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## **ELECTRONIC MEDIA OF PAKISTAN IN DECEPTIVE MARKETING PRACTICES PROTECTING THE BUSINESS INTEREST OF COMPETITORS UNDER COMPETITION LAW OF PAKISTAN**

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**ABSTRACT:** *The scope of this research paper deceptive marketing practices in electronic media of Pakistan protecting the business interests of competitors is basically an attempt to provide guidelines to both of the regulators CCP and PEMRA, to establish rules, regulations and guidelines enforcing competition in Electronic Media Industry specifically related to the doctrines of “information lacking reasonable basis”<sup>1</sup> (‘ILRB’) and “inconsistent comparison of products” (‘ICP’) which are extracted from the doctrine of “deceptive marketing practices”. The contentious area of this research paper is that, “whether directly or indirectly harming the business of competitors in the Industry of Pakistan by disseminating information lacking reasonable basis and inconsistent comparison of services constitutes deceptive marketing practice. Furthermore, resolving procedural implications shall also clear the depiction for the Industry and PEMRA that to what extent CCP has been mandated and empowered to ensure and enforce competition law.*

**KEYWORDS:** electronic media, PEMRA, competition law, telecommunication competition rules, competition commission of Pakistan

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## **INTRODUCTION**

After formulation of new electronic media regulator in Pakistan; i.e. Pakistan Electronic Media Regulatory Authority<sup>2</sup> (‘PEMRA’) the Electronic Media Industry of Pakistan<sup>3</sup> (‘Industry’) has enjoyed freedom largely in spite of political and military pressures<sup>4</sup>. PEMRA has developed itself as a sturdy regulator where it ensures that the Industry has been facilitated to promote awareness in free, fair and transparent manner and has emerged as one of the largest industry in Pakistan. Emergence of such huge Industry rapidly has generated quite many legal implications and enforcement of competition law being one of them. There is a deep relationship between media liberalization and competition policy, both seek to ensure that artificial barriers to the competitive processes are removed to the greatest extent possible in order to encourage efficiency in the society. Promotion of positive competition is one precise duty of the regulator but unfortunately, PEMRA as regulator is unable to ensure enforcement of positive competition in the Industry or presumably has ignored the competition law. The competition law is to ensure the positive competition in market, it prohibits all kind

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<sup>1</sup> Information Lacking Reasonable Basis

<sup>2</sup> Established through the Pakistan Electronic Media Ordinance, 2002; previously Regulatory Authority for Media Broadcast Organizations: RAMBO

<sup>3</sup> The Electronic Media Industry of Pakistan, as emerged after 2002: (Hereinafter to be referred as ‘Electronic Media Industry’)

<sup>4</sup> Freedom House Report of 2014: ‘Freedom of The Press 2014 - Pakistan.’

of anti-competitive practices such as; “abuse of dominant position”, “cartels”, “deceptive marketing practices” and “monopoly”. Competition law in Pakistan is prevailing in a quite broad spectrum after the composition of the Competition Regulator, i.e. Competition Commission of Pakistan<sup>5</sup> (‘CCP’). CCP is screening positive competition in the market through its various decisions and policy notes<sup>6</sup>. Most commonly the Industry is involved in disseminating such information which lacks reasonable basis, this practice is known as “deceptive marketing practices”<sup>7</sup>. As one of the anti-competitive practice both the regulators CCP and PEMRA have ignored or overlooked the Industry, neither there are such specific rules or regulations to prohibit such anti-competitive practices from the Industry.

### Scope of the Research Paper

There are quite many forms of deceptive marketing practices such as photo retouching, omitting information, hidden fees and surcharges, manipulation of measurement units and standards, fillers and oversized packaging, misleading health claims, inconsistent comparison and any claim lacking reasonable bases<sup>8</sup>. The scope of this research paper is basically an attempt to provide guidelines to both of the regulators CCP and PEMRA, to establish rules, regulations and guidelines enforcing competition in Electronic Media Industry specifically related to the doctrines of “information lacking reasonable basis”<sup>9</sup> (‘ILRB’) and “inconsistent comparison of products” (‘ICP’) which are extracted from the doctrine of “deceptive marketing practices”. The guidelines to be provided through this paper are in the light of jurisprudence developed by CCP<sup>10</sup>, the latest Telecommunication Competition Rules, 2017<sup>11</sup> and the Directive of the European Council on Unfair Commercial Practices<sup>12</sup> (‘UCP Directive’). Whereas, CCP has established a thorough jurisprudence through its decisions on the doctrine ILRB but lacks in ICP area, while the European Council’s UCP Directive covers both the doctrines.

<sup>5</sup> Competition Commission of Pakistan, the Competition Regulator of Pakistan, Established through Ordinance of 2007, the Competition Ordinance 2007, now the Competition Act, 2010. (hereinafter to be referred as “CCP”)

<sup>6</sup> The Policy Notes as one of the initiative of CCP; such as Telecommunication Competition Policy: can be archived at < [http://www.cc.gov.pk/index.php?option=com\\_content&view=article&id=21&Itemid=123&lang=en](http://www.cc.gov.pk/index.php?option=com_content&view=article&id=21&Itemid=123&lang=en)>

<sup>7</sup> The Doctrine of Deceptive Marketing Practices is recognized by Several Jurisdictions; Pakistan through Section 10 of the Competition Act, 2010 recognize this doctrine.

<sup>8</sup> See "Ribena-maker fined \$217,500 for misleading vitamin C ads". New Zealand Herald. 2007-03-27. ISSN 1170-0777. Retrieved 2016-04-03; see also "Airbrushed make-up ads banned for 'misleading'". BBC News. 2011; "Illegal Price Advertising". Boundless.com. 2015-07-21. Retrieved 2016-03-31; see also "Surcharges And Hidden Fees - Fraud | Laws.com". Fraud.laws.com. Retrieved 2016-03-31; see also "Add-ons and hidden fees | Commerce Commission". Comcom.govt.nz. Retrieved 2016-03-31; see also "Scams, cons and the TRUE cost of your budget flight: How our dreams of a bargain holiday are spoiled by unsavoury added extras".

<sup>9</sup> Information Lacking Reasonable Basis

<sup>10</sup> The Competition Commission has developed thorough jurisprudence in this area through various decision such as in In the matter of Messrs AL-HILAL INDUSTRIES (PVT.) LIMITED: 2012 CLD 1861

<sup>11</sup> The Latest Telecommunication Competition Rules, 2017 as drafted under the Competition Act, 2010: the Draft is not enforced yet, but has been passed through all other pre-requisites. Can be archived at << <http://moit.gov.pk/policies/FinalizedDraftCompetitionRules2017.pdf>>>

<sup>12</sup> Initially the Directive refers to Article 153(1) and (3) (a) of the Treaty Establishing the European Community DIRECTIVE 2005/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’)

The concept of this research was developed when different channels in Industry started making different claims, such as; “this is the No. 1 channel in the Pakistan” which falls under the ambit of ILRB and other claims that “we are broadcasting the news before than other channels” or “this news was broadcasted all of the first by us”; falls under the ambit of ICP. These claims are quite commonly heard but still overlooked by both the regulators. Another important aspect of this paper shall be application of competition law on defamation campaigns by the competitors in the Industry. This practice has been extensively adapted by most of the competitors of the Industry, whereas the news channels in Industry propagates, defame and impose allegations on competitors.

The contentious area of this research paper is that, “whether directly or indirectly harming the business of competitors in the Industry of Pakistan by disseminating information lacking reasonable basis and inconsistent comparison of services constitutes deceptive marketing practice?”.

### The Case of European Council

Generally, these claims as mentioned above are made to attract the consumer and that is why European Council has placed the doctrine of ILRB under the ambit of consumer protection<sup>13</sup>. The European Council’s attempt is to basically protect the consumer from deceptive marketing practices, which specifically overlaps the competition law when such practices are capable of harming business interest of the competitors<sup>14</sup>. UCP Directive is established under Article 12 of the ‘Treaty Functioning on the Functioning of European Union’<sup>15</sup> to provide level playing field for all competitors in the market harmonizing and controlling deceptive advertisements<sup>16</sup>. Basically, this directive is regulating the content of advertisements which are capable of harming interests of competitors and consumers. The basic requirement of launching this Directive was to ensure elevated level of consumer protection which is initially referred in the Directive<sup>17</sup>. This Directive defines ILRB in form of “misleading advertisement” i.e. “any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behavior or which, for those reasons, injures or is likely to injure a competitor”<sup>18</sup>. On the other hand, the ICP is defined as “Comparative Advertising” which means “advertising which explicitly or by implication identifies a competitor or goods or services offered by a competitor”<sup>19</sup>. The European Council reasonably restricts comparative advertising but if the same is lacking reasonable basis<sup>20</sup>. UCP Directive in this way protects both the consumer and the competitor, but is unable to resolve the overlapping question of jurisdiction<sup>21</sup>, whereas the Competition Regulator of Europe i.e. the European Competition Commission (‘ECC’) is unable adjudicate any kind of deceptive marketing practices harming the business interest of competitor. There is strong recommendation from different jurists and scholars to place deceptive marketing practices under ECC<sup>22</sup>. *In the Matter of Google*

<sup>13</sup> The European Council formed through the Lisbon Treaty of 2009, European Competition Commission is working as sub-ordinate institution of European Council. Aug. 18, 2007

<sup>14</sup> Thomas M. J. Möllers & Andreas Heinemann, *The Enforcement of Competition Law in Europe* 5 (2<sup>nd</sup> Ed. 2007)

<sup>15</sup> The Treaty on the Functioning of the European Union is formed for Distinct Functions of the European Union whereas the main area of this Treaty is to ensure Free Trade in the region: C 326/47 Dec 13, 2007 T.F.E.U

<sup>16</sup> Article 1, Directive 2006/114/EC of The European Parliament And Of The Council

<sup>17</sup> Preamble of the Directive 2006/114/Ec Of The European Parliament And Of The Council

<sup>18</sup> Article 2, Directive 2006/114/Ec Of The European Parliament And Of The Council

<sup>19</sup> Article 6, Part 2 of the Directive 2006/114/Ec Of The European Parliament And Of The Council

<sup>20</sup> *Ibid*

<sup>21</sup> Thomas M. J. Möllers & Andreas Heinemann, *The Enforcement of Competition Law in Europe* 5 (2<sup>nd</sup> Ed. 2007)

<sup>22</sup> Mark R. Joelson An International Antitrust Primer: A Guide to the Operation of United States ... Wolters and kluwers (3<sup>rd</sup> ed) 75-76; See Also Press Release Antitrust: Commission takes further steps in investigations alleging Google's comparison shopping and advertising-related practices breach EU rules\* Brussels, 14 July 2016

*Comparison Shopping*<sup>23</sup> the Counsel of the Google strongly relied on the argument that the matter should be placed before ECC because the European Commission<sup>24</sup> lacks the jurisdiction to decide the anti-competitive behaviour, the case is still pending for adjudication and after much deliberations, public comments, and opinions of jurists the European Commission has consider revisiting the directive.

### **Scope of ILRB, ICP and Defamation under Competition Regime in Pakistan**

Currently, the Competition Act, 2010<sup>25</sup> ('the Act') prevails in Pakistan, whereas there are several rules and regulations in specific areas for purposes of enforcing the competition law<sup>26</sup>. The Act covers all the areas of competition law to ensure positive competition, and in the light of the Act CCP has developed thorough jurisprudence for further enforcement and assurance of the competition law. CCP after its establishment initiated different mechanisms for awareness of competition law in market such as; competition advocacy, policy notes, academia drive and opinions<sup>27</sup> which remain core initiatives of CCP. Through these initiatives CCP has enabled itself as an esteemed regulator in the market.

Section 10 of the Act covers all forms of deceptive marketing practices, whereas Sub-section (2)(a) clearly classifies that dissemination of false or misleading information which is capable of harming business interest of the competitor shall constitute anti-competitive behaviour and such practice shall be considered as deceptive.<sup>28</sup> Whereas, Sub-section (2)(c) prohibits the false and misleading comparison of the goods through advertisements<sup>29</sup>.

### **Defining Consumer, *Locus Standi*, Procedure and General Enforcement: Settling Procedural Application through the mandate of CCP**

The purpose of defining the Consumer, *Locus Standi*, Procedure and General Enforcement is to resolve legal complexities pertaining to enforcement of ILRB and ICP in the Industry. Furthermore, resolving procedural implications shall also clear the depiction for the Industry and PEMRA that to what extent CCP has been mandated and empowered to ensure and enforce competition law.

The consumer in this case is the judge through which the market is built and through consumer the competitor is able to harm the business of other competitors. The requirement is to establish that whether the viewer of the Industry falls under the definition of consumer. As defined in Black's Law Dictionary "the consumer is the person who buys goods or services for personal, family or household use without intention of reselling them and not to use them for business purposes", whereas the Consumer Protection of Act of Islamabad and Punjab defines that consumer is a person who buys goods or hires any services which has been

<sup>23</sup> COMP/C-3/39.740, COMP/C-3/39.775 & COMP/C-3/39.768: << [http://europa.eu/rapid/press-release\\_MEMO-15-4781\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-4781_en.htm)>>

<sup>24</sup> The European Commission is the core institution of European Union for enforcement of Policies, Laws, Rules and Regulations, The European Commission also suggest legislations for different areas: the Commission is further divided for better enforcement mechanisms.

<sup>25</sup> Act no. XIX of 2010, as published in PLD Gazette of Federal Statutes 2010; the Act to establish Competition Commission of Pakistan to ensure Competition in the Market

<sup>26</sup> Such as, The Inquiry Rules, General Enforcement Regulations, Exemption Rules and Regulations. CCP is empowered through Section 57 and 58 of the Competition Act, 2010 to make Rules and Regulations

<sup>27</sup> Different initiatives of CCP can be archived from

<[http://cc.gov.pk/index.php?option=com\\_content&view=article&id=21&Itemid=123&lang=en](http://cc.gov.pk/index.php?option=com_content&view=article&id=21&Itemid=123&lang=en)>

<sup>28</sup> Section 10, Sub-Section 2 clause (a) of the Competition Act, 2010

<sup>29</sup> *Ibid*

paid<sup>30</sup>. Organisation of Economic Co-operation and Development in its Policy Round Roundtables on Competition Issues in Television in Broadcasting has recognised the viewer of the electronic media as consumer<sup>31</sup>. CCP in its various decisions has followed the definition of consumer as provided in the Consumer Protection laws of Punjab and Islamabad<sup>32</sup>. Furthermore, for registering the complaint against any anti-competitive practices CCP has promulgated Competition Commission (General Enforcement) Regulations, 2007 ('GE Regulation')<sup>33</sup> which defines the complainant as person which shall be known as 'undertaking' defined in the Act. Section 2 (1) (q) defines 'undertaking' as "any natural or legal person, governmental body including 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 shall include an association of undertakings"<sup>34</sup>. Through above submission it has been established that to serve the purpose of protecting the competitor business in the Industry the viewer falls under the definition of consumer and is empowered to file a complaint against any undertaking. The contentious issue to adjudicate the matter of the Industry is of *Locus Standi* that whether CCP can initiate proceedings where consumer is aggrieved. Settled by CCP in *Show Cause Notice Issued to Pakistan State Oil Company Ltd*<sup>35</sup> by referring to the language of Section 37 (2) of the Act that CCP can initiate proceedings on complaint of any undertaking contrary of being aggrieved. For adjudication of any matter CCP exercise its powers as Civil Court<sup>36</sup> and the procedure is adapted as of the Code of Civil Procedure. CCP non-traditionally initiate inquiry and investigation before issuing a show-cause notice, this practice as entailed in the Act empowers CCP to frame charge/issues and to dispose the proceedings succinctly. CCP is also mandated through the Act to take *Suo Motto* against any of the anti-competitive practices in the market and has sufficient powers to investigate, seal the premises, to inquire and issue a stay or interim order.

### Defining Electronic Media Channels under the ambit of competition law

The electronic media channels can be considered as service as defined in Section 2(hc) of the Ordinance as "Electronic Media includes broadcast and distribution services"<sup>37</sup>. Furthermore, the services of channels can be subscribed by the consumers, however nowadays there is digital access to most of the channels through internet services providers. The next contention arise over here is that, "whether the competition law is applicable on the services?" Answered through *the matter of show cause notices issued to Askari Bank ltd, United Bank Ltd, My Bank Ltd & Habib Bank Ltd*<sup>38</sup>, in this case the contention was raised over the term "goods" that Section 10 (2)(b)<sup>39</sup> of the Act has got limited scope and that it applies only to goods. This contention was made when the bank account was placed under the definition of service<sup>40</sup>. While settling this

<sup>30</sup> Section 2 Sub-Section 3 of the Islamabad Consumer Protection Act, 1995; Section 2 Clause (c) of the Punjab Consumer Protection, 2005

<sup>31</sup> Paper Presented before OECD on Competition Issues in Television and Broadcasting: DAF/COMP/GF(2013)13 <<http://www.oecd.org/daf/competition/TV-and-broadcasting2013.pdf>>

<sup>32</sup> 2016 CLD 1546

<sup>33</sup> The General Enforcement Regulations as enforced by the CCP empowered through the then Section 56 and Section 41 of the Competition Ordinance 2007 through S.R.O. 1189(I) 2007 (hereinafter to be referred as GE Regulations)

<sup>34</sup> Such as in *COMPLAINT FILED BY MJS NATIONAL FOODS LIMITED AGAINST MIS SHANGRILA (PRIVATE) LIMITED* (FILE NO. 108/SHANGRILAICOMP/2012) (Competition Commission Decision/Order)

<sup>35</sup> F. No: 170/ OFT/ PSO/ CCP 2013 (Competition Commission Decision/Order)

<sup>36</sup> Section 33 and 40 of the Competition Act, 2010

<sup>37</sup> Section 2 Clause (hc) of the PEMRA Ordinance, as inserted after PEMRA Amendment Act of 2007

<sup>38</sup> (No. 2(9)/DIR(L)/CCP/2008) (Competition Commission Decision/Order)

<sup>39</sup> *Supra* 26

<sup>40</sup> *Supra* 36

proposition of law CCP for first instance reviewed the language of Section 10 (2)(b) of the Act, i.e. “the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods”. CCP observes that the provisions of the Competition Act, 2010 are broadly articulated provisions, whereas the definition of undertaking is instructive and leaves no doubt that both goods and services are covered through that definition. The proposition was answered through connecting the definition of the term “undertaking” and the language of the Section 10 of the Act and settles the contention that services falls under the ambit of competition law.

### The Doctrine of ILRB

Section 10 (2) (b) of the Act prohibits any information distributed which lacks reasonable basis, “reasonable basis” is the term which requires an exhaustive interpretation for enforcement of this part. The term was defined in *Messrs National Foods Limited Against Messrs Shangrila (Private) Limited*<sup>41</sup> as the reasonable bases for making any claim rests upon the shares in the market. Moreover, CCP recognized the concept of reasonable of basis as established in American Jurisdiction which was introduced after much deliberations and public comments through a Policy Statement Regarding Advertising Substantiation. In this case *Messrs Shangrila (Private) Limited* made a claim through advertisements that their product ‘tomato ketchup’ was ‘No. 1’ in the market. This claim was challenged by *Messrs National Foods Limited* under Section 10 (2)(a)(b) of the Act on the grounds that the *Messrs National Foods Limited* holds more share than the *Messrs Shangrila (Private) Limited*. CCP ordered *Messrs Shangrila (Private) Limited* to stop such misleading campaign which is specifically harming the businesses of other undertakings in the market and to comply with the competition laws. This decision was solely relied upon the holding of market shares by each undertaking because the parties of this case referred to the market shares. CCP referred to the *M/S Proctor and Gamble Pakistan (Private) Limited*<sup>42</sup> wherein this case MS Proctor and Gamble claimed that their product stands as the “no. 1” product in the market produced the market share records; CCP observed that “The concept of having a reasonable basis ... provides that the advertiser must have had some recognizable substantiation for the claims made prior to making it in an advertisement”<sup>43</sup>. This statement elucidates another aspect of ILRB that the reasonable basis should exist prior to making such claim. CCP in this case followed the mechanism adapted by the Federal Trade Commission of United States of America (‘FTC’)<sup>44</sup> where “the concept of having reasonable basis was introduced after much deliberations and public comments through Policy Statement Regarding Advertising Substantiation”<sup>45</sup>.

### The Doctrine of ICP

Inconsistent comparison of products generally stands for the comparison of products which is false or misleading. Section 10 (2)(c) of the Act specifically deals with this kind of deceptive marketing practice but CCP never received any such complaint or never initiated a *Suo Motto* pertaining to this matter. The competition law generally doesn’t prohibit comparison of goods but enforce that such comparison should be on some reasonable basis. News Channels are majorly involved in this anti-competitive practice and there is strong recommendation to CCP to take coercive measures to stop these practices. Generally, News Channels compare their programmes with their competitors and suggest that their programme is the “No. 1” programme. The programmes are also compared in terms of viewers, ratings, the quality of the programme, the topic, the

<sup>41</sup> Show Cause Notice No. 20/2013, November 1<sup>st</sup>, 2013, decided on 26th February, 2015. [2015 C L D 1737]

<sup>42</sup> 2010 CLD 1695

<sup>43</sup> The lines extracted from the Federal Trade Commission Decision followed in *Proctor and Gamble Case*, 2010 CLD 1695

<sup>44</sup> An Independent Agency of United States of America, established in 1914 through Federal Trade Commission Act, 1914; Federal Trade Commission regulates the Trade, protects consumers and ensure positive competition in the market.

<sup>45</sup> *Supra* 41



guests and the speakers; these all are considered as ingredients of programme which makes the programme better than the one telecasted by the competitor. The programmes in this case falls under the definition of the services and following the *the matter of show cause notices issued to Askari Bank Ltd, United Bank Ltd, My Bank Ltd & Habib Bank Ltd*<sup>46</sup>, CCP is enabled and empowered to enforce this provision of ICP in the Industry. FTC allows comparison of goods but if such comparison is on reasonable basis, for example comparing a product and suggesting a better product shall be substantially reliable and should be better than the compared one.

### Defamation under Competition Law

Defaming the competitor in the market is one of the modern form of defamation, whereas this defamation can be through comparing the products, or simply defaming the product of the competitor. This practice has been recognised as “Business Defamation” or “Corporate Defamation”<sup>47</sup>. Since the Supreme Court of United States of America (‘SCUSA’) has faced plenty of matters in these regards but has yet to establish status of the practice<sup>48</sup>, this delay is due to legal status of the corporations (because corporations are considered as ‘artificial persons’), whereas defamation is considered as to damage the repute of person<sup>49</sup>. SCUSA has also figured out that defaming competitor is out of the general law of defamation because it intends to defame the product, service or the competitor<sup>50</sup>. The scholars and jurists in United States has suggested that the Corporations/Undertakings/Companies in these regards shall be treated as *Per Se Public Figures* to protect their interest in the market<sup>51</sup> and to award the damages. FTC, ECC and the European Council are still silent on this subject because it is an overlapping principle on laws of defamation, but this principle has been recognised through the recent and the latest Telecommunication Competition Rules, 2017; whereas Rule 7 (2)(a) of the Rules restricts all the competitors in market to defame each other<sup>52</sup>. Section 10 (2)(a) of the Act prohibits distribution of false or misleading information capable of harming business interest of the competitor. This portion can be recognised as covering the “corporate defamation” in terms of defaming the competitor, and is able to be interpreted while keeping the intend of legislature. CCP also considers the Act to be interpreted widely and broadly, therefore, CCP has interpreted the term ‘false information’ covering both the libellous and slanderous forms of defamation which can harm the business interest of the competitor<sup>53</sup>. CCP interprets the term ‘misleading information’ as a wrong impression or idea, tends to misinform, or contrasts with false information harming the business interest of competitor<sup>54</sup>. So far it is observed that the rationale behind Section 10 (2)(a) is to prohibit defamation from competitors in the market. There is Defamation Ordinance, 2002<sup>55</sup> prevailing in Pakistan but is silent on the competition issues. The Defamation

<sup>46</sup> *Supra* 36

<sup>47</sup> See *Brayton v. Cleveland Special Police Co.*, N.E. 57 - 1085 (Ohio 1900)

<sup>48</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, U.S. 472, 749 (1985).

<sup>49</sup> *Jadwin v. Minneapolis Star & Tribune*, 81 Nw. UL REV. (1987) See also: D. Mark Jackson “The Corporate Defamation Plaintiff in the Era of SLAPPs: Revisiting New York Times v. Sullivan” William & Mary Bill of Rights Journal I Volume 9 | Issue 2 Article 9

<sup>50</sup> *Ibid*

<sup>51</sup> *Supra* 47: See also: Steven B. Morgan “The First Amendment and the Corporate Plaintiff: Applicability of the New York Times Standard to Corporate Defamation and Product Disparagement” Valparaiso University Law Review I Volume 19 Number 4 pp.847-875; See also: Dave Wilson, “EVERYONE’S A CRITIC: DEFAMATION AND ANONYMITY ON THE INTERNET” I Mass Media Law Journal Issue 294-421 (2014).

<sup>52</sup> See Rule 7 Sub-Rule 2 clause (a) of the Telecommunication Competition Rules, 2017

<sup>53</sup> *In the matter of: Messrs TARA CROP SCIENCES (PRIVATE) LIMITED FOR DECEPTIVE MARKETING PRACTICES* 2016 CLD 105

<sup>54</sup> *Ibid*

<sup>55</sup> The Defamation Ordinance, Ordinance LVI of 2001

Ordinance, 2002 penalise the violator but is practised generally where any individual or group/company is defamed in terms of reputation. Defamation as principle of tort is turned distinct when it falls under the ambit of competition law, with specific purpose of defaming competitor<sup>56</sup>. The issue of defaming competitor is not covered by the Defamation Ordinance, 2002. Defaming the competitor through different mediums of communication is frequent practice in the market. This issue is still unanswered in several jurisdictions because of its overlapping effect, but CCP and PEMRA both are mandated to regulate this issue by following the Rule as incorporated in the Telecommunication Competition Rules, 2017.

### PEMRA's Role and Functions

Preamble of PEMRA Ordinance, 2002<sup>57</sup> ('Ordinance') implicates that establishment of PEMRA is to improve educational, information, education and infotainment standards<sup>58</sup>. Furthermore, the preamble also states that PEMRA shall enlarge the choices available to public of Pakistan and to facilitate the grass root level through devolution and responsibility upon the Electronic Media.<sup>59</sup> Functions of the PEMRA clearly indicates that the PEMRA shall be responsible for broadcast and distribution services, for audience.<sup>60</sup> PEMRA has to further regulate the distribution services of foreign and local TV Channels and Radio Stations in Pakistan<sup>61</sup>. The functions as provided through the enactment<sup>62</sup> the ambit of PEMRA is not limited to content regulation and distribution of foreign channels and radio stations at Pakistan, whereas Section 39 of the Ordinance empowers PEMRA to make rules and specifically clause (e) of Section 39 enables PEMRA to make rules to prohibit anti-competitive practices<sup>63</sup>. Though the PEMRA is empowered to formulate the rules regarding anti-competitive practices but still at halt to restrict the anti-competitive practices in the Industry.

In *Al Haj Mian Liaquat All & Dr. Shazia Liaquat of Liaquat Hospital Lahore*<sup>64</sup> CCP after concluding the case of deceptive marketing practices in Medical Profession issued recommendation to the relevant regulator, i.e. the Pakistan Medical and Dental Council ('PMDC')<sup>65</sup> to formulate guidelines regarding deceptive marketing practices. PMDC is also empowered to make rules and regulations to restrict any practice violating any of the prevailing law. Through this case it is established that CCP is empowered to issue recommendations and directions, such directions and recommendation are required from CCP to PEMRA to ensure positive competition in the Industry. In 2010, a meeting was held between CCP and PEMRA to promote healthy competition in the Industry. In that meeting, it was decided to take coercive measures to curb deceptive marketing practices in the Industry<sup>66</sup>, but still any further action is not observed.

<sup>56</sup> *Reckitt & Colman Of India Ltd. vs Kiwi T.T.K. Ltd.* on 1 May, 1996 Equivalent citations: 63 (1996) DLT 29, 1996 (37) DRJ 649, (1996) 114 PLR 45

<sup>57</sup> Pakistan Electronic Media Regulatory Authority Ordinance of 2002, which incorporated PEMRA.

<sup>58</sup> Preamble ("inserted via amendment "Act II of 2007") Pakistan Electronic Media Regulatory Authority Ordinance, 2002.

<sup>59</sup> *ibid*

<sup>60</sup> Section 4 of the Pakistan Electronic Media Regulatory Authority Ordinance, 2002 (functions of the authority)

<sup>61</sup> *ibid*

<sup>62</sup> *Supra* 58

<sup>63</sup> See PEMRA Ordinance, 2002

<sup>64</sup> (F. NO: 143/0FTILHOSPITALICCP/2013)

<sup>65</sup> Pakistan Medical and Dental Council (the Medical and Dental Practitioners Regulators) promulgated through Pakistan Medical and Dental Council Act, 1962

<sup>66</sup> CCP and PEMRA to curb deceptive marketing practices, "Pakistan Today": October 09, 2010 (Covered by Abidoon Nadeem)



### Role of Office of Fair Trade ('OFT')

OFT was established by CCP in 2008 with the objective of creating healthy competitive environment to protect consumers and competitors in the market<sup>67</sup>. OFT has been mandated by CCP to enquire into matters related to deceptive marketing practices<sup>68</sup>. OFT is also majorly involved in issuing policy notes and advocacy to promote awareness among the market regarding deceptive marketing practices<sup>69</sup>. OFT should involve PEMRA regarding the deceptive marketing practices in the Industry and shall issue policy notes to Industry. Furthermore, OFT shall also start competition advocacy for awareness in the Industry to come up with the better solution of the issue. OFT shall also involve the Industry for making such rules of competition because Industry itself is the largest stake holder.

### The Telecommunication Competition Rules, 2017 as perfect guideline

Recently, on recommendation of CCP the Ministry of Information Technology and Telecom ('MOITT') has formulated Telecommunication Competition Rules, 2017 ('Rules') to ensure positive competition in telecom sector<sup>70</sup>, these Rules are considered as best guidelines in this scenario. These rules identify all kind of anti-competitive practices in the market and has sanctioned them in a manner to protect the consumer and the competitor. There are different Sub-Rules incorporated under Rule 7 (2) of the Rules to prohibit deceptive marketing practices and specifically restricts ILRB and ICP<sup>71</sup>. The products and services through the Telecommunication Companies are also specifically defined in these Rules for better provision of competition law. The companies of telecom sector are the companies which are licensed by the Pakistan Telecommunication Authority<sup>72</sup> referred in the Rules as the Licensee for removal of difficulties.

### Making Rules for Industry: The Electronic Media Competition Rules

The most adequate solution for this issue is to make competition rules for electronic media industry by defining the 'News Channels' as licensee, the Programmes aired on these channels as 'products' and Electronic Media Industry as 'relevant market'. Furthermore, the ILRB, ICP and Defaming Competitor clauses shall be added in the Electronic Media Competition Rules and shall be considered as 'anti-competitive practices' with reference to 'deceptive marketing practices'. ILRB shall be defined as "any information disseminated lacking reasonable basis by any licensee"; ICP as "any licensee involved in inconsistent comparison of programmes" and; Defaming Competitor as "any licensee directly or indirectly defaming competitor". By providing these definitions the regulators shall be able to resolve the difficulties to prohibit these 'deceptive marketing practices'. The Electronic Media Competition Rules should not be restricted to 'deceptive marketing practices' only, but should also covers all other aspects of competition practices in the Industry. As far as PEMRA is empowered through Ordinance to make rules regarding anti-competitive practices<sup>73</sup> and CCP is mandated to enforce competition, both the regulators are able to make rules; whereas PEMRA should make such rules with recommendation of CCP.

<sup>67</sup> << [http://www.cc.gov.pk/index.php?option=com\\_content&view=article&id=75&Itemid=116&lang=en](http://www.cc.gov.pk/index.php?option=com_content&view=article&id=75&Itemid=116&lang=en)>>

<sup>68</sup> Such as CCP appointed OFT Officers in *Al Haj Mian Liaquat Ali & Dr. Shazia Liaquat of Liaquat Hospital Lahore* (F. NO: 143/0FTILHOSPITALICCP/2013)

<sup>69</sup> OFT issued different policy notes and is involved in different advocacy campaigns: can be archived at <[http://www.cc.gov.pk/index.php?option=com\\_content&view=article&id=21&Itemid=123&lang=en](http://www.cc.gov.pk/index.php?option=com_content&view=article&id=21&Itemid=123&lang=en)>

<sup>70</sup> TAHIR AMIN "MoIT drafts own telecommunication competition rules" Business Recorder: Dated Feb 14, 2017

<sup>71</sup> *Supra* 9

<sup>72</sup> The Telecom Regulator in Pakistan, Pakistan Telecommunication Authority established under the Pakistan Telecommunication Reorganisation) Act of 1996

<sup>73</sup> *Supra* 61

## **CONCLUSION**

In conclusion, the most adequate solution for this issue is to make competition rules for electronic media industry by defining the 'News Channels' as licensee, the programs aired on these channels as products and electronic media industry as relevant market. Furthermore, the ILRB, ICP and defaming competitor clauses should be added in the Electronic Media Competition Rules and shall be considered as 'anticompetitive practices' with reference to deceptive marketing practices. ILRB should be defined as “any information disseminated lacking reasonable basis by any licensee”; ICP as “any licensee involved in inconsistent comparison of programs” and; Defaming Competitor as “any licensee directly or indirectly defaming competitor”. By providing these definitions the regulators would be able to resolve the difficulties to prohibit these deceptive marketing practices. The Electronic Media Competition Rules should not be restricted to deceptive marketing practices but should also covers all other aspects of competition law in the industry. As far as PEMRA is empowered through the Ordinance to make rules regarding anticompetitive practices 82 and CCP is mandated to enforce competition, both the regulators are able to make rules; whereas PEMRA should make rules with recommendation of CCP.