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POLICY NOTE

TELECOM POLICY 2015 - TELECOM COMPETITION RULES INCONGRUITIES
WITH THE COMPETITION ACT, 2010

The Competition Act 2010

1. The Competition Commission of Pakistan (the **Commission**) is an autonomous, quasi-judicial, competition law enforcement authority, formerly established under the Competition Ordinance 2007 (the **Ordinance**). On 13 October 2010, while exercising its legislative powers, the Parliament (Majlis-e-Shoora) of Pakistan promulgated the Competition Act (Act XIX of 2010) (the **CA2010**).
2. The *raison d'eter* or the object and purpose which was in the mind of the framers of this legislation is provided in the preamble of the CA2010 as under:

'An Act to provide for free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behavior.'

'WHEREAS it is expedient to make provisions to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviour and to provide for establishment of the Competition Commission of Pakistan to maintain and

enhance competition, and for the matters connected therewith or incidental thereto.'

3. Section 1 of the CA2010 provides outlines the scope of the legislation as under:

'2. it extends to the whole of Pakistan [and]

3. it shall apply to all undertakings and all matters which take place in Pakistan and distort competition in Pakistan.'

4. Section 2(1)(q) of the CA2010 defines **Undertakings** as:

'any natural person or legal person, governmental bodies, a regulatory authority, body corporate, partnership, association, trust, or other entity in any way engaged directly or indirectly in the production, supply, distribution of goods or provision or control of services and [...] association of undertakings'.

5. To encourage free competition and to protect consumers from anti-competitive behaviors by undertakings in any sphere of economic or commercial activity, Chapter II of the CA2010 provides a framework for *ex-post* enforcement prohibiting the following:

(a) abuse of dominant position (Section 3);

(b) agreements restrictive of competition (Section 4);

(c) deceptive marketing practices (Section 10); and

(d) mergers that substantially lessen competition by creating or strengthening a dominant position (Section 11).

6. To carry out its competition enforcement and advocacy mandate, including in the regulated sectors, Chapter IV of the CA2010 envisages the functions and powers of the Commission, Section 28 of which reads as under:

'(1).—The functions and powers of the Commission shall be—

(a) to initiate proceedings in accordance with the procedure of the Act and make orders in cases of contravention of the provisions of the Act;

(b) to conduct studies for promoting competition in all sectors of commercial activities;

- (c) to conduct enquiries into the affairs of any undertaking as may be necessary for the purposes of the Act;
- (d) to give advice to undertakings asking for the same as to whether any action proposed to be taken by such undertakings is consistent with the provisions of this Act, rule or orders made thereunder;
- (e) to engage in competition advocacy; and
- (f) to take all other actions as may be necessary for carrying out the purposes of the Act.

(2).—*The Commission may, subject to such conditions as it may think fit to impose, delegate all or any of its functions and powers to any of its Members or officers as it deems fit.'*

7. Conjunctively, Section 29 of the CA2010 empowers the Commission to promote competition through advocacy which, among others, shall include—
 - a. *'creating awareness and imparting training about competition issues and taking such other actions as may be necessary for the promotion of a competition culture;*
 - b. *reviewing policy frameworks for fostering competition and making suitable recommendations for amendments to this Act and any other law that affect competition in Pakistan to the Federal Government and Provincial Government (underlined to lay emphasis);*
 - c. *holding open hearings on any matter affecting the state of competition in Pakistan or affecting the country's commercial activities and expressing publically an opinion with respect to the issues, and*
 - d. *posting on its website all decisions made, enquiries under review and completed, merger guidelines, educational material and the like.'*

8. To effectively carry out the purposes of the CA2010, Section 50 provides:

'50. In order that information relevant to the performance of its functions is available to the Commission and for carrying out the purposes of the Act:

- a. all offices and agencies of the Federal Government and Provincial Government shall supply free of costs or charges information requested by the Commission in the discharge of its function under this Act; and*
- b. the State Bank of Pakistan, Securities and Exchange Commission of Pakistan, the Central Board of Revenue, the Federal Bureau of Statistics and all regulatory authorities shall arrange to provide requisite information as permissible under their own laws to the Commission, from time to time, at its request in the discharge of its function under this Act.'*

9. To seek assistance and advice, Section 53 of the CA2010 provides:

- 1. 'the Commission may seek the assistance of any person, authority or agency for the performance of its functions under this Act.*
- 2. all officers of any an agency or any person whose assistance has been sought by the Commission in the performance of its functions shall render such assistance to the extent it is within their power or capacity.*
- 3. Subject to sub-section (3) of section 35, no statement made by a person or authority in the course of giving evidence before the Commission or its staff shall use against him or subject such person or authority to civil or criminal proceedings except for prosecution of such person or authority for giving false evidence'.*

10. Moreover, Section 59 of the CA2010 reads as follows:

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

11. A bare reading of the afore-referred provisions indicate that the scope and object of the CA2010 are broadly threefold:
- (a) *to provide for competition in all spheres of commercial and economic activity and enhance economic efficiency;*
 - (b) *to protect consumers from anti-competitive behaviour; and*
 - (c) *to establish specialist national level competition authority i.e. The Competition Commission of Pakistan.*
12. The substantive and procedural provisions of the CA2010 including, *inter alia*, the Commission's investigation, search and inspection powers, seeking assistance and advice from any person or organization and the rules/ regulations promulgated thereunder are based on sound legal and economic principles which in combination with competition advocacy make it a welfare centric, comprehensive, full-fledged and special antitrust/ competition legislation.
13. The CA2010 is meant to ensure free and effective competition by imposing *ex-post* behavioral remedies in terms of what not to do by prohibiting anti-competitive practices by undertakings or association of undertakings in all spheres of commercial and economic activity across Pakistan. Moreover, the CA2010 carries out international dimensions embodying Pakistan's membership of the United Nations and the World Trade Organization, International Competition Network, and other competition authorities around the world to fulfill its commitments to implement the objectives agreed upon and mandated by the Parliament (Majlis-e-Shoora).

Pakistan Telecommunication Reorganization Act 1996

14. As noted above, the *raison d'eter* or the object and scope/application of an Act of Parliament (Majlis-e-Shoora) in the mind of legislators are envisaged in the Preamble of the statute. The Preamble of Pakistan Telecommunication Reorganization Act 1996 (PTRA) reads as under:

'An Act to provide for re-organization of telecommunication system.'

'WHEREAS it is expedient to provide for reorganization of telecommunication system in Pakistan by establishing the Pakistan Telecommunication Authority, the Frequency Allocation Board and Pakistan, regulation of telecommunication industry, transfer of telecommunication services to private sector and for matters connected therewith and incidental thereof.'

15. Section 1 of the PTRA reads as under:

- '2. it extends to the whole of Pakistan [and]*
- 3. it shall come into force at once.'*

16. Section 2 of the PTRA provides a definition of various technical terms related to telecommunication industry and Section 3 provides for the establishment of Pakistan Telecommunication Authority (hereinafter, **PTA**). The functions, powers, and responsibilities of PTA are envisaged under Sections 4, 5 and 6 of the PTRA respectively. The core functions of PTA are enumerated as under:

'4. Functions of the Authority.—The Authority shall:

- (a) regulate the establishment, operation, and maintenance of telecommunication systems and the provisions of telecommunication services in Pakistan;*
- (b) receive and expeditiously dispose of applications for the use of radio-frequency spectrum;*
- (c) promote and protect interests of users of telecommunication services in Pakistan;*
- (d) promote the availability of wide range of high quality, efficient, cost-effective and competitive telecommunication services throughout Pakistan;*
- (e) promote rapid modernization of telecommunication systems and telecommunication services;*
- (f) investigate and adjudicate on complaints and other claims made against licensees arising out of alleged contravention of the provisions of this Act, the rules made and licences issued thereunder and take actions accordingly;*

(g) make recommendations to the Federal Government on policies with respect to international telecommunications, provisions of support for participation in international meetings and agreements to be executed in relation to the routing of international traffic and accounting settlement; and

(h) perform such other functions as the Federal Government may, from time to time, assign to it.

(i) regulate arrangements amongst telecommunication service providers of sharing their revenue derived from the provision of telecommunication service; (j) ensure effective compliance by licensees with Universal Services Obligations;

(k) regulate Access Promotion Contribution;

(l) settle disputes between licensees; and

(m) regulate competition in the telecommunication sector and protect consumer rights. (PTRA Amendment Act of 2006)'

17. While encapsulating responsibilities of PTA, the PTRA (as amended in 2006) provides:

'6. Responsibilities of the Authority.—In exercising its functions and powers under this Act, the Authority shall ensure that—

(a) rights of licensees are duly protected;

(b) all of its decisions and determinations are made promptly, in an open equitable, non-discriminatory, consistent and transparent manner;

(c) all applications made to it are disposed of expeditiously;

(d) the persons affected by its decisions or determinations are given a due notice thereof and provided with an opportunity of being heard;

(e) fair competition in the telecommunication sector exists and is maintained; and

(f) the interests of users of telecommunication services are duly safeguarded and protected.'

18. In respect of competition, Section 57(ad) of the PTR (as amended in 2006) provides:

'6. Power to Make Rules.— (1) For carrying out the purposes of this Act, the Federal Government may, from time to time, by notification in the Official Gazette, make Rules not inconsistent with this Act—

(2) Without prejudice to the foregoing powers, the Federal Government may make rules:

(a) extending the categories of telecommunication systems or telecommunication services for which a licensee is not required under section 20;

(ab) the manner in which the USF and Research and Development funds may be administered;

(ac) the criteria based on which sums may be released from USF and Research and Development Fund;

(ad) preventing, prohibiting, and remedying the effects of anticompetitive conduct by licensees (as amended in 2006);

(ae) regulating agreements or arrangements by licensees in respect of international telephony service;

(af) requiring licensees that handle international telephony service to make payments (i) to prescribed categories of licensees that terminate international telephony service calls in Pakistan in from of APC and (ii) to the USF in respect of international telephony service calls that prescribed categories of licensees terminate in Pakistan;

(ag) enforcing national security measures in the telecommunication sector; and

(ah) regarding lawful interception.]

(b) [xxxx]

(c) restricting or prohibiting the use of any public switched network for signaling purposes in circumstances in which charges otherwise payable may be avoided or reduced, or the advertising of means or services for such use.'

19. Furthermore, Section 58 of the PTRA states:

'58. An ordinance to override other laws: The provisions of this Act shall have effect notwithstanding anything contained in the Telegraph Act 1885 (XIII of 1885), the Wireless Telegraphy Act, 1933 (XVII of 1993, or other laws containing any provisions inconsistent with this Act.'

20. In light of the above provisions, the PTRA refers to competition, however, in an oblique manner because the pitch and substance of the PTRA provides for technical and economic regulation of the telecommunication sector and the two provisions (underlined above) encourage to create *ex-ante* structural conditions to facilitate growth and competition in the sector in terms of what to do and to identify problems and create an administrative machinery to deal with *structural matters*, which include, *among others*, licensing conditions, tariff fixing, spectrum/frequency allocation and other issues between and among the licensees.

Telecom Policy 2015

21. Clause 5.1 of the Telecom Policy 2015 (**TP-2015**) formulated and issued by the Ministry of Information Technology and Telecom (the **MoIT**) provides for the making of Competition Rules (hereinafter, the **Rules**) exclusively for regulation of ex-post competition issues in the telecommunication sector. TP-2015 states that the Rules as mandated under Section 57(ad) of the PTRA, shall be in conformance with the CA2010. Such Rules will govern all matters related to the telecom sector. The Rules will provide a process for market review, including but not limited to identifying product markets, remedying the anticompetitive behaviours (both ex-ante and ex-post) in the telecom industry.

22. Clause 5.1.14 provides that for the implementation of the Rules, PTA will review the market, determine the market power of telecom operators and impose remedies accordingly. Furthermore, Clause 5.1.16 states that stakeholders will be consulted during the development of Rules and during application of the Rules through PTA's regulatory framework, which will be prepared by PTA and reviewed by the Commission.

23. In its recent Consultation Paper on On-net and Off-net Tariffs offer by Cellular Operators dated 25 March 2016, PTA has reiterated in Clause 12 of the paper that *according to the new Telecom Policy, the current competitive and open telecommunication market structure will be maintained. Furthermore, the sector will be managed through the application of Competition Rules for the telecommunication sector. The rules will be developed by the MoIT, which will govern all competition related matters of the telecommunication sector.*

B. Issues

- I. *Whether the Rules being framed by the MoIT for the telecom sector create jurisdictional overlaps and conflicts between the legislative mandate of the Commission and PTA?*
- II. *Whether PTA can impose ex-post behavioral remedies for competition law violations, which are already being enforced by the Commission under the CA2010?*

C. Incongruities with the CA2010

Issue I

24. At the outset, it is noted that Article 18 of the Constitution of Pakistan 1973 (the **Constitution**) clearly marks the distinction between *the regulation of any trade and profession through a licensing system* [Article 18(a)], which role in the telecom sector has been assigned to PTA. On the other hand, *the regulation of trade, commerce or industry in the interest of free competition* [Article 18(b)] is exclusively vested with the Commission since its inception in 2007 with the primary and sole object to provide for free competition in all spheres of commercial and economic activity, to enhance economic efficiency and to protect consumers from anti-competitive behaviour.
25. Therefore, in the presence of a national competition authority through an Act of Parliament (Majlis-e-Shoora) i.e. the Commission, any attempt to create overlaps between the mandate of PTA and jurisdiction of the Commission by making of Rules by MoIT shall be a negation of the roles distinctively demarcated in Article 18 of

the Constitution. As is reflected in its Preamble and the above-noted clauses of the PTR, PTA, as a sector regulator, shall exercise only the powers as are conferred on it by law, which is predominantly ex-ante regulation of technical and economic issues in the telecom sector. Therefore, making of Rules to regulate ex-post anticompetitive behaviours in the market is in conflict with the intent of the legislature. [emphasis added]

26. The CA2010 is a *lex specialis* i.e. a special law encompassing all spheres of commercial and economic activity across Pakistan on the legislative subject of competition. In legal theory and practice, *lex specialis derogat legi generali*, that is where two laws govern the same factual situation, a law governing a specific subject-matter (*lex specialis*) overrides a law which governs general matters on the same subject (*lex generalis*). Even assuming both PTR and CA2010 are special laws, with reference to the non-obstante clauses, the superior courts of Pakistan have consistently held that the general principle of interpretation is that special law shall have precedence over general law and when there are two special laws and they are inconsistent on any provision/situation, then one which comes later, shall prevail over the earlier one. Thus to decide as to which non-obstante clause with stand, reference is made to the object and purpose of law under consideration as well as the one that was enacted later in time. [emphasis added]

27. In furtherance to the above, section 59 of the CA2010 reproduced hereinabove is a non-obstante clause. The language of the provision unequivocally indicates the intention of the Legislature (Majlis-e-Shoora) that the CA2010 has an overriding effect over any other law on the same subject-matter. The expression '*notwithstanding anything to the contrary contained in any other law for the time being in force*' is meant to give precedence to the provision any Act or rule which were in force at the time of enactment of the CA2010. Accordingly, the non-obstante clause enshrined here by the legislature gives overriding effect to the provisions of the CA2010 over the conflicting or comparative provisions of the primary Acts of any other administrative or regulatory bodies, including SECP, OGRA, PTA, PEMRA, and NEPRA amongst others. [emphasis added]

28. It is pertinent to note that under its existing framework, no provision of the PTRA defines anti-competitive practices including, *inter alia*, abuse of dominant positions, agreements which are restrictive of competition or cartelization by undertakings or association of undertakings in the telecom sector, deceptive marketing practices, mergers which substantially lessen competition by creating or strengthening a dominant position in the relevant market and criteria for exempting agreements. The legislative scheme under which PTA is established and operates does not embody any mechanisms to carry out antitrust/anti-competitive practices related enquiries/ investigation to remedy anti-competitive behaviour. This is abundantly clear from the scheme of Section 23 of the PTRA, which does not envisages any remedy (in term of commitments/ penalty/ appeal) with regard to anti-competitive practices.
29. On the other hand, under Section 30 of the CA2010, the legislature has provided a *sui generis* system for conducting proceedings (section 30), orders in case of contravention of Chapter II prohibitions (section 31), proceedings and enquiry, enter and search premises, and to call for information and conduct enquiry and studies (section 33 – 37). Furthermore, Chapter V of the CA2010 prescribes the method of determining financial penalties specific to anti-competitive behaviours, including the leniency and appeal provisions.
30. In view of the foregoing, while generally for telecom operators, PTRA might be taken as a special law in order to regulate their licensees' activities, nevertheless for alleged anti-competitive practices, there is no cavil in holding that the competition regime envisaged under the CA2010 is a special law. All telecom operators, including PTA and sector regulators, are **undertakings** in terms of Section 2(1)(q) of the CA2010 and subject to it.
31. It is pertinent to mention that since its inception, the Commission has demonstrated its efficacy and has consistently received appreciation for its performance, both on a national level and from international peers. By virtue of its membership of organizations such as the International Competition Network and cooperation with the OECD, UNCTAD, and various competition agencies around the world, the Commission is able to benefit from the specialized knowledge of antitrust/ competition affairs, which the sector regulators are not privy to.

32. It may well be appreciated that the CA2010 being a statute takes precedence over any other subordinate or delegated legislation including the Rules being proposed by the MoIT, in accordance with the hierarchy of statutory instruments in Pakistan and around the world. It is a cardinal principle of statutory interpretation that in the event of any actual or potential overlaps/ conflicts between the CA2010 and the PTR, both of which are creations of Parliament (Majlis-e-Shoora), the statutes are required to be read in harmony with one another. Any overlaps/ conflicts are required to be delineated as practically as possible. This is in line with the legal maxim that no legal ambiguity or absurdity in the statutory schemes can be imputed to the legislator.
33. The Commission is of the considered opinion that the TP-2015 and the Rules being framed by the MoIT (to the extent of regulating anti-competitive practice and mergers in the telecom sector) aimed to create jurisdictional overlaps and conflicts between the mandate of the Commission and PTA, which otherwise do not exist, should be reviewed in their entirety by the Federal Government and the respective agencies. Even if such conflict is assumed, in view of the above discussion it is abundantly clear that the provision of the CA2010 shall prevail over the PTR in the matters related to ex-post enforcement of competition law. [emphasis added]

Issue II

34. In the context of regulation of competition in the telecommunication sector, PTA's core mandate, as envisaged by the Parliament (Majlis-e-Shoora) in the PTR, encompasses devising an appropriate *ex-ante* technical/ economic framework in terms of structural growth of the market including, *inter alia*, setting of licensing conditions and tariffs, interconnection, quality of services, introduction of a robust regime for mobile virtual networks and interoperability to encourage competition between and among the licensees and facilitate market entry and exit conditions.
35. With the establishment of the Commission in 2007, the identification and prohibition of anti-competitive practices such as abuse of a dominant position, agreements which are restrictive of competition and cartelization, deceptive marketing practices and mergers which substantially lessen competition through a

comprehensive *ex-post* enforcement mechanism have exclusively been entrusted to the Commission by Parliament (Majlis-e-Shoora) by virtue of the CA2010. The Commission's enforcement powers extend to the whole of Pakistan and apply to all undertakings engaged in economic or commercial activity in any identifiable market therein, including the telecom sector and its related markets.

36. While delineating the scope of general and special law, purposive interpretation rests on the straightforward premise that law is enacted to fulfill a purpose or remedy a certain mischief. That is, the sector regulators have the specialist role in regulating technical and economic issues *ex-ante*. On the other hand, the Commission is vested with special jurisdiction to examine behavioral issues *ex- post*. In line with the foregoing, the prohibitions contained in Chapter II of the CA2010 (Section 3 to Section 10 violations) are already present in *ex-post* terms. Nevertheless, Section 11 of the CA2010 requires mandatory merger notification with suspensory effect for antitrust scrutiny by the Commission. This regime is based on the assumption that preventing a competition problem from arising can be more effective than fixing it, post-merger. While reviewing a merger, the Commission under section 50 and 53 of the CA2010 duly consults with the sector regulators, including PTA while granting a clearance before the parties can consume the transaction and integrate their business.
37. It is also the general consensus that only in the absence of a national competition authority, a sector specific regulator may assume both purposes i.e. the *ex-ante* technical regulation necessary for the introduction of competition in the relevant industry and also the *ex-post* competition enforcement. That, however, is evidently not the case with Pakistan. Post privatization of a sector, it is not uncommon for the demarcation lines between competition policy and sector-specific regulation to become blurred, which at best are to be resolved by the sector regulators and competition authorities through a collaborative approach.

C. Conclusion

38. The national competition authorities are best equipped to deal with behavioural issues, to ensure free competition and to protect consumers from anticompetitive practices by dominant undertakings and cartels by *ex-post* enforcement of

competition law. On the flip side, sector regulators are better equipped to deal with structural matters as has been envisaged in their respective legislations.

39. Empowering PTA to impose *ex-post* behavioral remedies and obligations for competition related infringements in the telecom sector will not only create redundant duplication of jurisdictions but also engender legal uncertainty for the telecom operators and consumers as well as wastage of state resources. Moreover, the Rules being framed by MoIT for the telecom sector may also prompt other sector specific regulators and their respective ministries to embark upon a similar course of action, to the detriment of the economy as a whole.
40. As noted above, the CA2010 being an Act of Parliament (Majlis-e-Shoora) shall take precedence over the Rules being framed by MoIT which is a subordinate legislation. The intention of the supreme legislature is abundantly clear in the Preamble of the CA2010, i.e. the creation of a specialized and comprehensive competition regime to be enforced by the Commission since its inception in 2007. Such a regime cannot whimsically be undermined through the issuance of competition Rules by any ministry of the Government of Pakistan. Hence, the CA2010 shall prevail in the event of any conflict or overlap between the Commission's mandate and that of any other regulatory or public body in Pakistan to the extent of matters pertaining specifically to competition.
41. In order to avoid the overlaps of jurisdiction and forums for redressal from anti-competitive behaviour, section 59 has been incorporated in the CA2010, which provides that its provisions shall have an overriding effect, notwithstanding anything contained to the contrary in any other law for the time being in force. The effect of this non-obstante clause is to avoid an overlap and conflict of jurisdiction between and among the Commission and sector regulators.
42. To conclude, none else except the Commission is competent to adjudicate upon competition law related matters as are discerned above. The CA2010 is a special enactment legislated to ensure free competition and remedy anticompetitive practices with the ultimate objectives of consumer welfare. The CA2010 has overriding effect over the general provisions provided in various regulatory

instruments, including the PTRAs. The promulgation of Rules by the MoIT to administer *ex-post* competition issues will create concurrent jurisdictions, which will inevitably lead to a conflict between the mandates of PTA and the Commission.

D. Recommendations

The development of the Rules by the MoIT will result in the negation of the exclusive mandate, enforcement powers and purpose on which the whole edifice of competition regime was built by the Parliament (Majlis-e-Shoora) through the CA2010 and establishment of the Commission. Hence, the MoIT should refrain from the development of the Rules.

43. Regulatory reforms envisaged under the PTRAs principally provides benchmarks for assessing the quality of technical and economic regulation and to encourage an efficient market structure. On the other hand, vigorous enforcement of competition law coupled with competition advocacy by an independent authority, such as the Commission, is necessitated to prevent market abuse and cartelization from reversing the gains achieved through the regulatory reform envisaged under the PTRAs.
44. In the interests of the administration of justice, legal certainty and policy coherence, it is therefore of the utmost importance that the TP-2015 be reviewed in its entirety, with particular attention to the competition matters, to avoid any actual or potential conflict between the explicit mandate of PTA and jurisdiction of the Commission.
45. It is recommended that PTA, as the sector regulator for telecommunication, and the Commission may adopt a collaborative approach through a mutual consultation and cooperation memorandum on matters that may be overlapping and thereby avoiding any actual or potential conflicts in the future. It is only then that both authorities can expect a healthy competition culture and a higher growth rate in the telecom sector and the related markets in Pakistan. The same approach is also beneficial and warranted for other regulated sectors in the country.

Islamabad the 10th November 2016