan, *The World Trade Review*, (2002).
[56] Saleem Asghar Mian, "Pakistan Experience in the Enforcement of Monopolies Law and Capacity Building Requirement", *United Nations Conference on Trade and Development*, (2002), 3.

insufficient physical infrastructure, inadequate or lesser skilled staff, and limited database pertaining the industry/market it was regulating. Despite all constraints, the MCA strived to act in the core public interests, and it delivered at times, but lamentably the achievements could not adequately be conveyed to the general masses.[57]

The Government, in 1972, nationalized private sector on large scale which further reduced the scope for the MCA and consequently added miseries to MCA, which became functional by that time. There was another lacuna in the scheme that without any support base, new Competition regime was imposed whereagainsnt the segments working against it was powerful. This kind of difficulties had to be faced by Japan as well, whereas Germany had also suffered through on account of identical poor enforcement milieu.[58]

Nevertheless, the capacity building of the MCA was pondered upon, it was reorganized, its staff was sent abroad for higher training, certain hierarchical impediments were eradicated, but all lamentably proved far from fruitful.[59]

In 1990s, the Government made an altogether reversal of its economic policies, whereby a large number of nationalized industries was initiated to be privatized. De-regulation and liberal policies were adopted in order to attract local and foreign investors especially. Pakistan meanwhile also became a signatory of World Trade Organization (**WTO**) Agreements, hence had to get away from most tariff and non-tariff barriers. This was the time when the deficiencies in the MRTPO and the limitations faced by the MCA were seriously realized by the Government, consequent

[57] Khalid A. Mirza, and Faisal K. Daudpota, "Competition in Pakistan: the New Regime", *Competition Law Insight*, (2007).
[58] Khan, "Competition Policy and Law: Conceptual Basis, Legal and Institutional Designing", 5:1-15 March.
[59] Mirza and Daudpota, *Competition Law Insight*, (2007).

whereupon the Government revisited the competition regime and institutional framework.[60]

As a consequence, the Competition Ordinance, 2007 (the "**Competition Ordinance**") with a preamble "an Ordinance to provide for free competition in all spheres of commercial and economic activity to enhance economy of efficiency and to protect consumer from anti competitive behavior"[61] promulgated on October 2, 2007 has now replaced the MRTPO.[62]

Consequent to promulgation of the Competition Ordinance, the new framework is premised on rules of analysis and reason administered by an autonomous but accountable Institution; Competition Commission of Pakistan (**CCP**), with a hope and expectancy of observance of the principles of rule of law, transparency, fairness and neutrality thereby.

Neutrality, business oriented, non-discrimination, protection of competition not competitors, coordinated approach, and pursuing integrity in the application of the law by means of transparency, public proceedings, stern audited reporting mechanics, publication of decisions subject to appeal, and more especially the ability, independence and integrity of commissioners of CCP, are a few cardinal principles of new competition framework.

The new Competition framework inspired by the Rome Treaty, United Nations and the OECD models, in the form of the Competition Ordinance, have many commendable traits including but not be limited to: redressal of abuse of dominance, prohibition of any agreement reducing competition within a given market, despite not being "unreasonably restrictive", stress on competition advocacy, prohibition of

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[60] Ibid.
[61] Preamble: The Competition Ordinance, 2007 (Ordinance No. LII of 2007), *Ministry of Law, Justice and Human Rights, Government of Pakistan*, (October 2, 2007).
[62] Mirza and Daudpota, *Competition Law Insight*, (2007).

unfair trading practices and stipulating a detailed and viable mechanism for review and clearance of mergers and acquisitions, prescription of block exemptions eradication of compliance costs or unnecessary transactions studies and research-oriented approach in order to foster competition in all crucial sectors of the economy, issuance of non binding opinion on a matter effecting competition in Pakistan, conduct of open hearings by CCP to ensure maintenance of competitive market structure, sound financial support to CCP, service guarantee to officers of CCP, adoption of an approach of a "carrot and stick" - allowing leniency leading to no fines and penalties, under certain conditions, and on the other hand hefty fines and physical deterrence of imprisonment in case of non compliance, high penalty powers, and recovery of penalties by diversified sources (recovery from any debtor, appointment of receiver, or attachment of property), grant of right of intra CCP appeal before the Appellate Bench of the CCP comprising of at least two Commissioners, who were not part of order/decision under challenge, and most importantly the empowerment of CCP by all means under appropriate legal safeguards.

The Competition Ordinance also envisages rather acknowledges the significance of interface with Sector Specific Regulators like; Pakistan Telecommunication Authority (PTA), Oil and Gas Regulatory Authority (OGRA), National Electric Power Regulatory Authority (NEPRA), and Pakistan Electronic Media Regulatory Authority (PEMRA) etc., which are fostering competition in specific sectors; telecommunications oil, gas, electric power, media etc.

The scheme of the Competition Ordinance does not allow the CCP to supersede, override or overlap the Sector Specific Regulators, but allows the Sector Specific Regulators to work under the respective Sector Specific regimes; however

just allows CCP to come forward to fill in the gaps, where Sector Specific Regulation is either silent or ineffective by any means.[63]

The fostering of competition is the core objective of the CCP and the effectiveness of the CCP may be linked with achievement of this goal. However, promulgation of Competition Ordinance and establishment of a credible CCP will go a long way to develop competition culture and conducive environment for business activity in Pakistan.[64]

The promulgation of the Competition Ordinance apart, Pakistan has experienced great legal and regulatory reformation since early 1990s, most significant whereof are removal of foreign exchange restrictions, privatization of various public enterprises in manufacturing and financial sectors, de-regulation and privatization of telecommunications industry, withdrawal of import licensing, de-regulation of interests rate etc. However, room always remains available for further legal and regulatory reformation which convincingly is a continuing process. The mandate of the CCP and the Sector Specific Regulators is tedious and demanding, and call for autonomy thereof with appropriate checks and balances, and on the other hand the observance of basic traits of neutrality, credibility, transparency, observance of rule of law, non discrimination are also expected therefrom.[65]

VI. United Kingdom

The Competition Law in the United Kingdom has developed in fits and assumed to have start off prior to registered legal history, and was made a subject of vigorous analysis in the twentieth century, though no satisfactory single history of the early Competition Laws is available.[66] However, in the recorded history, many Saxon kings

[63] Ibid.
[64] Ibid.
[65] Kemal, *The Pakistan Development Review*, 319–332.
[66] H. B. Thorelli, *The Federal Antitrust Policy*, (Stockholm, 1954).

used to take actions against a range of unfair trade practices, including, for example, setting out punishments for ingrossers, who purchased the agricultural produce at lower rate with an intent to resale the same in the same or neighboring market subsequently at a higher rate; regrators; the purchase of products before reaching thereof to the designated market(s) for price increment, and making a profit on resale known to be the crime of foresteeling, or forestalling; and travelling salesmen, known as "badgers", who used to deal in foodstuffs, purchasing at lower rate from a place and reselling thereof at a premium in another. All monopolies were declared to be contrary to law owing to their pernicious effect on individual freedom at the time of the framing of the Magna Carta, 1215.[67]

Nevertheless, as per recent registered history, the competition regime in United Kingdom is governed by two substantive laws; The Fair Trading Act, 1973 and the Competition Act, 1998.

The Fair Trading Act, 1973 regulates monopolies (including mergers) contrary to public interest and also cater for following policy objectives:

- maintaining and promoting effective competition;
- promoting interest of consumers, purchasers and other users of goods/services;
- promoting reduction of R&D cost and facilitating entry of new competitors; and
- maintaining and promoting competitive activity in overseas markets.

The Competition Act, 1998 implements the national Competition Policy. The agreements preventing, restricting or distorting competition; and conduct that amounts to abuse of dominant position in a market are prohibited under the Competition Act, 1998. The Competition Act, 1998 envisaged a neutral, autonomous and a non-

[67] Lord Wilberforce, A. Campbell, and N. Elles, *The Law of Restrictive Trade Practices and Monopolies*, 2nd edn., (London: Sweet & Maxwell, 1966).

departmental public body (**NDPB**) under the Department of Trade and Industry; and the Competition Commission (which replaced the Monopolies and Mergers Commission), to cater for competition in the UK markets and to investigate market shares and conditions, mergers, acquisitions, and regulation of UK companies.[68]

VII. United States

The Sherman Act, 1890 is generally considered to be the pioneer statute so far as modern competition (or "antitrust" as in America) framework is concerned, but a minute analysis may drive to the fact that the roots of Competition Law lie much deeper. Senator Sherman himself told the Senate that his bill did "not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government." It has, however, even been suggested, unconvincingly, that the Sherman Act is inspired in part on the Constitution of Zeno (Emperor of the East from 474 to 491), promulgated in 483, whereas the Roman legislation dealing with some aspects of competition predates the Constitution by over 500 years.[69]

The Federal Trade Commission (**FTC**) and the Anti Trust Division of the Department of Justice (**DoJ**); an executive arm of government are the two entities, mandated to enforce prevalent Competition Law in the United States of America. However, the DoJ is empowered to undertake criminal prosecutions, whereas FTC is mandated to undertake consumer protection functions. The FTC's antitrust arm, the Bureau of Competition (**BoC**) seeks to prevent business practices that restrain competition including monopolistic practices, attempts to monopolize, conspiracies in restraint of trade, and anticompetitive mergers and acquisitions. The Federal Trade

[68] http://www.globalcompetitionforum.org/europe.htm#uk, (Last accessed July 15, 2009).
[69] Haxell, *Introduction to Competition Law*, 3.

Commission Act, 1914[70] and the Clayton Act, 1914[71] are the statutes wherefrom the FTC's antitrust authority emanates, in fact. However, The Sherman and Clayton Acts, supplemented by a diversified variety of federal competition and consumer protection laws could be declared to be the main antitrust's scheme governing statutes, administered by these organs.[72]

The Sherman Act, as a compendious economic charter, was meant for protecting and fostering free and unfettered competition in the market. Its basic premise was that the more unrestrained interaction of market players would be, the more it would be productive in the form of reduction of prices, versatility and improvement of quality of products and services, sequeling congenial and enviably conducive socio-economic and political milieu simultaneously eventually.

Exclusive dealings, mergers and interlocking directorates, price discrimination, and tying arrangements are prohibited under the Clayton Act, 1914 (as amended by Robinson-Patman Price Discrimination Act and Celler Kefauver Anti-Merger Act), whereas unfair or deceptive acts/practices in commerce and unfair methods of competition in (interstate) commerce are declared to be unlawful vide the Federal Trade Commission Act, 1914.[73]

The BoC, in addition to serving as Research and Development resource on Competition Law and Policy issues, is also mandated to investigates alleged violations of law, and formal enforcement actions by the FTC is at times also recommended by the BoC, and in case of amenability of the FTC on the recommendation of BoC to taking of formal action, the assistance in terms of

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[70] http://www.law.cornell.edu/uscode/html/uscode15/usc_sup_01_15_10_2.html, (Last accessed July 15, 2008).
[71] http://www.law.cornell.edu/uscode/html/uscode15/usc_sec_15_00000012----000-.html, (Last accessed July 15, 2008).
[72] http://www.ftc.gov/ftc/antitrust.htm, (Last accessed July 15, 2008).
[73] Khan, "Lectures on Competition Law and Policy".

implementation of FTC's decision through litigation in administrative law judges or the federal court or before administrative law judges is also rendered by the BoC. The reports and testimony for Congress are also prepared by the BoC; which has also developed great expertise in health care, energy, food and other professional services.[74]

Recapitulating the above however, one may be able to deduce that the development of Competition Law and Policy may not necessarily observe the path of development of Competition Laws and Policies of these model economies, which rather followed myriad courses witnessing different experiences and consequences, as market dynamics, and economic conditions of a country varies from the other countries.

The Competition Law and Policy developed from time to time in response to domestic or external pressures, or ever changing geo-politics, or through joining the club (i.e. conforming to the norms of behavior expected in the main economic "clubs").[75]

Linking the development of Competition Law with the domestic regulation of corporate activity, this could be observed that the Competition Law and Policy have generally followed three basic models, viz:

- Public interest model: based on the argument that market failures force the governments to regulate industries.
- Private interest model: in which policy creation and decisions are heavily influenced by particular interest groups.

[74] http://www.globalcompetitionforum.org/n_america.htm#usa, (Last accessed July 15, 2009).
[75] Khan, *The World Trade Review*, (2002).

- Organizational approach: This takes a case by case approach and tends to view the behavior of particular regulatory agencies as being the result of a combination of actions of, "political entrepreneurs" and their interaction with organizational factors within the regulatory body.

A big influence of these factors on the development of Competition Law and Policy and its enforcement has been witnessed. However, domestic legislative backing and public support base is more crucial than anything else in the development of the Competition Law and Policy and especially enforcement thereof, whereby the objectives of competitions; productivity, increased economic efficiency, innovation, overall consumer welfare may easily be achieved.[76]

A celebrated competition analyst; Massimo Motta analyses, "only vigilant Competition Law and Policy can guarantee a competitive milieu wherein potential and actual competitors may be able to challenge big players enjoying significant market share and power."[77]

To crown the above discussion, one may infer that the application of Competition Laws and Policies naturally calls for the Competition Authorities to have access to great deal of information and high quality analysis.[78] Besides, the Sector Specific Regulators and the Competition Authorities must be competent enough to ascertain and gauge the market dynamics, and hidden anti-competitive or collusive practices resorted to by the market forces.[79]

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[76] Ibid.
[77] M. Motta, "Competition Policy- Theory and Practice", (Cambridge: Cambridge University Press, 2004).
[78] Naim, Tulchin, "Competition Policy, Deregulation, and Modernization in Latin America".
[79] Shahid, Lian, and Liu, *International Journal of Management Science and Engineering Management*, 268-277, http://www.worldacademicunion.com/journal/MSEM/msemVol02No04paper03.pdf, (Last accessed July 22, 2009).

CHAPTER - 3

SECTOR SPECIFIC REGULATION IN TELECOM

(WITH REFERENCE TO PAKISTAN)

3.1 REGULATING THE COMPETITION IN TELECOMMUNICATIONS: A GENERAL OVERVIEW

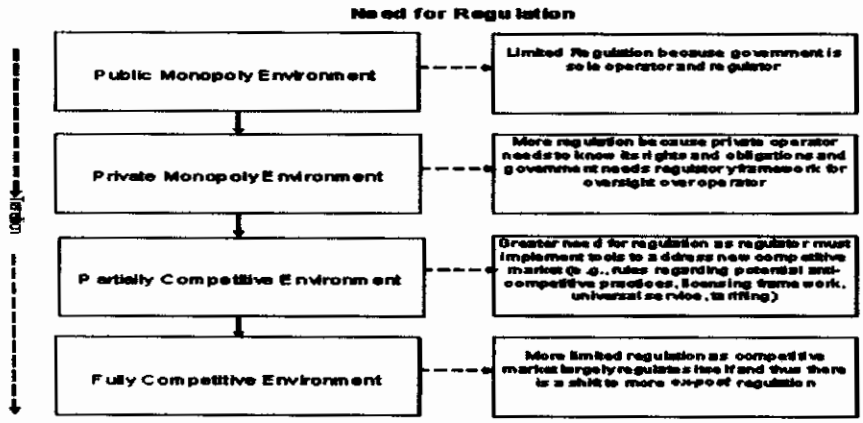
A large scale reformation in the legal and regulatory framework of the telecommunication sector has been experienced all over the world in the last twenty years, which earlier was used to be mainly a monopoly either under state owned, managed or controlled organs or owned by a few private companies in many countries, and classical model of governance of everything; spectrum management, pricing, policing, regulating etc. by a single entity continued for many years in major countries of the world, but it could not deliver well in majority of the developing countries.

The increasingly crucial contribution of telecommunication sector in the economy of a country was realized in early 80s, whereas in developed countries, Competition Policies and Laws and Telecom Sector Specific regimes were introduced, so that consumer choice may get diversified, and that too against quality of service, vast service coverage and meager service charges. These objectives were tried to be achieved by means of privatization of the telecommunication sector in many countries in the first phase, and by de-regulation, liberalization and introduction of new and modern value added services in the second phase of reformation, though the scope of these services was limited to certain extent, since incumbent operators were having exclusivity in certain services, which when became over, the new

entrants were allowed to compete with the incumbent on service levels in the third phase of development and reformation of telecommunications sector.[80]

One may think that when competition regime is introduced in a particular market, the regulation may not be needed, but the reality is otherwise. This is the established fact that once competition is introduced in a particular market place, the role of the Regulator gets increased, as especially when the reformation is still on and the sector is in the phase of transition to the development, this is the Sector Specific Regulator mainly, which is to ensure establishment of a viable, dynamic and progressive regulatory framework whereunder it has to ensure smooth development, by means of ensuring level playing field, catering for competitive market structure, protecting consumers' rights, addressing all sectoral issues and disputes between the market players, and attaining the objectives of growth, development, dynamism and productivity of the telecommunications sector; which has diagrammatically been tried to be sketched in figure to come:[81]

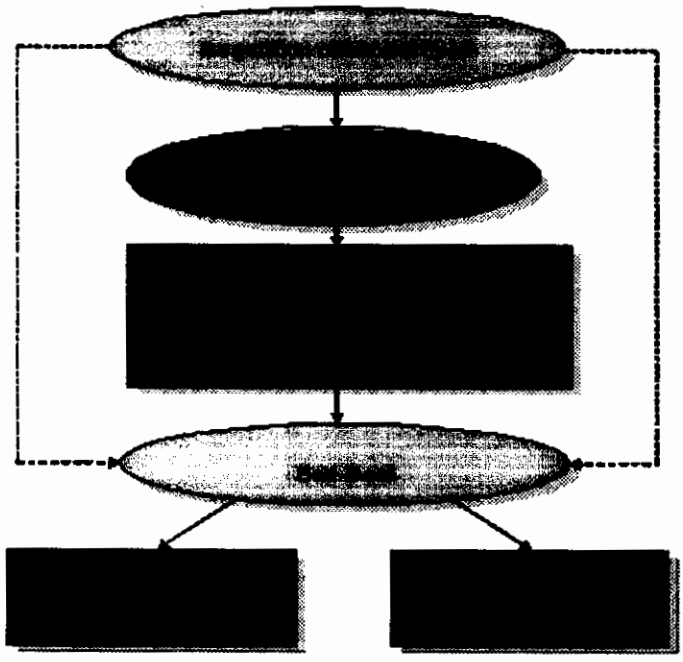
Figure 3.1. Need for Regulation[82]



[80] "Evolution of Regulatory Reforms", http://www.ictregulationtoolkit.org/en/Section.1685.html, (Last accessed August 22, 2009).
[81] "Trends in Telecommunication Reform: Effective Regulation", (International Telecommunication Union, 2002), 21.
[82] "Regulation in Transition to Competitive Markets", http://www.ictregulationtoolkit.org/en/Section.1686.html, (Last accessed August 22, 2009).

One should, however, need to understand without any iota of doubt that Regulation *per se* is not the objective but a tool and a means to attain the objectives; progress, effective competition, sustainability, development and growth. The privatization, de-regulation, liberalization and introduction of competition in the telecommunication market warrant effective strategies and dynamic policies which must cater for removal of entry and exit barriers, privacy of subscribers/consumers, equitable allocation of resources, wise allocation of scare resources, prudent numbering planning, effective management of spectrum, fostering of competition in the telecom market, ensuring universal service, enhancing access to information and communication technologies services, and strong enforcement of governing scheme by the Sector Specific Regulator; which has diagrammatically been tried to be sketched in brief terms in the figure hereinbelow.[83]

Figure 3.2. Goals of Regulation[84]



[83] Ibid.
[84] Ibid.

This is simultaneously a fact as well that when a market becomes fully competitive, the scope and need of regulation gets limited, yet the Sector Specific Regulation still has very key roles to play in order to sustain the competitive market structure. There are also certain situations, where market players fail to or refuse to pass on the benefits of competition to consumer, and this is the Sector Specific Regulator which has to ensure consumer welfare, since implementation of universal service by Sector Specific Regulator, for example, is a means to foster competitive milieu on the one hand, and developing social cohesion, and filling in the gaps between served and un-served or under-served segments of the society on the other hand, which otherwise, may not be on players' priority list, out of non viable business conditions, lower rate of return, and const orientation.[85]

Likewise, the Sector Specific Regulator is to: manage spectrum and its effective allocation and use, out of the scarcity and value of this resource, ensure maintaining a balance between the market players; operators and consumers, and cater for change of technologies with the development in the field of science and technology.[86]

The dynamic, and effective regulation and their implementation in true spirits by the Sector Specific Regulator brings fruits in the shape of versatility and better quality of service, introduction of new and value added services, reduction in tariff, better coverage maps, and development and growth of telecommunication sector. WTO stressed much on de-regulation and liberalization of telecommunication sector,

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[85] "Trends in Telecommunication Reform: Promoting Universal Access to ICTs", *International Telecommunication Union*, (2003), 30.

[86] "Regulation in a Fully Competitive Environment", http://www.ictregulationtoolkit.org/en/Section.1687.html, (Last accessed August 22, 2009).

and Pakistan being a signatory to WTO Agreements has satisfied its commitments of de-regulation, privatization and liberalization of telecommunication sector.[87]

3.2 HISTORICAL BACKGROUND AND DEVELOPMENT OF LEGAL AND REGULATORY FRAMEWORK OF TELECOMMUNICATIONS IN PAKISTAN

The telecommunications sector is considered to be one of the biggest sectors contributing to the economic development of any country in today's age. The telecom sector has been de-regulated and liberalized in the developed countries, and is under this transition in many developing countries.[88]

Pakistan, enriched with abundant natural resources and more than 180 Million population, is one of the major regional economies of South Asia and amongst the top ten most populous states in the world and is categorized to be as one of the fast paced developing countries.

The telecom sector in Pakistan is at its boom, and Pakistan has taken very bold steps in the privatization, development, de-regulation and liberalization of its telecom sector, consequent whereupon the sector is progressing so immensely that Pakistan is considered to be a role model for the South East Asian countries region.[89]

The essence of the Competition Law in telecommunications sector in certain model jurisdictions generally and Pakistan is attempted to be elucidated in this Chapter. However, it may be pertinent to have a slight flavor of historical development of telecommunication *per se* and its legal framework in Pakistan. The

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[87] "Benefits of Regulation", http://www.ictregulationtoolkit.org/en/Section.1688.html, (Last accessed August 22, 2009).
[88] Shahid, Lian, and Liu, *International Journal of Management Science and Engineering Management*, 268-277, http://www.worldacademicunion.com/journal/MSEM/msemVol02No04paper03.pdf, (Last accessed July 22, 2009).
[89] Ibid.

Flags, Bonfires, Mirrors and Pigeons (Reuters) have been the classical means of communication. The invention of electricity gave birth to telegraphy, radio and the microphone in the world.

In 1876, Alexander Graham Bell of US invented telephone. The journey of transmission elements from modes of copper, coaxial, radio, to optical fibre in fixed networks, and from analogue, GSM, WiMax to UMTS in cellular mobile networks and present day's myriad valued added services including but not be limited to Virtual Private Network, CLI, virtual medicine, tele-customer care, virtual education, tele-polling, tele-charity, tele-entertainment, tele-marketing, tele-security and intelligence networks is marvelous.

Analyzing the historical development of legal framework in Pakistan and especially the one which governs today's techno-legal and regulatory regime prevalent in the Telecommunications industry of Pakistan, one needs to at least travel from the Lord Mountbatten's 3rd June, 1947 Plan, consequent whereof The Indian Independence Act, 1947 was enacted by the British Parliament and Pakistan emerged on the map of world as an Independent and Sovereign Dominion. The Laws of British India were adopted pursuant to Section 18(3) of The Indian Independence Act, 1947, and continued as law of the Dominion (Pakistan), though certain necessary amendments were made, till Pakistan made its own laws. The then Governor General (Mountbatten of Burma) who was empowered to carry into effect the operation of The Indian Independence Act, 1947, issued The Pakistan (Adaptation of Existing Pakistan Laws) Order, 1947 (G.G.O. No. 20 of 1947) on August 14, 1947, Section 3 whereof doth read as "As from the appointed day, all existing Pakistan Laws shall, until repealed or altered or amended by a competent Legislature or other competent authority, in their application to Pakistan and any part or parts thereof, be subject to

the adaptation directed in this Order". Pursuant to this legislative scheme, a plethora of instruments was inherited. At the birth of Pakistan, the laws governing Telecommunication were; The Telegraph Act, 1885 (XIII of 1885) and The Wireless Telegraphy Act, 1933 (VII of 1933). Pursuant to The Adaptation of Central Acts and Ordinances Order, 1949 and Central Laws (Statute Reforms) Ordinance, 1960, these laws were adopted and extended in Pakistan.

The primary telecommunications governing statute was the Telegraph Act, 1885 (the "**Telegraph Act**") envisaging a joint Director General of Posts, Telegraph and Telephone. Certain exclusive privileges to Government; Posts, Telegraph and Telephone (**PTT**) Department were given pursuant to the Telegraph Act, in relation to establishment, maintenance, licensing, and regulating the telegraph network in Pakistan, hence pursuant to this framework, this was Government of Pakistan which used to control and govern telecommunication in Pakistan.

With the introduction of the wireless telegraphy, the British Government in British India enacted The Wireless Telegraphy Act, 1933 (the "**Wireless Telegraphy Act**"), which was also adopted by Pakistan. The enactment of The Posts and Telegraph (Amendment) Act, 1962 amended the Telegraph Act, The Wireless Telegraphy Act, and The Post Office Act, 1898, whereby the Postal Department and the Telegraph and Telephone Department were split.

The decade of 1990s is considered to be a awakening decade so far as the telecommunication sector of Pakistan is concerned, whereby The Pakistan Telecommunication Corporation Act, 1991 (the "**PTC Act**"), created Pakistan Telecommunication Corporation (**PTC**), merging Telegraph and Telephone Department into PTC. The PTC Act though did not envisage any Sector Specific

Regulator, but the PTC had to play this role in terms of licensing, research and development, tariffing etc.

The telecom sector was further liberalized pursuant to enactment of The Telecommunication Ordinance, 1994 envisaging Sector Specific Regulator; Pakistan Telecommunication Authority (**PTA**), National Telecommunication Corporation (**NTC**) and Frequency Allocation Board (**FAB**).[90]

Pursuant to the Telecommunication Ordinance, 1994, PTC was converted into Pakistan Telecommunication Company Limited (**ptcl**) under the Company, which was granted exclusivity of seven years so far as provisioning of basic telephony in Pakistan was concerned. The Telegraph Act, and certain provisions of the PTC Act were repealed by The Telecommunication Ordinance, 1994 which was given life afresh vide promulgation of another Ordinance [LXXVII of 1994]. This Presidential Legislation continued in the string of the Ordinance [XXIII of 1995] dated March 7, 1995, the Ordinance [LXIII of 1995] dated July 5, 1995, the Ordinance [CIII of 1995] dated October 30, 1995, The Pakistan Telecommunication (Re-organization) Ordinance, 1995 [CXV of 1995] dated November 27, 1995, the Ordinance [XXX of 1996] dated March 7, 1996 and the Ordinance [LXXVII of 1996] dated July 4, 1996 [every earlier Ordinance was repealed by the subsequent one] until the Pakistan Telecommunication (Re-organization) Act, 1996 (the "**Act**") was enacted on October 17, 1996.[91]

3.3 PREVALENT LEGAL AND REGULATORY PARADIGM

Realizing the significance of telecommunication sector, and the contribution it makes in the economy of the country, a lot of efforts and fast track governing legal and

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[90] M. Naeem Sheikh, "Telecommunication Laws in Pakistan", http://ezinearticles.com/?Telecommunication-Laws-in-Pakistan&id=362110, (Last accessed July 21, 2008).
[91] Ibid.

regulatory regime has been introduced in Pakistan to reap fruits of growth and development in the telecommunications arena of Pakistan, travelling from a state owned monopoly to liberalized and competitive telecom market structure.[92]

A brief overview of prevalent legal and regulatory framework starting from the Act, being the core statute governing prevalent legal and regulatory framework in telecommunication in Pakistan would be given in lines to come.

I. Pakistan Telecommunication (Re-organization) Act, 1996

The Act, being the principal governing instrument of the telecommunication' legal and regulatory framework, revalidated the existence of the Sector Specific Regulator; PTA, and sets out functions, powers and responsibilities thereof alongwith giving a broad scheme of governance of the telecommunications sector in Pakistan.

The Act principally governs the core scheme of techno-legal framework pertaining to telecommunications in Pakistan.[93] Some of the salient features of the Act include:

- Creation of Regulator;
- Regulation of Telecommunication Industry and Services;
- Transfer of telecommunication regime to private sector;
- Powers of Federal Government to Issue Policy Directives;
- Licensing;
- Establishment of **ptcl** as a Company under the Companies Ordinance, 1984;
- Creation of **NTC** to provide telecom services to armed forces, defence projects, federal and provincial governments and local authorities etc.;

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[92] Shahid, Lian, and Liu, *International Journal of Management Science and Engineering Management*, 268-277, http://www.worldacademicunion.com/journal/MSEM/msemVol02No04paper03.pdf, (Last accessed July 22, 2009).

[93] "The Pakistan Telecommunication (Re-organization) Act, 2006", http://www.pta.gov.pk/media/pta_act_140508.pdf, (Last accessed July 27, 2008).

- Formation of **FAB** with the responsibility of allocation and management of frequency spectrum. The FAB replaced Pakistan Wireless Board (**PWB**) established under The Wireless Telegraphy Act and took over the function of the PWB. The FAB has the exclusive mandate to ensure efficient management of the scarce resource; radio frequency spectrum and to allocate and assign portions of the radio frequency spectrum to the Government, providers of telecommunication services and systems, radio and television broadcasting operations, public and private wireless operators etc.; and
- Creation of Pakistan Telecommunication Employees Trust (**PTET**) with the objective of welfare of the employees of the Company.[94]

The fostering of competition and safeguarding consumers' interests are some crucial functions of the PTA as per the Act.[95]

This may, however, be significant enough to be mentioned here that Pakistan being signatory to the WTO Telecommunications Agreement, fulfilled its commitments made pursuant to that.[96]

The Act, being the principal instrument, is, however, silent on certain issues: tariff, interconnection, dispute settlement, accounting standards, role and responsibilities of incumbent operator; but empowers the Federal Government of Pakistan to issue Policy Directives under Section 8 of the Act, and to make Rules under Section 57 of the Act and PTA to frame Regulations under Section 5(2)(o) of the Act supplemented by the Guidelines under Section 5(2)(h) of the Act and modern

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[94] Sheikh, "Telecommunication Laws in Pakistan", http://ezinearticles.com/?Telecommunication-Laws-in-Pakistan&id=362110, (Last accessed July 21, 2008).
[95] Ibid., Section 4(1)(m).
[96] Marco C.E.J. Bronckers, "Trade and Competition Interlinkages: the Case of Telecom", (Venice: Fondazione Eni Enrico Mattei, December 4-5, 1998).

frameworks, on the permissible subjects from time to time:[97] some of the salient Rules, Regulations, Policies, modish framework and Guidelines include:

II. Rules

a. The Pakistan Telecommunication Rules, 2000

The Telecommunications Rules, 2000 (the "**Telecom Rules**") were framed by the Federal Government under Section 57 of the Act, which mainly cater for licensing procedure, its term, renewal, transfer and assignment, interconnection mechanics, terms and conditions of the interconnection agreement and charges thereof etc.[98]

The issues of the quality of services, tariff and exchange of information between the two operators have also been dealt in the Telecommunication Rules; etc.[99]

Interconnection is very crucial tool in the promotion of competition. All the operators are obliged to interconnect in order to make the new entrant's entry feasible.[100] The Telecom Rules obliged major operators to have interconnection agreements and/or arrangements with all the other players in the market, which, in fact, drove the industry towards competition.[101]

The Telecom Rules have also prescribed some terms and conditions of interconnection agreements; the most significant thereamongst include:

- Interconnection charges and their evolution or revision over time;
- Terms of payment and billing procedures;

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[97] Sheikh, "Telecommunication Laws in Pakistan", http://ezinearticles.com/?Telecommunication-Laws-in-Pakistan&id=362110, (Last accessed July 21, 2008).
[98] "Pakistan Telecommunication Rules, 2000", http://www.pta.gov.pk/media/rules_280208.pdf, (Last accessed August 1, 2008).
[99] Sheikh, "Telecommunication Laws in Pakistan", http://ezinearticles.com/?Telecommunication-Laws-in-Pakistan&id=362110, (Last accessed July 21, 2008).
[100] Rule 13, Pakistan Telecommunication Rules, 2000, http://www.pta.gov.pk/media/rules_280208.pdf, (Last accessed August 1, 2008).
[101] Shahid, Lian, and Liu, *International Journal of Management Science and Engineering Management*, 268-277, http://www.worldacademicunion.com/journal/MSEM/msemVol02No04paper03.pdf, (Last accessed July 22, 2009).

- Minimum duration period of at least twelve months; and
- A provision that the interconnection agreement may only be altered by mutual consent of the parties or through a determination of the Authority.

For the first time in Pakistan the concept of Significant Market Power (**SMP**) was introduced in the Telecom Rules. An operator is presumed to have significant market power under Rule 17, when "it has a share of more than twenty-five per cent of a particular telecommunication market. The relevant market for these purposes shall be based on sector revenues." Apart from this 25% method of determining market power, the PTA has been empowered under the Telecom Rules not to determine a player having market share of 25% or above to be SMP or otherwise to determine a player having less than twenty-five per cent share in a given market to be the SMP considering certain factors detailed in the Telecom Rules, so that a level playing field for all players whether big or small may be ensured.[102]

b. Access Promotion Contribution Rules, 2004

The MoIT issued Access Promotion Contribution Rules, 2004 on December 31, 2004 in order to govern mechanics of Access Promotion Contribution (**APC**) to be paid to Local Loop (**LL**) operator/licensee[103] or in the Universal Service Fund (**USF**) created and maintained by the Federal Government by the Long Distance and International (**LDI**) operator/licensee,[104] whereby the PTA determined upto US$ 0.06 to be the mopped up APC. This is, however, lamentable to observe that APC for mobile, in

[102] Yousaf Haroon, "Pakistan Telecommunication Liberalization", (Islamabad: National Post Graduate Institute of Telecommunications and Informatics).

[103] LL Licensee means a person licensed under the Act to establish, maintain and operate a public fixed switched network for the provision of local exchange telecommunication service, and includes PTCL, National Telecommunication Corporation and any person licensed under the Act to provide Limited Mobility Communication Service, Rule 2(l) of the Access Promotion Contribution Rules, 2004, http://www.pta.gov.pk/images/stories/kashif/apc_rules.pdf, (Last accessed August 2, 2008).

[104] LDI Licensee means a person licensed under the Act to establish maintain and operate a public fixed switched network for the provision of nation-wide long distance and international telephony service, Rule 2(k) of the Access Promotion Contribution Rules, 2004, http://www.pta.gov.pk/images/stories/kashif/apc_rules.pdf, (Last accessed August 2, 2008).

sheer discrimination, is not given to Mobile Industry despite its every right and demands.[105] PTA also issued The Access Promotion Regulations, 2005 on this subject.

c. The Universal Service Fund Rules, 2006

The Universal Service Fund Rules, 2006 (the "**USF Rules**") provide for the mechanics of possession, management and control of USF, constitution of USF, collection of USF, utilization and operation of USF. USF Rules also envisage creation of a USF Company limited by guarantee, its Board and other details in order to prepare projects and grant contracts to successful operators through reverse auction etc. USF Rules also postulate monitoring and enforcing mechanism so far as the projects are concerned in order to ensure that Fund is adequately used for provisioning of desired telecommunication services in un-served or under-served areas of Pakistan. Certain amendments have also been made in the USF Rules in 2007.

d. The ICT R&D Fund Administration Rules, 2006

The Information and Communication Technology Research and Development Fund Administration Rules were framed in 2006, which envisage constitution of a Company for administration of Fund, in addition to other provisions for constitution of its Board, its functions, sources of R&D Fund, dispute settlement mechanism, confidentiality of information, core policy objectives and key priority areas.

III. Regulations

a. Card Payphone Service Regulations, 2004

These Regulations have been issued by PTA under Section 5(2)(o) of the Act, which govern accounting and auditing, relationship with customers by the payphone

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[105] "Access Promotion Contribution Rules, 2004", http://www.pta.gov.pk/images/stories/kashif/apc_rules.pdf, (Last accessed August 2, 2008).

operators and with other operators, code of commercial practices, assignment, monitoring procedure, inspection by PTA, and complaint systems etc.[106]

b. Interconnection Dispute Resolution Regulations, 2004

In order to achieve the full objectives of competition, mandatory interconnection[107] is indispensable.[108]

The players having low penetration in the market are unable to compete with bigger players without assured interconnection, whose entry even, may otherwise be made limited by bigger players.[109]

WTO accession warranted provisioning of mandatory interconnection, whereas Telecom Rules obliged all major operators to have interconnection agreements and/or arrangements with all the other players in the market, which, in fact, drove the industry towards competition. On the basis of the Telecom Rules, PTA made regulations to resolve the disputes regarding interconnection in the year 2004. These Regulations provide for the compendious dispute resolution mechanism between the operators regarding Interconnection by the PTA, in case the Operators fail to settle their disputes concerning interconnection.[110]

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[106] Sheikh, "Telecommunication Laws in Pakistan", http://ezinearticles.com/?Telecommunication-Laws-in-Pakistan&id=362110, (Last accessed July 21, 2008).

[107] The term Interconnection refers to "the linking of different telecommunication networks and to the use by one operator of other operators' networks including physical infrastructure and software systems." Thanks to interconnection agreements between operators, an operator can therefore give users of its own network access to the users or services of other networks. One of the key regulatory objectives in telecommunications is to ensure that operators do conclude interconnection agreements under equitable conditions. Michel Kerf, Isabel Neto and Damien Geradin, "Antitrust vs. Sector Specific Regulation in Telecom: A Close Look at Interconnection", 1.

[108] Shahid, Lian, and Liu, "Competition And Liberalization Policies And Regulations For Telecommunications Industries In China And Pakistan: A Comparative Analysis", 4, 268-277, http://www.worldacademicunion.com/journal/MSEM/msemVol02No04paper03.pdf, (Last accessed July 22, 2009).

[109] M. Armstrong, C. Doyle, J. Vickers, "The Access Pricing Problem: A Synthesis", *Journal of Industrial Economics*, (1996), 44.

[110] "Interconnection Dispute Resolution Regulations, 2004", http://www.pta.gov.pk/media/Interconnection_Disputes_Resolution.pdf, (Last accessed August 3, 2008).

c. Pakistan Telecommunication Authority (Functions and Powers) Regulations, 2006

Initially in 2004, the Pakistan Telecommunication Authority (Functions and Powers) Regulations were issued by the PTA under Section 5(2)(o) of the Act, whereas in 2006 the same were repealed and superseded by the Pakistan Telecommunication Authority (Functions and Powers) Regulations, 2006. These mainly envisage the mechanics of performance of functions and exercise of powers by the PTA, more importantly in relation to governing public hearing, issuance of determination, laying down standards for Terminal Equipments, setting out and designating the criteria for quality of service to be complied with by its licensees, application for licensing and its pre requisites, modification of licenses on application by licensee, transfer or assignment of license, auction for assignment of Radio Frequency Spectrum, procedure for investigation and adjudication, appointment of administrator to manage the affairs of a licensee, procedure on complaints and claims, manner of conducting hearings etc.[111] Certain amendments have also been made in these Regulations in recent past vide the Pakistan Telecommunication Authority (Functions and Powers) (Amendment) Regulations, 2008, to make the same more compendious and contemporaneous.[112]

d. Mobile Number Portability Regulations, 2005

Mobile Number Portability (**MNP**) is a unique scheme/arrangement prevalent in the cellular Mobile Industry of Pakistan, whereby the subscriber of any cellular mobile network can leave its original network and switch to another mobile network, retaining his/her/its original mobile number and prefix in pursuit of better coverage,

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[111]. "Pakistan Telecommunication Authority (Functions and Powers) Regulations, 2006", http://www.pta.gov.pk/media/func_powers_06.pdf, (Last accessed August 11, 2008).
[112] "The Pakistan Telecommunication Authority (Functions and Powers) (Amendment) Regulations, 2008", http://www.pta.gov.pk/media/functions_powers_reg_08.pdf, (Last accessed August 9, 2009).

tariff, quality of service etc. in accordance with the MNP Regulations, 2005, MNP Code of Practice, MNP Porting Process Guidelines and MNP Subscribers' Guidelines.

The MNP Regulations envisage provisions regarding eligibility criteria for MNP, general conditions for porting, rights and obligations of Subscribers, rights and obligations of Operator (whether be the Donor or Recipient), administration of central Database, establishment of efficient and easy-to-use complaint handling/redressal system, publication of the Code of Practice by the Operators, maintenance of Data privacy by the Operators, and use of Central Database etc.[113]

e. Telecom Consumer Protections Regulations, 2009

The PTA in exercise of its powers given under Section 5(2)(o) of the Act to make Regulation, issued Telecom Consumer Protections Regulations, 2009 in order to protect and cater for rights of the Consumers.[114] Following are the core obligations of Operators under the Telecom Consumer Protection Regulations, 2009:

- Reg. 9(1): Operators which are required to take approval from the Authority regarding Code of Commercial Practice and standard contract of Service under their respective License are to publish their Code of Commercial Practice and standard contract of services for the Consumers' information.
- Reg. 10(2): Operators to provide detailed billing information to their Consumers.
- Reg. 12(2): every Operator is to establish and maintain a Consumer complaint handling mechanism.
- Reg. 12(3): Complaint handling mechanism to be widely publicized.

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[113] The Mobile Number Portability Regulations, 2005, http://www.pta.gov.pk/media/Number%20Portability.pdf, (Last accessed December 17, 2008).

[114] "Telecom Consumer Protection Regulations, 2009", http://www.pta.gov.pk/media/consumer_reg_090409.pdf, (Last accessed August 9, 2009).

- Reg. 13: Establish round the clock Consumer Care Call Centers with a helpline number for lodging of Consumer complaints.
- Reg. 14(1): Upon receiving complaint, Operator must register it through the allocation of a unique complaint number to be communicated to Consumer alongwith an expected timeframe within which the Complainant may be redressed.
- Reg. 14(2): Escalation path to be set up by the Operator and duly conveyed to the Complainant.
- Reg. 15(6): Where Complainant files a complaint with the Authority, the Operator shall communicate the redressal status report of the Complaint to the concerned Consumer and the Authority within the time frame set by the Authority.
- Reg. 16: All Operators or employees of Operators shall maintain confidentiality of information about Consumers.
- Reg. 17(1): Operators to establish a Consumer's Manual (containing customer services helpline, pre-requisite for new connection, applicable tariff and charges, quality of service standards, and procedure for resolution of complaints) and advertise the same through electronic and print media within 90 (ninety) days of publication of the Notifications. (Where Operators are to commence Services after the publication of these Regulations, 17(1) is to be implemented within 90 days of commencement of Services.)
- Reg. 17(3): After notification of these Regulations, Operators are to include Consumer Manual with every sale of their Services.

In addition to above briefly enumerated Regulations, there are miscellaneous other Regulations, significant whereof are as follows:

- Fixed Line Tariff Regulations, 2004;
- Vehicles Tracking Services Regulation, 2004;
- Burglar Alarm Services Regulations, 2004;
- Amateur Radio Services Regulations, 2004;
- Audio-Tex Service Regulations, 2004;
- Non-voice Communication Network Service Regulations, 2004;
- Registration of Satellite Service Provider Regulations, 2004;
- Trunk Radio Services Regulations, 2004;
- Type Approval Regulations, 2004;
- Pakistan Telecommunication Authority Employees Service Regulations, 2004;
- The Access Promotion Regulations, 2005;
- Number Allocation and Administration Regulations, 2005; and
- Class Value Added Services Licensing and Registration Regulations, 2007 (as amended in 2008).[115]

IV. Policies

A bare analysis of core mandate of Policy and Regulation may lead one to the inference that the former determines comprehensive goal, which needs to be achieved in a particulate sector under the guiding principles to be provided therein even; whereas the micro aspects and details of market-making may be left for a Sector Specific Regulator under the Sector Specific Regulation, considering business dynamics, catering for rights and obligations of each and every stakeholders,

[115] http://www.pta.gov.pk/index.php?option=com_content&task=view&id=184&Itemid=347, (Last accessed August 22, 2009).

controlling entry and exit in the market, determining minute details in order to achieve the designed objectives.[116]

Section 8 of the Act empowers the Federal Government; the Ministry of Information Technology (IT & T Division), Government of Pakistan (**MoIT**) to issues Policy directives in order to supplement the Government's intent to further develop telecommunications sector in Pakistan and to ensure subscribers' welfare by means of competitiveness, increased economic efficiency, innovation, and productivity. A brief enumeration in relation to the Policies is given below in following terms:

a. The De-Regulation Policy, 2003

As discussed above, that Pakistan has made very bold steps in relation to development of telecommunications; and one of the most bold steps is unquestionably the introduction of the De-Regulation Policy for Telecommunication Sector, 2003, whereby Pakistan opened up its telecommunication sector for private players.[117] It was indeed a turning point for development in telecommunication sector.[118] The idiosyncratic features of this very smart Policy may include but not be limited to the following:

- Tariffs of both types of licensees (LL/LDI) will not be regulated by PTA until they attain SMP status. However, PTA has the right to regulate tariffs in case of evidence of unfair and burdensome pricing to consumers. Therefore, this

[116] George David, "Comparative Analysis of Policy Approaches for Telecom Competition", *Strategic Management*, 5th edn., (New York: Prentice Hall International).
[117] Shahid, Lian, and Liu, *International Journal of Management Science and Engineering Management*, 268-277, http://www.worldacademicunion.com/journal/MSEM/msemVol02No04paper03.pdf, (Last accessed July 22, 2009).
[118] "De-Regulation Policy for the Telecommunication Sector, 2003", http://www.pta.gov.pk/media/telecom25092003.pdf, (Last accessed July 31, 2008).

obligation on the part of SMP is to ensure that SMP does not manipulate its dominance in an anticompetitive way, e.g. Marginal squeeze.[119]

- There will be no obligation on licensees to open ducts, poles or other such facilities to competitors until they enjoy status of SMP.[120]
- The Government believes that the success of market liberalization depends on the development of a "fair competitive environment for all licensees". In this regard, ptcl and other SMP licensees that may emerge shall be prohibited from abusing their dominant positions through anti-competitive conduct. At present, ptcl's license contains "prohibitions against anti-competitive conduct". These prohibitions shall be updated, incorporated in the Rules and made applicable to all such licensees that are determined by the PTA to possess SMP.[121]
- PTA shall have the responsibility of promptly investigating allegations of anti-competitive conduct and taking remedial measures against such conduct.[122]
- PTA will prepare detailed pricing framework for new fixed-line telephony licensees. PTA will also have the power to determine as to which of the licensees hold SMP. Licensees who are not SMPs will not be subjected to any tariff regulations. It may be noted that competitive telecom market may result in differential regional prices as against current uniform rates for various fixed-line services across the country.[123]

In addition to above, "increase of service choice for customers" of telecommunication services at "competitive and affordable rates" as well as liberalization of telecommunication sector by encouraging "fair competition amongst

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[119] Professor Damien Geradin and Robert O'Donoghue, "The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector", *The Global Competition Law Centre Working Papers Series,* (GCLC Working Paper 04/05).
[120] "Policy, 2003", http://www.pta.gov.pk/media/telecom25092003.pdf, (Last accessed July 31, 2008).
[121] Ibid.
[122] Ibid.
[123] Ibid.

service providers" were enshrined to be the principal objectives of the De-Regulation Policy.

The setting up of a De-Regulation Facilitation unit in the MoIT comprising of senior officials thereof, in order to facilitate implementation of the De-Regulation Policy was also envisaged in the De-Regulation Policy.[124]

b. The Mobile Cellular Policy, 2004

Pakistan liberalized its telecom industry partially in early 1990s by allowing private sector investment in wireless, value-added, paging, and card payphones services. Later on, the data services were also liberalized.[125] The De-Regulation Policy, 2003 was mainly meant for fixed line telecommunications sector, and it was dire need to have a Policy governing mobile cellular sector as well. Therefore, in 2004, MoIT issued the Mobile Cellular Policy, 2004 for the mobile cellular sector, postulating expectancy of achievement of following objectives peculiar to mobile cellular sector:

- Promotion of efficient use of radio spectrum;
- Increased choice for customers of Cellular mobile services at competitive and affordable price;
- Private investment in the cellular mobile sector;
- Recognition of the rights and obligations of mobile cellular operators;
- Fair competition amongst mobile and fixed line operators;
- An effective and well defined regulatory regime that is consistent with international best practices.[126]

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[124] Ibid.
[125] Shahid, Lian, and Liu, *International Journal of Management Science and Engineering Management*, 268-277, http://www.worldacademicunion.com/journal/MSEM/msemVol02No04paper03.pdf, (Last accessed July 22, 2009).
[126] "Mobile Cellular Policy, 2004", http://www.pta.gov.pk/media/Mobile_Cellular_Policy_Jan_28_2004.pdf, (Last accessed July 31, 2008).

The same objectives of "increase of choice for customers" of Cellular mobile services at "competitive and affordable price" and "promotion of fair competition" amongst mobile and fixed line operators were reiterated in the Mobile Cellular Policy, 2004. To achieve this objective, some policy decisions were taken like:

- The new licensee(s) will have the right to interconnect its network with other licensed mobile and fixed networks in Pakistan;
- PTA will immediately undertake a consultation process on the implementation of Mobile Number Portability with the aim to implement number portability within two years of Policy notification.
- The concept of MVNO supports and encourages an open and competitive market in telecommunications. All Operators will be permitted to support MVNO services, a detailed framework for which is to be prepared by PTA within two years of the notification of the Policy.[127]

The competition in telecom sector in Pakistan, in fact, started in certain flares, in late 1980s and early 1990s, whereby licenses for cellular (based on AMPS, D-AMPS and GSM technologies to Paktel, Instaphone and Mobilink), paging, card operated payphones, and subsequently for data communication services were granted to the private players.

In 2001, after the change of tariff mechanism, and introduce of Calling Party Pays (**CPP**) in lieu of Mobile Party Pays (**MPP**), the prices decreased immensely, and the competition in mobile cellular market get immense, when Pak Telecom Mobile Limited (**PTML**), with name and style of Ufone, launched its commercial services on January 29, 2001, but the things got altogether changed when two more cellular mobile licenses to two multinational companies, Telenor Pakistan (Pvt.)

[127] Ibid.

Limited (**Telenor**) and Warid Telecom (Pvt.) Limited (**Warid**), pursuant to this Policy were granted.

There are certain approaches as to whether market be privatized first and then liberalized or vice versa. Pakistan adopted the second approach.[128]

The Mobile Cellular Policy guaranteed the sustainability of the framework envisaged thereby for five years; to incentivize foreign investors especially; which time has elapsed now, hence the same is under the review to further liberalizing and opening up the market at vertical and horizontal levels.[129]

c. Broadband Policy, 2004

For the economic progress and digitization of economy, the broadband access is considered to be the core catalyst. In December 22, 2004, MoIT issued a Policy for governance of provisioning, and promotion of broadband services in Pakistan, envisaging, incentivizing schemes for private investors, growth of new and existing service providers, spread of an affordable, "always on", broadband high speed internet service in the corporate/commercial and residential sectors across Pakistan etc. as the core objectives of the Policy.[130]

d. Universal Service Fund Policy, 2006

In 2006, Universal Service Fund Policy was issued by the MoIT to cater for Information and Communication Technologies requirements of those areas of Pakistan which are either un-served or under-served in terms of telecommunications services. The De-Regulation and Mobile Cellular Policies also contained provisions regarding Universal Service, which formed the basis of this Policy. However, following prime objectives were postulated herein:

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[128] Shahid, Lian, and Liu, *International Journal of Management Science and Engineering Management*, 268-277, http://www.worldacademicunion.com/journal/MSEM/msemVol02No04paper03.pdf, (Last accessed July 22, 2009).
[129] Haroon, "Pakistan Telecommunication Liberalization".
[130] "Broadband Policy, 2004", http://www.pta.gov.pk/media/bbp.pdf, (Last accessed August 8, 2008).

- Access to and coverage of networks shall be extended to un-served or under-served areas
- Access to services shall be offered by operators, both through shared access points as appropriate, and to all customers requesting service in the areas now covered through the support of the USF, at published national tariffs
- Services shall be affordable to the majority of households and individuals.[131]

e. National ICT Research & Development Fund Policy Framework, 2006

With a vision to "transform Pakistan's economy into knowledge based economy by promoting efficient, sustainable and effective ICT initiatives through synergic development of industrial and academic resources", Research and Development Fund Policy Framework was issued by the MoIT, in 2006. The following broad Policy objectives, in order to cater for the key aspiration of R&DF Policy Vision, were envisaged therein:

- provide an enabling environment that facilitates deployment, exploitation and utilization of ICT for enhanced national productivity;
- enhance the national ICT related human resource development capacity manifolds by facilitating industrial demand focused human resource capacity building and R&D capabilities in the country and promoting ICT related educational programs and activities;
- help develop a knowledge based ICT industry for delivery of value-added ICT products and services;
- facilitate the development of comparative advantage in the ICT Industry;

[131] "Universal Service Fund Policy, 2006", http://www.usf.org.pk/FCKeditor/editor/filemanager/connectors/aspx/UserFiles/USF-Policy.pdf, (Last accessed August 6, 2008).

- make Pakistan an attractive destination for service oriented and research and development related outsourced jobs;
- enhance use of ICT in nationally important segments of economy like agriculture;
- promote indigenous development in Telecom Sector that would support ICT;
- contribute towards the growth of other sectors of economy through deployment of superior ICT products and services;
- cultivate Industry-Academia Partnership;
- provide support to national information and communication infrastructure through indigenous development of ICT products and services;
- spread the ICT activities on a true National Level;
- help develop standards, practices, guidelines and models for the sustainable promotion and growth of ICT;
- use ICT as a tool for poverty alleviation and upward mobility for economically challenged groups of citizens;
- facilitate research and development in those sections of ICT that enhance quality of life for citizens.[132]

V. Contemporaneous Framework — Framework for MVNO Services in Pakistan

As one of the steps to foster competition, the PTA has recently published a "Framework for Mobile Virtual Network Operator (**MVNO**) Services in Pakistan", which has following salient features:[133]

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[132] "National ICT Research and Development Fund Policy, 2006", http://www.pakistan.gov.pk/divisions/itandtelecom-division/media/RDPolicyDocument.pdf, (Last accessed August 5, 2008).

[133] "Framework for MVNO Services in Pakistan", (May 15, 2007), http://www.pta.gov.pk/media/mvno_app_framework.pdf, (Last accessed August 22, 2009).

- MVNO shall be allowed to use its own brand name for provision of services in Pakistan. For this purpose, the PTA shall allocate separate number blocks to Mobile Network Operators (**MNOs**) for use by its MVNO only. Further, each MVNO shall have separate number blocks on which it will sell its own SIM. However, for the number portability, MNOs shall be responsible who actually control the network infrastructure. In case an agreement is singed for Full MVNO model then the MNOs shall make sure that their concerned MVNOs make arrangements in MSC etc. in order to enable number portability prior to commencement of services by the MVNO concerned.[134]
- MVNO shall be allowed to install certain network elements as agreed upon by the MNOs and as approved by the PTA. Further the Agreement once approved by the PTA shall not be changed by the MNOs and MVNO without prior approval of the PTA.[135]
- MVNO shall not be allowed to make roaming agreement with other local/national/international mobile networks. The MVNO shall provide roaming facilities to its customers as per roaming agreements made by its parent MNO.[136]

However, these salient provisions in the "Framework for MVNOs" show that it is not a very MVNO friendly policy framework. The Regulators around the globe are focused on fostering competition in the telecom sector/industry by enabling operators who do not have resources to obtain radio spectrum right to participate in the Mobile business market. Therefore, MVNOs should be given right to appear before the customer as an independent operator although they use incumbent operators'

[134] Ibid., Clause 2.4.
[135] Ibid., Clause 2.5.
[136] Ibid. Clause 2.9.

spectrum; and this is what spurs existing established brands to enter in Mobile communications market and compete with existing operators; hence, more freedom to potential and keen players to be given to enter and create a competitive environment, and instead of protecting incumbents, more opportunities to new entrants to enter in the market may be given.[137]

VI. Guidelines

a. Guidelines Regarding Global Mobile Personal Communication by Satellite (GMPCS) Licensing

The PTA has given framework for GMPCS which covers variety of aspects, including but not be limited to frequency coordination, tariffs and quality of service, type approval, and service licensing etc., but GMPCS, despite being universally accepted and acknowledged as a basic system for development of telecom infrastructure is cost oriented in Pakistan, and making this service cost effective and affordable for the business as well as for consumers is call of the hour and invite attention of the PTA.[138]

b. Interconnection Guidelines, 2004

The PTA, under Section 5(2)(h) of the Act, issued the Interconnection Guidelines, 2004 to streamline and govern interconnection arrangements between all the licensed telecommunication operators. These Guidelines acknowledge right of interconnection of an operator with other operators on the basis of non discrimination. These Guidelines envisage that cost of inefficiencies of an operator in terms of higher interconnection cannot be passed on to other operators. The SMP operator for the relevant market (which for fixed lines market is ptcl and for mobile cellular is

[137] Sahibzadah Uzair Hashim, "Mobile Virtual Network Operators (MVNOs): Special Reference to Regulatory Environments", *A Research Paper submitted to the University of Manchester in the Faculty of Humanities: School of Law*, (Manchester, 2006).
[138] "Guidelines regarding Global Mobile Personal Communication by Satellite (GMPCS) Licensing", http://www.pta.gov.pk/media/gmpcs.pdf, (Last accessed August 7, 2009).

Mobilink) are obliged to make and tender a Reference Interconnect Offer (**RIO**) to PTA for its accent, once approved, the same RIO is signed by the SMP with all operators, subject to certain exceptions, on non discriminatory basis.[139]

c. Accounting Separation Guidelines, 2007

Section 5(2)(e) and Section 25 (1) of the Act, doth empower the PTA to require from any of its licensees for establishment and maintenance of a specified accounting procedures to enable it to get all kindred information for tariffing or any other purpose. Pursuant to the Accounting Separation Guidelines, 2007, the PTA may initially place this obligation upon SMP for a relevant market but is empowered to oblige any operator to do so.[140]

d. Guidelines on Costing Methodologies for Accounting Separation, 2007

These Guidelines mainly provide for the principles intended to be used in order to allocate and apportion the costs, assets and liabilities and revenues, within the accounting separation process, and also propose myriad categories of costs and mechanism of treatment thereof for the preparation of Separated Accounts.[141]

3.4 Legal and Regulatory Reformation and Fostering of Competitive Milieu

A celebrated analyst, Northfield asserted, "comparison of national experiences identify some common lessons for nations to review their policies and provide a mirror for countries to examine the results of existing approaches".[142]

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[139] Shahid, Lian, and Liu, *International Journal of Management Science and Engineering Management*, 268-277, http://www.worldacademicunion.com/journal/MSEM/msemVol02No04paper03.pdf, (Last accessed July 22, 2009).

[140] Accounting Separation Guidelines, 2007, http://www.pta.gov.pk/media/AccSepGuidFIN210807.pdf, (Last accessed August 9, 2009).

[141] Guidelines on Costing Methodologies for Accounting Separation, 2007, http://www.pta.gov.pk/media/GuiCosMethAccSep210807.pdf, (Last accessed August 9, 2009).

[142] D. Northfield, "The Information Policy Maze: Global Challenges-National Responses", (Melbourne: RMIT University Press, 1999).

No design of legal and regulatory reformation could though be treated as model, yet countries should learn from experiences of others and their mistakes and achievements as well. Pakistan opted for the approach of, "increase of service choice for customers" of telecommunication services at "competitive and affordable rates" as well as liberalization of telecommunication sector by encouraging "fair competition amongst service providers."[143]

In addition to legal steps and regulatory measures Pakistan resorted to which have been illuminated in pages hereinabove, the Parliament on February 6, 2006, passed "The Pakistan Telecommunication (Re-Organization) (Amendment) Act, 2006". This Amendment Act has amended the Act, to give legislative backing to certain concepts envisaged in De-Regulation and Mobile Cellular Policies.[144] Four important developments that have been interposed in the Act include: Universal Service Fund, Access Promotion Contribution, Research and Development Fund; whereas the forth significant development is the induction of a provision regarding Right of Way to defuse all the confusions in the industry operators and to give them adequate cover under applicable legal and regulatory framework.

The Government of Pakistan incentivised foreign investors by introducing the investor friendly Foreign Direct Investment (**FDI**) policy to afford better opportunities to foreign investors to invest in the telecommunications sector of Pakistan.[145]

Following steps have mainly been taken to incentivise foreign investors:

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[143] Shahid, Lian, and Liu, *International Journal of Management Science and Engineering Management*, 268-277, http://www.worldacademicunion.com/journal/MSEM/msemVol02No04paper03.pdf, (Last accessed July 22, 2009).

[144] "Year Book, 2005-2006", 3, (Islamabad: Ministry of Parliamentary Affairs, Government of Pakistan), 11, http://www.pakistan.gov.pk/divisions/parliamentary-division/media/YearBook.pdf, (Last accessed March 11, 2009).

[145] R. A. Joseph, "Australian Telecommunications Policy in an International Context: Issue for the Future", 14(1), (Prometheus, 1996), 61.

- eliminating the requirement of minimum foreign equity in the services sector after declaration of telecom sector as industry in the year 2004;
- lifting the restrictions from repatriation of the profits, by allowing foreign investors to repatriate 100 percent of their profits; and
- reduction and, in some cases, exemption in duties, taxes, and technical/royalty/franchise fees.[146]

Pakistan has achieved in gaining colossal amount of money in shape of FDI in its telecommunication sector in the last seven/eight years, a tabular account whereof has been given hereinbelow:[147]

Table 3.1. Foreign Direct Investment in Telecom Sector (US $ million)[148]

2001-02	484.7	6.1	1.26
2002-03	798	13.5	1.69
2003-04	979.9	207.1	21.13
2004-05	1524	494.4	32.44
2005-06	3521.0	1905.1	54.11
2006-07	5124.9	1824.3	35.60
2007-08	5152.80	1438.60	27.92

The statistical evidence of myriad countries' analysis support that the productive and dynamic legal and regulatory reformation process yield desirable results in the form of innovation, consumer welfare and productivity.[149]

Owing to the better Competition Policies and their application, in a recently held study project[150] on the subject of "Telecom Regulatory Environment" Pakistan

[146] Shahid, Lian, and Liu, *International Journal of Management Science and Engineering Management*, 268-277, http://www.worldacademicunion.com/journal/MSEM/msemVol02No04paper03.pdf, (Last accessed July 22, 2009).
[147] Ibid.
[148] http://www.pta.gov.pk/index.php?option=com_content&task=view&id=648&Itemid=600, (Last accessed August 9, 2009).
[149] C. Fink, A. Mattoo, R. Rathindran. "Liberalizing Basic Telecommunications: the Asian Experience", *World Bank Working Paper*, Development Research Group, (2001).

stood first (both in Mobile and Fixed Line) among India, Philippine, Thailand, Indonesia and Sri Lanka. In this study project country's performances with reference to telecom have graphically been represented.[151]

Figure 3.3.TRE Component Score Comparisons: Mobile[152]

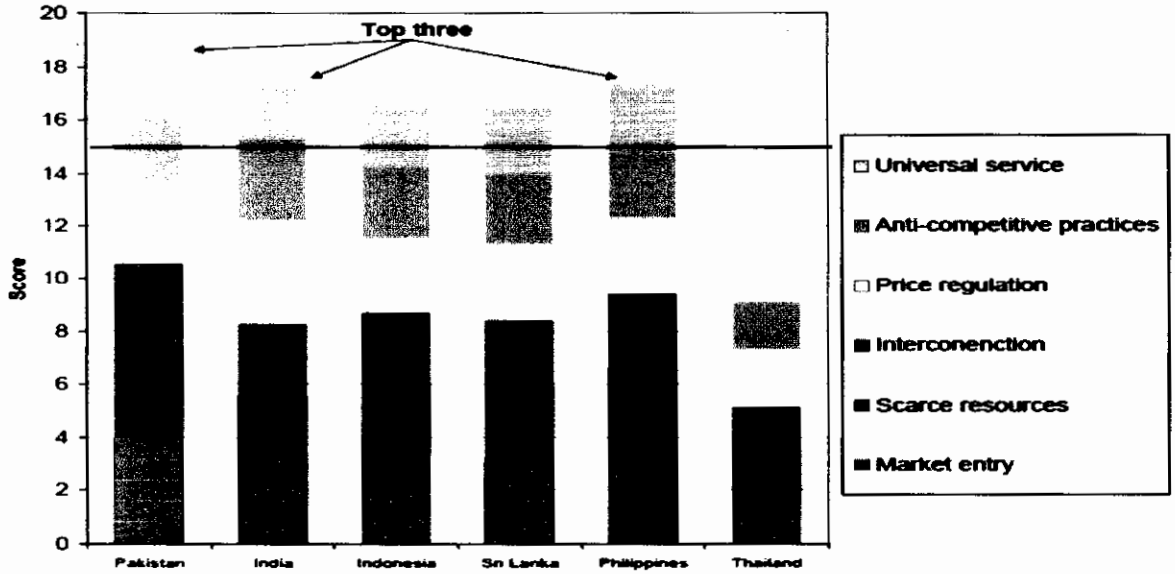
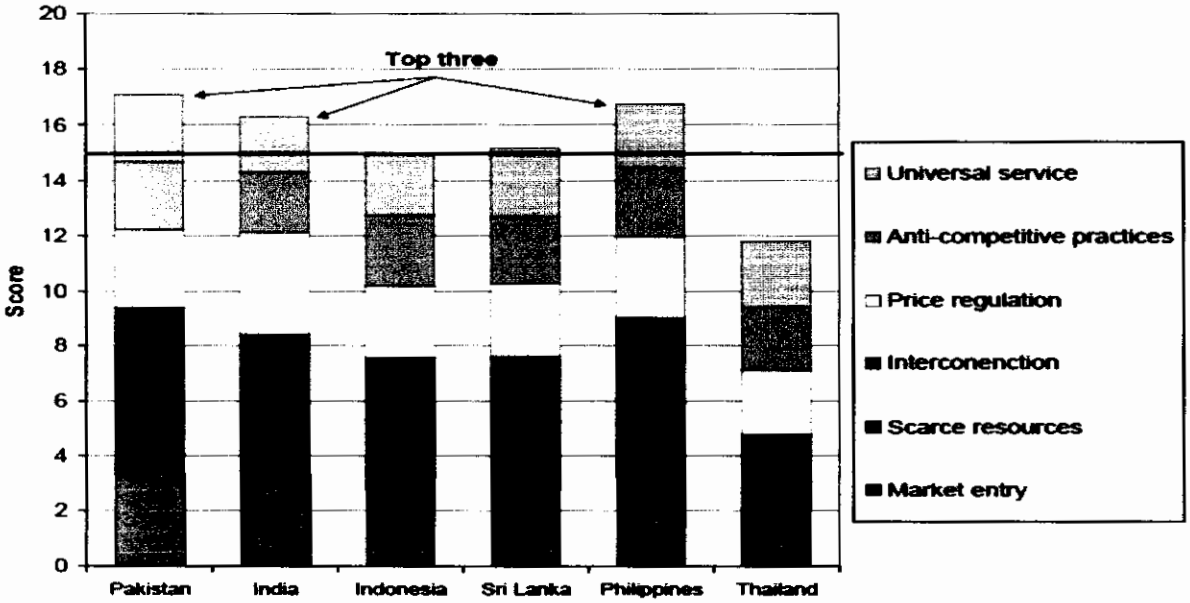


Figure 3.4.TRE Component Score Comparison: Fixed[153]



[150] Payal Malik, Divakar Goswami, Joseph Wilson, Lorraine Salazar, Malathy Knight John and Deunden Nikomborirak, with input from Harsha de Silva and Helani Galpaya, "Telecom Regulatory Environment (TRE) Assessment: A Six Country Comparison", (The paper is based on the comparative research conducted across six countries; India, Indonesia, Pakistan, Philippines, Sri Lanka and Thailand in 2006). www.pta.gov.pk , (Last accessed April 1, 2007).

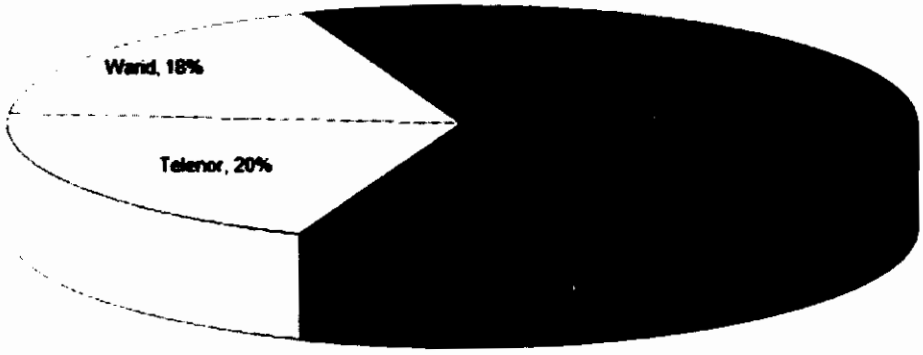
[151] Ibid.

[152] Ibid.

[153] Ibid.

From analysis of existence of more than 3'828'756 Fixed Line Subscriber[154], 2'615'544 Wireless Local Loop Subscribers[155], 94'627'102 Cellular Subscribers[156] and 130'281 (Internet) DSL subscribers in total[157] and following demographical and tabular account of Economic Indicators, in terms of each cellular Operator's market share, Telecom Sector's total share in GDP, GST/CED collection from Telecom Sector and tele-density (Fixed Lines, Wireless Local Loop and Cellular), one may certainly ascertain the significance of telecommunication sector of Pakistan, and the monetary contributions it has been making in the government exchequer which could convincingly be gauged as one of the biggest revenue pockets of Government of Pakistan for last couple of years.

Figure 3.5. Pakistan Mobile Market Share



Pakistan Mobile Market Share
Q3 2008 - Data Source: PTA

158

[154] http://www.pta.gov.pk/index.php?option=com_content&task=view&id=649&Itemid=602, (Last accessed August 9, 2009).
[155] Ibid.
[156] http://www.pta.gov.pk/index.php?option=com_content&task=view&id=650&Itemid=603, (Last accessed August 9, 2009).
[157] http://www.pta.gov.pk/index.php?option=com_content&task=view&id=651&Itemid=604, (Last accessed August 9, 2009).
[158] http://telecompk.net/wp-content/uploads/2008/11/pkms-0908.jpg, (Last accessed August 9, 2009).

Table 3.2. Telecom Sector Share in GDP (%)[159]

2000-01	1.6
2001-02	1.6
2002-03	1.7
2003-04	1.7
2004-05	1.9
2005-06	2.0

Table 3.3. GST/CED Collection from Telecom Sector (PKR. in Billion)[160]

Mobile	2.0	3.3	5.2	9.9	18.8	28.2	36.80
Basic Telephony*	6.9	8.2	6.9	9.7	7.7	7.9	6.80
Others**	-	-	-	0.9	0.3	0.2	0.93
Total	8.9	11.5	12.1	20.5	26.8	36.3	44.53

* PTCL and NTC only
**Others include WLL/ LDI operators

Table 3.4. Teledensity (Fixed + WLL + Mobile)[161]

2000-01	2.80
2001-02	3.66
2002-03	4.31
2003-04	6.25
2004-05	11.89
2005-06	26.26
2006-07	44.06
2007-08	58.90
2008-09	61.8
*FLL Teledensity Revised Note: Including AJK and NAs FLL Teledensity As of Mar 09	

[159] http://www.pta.gov.pk/index.php?option=com_content&task=view&id=648&Itemid=600, (Last accessed August 9, 2009).
[160] Ibid.
[161] Ibid.

Table 3.5. Internet [162]

Years	Users (M)	Growth Rate (%)	Subscribers
2000	0.50	150	
2001	0.80	60	
2002	1.00	25	
2003	1.60	60	
2004	2.00	25	
2005	2.10	5	14,600
2006	2.40	14	26,611
2007	3.5	46	45,153
2008	3.7	5.7	130,281

DSL Subscribers upto March, 2008

The telecom markets in Pakistan can be characterized as open competitive markets for domestic as well as foreign investors. Herfindahl-Hirschman Index (**HHI**); a measure of competition in the market, is improving in Pakistan especially for the mobile cellular sector in the presence of five mobile operators in the market.[163]

Nevertheless, there are many issues that PTA has to address to get the telecom industry of Pakistan to its apex. Current issues before PTA include but may not be limited to:

- Effective implementation of Mobile Number Portability (**MNP**);
- Broadband Proliferation;
- Internet Protocol Telephony (**IPT**);
- Wireless Fidelity (**Wi-Fi**);
- Worldwide Interoperability for Microwave Access (**Wi-Max**);
- Infrastructure Sharing;

[162] http://www.pta.gov.pk/index.php?option=com_content&task=view&id=651&Itemid=604, (Last accessed August 9, 2009).
[163] Haroon, "Pakistan Telecommunication Liberalization".

- Policing, management, planning, pricing and sharing of Spectrum (in association with FAB);
- Anti-competitive practices by SMPs;
- 3rd Generation (**3G**) and Next Generation Network (**NGN**);
- Mobile Tele Vision (**MTV**);
- Universal Service Obligation (**USO**);
- Class Value Added Services (**CVAS**) Licensing and
- Access Promotion Contribution (**APC**) for Mobile.

The telecommunications industry in Pakistan has made a tremendous growth in a long journey from a state-owned monopoly to de-regulated and liberalized competitive market by means of myriad instruments as enumerated in this Chapter.[164]

[164] Ibid.

CHAPTER - 4

SCHEME OF POWERS BETWEEN COMPETITION AUTHORITY AND TELECOM SECTOR SPECIFIC REGULATOR: WHAT WORKS BETTER?

Regulation literally means "influencing the flow of events". Regulation may consist of government or regulator rules, or certain incentives of the market framed in such a way that they may adequately cater for the entry, exit, sale, price, or production decision of market players.[165]

The significance of Sector Specific Regulations in relation to telecommunications sector and how different countries have resorted to the application of Competition Law and/or Sector Specific Regulations with reference to telecommunications shall be subject of analysis in this Chapter.

Amongst the different jurisdictions that de-regulated and liberalized their telecommunications sector, different models for fostering competition in their respective telecommunications sectors were resorted to. Some relied on Converged Regulator, to oversee a broader range of connected categories of services; telecom, data, media and IT, whereas some relied mainly on Sector Specific Regulations applied through Sector Specific Regulator; a few others adopted an approach of reliance on a Multi Sectoral Regulatory Authority, which may encompass myriad industry sectors which may be considered public utility sectors such as water, telecommunications, sever, electricity etc.; some focused upon application of

[165] Rahul Singh, "State of Competition in the Indian Economy— Competition Law in Action: Interface between Competition Authority and Sector Specific Regulators", *National Law School of India University*, (Bangalore, March 15, 2007).

economy-wide (general principles of) Competition Law and Policy and some applied Competition Law and Sector Specific Regulations concurrently to control market forces and to foster competition in respective telecommunication sector. In this Chapter, the critical evaluation of all the approaches resorted to by different countries in their respective jurisdictions shall be made in order to derive an inference as to what approach and on what basis may be the most desirable and viable one.

4.1 OVERVIEW OF MYRIAD INSTITUTIONAL SETUP

From the epitome enunciated hereinabove, one may postulate that there are five cardinal institutional designs for governance of telecommunications generally and competition therein particularly:

a. **Single (Telecom) Sector Specific Regulator**: sole function is to oversee the telecommunications sector, for the most part these entities originated from the separation of the operational and regulatory activities of state-owned post and telecommunications companies - thus they often include the postal and telecommunications industry as well as radio-communications. This is a model which has been adopted in certain developing countries where there is no Competition Authority, but a Sector Specific Regulator with respective Sector Specific Competition mandate (e.g., Dominican Republic, Algeria, the Comoros, Jordan, Egypt and Oman);
b. **Sector Specific Regulator and Competition Authority**: This is the most common scenario wherein countries have both a Sector Specific Regulator, like Telecommunications Regulator for instance, and one or more entities with jurisdiction over economy-wide competition matters (e.g., the United States, Chile, Pakistan, India, and South Africa); or a Telecommunication Sector

Specific Regulator and a Competition Authority with a specific mandate in relation to governance of competition in the telecommunication sector (e.g., Australia);

c. **Converged Regulator:** these entities oversee a broader range of services which, in addition to telecommunications, also include information and communications technologies, including broadcasting (e.g., the United Kingdom);

d. **Multi Sector Regulatory Authority:** usually encompasses various industry sectors that are considered public utilities, e.g., telecommunications, water, electricity, and transportation (e.g., Costa Rica, the Gambia, Jamaica, Latvia, Luxembourg, Niger and Panama, as well as state public utility commissions in individual states in the United States); and

e. **No Specific Telecommunications Regulatory Authority:** in this approach Competition Policy and Law is the main method of overseeing the telecommunications sector. This is the least common model adopted in New Zealand, for instance, where a Sector Specific Commissioner is part of the general, economy-wide competition authority[166]

The structure of Competition Policy and Law and Sector Specific Regulation and interface between the Competition Authority and the Sector Specific Regulator need to be well defined in the legal, regulatory and institutional framework they are operating in. This at times may be influenced by socio-political considerations, the

[166] "Overview and Comparison of Different Institutional Designs", http://www.ictregulationtoolkit.org/en/Section.2033.html, (Last accessed December 19, 2008).

development and growth of telecommunication sector, size and maturity level of the market and management of human as well as financial resources.[167]

The core characteristics of these models of institutional entities for Telecommunications Regulatory Authorities are as follows.

4.1.1 Single (Telecom) Sector Specific Regulator

In this scenario, the telecommunications, or at times postal sector is the focal area of the Single (Telecom) Sector Specific Regulator, which doth associate with other government bodies, catering for IT and media/broadcasting areas. In this kind of the scenario, a ministry could also serve as Sector Specific Regulator, as does the Ministry of Internal Affairs and Communications in Japan, for instance. In telecom sector as well, this was not an unusual phenomenon before early 80s that the telecom used to be a monopoly either under state owned, managed or controlled organs or owned by a few private companies in many countries, and classical model of governance of everything by a single entity continued for many years in major countries of the world, but it could not deliver well. Therefore, need for separation of operation and regulatory function was felt, wherefor autonomous Telecom Sector Specific Regulators were constituted, which initially took over "regulatory function" from government-owned organs, followed by other things subsequently.[168]

4.1.1.1 Justification for a Single (Telecom) Sector Regulator

- Telecommunications sector includes specific technical issues, such as numbering plan and portability, radio frequency, network deployment etc. that

[167] Ibid.
[168] Ibid.

are unique to the telecommunications sector and exhibits specific characteristics that differentiate it from other industries;

- Decision-making within communications policy is based on the expertise of the regulators; experts often participate in drafting laws and advise appropriate ministries/authorities;
- Regulators need to be able to cooperate with other countries on sectoral issues at the international level[169]; and
- Sector Specific specialized/qualified staff is used.[170]

4.1.1.2 Advantages

- Can be focused on the complex technical challenges of the telecommunications sector, including network and service development;
- The telecommunications sector tends to be more dynamic than other utilities and a Single Sector Regulator can often adapt to this more easily; and
- In many cases, Single Sector Regulators tend to inherit staff from the former postal and telecommunication authority, i.e. have a core of specialized professionals from the start with a thorough understanding of the technical issues and strong engineering skills, which gives it a key advantage when dealing with complex network issues.[171]

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[169] Ibid.

[170] The perceived need for a specialized skill-set led the Cape Verde Government to establish a separate ICT specific regulator in 2004 (Institute of Communications and Information Technology – **ICTI**) in parallel with and despite the existence of a Multi-Sector (economic) Regulator (Autoridade de Regulamentação Economica – **ARE**) which also has a mandate to regulate telecommunications. Since becoming operational, ICTI has in practice undertaken both the technical and economic tasks in the ICT sector, with ARE focusing on the other sectors. This has been in part because ICTI has the staff and desire to review a wide range of telecommunications issues, including tariffs, that would normally be within the purview of ARE, and because the two institutions have come to an agreement allowing ICTI to take the lead role on telecommunications issues.

[171] "Overview and Comparison of Different Institutional Designs", http://www.ictregulationtoolkit.org/en/Section.2033.html, (Last accessed December 19, 2008).

4.1.1.3 Disadvantages

- Insufficient resources may lead to lack of staff which in turn means that there may be duplication for regulatory activities that are common to different industries;
- Inheritance of former staff leads to it to be biased in favour of the incumbent. Bearing in mind that this issue is not unique to the Single Sector Regulator – may need a series of "checks and balances" to ensure independent performance of mandate; and
- Major concern is possibility of institutional rigidity - if restricted to telecommunications, can limit the effectiveness of the Authority/Agency and its staff members as it faces the issues raised by convergence. Being historically focused on a narrow sector, the Regulatory Authority may become nearly frozen in time in terms of defining the sector it is regulating. As a consequence, it may not necessarily draw the appropriate staff from across the broader communications sector necessary to be flexible and, therefore, is unable to adapt to the continuous changes in the communications sector. A practical example of such difficulties has been the case of Single Sector Telecommunications Regulator having difficulties when incorporating next generation technologies and services into the regulatory framework.[172]

4.1.1.4 Classical Example – Dominican Republic

There is no general competition rules or authority in the Dominion Republic, but an extensive set of Telecommunications instruments empowering the Regulatory Authority (Instituto Nacional de Telecomunicaciones or **INDOTEL**); an off spring of

[172] Ibid.

the General Telecommunications Law (**GTL**), in order to govern competition, and to prevent or correct discriminatory or anticompetitive practices in the telecommunications sector.

Many countries across the world, especially a few Middle Eastern and certain African Arab countries mainly: **Egypt** (National Telecommunications Regulatory Authority), **Algeria** (Regulatory Authority for Post and Telecommunications), **Oman** (Telecommunications Regulatory Authority), and **Jordan** (Telecommunications Regulatory Commission, which includes postal oversight) have opted this Single Sector Regulatory Authority approach.[173]

4.1.2 Sector Specific Regulator and Competition Authority

In this kind of most celebrated scenario, the country has both Sector Specific Regulator to govern a particular sector, telecommunications most particularly, and also has a Competition Authority to govern economy-wide competition (e.g., the **United States, Pakistan, India, Chile,** and **South Africa**); or there may be a unique scenario wherein Competition Authority and the a Telecom Sector Specific Regulator, both have been mandated over competition, so far as the telecommunications sector is concerned (**Australia** is classical example of this novel scenario).

4.1.2.1 Classical Examples

a. European Union

There is a division of powers and functions between the respective Competition Authorities within the EC and the EU member states in relation to all competition

[173] Ibid.

matters. The Information Society and Media Directorate-General (**DG InfoSoc**), which has mandate to develop Information Society initiatives and harmonization efforts and the Competition Directorate General (**Competition DG**), who is to design and enforce general competition rules under the EU's Community Treaties and to ensure preserve competitive market structure in the EU and also mandated to play a key role so far as the EU Telecommunications Policy development is concerned; are the two main but separate directorates within EC to look after matters pertaining to competition and electronic communication.

The national Competition Laws are enforced by the National Competition Authorities (**NCAs**), whereas all competition maters on community levels are dealt with by the EC. Though in many cases, EC has the exclusive authority, but in certain matters, the merger controls, for instance, the authority may be shared with NCAs as well. The EU framework also envisages National Regulatory Authorities (**NRAs**); and competition in telecommunications sector on national level is generally governed by these NRAs. NRAs may join hands with NCAs to foster competition in the communications market, which may though cause confusion in certain minds, since there are certain areas of over lap between the NRA and the NCA yet the interaction and cohesive interface between the NRA and the NCA makes the model effective and viable one.[174]

b. India

India has both, the Competition Authority; Competition Commission of India (**CCI**) constituted under Competition Act, 2002 and the Telecommunications Sector Specific Regulator; the Telecommunications Regulatory Authority of India (**TRAI**) constituted

[174] Ibid.

under the TRAI Act, 1997. The CCI has mandate to prohibit abuse of monopoly power and anticompetitive agreements hampering competition in the economy, though it is competent to look after competition issues in relation to certain services, including "communication" services as well, whereas TRAI is mandated to foster competition in the telecommunications sector and to adjudicate upon all matters pertaining to operators, revenue sharing, telecom consumer protection, and quality of telecommunications services.. However, the TRAI under the TRAI Act is not competent enough to adjudicate upon any matter pertaining to unfair trade practices, monopolistic trade practices or restrictive trade practices, which fall under the exclusive domain of CCI, and whenever TRAI comes across any such issue, it is obliged to refer the matter to CCI for adjudication.

The TRAI Act underwent certain reformation, whereby in 2000, an independent tribunal; Telecom Disputes Settlement and Appellate Tribunal (**TDSAT**) was established, having both original and appellate jurisdiction. A right of direct Appeal to the Supreme Court of India against any decision/order of TRAI has been provided, hence neutrality and credibility of TRAI has been tried to be ensured by making reliance on multiple fora.[175]

However, from the analysis of telecom sector in India, one may be able to understand that India, following models of many countries across the globe, has opted for slow and steady reformation process in telecommunications sector, from selective privatization to gradual development and growth of telecommunication sector.[176]

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[175] Manas Bhattacharya, IES, "Telecom Sector in India, Vision 2020", *Background Paper submitted to the Committee on India: Vision 2020*, http://planningcommission.nic.in/reports/genrep/bkpap2020/1_bg2020.doc, (Last accessed March 9, 2009).
[176] ITU, *World Telecommunication Development Report*, (2002).

c. Pakistan

A detailed account in relation to the Competition Authority and Telecom Sector Specific Regulator has been made in Chapters 2 and 3 hereinabove, however, in brief terms this may be interesting to reiterate here that there are two main Regulators in Pakistan, the first is called the "Economy Wide Competition Regulator" in the form of the Competition Commission of Pakistan, established under the Competition Ordinance; and the other one is called the "Telecom Sector Specific Regulator", established under the Telecommunication Ordinance, 1994 and revalidated under the Act. There are many Sector Specific Regulators, like PTA, OGRA, NEPRA and PEMRA governing their respective sectors. The Telecom Sector Specific Regulator; PTA was established with a view to having an independent, neutral, expert, technical, Sector Specific Regulator in order to cater for competition particularly and all matters generally pertaining to telecommunications sector.[177]

An Ideal Telecommunications Regulator is undeniably expected to:

- determine the size of the telecommunications market by providing licenses for the purposes of delivering telecommunication services;
- to foster healthy relations between the different service providers by overseeing interconnection agreements and otherwise;
- to address consumer complaints and to resolve all kinds of disputes and maintain a level playing field or regulate for fair competition so that the dominant operator does not abuse his/her/its dominance in the market place;

[177] Kemal, *The Pakistan Development Review*, 319–332.

- to meet the policy goals so that consumers are protected against high prices, poor quality of services, inadequate infrastructure, limited services, unsafe equipment and neglect by the service provider;
- to ensure efficient use of frequency spectrum and space for the provisioning of information technology services;
- to encourage investment, innovation and optimum growth of the sector (or related sectors) and operators' performance;
- to administer the numbering plan so that there are sufficient numbers available; and
- to monitor compliance with national and international telecommunications equipment suppliers and service providers.[178]

PTA has majority of the traits of a good Telecom Sector Specific Regulator and has successfully been managing telecommunication sector in Pakistan and fostering competition therein, however nothing is absolutely marvelous and room for improvement is always there.[179]

d. United States

In United States, the Federal Trade Commission (**FTC**) and the Anti Trust Division of the Department of Justice (**DoJ**); an executive arm of government are mandated to enforce prevalent Competition (Anti trust) Law. However, FTC is to cater for consumer protection functions whereas the DoJ is mandated to undertake criminal prosecutions. The FTC's antitrust arm, the Bureau of Competition (**BoC**) seeks to prevent business practices that restrain competition including monopolistic practices,

[178] Ibid.
[179] Sheikh, "Telecommunication Laws in Pakistan", http://ezinearticles.com/?Telecommunication-Laws-in-Pakistan&id=362110, (Last accessed July 21, 2008).

attempts to monopolize, conspiracies in restraint of trade, and anticompetitive mergers and acquisitions.

The Federal Communications Commission (**FCC**) on the other hand, is mandated to oversee interstate and international communications, but despite being independent Sector Specific Regulator, it essentially needs to coordinate with the **DoJ** or the **FTC**, (considering the economic impact and the sector involved), in relation to all matters pertaining competition. The FCC is empowered to review and approve telecommunications licensees' merger cases, but obliged to having prior consultation with DoJ in relation to granting of certain authorizations to local exchange carriers.

The DoJ under the Competition (Anti Trust) Law and the FCC pursuant to the Communication Act are empowered to regulate all activities of the telecommunications operators in the United States.[180]

So far as the jurisdictional division among: the FCC, DoJ and FTC is concerned, the same runs parallel and overlaps at times. However, in order to cater for the jurisdictional frictions and overlapping issues, the FTC and DoJ entered into a Memorandum of Agreement whereby areas of responsibilities have mutually been allocated therebetween thereby in relation to enforcing Competition (Anti trust) Law and reviewing mergers. The DoJ, consequent whereto, now oversees enforcement of Competition (Anti trust) Law on telecommunications matters. Common carrier transactions, therefore, may not be reviewed by the FTC, but the transactions involving cable or mass media entities are reviewed thereby.

The Memorandum of Agreement between DoJ and FTC allocates primary responsibility to DoJ for Competition (Anti trust) enforcement involving the media and entertainment industry, telecommunications services and equipment industry.

[180] Ibid.

(The pre-Memorandum of Agreement AOL-Time Warner merger was reviewed by FTC as a result of DOJ's clearance).[181]

A broader range competition analysis may be carried out by the FCC, which may allow a merger with certain conditions in consultation with the DoJ.[182]

e. Unique Example — Australia

Australia is classical example of a unique design under this scenario of mutual coexistence of the Competition Authority and the Telecom Sector Specific Regulator and with a specific mandate in relation to governance of competition in the telecommunication sector.

In essence, there are three main aspects of telecommunication regulation in Australia:

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[181] Verizon v. Trinko LLP, (U.S. Supreme Court Case): In a 2004 decision, the Supreme Court considered whether Verizon's alleged breach of its Telecommunications Act duties to share its network with competitors constituted an anti-trust claim under Section 2 of the Sherman Act, which prohibits firms from monopolizing or attempting to monopolize. The respondent Curtis Trinko (an AT&T customer that received services on Verizon lines) claimed that Verizon discriminated against AT&T customers by providing them services of lower quality than it provided to Verizon's own customers, thus constituting a breach under the Telecommunications Act and the Sherman Act. In a unanimous decision the Supreme Court held that a breach of Telecommunications Act duty to share networks with competitors does not state a competition claim under the Sherman Act. In making it determination, the Court considered whether the Telecommunications Act has any effect on the "application of traditional antitrust principles." It noted that while the Telecommunications Act contains certain duties to facilitate market entry by competitive carriers (i.e., the incumbent's duty to offer access on "just, reasonable, and nondiscriminatory terms", and the duty to allow physical "collocation", permitting a competitor to locate and install its own equipment on the premises of the incumbent), this "does not automatically lead to the conclusion that they can be enforced by means of an antitrust claim." The Court noted that Telecommunications Act's contains a "saving clause", as a result of which the Act does not modify or supersede the application of antitrust laws. The Court then proceeded to determine whether Verizon's action in fact violated existing antitrust standards under the Sherman Act and court precedent (i.e., refusal to deal), and concluded that Verizon's alleged insufficient assistance to competitors was not recognized as an antitrust claim under such standards. The Court also rejected the possibility of adding this case as one of the few "exceptions from the proposition that there is not duty to aid competitors", because the existing regulatory structure designed to prevent and remedy anticompetitive harm would not benefit from such additional scrutiny. As a result, because Verizon was already subject to FCC and state oversight, and action had already been taken by the corresponding regulatory agencies against Verizon, the Court found no additional benefits in enforcing an antitrust claim.

[182] "Overview and Comparison of Different Institutional Designs", http://www.ictregulationtoolkit.org/en/Section.2033.html, (Last accessed December 19, 2008).

- Technical regulation (e.g. standards), rules about how the network is used (affecting for example copyright and censorship);
- Competition regulation (reflecting the dominant position of the five largest telecommunication groups); and
- "Co-regulatory" regime provides for substantial self-regulation by industry, both through formal codes and through administration of particular matters (including disputes) by industry bodies.[183]

The analysis of legal and regulatory framework governing telecommunications in Australia may drive one to the postulation that it involves a plethora of legislation, a few may deal with general competition scenarios, whereas the other may specifically deal with content regulation and the telecom market specific activities involving a number of ministries and motley government departments and bodies. The legislation "Co-regulatory regime" is also part of this legislative framework, whereby the telecommunication operators self regulate them substantially, which is incentivised and urged by the Australian Communications Industry Forum (**ACIF**).[184]

The Australia also has the Telecommunications Industry Ombudsman (**TIO**) since 1993 for the settlement of telecom operators and consumers disputes.[185]

The TIO, under the "co-regulatory regime" has been empowered to make binding decisions; even its recommendations are obliged to be observed by the telecom operators.[186]

The merger of the Trade Practices Commission and the Prices Surveillance Authority gave birth to the Australian Competition and Consumer Commission (**ACCC**) in 1995, which is mandated to administer the Prices Surveillance Act, 1983

[183] http://www.caslon.com.au/austelecomsprofile5.htm, (Last accessed July 26, 2008).
[184] "Cogent Analysis of the Regime", Alasdair Grant (ed.), *Australian Telecommunications Regulation*, (University of NSW: UNSW Press, 2004).
[185] http://www.caslon.com.au/austelecomsprofile5.htm, (Last accessed July 26, 2008).
[186] Ibid.

and The Trade Practices Act, 1974, in addition to certain other responsibilities under other legislation. ACCC has attained the status of national Competition Authority and is empowered to oversee competition related to telecommunications.[187]

The portfolio of the Minister for Communications, Information Technology and the Arts, encompasses the two national broadcasters (**ABC** and **SBS**); the Department of Communications, Information Technology and the Arts (**DCITA**) and Australian Government Information Office (**AGIMO**, formerly the autonomous National Office for the Information Economy); sundry cultural institutions such as the National Museum of Australia; the Australian Broadcasting Authority (**ABA**); and the Australian Communications Authority (**ACA**).[188]

In June 2005, the Australian Communications and Media Authority (**ACMA**) was formed, pursuant to merger of ABA and the ACA (earlier formed pursuant to the merger of the Spectrum Management Agency (**SPA**) and the Australian Telecommunications Authority (**Austel**), in 1997).[189]

4.1.3 Converged Regulator

In this model, all communications services i.e., broadcasting and media (and postal services at times) and telecommunications including radio-communications are converged in one Authority, which is to oversee all matters including competition and else pertaining to broadcasting, media, telecommunications, radio communications and at times postal services as well.[190]

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[187] Ibid.
[188] Ibid.
[189] Ibid.
[190] "Overview and Comparison of Different Institutional Designs", http://www.ictregulationtoolkit.org/en/Section.2033.html, (Last accessed December 19, 2008).

4.1.3.1 Advantages

- Like the Single Sector Telecommunications Regulator, the Converged Communications Regulator tends to be strong in specialized engineering skills in the communications sector, which is an important core expertise in dealing with complex network issues;
- Meets the challenges posed by service convergence by bringing in related skills, and, therefore, overcomes what is generally viewed as being one of the main disadvantages of a Single Sector Regulator (e.g., a telecommunications regulator overly focused on the telecommunications sector);
- Better meets the need for flexibility in terms of its internal administration's ability to meet market realities;
- Gives the regulatory authority and its staff the flexibility to better handle the continuous technological and regulatory changes and developments;
- By having all services under one regulator, the staff responsible for specific services can work with other parts of the regulator that are dealing with related issues, and therefore the regulator can take a more consistent approach when considering changing technologies and their effect on legacy regulations;
- In addition, the converged model tends to resolve some of the overlap between telecommunications and broadcasting that has tended to become one of the regulatory issues regarding convergence.[191]

Many countries across the globe resorted to this model, converging governance of broadcasting, information technology and telecommunications by a single entity: The Infocomm Development Authority (**IDA**) was constituted in

[191] Ibid.

December 1999, in lieu of the Information Technology Agency (National Computer Board – **NCB**), and the Telecommunications Authority of Singapore, (**TAS**), pursuant to the Info-Communications Development Authority of **Singapore** Act, 1999. Likewise, **South Africa, Netherlands, Saudi Arabia, Finland, Italy, Austria** and the **United Kingdom** have opted this model of Converged Regulator.[192]

4.1.3.2 Classical Example — United Kingdom

Before embarking upon today's telecommunications scenario in UK, this may not be out of place to analyze its historical development. This is story of era of 1600, when communication through letters was considered sensitive, wherefor General Post Office (**GPO**) was established as monopoly, whereas the telegraphy was not wide spread commercially and it was initially used by army and navy. The railways started using telegraph, and the Railway Regulation Act, 1844 postulated telegraph. The Telegraph Act, 1863 was promulgated to control the telegraph activity, whereas consequent to the Telegraph Acts, 1868 and 1869, the companies and individuals were allowed to own telegraph systems on their own land under strict licensing arrangements. However, there were strict rules about conduct of telegraphs: confidentiality, interference etc. These statutes also contained provisions pertaining to construction and installation of telegraph, compulsory acquisition of land, digging streets, cross railways etc. The telegraph being considered to be a form of letter, was with Postmaster General (state monopoly), whereas only Lloyds and Railways were partially allowed to have own telegraph under strict supervision of GPO. However, there was no concept of telecommunication system or telephone network as such in law until 1884, when in 1884 the Telegraph Act was codified. However, initially the

[192] Ibid.

state monopoly, the GPO did not take telephone seriously mainly for two reasons: first the Telephone call was out of purview of GPO jurisdiction, and secondly the telephony was a passing phase for rich. The GPO licensed others to run telephony in late 1870s and 1880s. The Radio was considered to be another form of telegraph (Wireless Telegraphy) in early 20th century, and the radio communications were governed under the Wireless Telegraphy Act, 1949 under the control of GPO. The GPO by 1979 felt threatened and started its own telephone system. The Telegraph Act, 1899, however, empowered local authorities to run telegraph, whereunder six licenses were issued; one of them was issued to the Hull City Council, which was to expire in 1914 but probably owing to war it was renewed, which continued successfully until 1984. The case of Hull is significant enough to be studied for many reasons. It showed that even small scale operation may provide efficient and cost effective service. Hull also had a working interconnect with British Telecom (**BT**). The GPO was converted into a nationalized industry (statutory corporation) by virtue of the Post Office Act, 1969, whose chief; being Chairman in title was appointed by the Government. The Post Office used to enjoy exclusive privileges over running telecommunication system. However, in 1981, pursuant to enactment of the British Telecommunication Act, 1981, the split of Post Office was formalized. This Act also envisaged new responsibilities for British Standards Institutions besides setting up British Approvals Board for Telecommunications. The second fixed network; Mercury Communications, was also given license under the 1981 Act. However, the 1981 Act allowed BT to retain exclusive privileges. It also did not contain even a single provision to force BT for interconnect, and even BT was required to be

consulted about all licenses. In May 1983, first ever national cellular radio network licenses (analogue services) were granted to Cellnet and Vodafone.[193]

This was the Telecom Act, 1984, in fact, which converted BT into PLC from nationalized industry statutory corporation. The objectives of the Telecom Act, 1984 included: complete liberalization of customer apparatus; grant of better license to Mercury; improvement of cellular and local cable networks' licenses; allowing Mercury and other cable operators to dig up streets; ending BT exclusive privileges and removing control of BT over licensees; regulating BT charges to prevent monopoly profits; and controlling anti-competitive practices of BT, (Interconnect).[194]

The independent regulator; the Office of Telecommunications (**Oftel**), the head whereof was DGT, was also off spring of Telecom Act, 1984. The Oftel determined the interconnect terms between Mercury and BT in 1985. The end of Duopoly, pursuant to publication of the White Paper "Competition and Choice: Telecom Policy for the 1990s" was announced in March 1991. Two more cellular licenses were issued to Orange and One2One (Mercury) in 1993. The Oftel also took over UK numbering scheme from BT in 1994. Pursuant to the Wireless Telegraphy Act, 1998, license fee was associated with market value of spectrum instead of its former association with administration costs of spectrum management by Radio Communication Agency.[195]

Consequent to the enactment of the Communication Act, 2003, the **Ofcom** as the Converged Regulator for telecommunications, radio and television, combining

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[193] Muhammad Aslam Hayat, "Lectures on Telecommunications Law", (Islamabad: International Islamic University, 2004).
[194] Ibid.

[195] Ibid.

five former agencies: the **Oftel**, the Independent Television Commission (**ITC**), the Radio Authority, the Broadcasting Standards Commission (**BSC**), and the Radiocommunications Agency (**RA**) was established in December 2003.

The Ofcom is mandated to: ensure availability of large-range of TV, radio and communication services, optimal use of radio spectrum, maintaining plurality in provisioning of broadcasting, privacy of individuals and to foster interests of the consumers by means of effective competition in relation to all these services.[196]

An extensive strategic review of the fixed telecommunications sector was carried out by Ofcom in 2005, exercising its certain independent powers under the Enterprise Act, 2002, in order to ascertain the market dynamics, and potential abuse of power and hampering or diminishing competition in the market, and if so, analyzing and suggesting remedial measures, which proved out to be very productive.[197]

A Competition Appellate Tribunal is available, wherein the decisions/orders of the Ofcom could be challenged, which has the power to review both economic and legal analysis undertaken by the Ofcom, and can reverse the findings of the Ofcom.[198]

Pursuant to detailed analysis of market by the Ofcom, it has recently published details of a new regulatory approach catering for the UK's fixed line telecommunications market, and having following six objectives:

- to drive down the price of calls, connections and services for consumers and businesses;

[196] Hayat, "Lectures on Telecommunications Law".
[197] Ibid.
[198] Ibid.

- to support more innovation through the growth of competitive products and services, such as faster broadband, television and voice over the internet and video-on-demand, from a range of credible companies;
- to provide regulatory certainty for providers and investors so that they commit to developing, marketing and extending these products and services for UK consumers and businesses;
- to re-focus regulation where it is truly needed, with swifter remedies to tackle anti-competitive behavior and a structure which delivers equivalence to a timetable with real penalties and incentives;
- to remove regulation wherever competition is effective and the effect of open markets - rather than regulatory intervention - ensures the delivery of choice; and
- to ensure the necessary level of consumer protection through a combination of codes, sanctions and effective consumer information.[199]

A Convergence Think Tank in order to assess the impact of converging communications sectors on future policy and regulation has also been established by the Government in 2007.[200]

4.1.4 Multi Sector Regulatory Authority

These kinds of Regulators not only oversee the telecommunications sector, but other sectors having similar or common legal and economic traits, like water, transportation, electricity and energy etc. as well.[201]

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[199] "A New Regulatory Approach for Fixed Telecommunications", http://www.ofcom.org.uk/media/news/2005/06/nr_20050623, (Last accessed December 22, 2008).

[200] Overview and Comparison of Different Institutional Designs, http://www.ictregulationtoolkit.org/en/Section.2033.html, (Last accessed December 22, 2008).

4.1.4.1 Justification for Multi Sector Regulatory Authority

Some segments of society may find rationale behind using cross-sector regulatory authorities in order to regulate telecommunications pursuant to convergence scenario, whereas another segment finds regulatory efficiency to be the justification for establishment of a Multi Sector Regulatory Authority. However, there is no less number of the supporters of an altogether different view that the telecommunications sector being a very crucial and most liberalized sector, may negatively be effected under the auspices of the Multi Sector Regulatory Authority.[202]

4.1.4.2 Advantages

- Lack of resources and the need for economies of scale to effectively regulate the different infrastructure industries and sectors; it is often argued that with this type of structural organization, one set of staff can be used to oversee a variety of industries. The rationale is that telecommunications is considered to form part of the overall infrastructure sector alongwith other utilities, such as electricity and water, and that infrastructure services share certain aspects: they are aimed at providing basic needs to the public; they often use similar rights-of-way; and they typically involve the economic regulation of large monopolies with network economic characteristics (i.e., high sunk and fixed costs);
- Supporters argue that a Multi Sector Regulator can reduce political and other influences regarding the decision-making process as opposed to, for example,

[201] Ibid.
[202] Ibid.

the Single Sector Regulator. However easily countered by the need to incorporate a clear set of "checks and balances" in the design of the regulator;

- Reduce risk of "industry capture" because the creation of a regulator with responsibility for more than one sector can help avoiding the rule-making process being captured by industry-specific groups;
- Reduce risk of "political capture" because a regulator with responsibility for more than one sector will necessarily be more independent of the relevant line ministries. The broader range of entities regulated by such a regulator will be more likely to resist political interference in a decision on, say, price regulation in one sector since that could set a precedent for other sectors;
- Create more precedents, and therefore less uncertainty, for investors because a decision by a Multi Sector Regulator in relation to one sector on a regulatory issue common to other sectors (e.g., the application of price cap regulation or cost accounting rules) will set a precedent that is valuable to potential investors in those other sectors;
- Economies of scale in use of one set of high-caliber professionals (e.g., economists, lawyers, financial analysts). Such economies are particularly important during the early stages of liberalization and privatization in a transitional and developing country (**TDC**) when there is likely to be a scarcity of regulatory experience;
- Economies of scale in administrative and support services (e.g., computers, office space, support staff), particularly important where the costs of regulation can have a real impact on the affordability of basic services;

- Flexibility in dealing with "peak load" periods, such as periodic prices reviews, where intensive regulatory expertise is needed which may spread across sectors if a multi-sectoral approach is adopted;
- Economies of scale in the development and implementation of the regulatory authority whereby, for example, uniform rules on license award or dispute settlement procedures can extend to more than one sector and, therefore, avoid the need to "reinvent the wheel" for each sector;
- Transfer of regulatory know-how between regulators responsible for different sectors; again, this is particularly important when a country has limited experience in regulation;
- Effective means of dealing with converging sectors (e.g., telecommunications and broadcasting where it is increasingly difficult to decide what is telecoms and what is a broadcasting service, for example video-on-demand, or telecommunications and posts, for example e-mail and fax re-mailing;
- Effective means of dealing with the bundled provision of services (e.g., provision of both telecommunications and electricity by the same company) and with the coordination requirements between sectors (e.g., where companies from number of different sectors all need to dig up the same roads to construct their networks;
- Avoidance of market distortions due to the application of different rules to competing sectors (e.g., electricity and gas, or road and rail).[203]

[203] Ibid.

4.1.4.3 Disadvantages

- Experience in some countries, such as **Latvia**, has shown that existing Multi Sector Regulators are performing poorly;
- The **Single Sector Regulators** will look for highly technical staff focused on the telecommunications sector and generally organize their staff in industry-based units (e.g., post, telecommunications, and radio communications); **Converged Regulators** will look for staff that can bring in the expertise and know-how from the different sectors they are regulating. Generally these regulators are organized in functional units or indeed in horizontal, project-based units and **Multi Sector Regulators** will recruit staff specialized in the different sectors, and are generally organized in terms of the sectors within their mandate although some pool legal and economic resources to deal with, for example, tariffing issues that may be common across the different sectors;
- The experience shows that staff within this model is generally recruited in terms of the sector they are regulating and only legal and occasionally economic staff is pooled to deal with specific issues that occur across the sectors. **Luxembourg**, for example, has organized its agency according to industries/services: telecommunications, electricity, gas, postal and spectrum management issues – these are then divided into smaller issue-specific units. This can also be seen in **Belize** and **Niger**.[204] An interesting discussion of this issue is presented in the WDR Discussion Paper # 0204 of March 2002 which claims that:

[204] Ibid.

> Examination of the actual organization of U.S. state-level multi-sector regulatory agencies, the Public Utility Commissions (**PUCs**), does not provide much evidence of economies of regulation, except at the level of the decision-makers, or Commissioners. Generally, staff members specialize in a particular sector such as telecommunications or water and work within distinct divisions that are devoted to Sector Specific Regulation. Resources are shared at the levels of commissioners, who hear cases pertaining to all sectors, the senior staff who manage the agency as a whole, and the legal staff responsible for hearings and related procedural matters. Generally, the different divisions are located in common facilities and use common amenities such as libraries, which may yield certain savings. … It must also be noted that U.S. PUCs do not have jurisdiction over frequency management, cable and broadcasting. … The U.S. PUC experience shows that there may be significant economies in areas such as use of buildings, libraries, and training facilities in common. This does not, however, justify multi-sector regulation as such; only close collaboration among sectoral regulatory agencies.[205]

- There may be greater complexity in establishing the legal framework for the Multi Sector Regulator, including the level of independence and allocation of functions as between the minister and the regulator;
- Often Multi Sector Regulatory Authority is created as a result of merging several existing agencies; which often creates significant morale problems and results in increased expenditures;

[205] Rohan Samarajiva and Anders Henten, "Rationales for Convergence and Multisector Regulation", *World Dialogue on Regulation for Network Economies,* (WDR Discussion Paper 0204, March 2002), 13-14, http://www.regulateonline.org/2003/2002/dp/dp0204.htm, (Last accessed December 23, 2008).

- As the market develops, and convergence affects the way in which communications is offered to the people, regulators are not only expected to possess high technical expertise, but to have an understanding of the structure and development trends of the communications market;
- Regulators should be able to anticipate potential situations that could threaten or interfere with the development of the electronic communications industry. The concern that staff in a Single Sector Telecommunications Regulator may face difficulties when incorporating next generation technologies and services into the regulatory framework is heightened with a Multi Sector Regulator since the staff of a Multi Sector Regulator would not necessarily be as technically focused on the communications sector. Obviously, a Multi Sector Regulator could recruit staff suited to the task of regulating the communications market, but the risk, especially where economists and legal experts are shared across the utilities sector, is that the pool of expertise becomes more diluted, thus compromising the capability and ultimately the credibility of the Regulator;
- Increase risk of "industry capture" by a dominant industry player not only of the Single Sector Regulator but of the entire Multi Sector Regulatory body;
- Increase risk of "political capture" by a dominant ministry of not only the Single Sector Regulator but of the entire Multi Sector Regulatory body;
- Increase the risk that a precedent set in relation to one sector could be applied inappropriately in another sector (although this can also be mitigated by creating strong Sector Specific Departments underneath a central cross-sectoral decision-making body);

- Dilution of Sector Specific technical expertise required where, for example, the skills of a tariff expert for one sector are not transferable to similar tariffing issues in another sector, or, for example, of a frequency engineer;
- Failure by the regulator cascades to other sectors;
- Subsequent difficulty in achieving consensus from the relevant line Ministries on the type of Multi Sector Regulator to be established;
- Potential delays in the reform process due to the disadvantages mentioned above; and
- Merging existing agencies may be problematic.

4.1.4.4 Classical Examples

Luxembourg, Panama, Gambia, Latvia, Costa Rica, Jamaica, Latvia, and **state public utility commissions in individual states in the United States** are classical examples of this Multi Sector Regulatory Authority model.[206]

4.1.5 No Specific Telecommunications Regulatory Authority

In addition to above analyzed four designs, another model is that instead of relying on the Sector Specific Regulation, the reliance could be made on the Competition Law for fostering of competition and governing telecom market even. The **New Zealand,** being the classical example of this model, used to rely on Competition Authorities to foster competition in the telecommunication market by means of application of Competition Law; the Commerce Act, 1986.

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[206] "Overview and Comparison of Different Institutional Designs", http://www.ictregulationtoolkit.org/en/Section.2033.html, (Last accessed December 25, 2008).

No Sector Specific Regulatory obligations except for certain obligations on **Telecom New Zealand**, called the **Kiwi Share Obligations (KSO)** were enshrined, and the competition was used to be governed under the Commerce Act, 1986. However, inadequacy of this scheme was realized in 2000, pursuant whereof the Telecommunications Act, 2001, containing Sector Specific provisions, and envisaging establishment of the **Telecommunications Commissioner**, within the Commerce Commission, in order to regulate the telecommunications sector, to resolve disputes concerning telecommunication, for enforcing the KSO, and having certain other statutory responsibilities, was passed in December 2001 in order to complement The Commerce Act, 1986.[207]

4.1.5.1 Advantages

- Simple to implement;
- Inexpensive;
- Reliance on economy-wide rules and institutions to regulate the sector promotes a coherent treatment between telecommunications and other sectors; and
- Less risk of political capture where the judges are ultimately in charge of enforcing economic regulation in the telecommunications. Judges are seen to enjoy a clearer and more straight-forward protection against undue pressures from the government and are independent from industry.[208]

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[207] "Overview of Commerce Commission", http://www.comcom.govt.nz/TheCommission/Overview.aspx, (Last visited on January 8, 2009).

[208] "Overview and Comparison of Different Institutional Designs", http://www.ictregulationtoolkit.org/en/Section.2033.html, (Last accessed November 19, 2008).

4.1.5.2 Disadvantages

- Non-specialized judges are ill-equipped to deal with complex telecommunications regulatory issues (e.g., local interconnection cases in New Zealand);
- Legal processes are often not designed to give a voice to those who are not directly parties to the dispute;
- Costs of protracted litigation and regulatory mistakes can be very high;
- Sector Specific issues such as interconnection and number portability may be difficult to resolve in the absence of Sector Specific requirements; and
- Lack of clear accountability channels renders it unnecessary to set and achieve sector objectives such as universal service, thereby opening the door for ineffective or sometimes unnecessary regulation.[209]

4.1.5.3 Classical Example — New Zealand

The telecommunications sector in New Zealand was de-regulated between 1987 and 1989, whereby its incumbent telecommunications operator; Telecom New Zealand was privatized in 1990. The New Zealand at that point of time used to rely on a "light-handed" regulatory framework, wherein no Sector Specific Regulation was available, but the reliance was made on the Competition Law; the Commerce Act, 1986 (the "**Commerce Act**"), to foster competition in the telecommunication market. The Commerce Act can be enforced by the Commerce Commission (New Zealand's Competition Authority), or privately through the Courts, Information disclosure requirements have been placed on Telecom New Zealand. These requirements are intended to inform access negotiations, and to assist the Government (and market

[209] Ibid.

participants) to identify competition problems, and the threat of further regulation if Telecom New Zealand abused its market power. This could take the form of price control (available under the Commerce Act), or changes to the regulatory regime.[210]

The Telecommunications Act, 1987 also used to cover technical regulation. This Act was administered by the Ministry of Commerce. Telecom New Zealand itself was responsible for key elements of technical regulation, such as equipment approvals. The Radiocommunications Act governed allocation of radiospectrum. The Ministry of Commerce administered this Act and managed the spectrum allocation process. The basic reliance of the regime was on New Zealand's general consumer protection law; the Fair Trading Act, 1986, to foster interests of telecommunications consumers. In addition, the terms of the sale of Telecom New Zealand included certain protection for rural and residential subscribers in the form of the KSO.[211]

Some competition did emerge under New Zealand's light handed regulatory regime. However, the regime was characterized by sometimes lengthy disputes and uncertainty over "acceptable" interconnection prices. These issues were illustrated by the dispute between the incumbent; Telecom New Zealand and Clear Communications (a new entrant) and over terms and conditions for local access. The dispute took 5 years to resolve and cost the parties millions of dollars in legal fees, expert advice, and management time. The Clear-Telecom dispute began in August 1991. Clear initiated legal proceedings under New Zealand's Competition Law, after failing to negotiate terms and conditions for access to Telecom's local loop. The parties appealed the case to New Zealand's final appellate court; the Privy Council. The central issue of the dispute was the interconnection price, and whether Telecom

[210] "Using Competition Law to Regulate Interconnection: The New Zealand Experience", http://www.ictregulationtoolkit.org/en/Section.2033.html, (Last accessed January 11, 2009).
[211] Ibid.

New Zealand could lawfully charge a price based on the Efficient Component Pricing Rule. The Privy Council found that Telecom New Zealand's proposed pricing was lawful, even though it would allow Telecom New Zealand to recover any loss of monopoly profits through its interconnection price. The Government subsequently stated that it was opposed to the use of the Efficient Component Pricing Rule because it had the potential to lessen competition. By the late 1990s, dissatisfaction with the light-handed approach to telecommunications regulation was wide-spread. Many commentators, citing the Clear-Telecom case, raised concerns about the cost and timeliness of access under the regime. In 2000 the new Government announced a Ministerial Inquiry into Telecommunications in order to ascertain the pros and cons of the then prevalent legal and regulatory framework for telecommunications, and recommend changes, pursuant whereof the Telecom Sector Specific Regulations for governance of the telecommunications sector, in lieu of "light handed" regulation, were introduced, envisaging establishment of a specialist **Telecommunications Commissioner** to regulate the telecommunications sector. The Telecommunications Commissioner is located within the Commerce Commission (New Zealand's Competition Authority). The Commissioner has powers to:

- Resolve disputes between industry players over key services;
- Set prices and access obligations for "designated" services, where the parties are unable to agree. At the introduction of the regime, designated services were:
    - Interconnection with Telecom's fixed telephone network;
    - Wholesaling of Telecom's fixed network services; and
    - Number portability

- Make recommendations to the Minister of Communications for regulation of other services in the future.[212]

Pursuant to the Telecommunications Act, 2001, a variety of Sector Specific Regulation, concerning number portability and interconnection, for instance, have been introduced, but the significance of the Commerce Act, 1986, as amended from time to time, cannot be ruled out.[213]

New Zealand experimented reliance of Competition Commission instead of Sector Specific Regulator(s), which resulted in protracted and multiplied litigation; hence it had to create Telecommunication Commissioner within the Competition Commission under the Telecommunications Act. Even otherwise, the analysis of the New Zealand's model sees bleak chances of likelihood of success of this model in developing countries out of lack of expertise of Competition Law mainly.[214]

4.2 CRITICAL ANALYSIS

A critical analysis of all the above five models drives one to the main conclusion that different models have their own pros and cons, and one model good for a certain market or economy may not be equally good rather counter productive for another market or economy out of different socio-political milieu and economic conditions. This is, however, undeniable fact that productive and effective enforcement of the Competition Law and Policy and Sector Specific Regulation reap desirable fruits; and issue of competition cannot be divorced from the issue of regulation.[215]

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[212] Ibid.
[213] Ibid.
[214] "Analysis of Jurisdictional Division of Power between Competition Authorities and Regulatory Institutions", http://www.ictregulationtoolkit.org/en/Section.1690.html, (Last accessed February 3, 2009).
[215] ITU, *World Telecommunication Development Report*, (2002).

Recapitulating the above discussion, when one may make a plain comparison of Sector Specific Regulation approach viz. the Competition Law approach, he may observe that the Sector Specific Regulation is not only more focus oriented, but may also be able to tackle problems concerning market dynamics and technology interplay; hence is considered to be the desirable approach in many jurisdictions; whereas the Competition Law approach being too general in nature may at times prove out to be inflexible, hence may get ineffective. However, the supporters of Competition Law approach propagate that the same is forward looking and progressive, and despite presence of Sector Specific Regulators can cater for consumer interests and welfare in a better fashion by introducing the competitive milieu and fostering competition amongst the market players, though expertise on certain areas may need to be built up. In general terms, the Competition Law tends to be mainly *ex post*, whereas the Sector Specific Regulation is generally *ex ante*.[216]

[216] "The Evolution from Sector-Specific Regulation to Competition-Based Regulation", http://www.ictregulationtoolkit.org/en/Section.1689.html, (Last accessed April 22, 2009).

CHAPTER - 5

CRITICAL ASSAY AND WAY FORWARD FOR PAKISTAN

The significance of competition, its objectives, means to foster it, the epigrammatic portrayal of designs of the Competition Law, Competition Policy, Competition Authority, and application of Competition Law and Policy by the Competition Authority, with reference to seven model jurisdictions; Australia, EU, India, New Zealand, Pakistan, UK and US, enunciating the complex interplay of the Competition Law, Competition Policy, Competition Authority in order to achieve the objectives, a detailed account of the Sector Specific Regulation in Telecom with reference to Pakistan and a critical analysis of application of Competition Law and Policy compared with the Telecom Sector Specific Regulation, again with respect to even seven model and certain other jurisdictions, and the cardinal context of extent, objective and nature of principal goal of consumer welfare to be achieved through Competition Authority and/or the Sector Specific Regulator have been parleyed at reasonable length in Chapters 1-4 hereinabove.

Competition Law is basically a deterrent, little different to any other law that defines odd behavior with accepted community standards, but is mainly *ex post* (penalty imposed if breach of Competition Law is proven) - therefore in framing a Competition Law and Policy, deterrence effect of Law needs to be taken into account upfront; whereas the Sector Specific Regulation is generally *ex ante* (remedy imposed before potential liability for breach of Regulation).

This has also been analyzed that that the Competition Law has brought a revolution to the economies around the globe. The essence of its application has been

recognized by the prevalent legal regimes of myriad jurisdictions; for every jurisdiction is keen to maintain and enhance competition to achieve the real goals; i.e. the consumer welfare particularly, and increased economic efficiency generally. Sundry jurisdictions resorted to promulgation/revision/amendment of the competition statute(s). However, to cater for the contemporary socio-economic developments and to run with the pace of time, the scheme of law adopted by various jurisdictions in terms of implementation of competition in different jurisdiction varied, as countries have their own approaches towards the same. However, almost every country has direct or indirect laws and regulations for the creation and promotion of healthy competitive market.

Nonetheless in order to reap the fruits of introduction of a Competition Law and Policy and catering for the developmental needs of a nation, its integrity should never be compromised and one should not fall a prey to foreign forces, which might have their own hidden agenda. This has also been discussed that there may arise jurisdictional friction issues/conflicts in an event the different Authorities may be competent enough to deal with the same matter in principle. The resort by different persons to myriad Authorities by means of parallel actions in pursuit of desirable relief may be common phenomenon, which may not only result in parallel proceedings, undesirable multiplication of work but also in potential conflicting judgments, interpretational bias, and imposition of inconsistent remedies. This kind of risk of jurisdictional overlap (vertical or horizontal) and parallel proceedings may be natural as, the Competition Authority and Sector Specific Regulator may not necessarily apply the same imputation on same case which may yield into conflicting sequels; hence preferential taking up of the specialized, technical or Sector Specific

matters by the Sector Specific Regulator in comparison to non-specialized forum may likely to be justified.

For certain people, the Competition Law for certain situations may be a better approach in comparison to Sector Specific Regulation. However, the choice of approach may mainly depend upon effectiveness and result orientation of each in order to achieving desired objectives. Therefore, before making a choice between mainly *ex post* Competition Law and a generally *ex ante* Sector Specific Regulation, certain basic factors including but not be limited to the easy mechanism for correction of mistakes, the competence of a Sector Specific Regulator or a Competition Authority or even Court of Law to call for necessary information in order to ascertain basis of intervention thereby in a certain event, and ability to adequately deter pressure and absorb shocks from certain pressure and/or interest groups should be taken into consideration.

Needless to reiterate core advantages and certain disadvantages of the Competition Authority since a detailed analysis on that score is available on pages hereinabove. Likewise, the Sector Specific Regulators has certain core advantages and disadvantages. Considering the advantages and disadvantages of Competition Authority and Sector Specific Regulator, the cardinal question would still remain to be as to whether the Sector Specific Regulator, with its peculiar sectoral know how, should have exclusive jurisdiction to foster competition, or the Competition Authority should be allowed to play in, or otherwise both the Competition Authority and the Sector Specific Regulator should be allowed to function concurrently.

There has been an extensive discussion in Chapter 4 regarding jurisdictional division of powers between the Telecom Sector Specific Regulator and the

Competition Authorities and as to what and why works better. However, the two most celebrated scenarios have been re-agitated in the lines to come.

The supporters of the exclusivity of the Sector Specific Regulator, in Telecom more particularly, do suggest that it should have exclusive jurisdiction over all the respective Sector Specific issues; out of its extensive know-how of the sector and the technology involved, availability of requisite staff therewith, awareness of the economics of the respective sector, understanding of the market dynamics and vast experience of years dealing with the telecommunication sector; whereas on the other hand, the Competition Authority may almost have no know-how of the telecommunication stuff at all, though may be assumed to have a core acumen of Competition Law and Policy, experience of application thereof in diversified cases; hence may be expected to adequately gauge and address a consumer complaint in relation to quality of service of a telecommunications operator, for instance, on the basis of complaints it had already settled and grievances redressed. Nevertheless, the Telecom Sector Specific Regulator may still be needed to foster competition in telecommunication sector, as the Competition Authority may fail to appreciate the market dynamics and technology and economics involved pertaining to the telecom sector, and error of judgment in application of Competition Law in a particular situation may not be ruled out.

The second welcome scenario is that the Competition Authority and the Telecom Sector Specific Regulator should be allowed to function concurrently to turmoil on potential avenues in hot pursuit of desired objectives of competition. However, one may also bear in mind that the concurrent application of Competition Law and Policy and the Telecom Sector Specific Regulation may ensue enigmatic and uncertain situations, not only for enforcing people of the Competition Authority and

the Telecom Sector Specific Regulator but also for the stakeholders involved as well, wherefor very wise strategies may be required to be devised to cater for jurisdictional frictions and overlapping issues.

These kinds of potential or natural overlaps do, however, warrant desirable interface between the Telecom Sector Specific Regulator and the Competition Authority, which, in fact, has been the converging field in this research.

An interesting example is that of Singapore where Section 87 of the Singapore Competition Act, 2004 envisages an assurance of cooperation between the Competition Commission and the other Regulatory Authorities in relation to all matters concerning competition.[217]

A further example of such a desirable interface between the Sector Specific Regulator and the Competition Authority is the protocol in the Netherlands between the Commission of the Independent Post and Telecommunications Authority and the Dutch Competition Authority.[218]

There is another debate that when a Sector-Specific Regulator relying on certain Sector Specific Regulation has passed an order, should the Competition Authority be allowed to intervene if pursuant to this order the violation of the Competition Law may occur. The second part of the question may be whether the Competition Authority should intervene where Sector Specific Regulation may provide appropriate remedies. However, a fair distinction in two scenarios should be made. First could be as to whether should the Competition Authority be authorized to intervene where a Sector Specific Regulation may provide appropriate remedy which could adequately cater for the market dynamics and more especially the competitive market structure in the respective sector, and has effectively been enforced by a

[217] http://www.adb.org/Documents/Others/OGC-Toolkits/Competition_Law/complaw070600.asp, (Last accessed August 22, 2009).
[218] Ibid.

respective Sector Specific Regulator, which also otherwise no way violates the general competition regime as well. In this scenario, the Competition Authority may not be allowed to intervene for the reasons: (i) in comparison to the Competition Authority, the Sector Specific Regulators are generally better placed to address all the issues peculiar thereto, calling for specific sectoral know-how and requisite technical expertise, which the Competition Authority may not generally possess; (ii) having taken the similar matter up by two different Authorities under different set of rules may raise the risk of conflicting judgments, interpretational bias, or imposition of inconsistent remedies.

The second scenario could, however, be as to should Competition Authority be allowed to intervene despite availability of a Sector Specific Regulator specifically constituted to foster competition in a particular sector under the framework specifically designed therefor, which out of its laziness, or capture has lamentably not delivered though, in this case, the Competition Authority may only and only be allowed to fill in the gaps to administer the justice.

The Courts have, however, interestingly held a different point of view that in a famous Deutsche Telekom case[219] "once a Sector Specific Regulatory structure 'designed to deter and remedy anticompetitive harm' exists, there should be no further scope for antitrust intervention."

The two basic inferences from the above analysis may be: (i) the Competition Law may be a useful new means to take swift action to control anti-competitive behavior in economy whereas the Sector Specific Regulator is needed to play a key role to ensure competition in the telecoms sector; (ii) however effective the legislation

[219] Verizon Communications Inc. v Law Offices of Curtis v Trinko, LLP: 540, U.S. 682, (2004).

is, effective enforcement depends upon an ever greater degree on the skills and energy of the personnel in the enforcement authority.

One may, however, always need not to make a choice between the Competition Authority and the Sector Specific Regulator. A hybrid system may be resorted to, wherein the Competition Authority may be mandated to foster economy wide competition, and have schemes of persistent liaison with the Sector Specific Regulators and can given assistance in research and policy matters, review of competition governing schemes and holding of joint investigation, wherefor specialists' teams from both the Sector Specific Regulator and Competition Authority could be pooled from a joint pool.

Another probable equation of matrix of responsibilities could be that the Competition Authority may be made super regulator (which in my opinion may not be political will in Pakistan), and the Telecom Sector Specific regulator; PTA may be made subservient thereto, which may be undesirable for majority segments of society asserting that it may lack expertise in competition issues. Another possibility is that the Competition Authority may be made an Appellate Authority for all the Sector Specific Regulators, wherein there is still no guarantee that the expertise in competition would be available dealing with a Sector Specific issue, in the absence of accumulated wisdom. There could be another way out that the Courts may be relied upon in relation to application of Competition Law v. Sector Specific jurisprudence, which scheme could also be uncertain and unpredictable pursuant to given history.

The application of Competition Law in Pakistan has also been analyzed in Chapter 2 hereinabove, and many upheavals in its development have also been observed, which may perhaps mainly be attributed to the changing political scenarios and varying strategies and polices of the governments from time to time. For instance,

MRTPO was only applicable to private monopolies, and not applicable to state monopolies as well as to several services as illuminated in detail in Chapter 2 hereinabove. Besides, MCA was authorized to impose meager fiscal penalties and that too in case of non-compliance of its orders only, whereas implementation mechanism provided was also weak. What's more, consequent to certain regulatory and legislative developments and constitution of certain Sector Specific Regulators, in 2002, an amendment in MRTPO (which has now been replaced by the Competition Ordinance) was made, whereby the MCA was prevented from exercising its jurisdiction on the organizations/enterprises regulated by their respective Sector Specific Regulators; PTA, OGRA, NEPRA, and PEMRA etc.

However, the Competition Ordinance drafted out in inspiration of UNCTAD Model Framework is a promising and uplifting development, which postulates a strategy for CCP's interface with Sector Specific Regulators, which are meant to foster competition in their respective sectors. The design enshrined in the Competition Ordinance does not overlap the responsibilities and powers of the Sector Specific Regulators, but allows the CCP to come forward to fill in the gaps in order to meet the ends of justice only and only in an event the legal or regulatory framework governing a particular sector is silent or in effective.

5.1 CONCLUSION/RECOMMENDATIONS

In sequel to the whole discussion and an extensive analysis of the matter in the light of historical development, one may be able to deduce that the socio-political, legal and market dynamics of a developing country may require more prescriptive and detailed Sector Specific Regulation, and more empowered, neutral, and autonomous Sector Specific Regulator as the Competition Authority or alternatively the Court may lack requisite peculiar know-how and technical expertise to cater for competition in a specific sector.

So far as the scenario of fostering competition in telecommunications sector is concerned, different jurisdictions have applied different models. Some relied solely on Sector Specific Regulations, some on general principles of Competition Law and some applied Competition Law for economy-wide competition and Telecom Sector Specific Regulations for fostering competition in telecommunication.

The critical evaluation of all of the approaches resorted to by different countries in their respective jurisdictions evidenced that the third approach: implementation of competition by the Competition Authority under Competition Law and Policy so far as economy-wide competition is concerned with concurrent application of Telecom Sector Specific Regulations by the Telecom Sector Specific Regulator to foster competition in the Telecom Sector may be regarded as the most desirable one in any developing country generally and Pakistan particularly, and Pakistan's prevalent legal and regulatory scenario is evident of this fact, as the competition in Pakistan's telecom industry has also quite successfully been carried out by the Sector Specific Regulator; PTA, after its establishment in 1994 (endorsed by the Act, 1996).

Nevertheless, the rift between the Competition Authority; CCP and all Sector Specific Regulators should end up generally; and this is categorically recommended that PTA should be allowed to govern Telecom Sector Specific Competition by all means whereas economy based competition should exclusively be governed by the CCP. However, in order to avert jurisdictional frictions issues, there should be desirable and persistent interface between the CCP and PTA, which may ensue better quality of work; as with the support of the CCP, the PTA will be able to get more modernized information and diversified knowledge of governance of competition and with its own industry knowledge, it may triumph over sequeling sumptuousness in the telecom industry in Pakistan particularly and growth in economy generally through this vital revenue pocket of the Government.

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