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Regulatory Capture: Private
Interests Deriving Public Policy
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I. INTRODUCTION

Where private interests derive public policy, the role of a Competition Agency becomes even more challenging. One case in point, described below, is the establishment of International Clearing House (“ICH”) by 14 international long distance telecom operators (“LDI Operators”) in Pakistan.

II. EXEMPTION APPLICATION

In September 2011, the LDI Operators filed an application under Section 5 of the Competition Act 2010 (“the Act”) for exemption, from Section 4 of the Act, of their agreement to establish ICH. Section 4 prohibits entering into agreements that have the object or effect of preventing, restricting, or reducing competition within the relevant market. Section 5 permits the Commission to grant exemption to certain agreements that lessen competition, but: (i) can improve production or distribution; (ii) promote technical or economical progress, while allowing consumers a fair share of the resulting benefit; or (iii) where the benefits of the agreement clearly outweigh the adverse effects of absence or lessening of competition.

The ICH Agreement, in essence, proposed: (i) giving a monopoly to one of the LDI operators, namely PTCL, to receive all incoming international traffic; (ii) a single rate for terminating incoming international traffic with the rates increasing from U.S. 2 cents to more than U.S. 8 cents; and (iii) dividing the profits from incoming international traffic based on the existing market share of the LDIs.

The Commission heard the parties in detail to analyze whether the proposed ICH Agreement could be granted an exemption. However, before a final order could be issued, LDI Operators requested to withdraw the exemption application. Conflicting rationales were given by the parties for the withdrawal of their application. For example, Dancom Pakistan Private Limited, in its letter dated February 8, 2012, stated “that industry has made joint representation before MoIT [Ministry of Information and Technology] for seeking provisions of ICH under policy framework. Until a firm reply from the Ministry, it is requested that matter may be kept in abeyance.” Pakistan Telecommunication Company Limited, in its letter dated February 7, 2012,

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wrote “[t]he industry has not reached consensus on the modalities of ICH operations and therefore, we have decided to withdraw application filed by PTCL to seek exemption on ICH agreement.”

Despite the withdrawal of exemption applications by the LDIs, the Commission issued its determination on February 8, 2012 wherein the Commission stipulated that:

If in future the Applicants enter into such agreement/arrangement, notwithstanding, any authorization obtained from any other authority such agreement/arrangement prior to its execution would require clearance from the Commission, as, prima facie, it has serious competition concerns and would attract the provisions of the Act.²

III. MOIT POLICY DIRECTIVE

Recognizing that the Commission was not going to exempt the ICH agreement, the LDI Operators were able to get the ear of the MoIT. Some six months after the Commission’s decision on the exemption application, the MoIT on August 13, 2013 issued a Policy Directive³ that it had decided to establish one gateway (International Clearing House Exchange)—to be operated by the PTC—for termination of all incoming international traffic instead of the individual gateways of the LDI operators.

The Policy Directive was in complete violation of the provisions of the Act as well as the Telecom De-regulation Policy of 2003, which has as its objectives, among others, to: (i) increase service choices for customers of telecommunications services at competitive and affordable rates, (ii) liberalize the telecommunication sector by fair competition among service-providers, and (iii) maintain an effective and well-defined regulatory regime that is consistent with the international best practices.

IV. POLICY NOTE BY CCP

In response to the MoIT’s Directive, the Commission issued a Policy Note on August 28, 2012, wherein it highlighted the competition concerns emanating from the prospective establishment of International Clearing House, and recommended that MoIT withdraw the Policy Directive.⁴ The Commission also warned that any such proposed arrangement/agreement, if entered into, would not be tenable under the law in terms of Section 4 of the Competition Act.

V. PTA’S INDEPENDENCE COMPROMISED

We have heard of “regulatory capture”⁵ where the regulatee influences the decisions of the regulator. However, in this case, we witnessed the capture by MoIT of the Pakistan Telecommunications Authority (“PTA”)—an independent regulatory body.

² Policy Note available at

http://www.cc.gov.pk/images/Downloads/policy_notes/policy_note_ich_exchange_arrangement.pdf.

³ MoIT letter No. 9-1/2002 DT.

⁴ http://www.cc.gov.pk/images/Downloads/policy_notes/policy_note_ich_exchange_arrangement.pdf.

⁵ “Regulatory capture” is a form of political corruption that occurs when a regulatory agency, created to act in the public interest, instead advances the commercial or special concerns of interest groups that dominate the industry or sector it is charged with regulating.

On July 23, 2012, the four-year term of the incumbent PTA Chairman, Dr. Muhammad Yasin, came to an end. On July 28, 2012, Prime Minister Raja Pervez Akhtar appointed Mr. Farooq Awan, a civil servant, who has been working as acting Secretary Information Technology, as member PTA and then as Chairman PTA on the same day, in violation of various provisions of the Pakistan Telecommunications Re-Organization Act 1996.

The appointment of Farooq Awan was challenged in the Lahore High Court. The single bench terminated the appointment in January 2013 as illegal and against the law.⁶ While Mr. Awan challenged the order of the single bench through an intra-court appeal, the government appointed Mr. Awan as Member (Finance)/Chairman on an acting-charge basis—this time as a civil servant on deputation to a regulatory body.⁷ A division-bench of the Lahore High Court restrained Mr. Awan from performing his duties as Member (finance)/Acting Chairman in March, 2013 and in June 2013 declared his appointment as illegal.

The government's insistence on placing a civil servant as head of the PTA, which ought to be an independent body, smacks of pushing ulterior motives.

VI. PTA'S CONDUCT IN PROMOTING ICH

On August 23, 2012, the PTA issued a letter wherein it directed all LDI Operators to conclude the International Clearing House Agreement in light of the Directive.

On September 25, 2012, the PTA issued another letter directing all Local Loop Operators and Cellular Mobile Operators to suspend their international inter-connect circuits to terminate international incoming traffic with all LDI Operators except PTCL.

The PTA, in furtherance of its letter dated August 23, 2012, issued a letter dated August 30, 2012 to fix, *inter alia*, the Approved Accounting Rate ("AAR"), Approved Settlement Rate ("ASR"), and the Access Promotion Contribution ("APC").

VII. LITIGATION ENSUED

Brain Telecommunication Limited, one of the circuit providers for international incoming traffic to LDIs—being aggrieved of the PTA's Directive to all Local Loop Operators and Cellular Mobile Operators to suspend their international inter-connect circuits with all the LDI Operators—filed a writ petition before the Lahore High Court⁸ challenging the Policy Directive of the MoIT (and the directive of the PTA which flowed from the Policy Directive). The Lahore High Court issued an interim order on October 25, 2012, where the Court held:

It is also noticed that the Competition Commission in its various policy notes and communications repeatedly informed the respondents that the proposed ICH Agreement constituted ant-competitive conduct and was likely to be hit *inter alia* by the provisions of Section 4 of the Competition Commission Act. . . It appears that the said advice was not heeded and statutory authority, which is charged with the responsibility of safeguarding interests of the consumer was intentionally and deliberately bypassed in a manner which shows undue haste in the matter regarding which serious questions were being raised at all relevant levels.

⁶ Appointment of Farooq as PTA head illegal: LHC; 2013 WLNR 2243951; Loaded Date: 01/29/2013.

⁷ <http://tribune.com.pk/story/517416/lahore-high-court-suspends-new-pta-member-finance/>

⁸ Brain Telecommunication Limited Vs. MoIT etc. (WP No. 26636/2012).

Until the next hearing date, several items were suspended: (i) operation of the August 13, 2012 Directive issued by respondent no. 1 (MoIT); (ii) the PTA's August 30, 2012 Applicable Rates Letter; (iii) the September 25, 2012 Implementation Letter issued by Respondent no. 2 (PTA); and (iv) the August 20, 2012 ICH Agreement.

Aggrieved with the decision of the Lahore High Court, *ADG LDI Private Limited* filed a "civil petition for leave to appeal" before the Supreme Court of Pakistan.⁹ The Supreme Court, while deciding the petition, directed the Competition Commission of Pakistan to treat the Writ Petition,¹⁰ filed by the M/s Brain Telecommunication Limited ("BTL") before the Lahore High Court, as representation under the Competition Act.

VIII. CASE BEFORE THE COMMISSION

The Commission, pursuant to the order of the Supreme Court, treated the petition filed by Brain Telecommunication as a complaint before it, heard all the parties concerned in detail, and issued its order on April 30, 2013.¹¹ The Commission held the ICH Agreement to be null and void, in violation of the Competition Act, and imposed a penalty of 7.5 percent of the annual turnover of the preceding year (2012) on all the LDI Operators.

In its decision, the Commission looked at various competition concerns, including, among others: (i) price-fixing, (ii) quota-fixing, (iii) placing of entry barriers, (iv) impact on the international incoming calls, (v) impact on the economy, (vi) violation of international obligations under the WTO, and (vii) likely-hood of an increase in grey-trafficking. The scheme of ICH was encapsulated in the following excerpt from the decision:

the respondents have agreed under the ICH Agreement not to compete on the settlement price with foreign carriers. In addition, they have also agreed to share revenue as per the allocated shares. We must draw a distinction between the sharing of revenue as in the instant case and dividing of the market. In the latter a member of cartel is still a market player, whereas in case of former the member of the cartel is a pure rent seeker seeking rent on the strength of its license despite suspending its services as is in the present case. This situation is more egregious than those who divide the market and still provide services.¹²

IX. DECISION CHALLENGED

LDI Operators challenged the decision of the Commission before the Sindh High Court and the Lahore High Court, which granted interim orders against the decision of the Commission.

In the meantime, after the May 2013 general election, a new government took charge in June 2013. By this time the adverse effects on the economy highlighted by the Commission in its Policy Note and decision had become evident, and with the new top brass at the MoIT, through a directive dated June 17, 2013, the MoIT rescinded its earlier Policy-Directive to establish the International Clearing House Exchange for International Incoming Calls. Despite the withdrawal

⁹ *ADG LDI Private Limited v. Brain Telecommunication Limited, et al*; C.P.L.A. No. 102-1/2013.

¹⁰ WP No. 26636/2012.

¹¹ http://www.cc.gov.pk/images/Downloads/ich_order_30_april_2013.pdf.

¹² Para 116, http://www.cc.gov.pk/images/Downloads/ich_order_30_april_2013.pdf.

of the Policy Directive to establish ICH, LDI Operators continued with the arrangements, citing “vested” interests. The federal government then filed a “civil petition for leave to appeal” before the Supreme Court of Pakistan.¹³ Finally, the Supreme Court put a closure on litigation and gave finality to the decision of the MoIT through its order dated February 24, 2015, which suspended the operation of the interim reliefs granted by the Sindh High Court and Lahore High Court and, in essence, gave effect to the Policy Directive of MoIT cancelling establishing the ICH.

X. CONCLUDING REMARKS

This case shows how private interests find their way in forming public policy. And once that public policy is formed, those private interests become the legitimate vested interest of the private parties. The problem is the same as when the fox is set to guard the hen house. Had the MoIT not become a party with the LDI Operators, the ICH would never have established.

The challenges facing a competition agency (assuming there is no fox guarding the hen-house at the agency) in a developing country are much more than in developed countries where institutions function within their mandate. For a competition culture to be embedded in a developing country, competition agencies must remind themselves that it not the pressure of the river flow, but the persistence of that flow, that cuts its way through rocks and stones.

¹³ Federation of Pakistan vs. Redtone Telecommunications (Pvt) Ltd. CPLA No. 146 of 2015.