

2012 CLD 1762

[Competition Commission of Pakistan]

Before Ms. Rahat Kaunain Hassan, chairperson,

Abdul Ghaffar and Dr. Joseph Wilson, Members

1-LINK GUARANTEE LTD. AND

MEMBER BANKS: In the matter of

Files Nos.1/24/ATM Charges/C&TA/CCP/2011, 2(317) and (318)/AGR/EXM/REG/CCP/2012,
decided on 28th June,

(a) Competition Act (XIX of 2010) ---

--- S. 2(1) (K) --- Relevant market, determination of ---Association of Banks—First step in order to determine the relevant product market want to identify the relevant products/services that, were interchangeable or substitutable with the products/services at issue— Product/services which were at issue, in the present case, were services available electronic banking mode,which were; cash withdrawal service (ATM); Utility Bills Payment Services (UBPS) Inter-Bank Fund Transfer(IBFT) and online inter-bank payment between the customers of two different banks—Automated Teller Machine (ATM), was a computerized telecommunication device that would allow the customer/client of m bank in Pakistan to conduct financial transaction, such as cash withdrawal, non-financial transactions and other services (UBPS or IBFT) at any time in a public space, without the need of a cashier, human clerk or bank teller—All that a customer/client had to do was to invert a Plastic ATM—Cash withdrawal transaction done through an

ATM, could not be said to be substitutive with cash withdrawal transaction at bank, teller—Second sub-set of relevant product market was that of "UBPS", which was an electronic bills presentment and payment system that enables banks to deploy bill presentment and payment service through their electronic delivery channels including 'ATM'—UBPS eliminates the inconvenience encountered during the bill payment procedure by submitting bills in traditional banking hours, or standing in long queues—Third sub-set of relevant product market was the 'IBFT' service, which service enables card holders of a bank to transfer funds instantaneously from their account to pay any of the millions of accounts of other banks network across the country through delivery channels made available by the switch and eliminates the hassle of writing cheques, making demands drafts etc.; and also reduces the cost of transaction significantly—'IBFT' service is available round the clock—Services of ATM cash withdrawal, UBPS and IBFT, had distinct features, and conventional/traditional banking services, were not comparable to them in terms of interchangeability and substitutability—Even otherwise services provided by banks through a network/switch, had been consistently recognized and dealt with in other jurisdictions as a distinct relevant market— Enough evidence was available which had established that State Bank of Pakistan had played a significant role in fixing the 'UBPS' charges and also the modality of its collection.[pp. 1782, 1784, 1793, 1794] A, B, C & D

(b) Competition Act (XIX of 2010) ---

Ss. 4, 5 & 9 --- Prohibited agreement ---Association of Bank—ATM Service— Individual exemption—Criteria for individual and block exemption— Term 'prohibited agreement', was applied to a wide range of practices, whereby competitions co-ordinate among themselves to prevent restrict or reduce competition in the market---Most glaring example of prohibited agreement was co-ordination among the competitors to fix the price—

Such anti-competitive agreement aimed to reduce price competition, raise price or effect price in a favourable way for the undertaking (Association of Banks in the present case) involved and certainty had the object and effect of reducing competition in the market under S.4 of Competition Act, 2010, prohibited agreement could also be exempted under S.5 of the Act—To seek such exemption, an agreement had to fulfill the criteria/ conditions laid down in S.9 of the Act—Section 9 of the Competition Act, 2010, essentially raised the question that whether there were efficiency gains of a competition restrictive agreement; and benefits were passed on to the consumers; or whether its pro-competitive benefits outweigh its anticompetitive harms---in absence of a collective agreement to standardize interchange fee, some of the members (Banks could find incentives to increase their fee, while also expecting others to keep their fee low; in such situation of free riding, while their customers continued to enjoy ATM cash withdrawal service at cheap rates, the customers of other banks would generate greater revenue for them in lieu of a higher fee ---If that trend would continue, every bank which owed large ATM networks, would find it in its interest to raise its fee at par with others in order to avoid the situation, wherefrom riding was taking place at its expenses --- Free riding would threaten the very existence of the network by reducing, demand for such services and could result in fees much higher than that which was collectively set by the members “Banks --- individually negotiated inter-change fee could have the effects of hampering production and distribution while also apparently threatening the failure of a system that would contribute to economy, [pp. 1794. 1800] E & F

ATM Fee Anti-Trust Litigation on March 24, 2008 rel.

(c) Competition Act (XIX of 2010) ---

--- S. 5 --- Individual exemption --- Association of Banks---Utility Bill payment Services (UBPS) facility introduced under the direction on the Supreme Court and regulation of State Bank of Pakistan had proved beneficial for utility companies by increasing their bill collection at a reasonable fee charged to them; and also providing relief to

customers by providing them different delivery channels without bearing any cost— Such was a fit case for exemption-Parties could avail the benefit of exemption to avoid unnecessary work load for business as well as to lawfully reduce the cost --- In view of peculiar facts and circumstances involved in the case, Competition Commission would grant individual exemption subject to conditions.[pp. 1804, 1805, 1806] G, H & I

(d) Competition Act (XIX of 2010) ---

—Ss. 4,5 & 9 — Individual exemption, claim for— Association of Banks— Exemption provision for a horizontal price fixing agreement, could not be invoked except in the case of a joint venture; that too where fee was not fixed vis-a-vis customers and exemption was granted on the distinct grounds of efficiency—Price fixing in horizontal agreements, was viewed as having the object of preventing, restricting and reducing the competition and treated as per se anti competition — Undertaking (Banks) in the present ease, had been behind the imposition of uniform charge on the customers/account holders by banks—Undertaking (Banks)in the guise of seeking clarification in fact had requested the State Bank of Pakistan to allow banks to continue to have a fixed and uniform fee in the garb of request for standardized fee—Undertaking had gone beyond its mandated-Board of the undertaking had deliberated, discussed and resolved on commercial aspect such as customer/cardholder's charges --- Undertaking in terms of its activities and decision, had acted more as an association of its Member Banks and provided a forum, particularly to those who were represented on the Board to discuss, review/revise on matters of common interest; and then the member banks acceding to agreement; who implemented the deliberation undertaken by the Board— Such conduct of the undertaking and collective behavior of banks of charging uniform fee “off US” ATM cash withdrawal transaction fell in prohibited category in terms of S,4(1) and(2)(a) of

Competition Act, 2010-Vtolatton had been committed on part of parties concerned, in circumstances--- Horizontal fixing of uniform charge amongst the competitor had the object of preventing, restricting and reducing the competition—In banking regulations, competition issues seemed to have been neglected or overlooked; and such behavioral trends, prevented more efficient systems to emerge in the banking industry—If such bad behavioral trends were not condemned or deterred, same would have far reaching impact on over vulnerable economy—Member Banks were directed to cease and desist from conduct of collective decision making or behavior with respect to charging a uniform fee from customers for "off US" ATM cash withdrawal transactions; and to hold their Board meetings for deliberations and independent decision making with respect to much imposition of fee/charge from their customers, [pp. 1807, 1813, 1817, 1818] J, K, L &M

Kazim Hussain, Barrister, Nadir Burney and Mehvish Muneera for Messrs 1-Link Guarantee Ltd.

Liaquat Merchant, Mustafa Ahmed, Umar Adam, Mehmood Mandiwalla and Ms. Sana Iftikhar for Standard Chartered Bank Ltd., JS Bank Ltd., Bank Al-Habib, Kashif Microfinance Ltd., Bank Alfalah, Barclays Bank. Citi Bank. Allied Bank, Habib Bank. Faisal Bank. BurjBank, Summit Bank. Soneri Bank, Tameer BankMehmood Mandiwalla and Ms. Sana Iftikhar for Al Barka Bank. Bank of Punjab, United Bank Ltd. Askari Bank Ltd.NIB Bank Ltd., KASB Bank, Habib Metropolitan Bank Ltd.,Meezan Bank Ltd, National Bank Ltd., Silk Bank and Samba Bank.

Umair R. Vadria and Ms. Sanaa Ahmed for Bank Islami and Sindh Bank Ltd.

Sheikh Imtiaz Ahmed, Advocate Supreme Court for Bank of Khyber.

Muhammad Azam Zia and Raja Tariq for Dubai Islamic Bank Ltd.

Date of hearing: 3rd May and 12th June, 2012.

ORDER

This order disposes of the proceedings initiated under section 30 of the Competition Act, 2010 (the "Act") vide Show Cause Notices Nos. 35 to 50, 52. 55 to 67 issued to 1-Link (Guarantee) limited ("1-Link") and to member banks, namely;

- (i) National Bank of Pakistan
- (ii) Allied Bank Limited
- (iii) Habib Bank Limited
- (iv) Bank Al-Falah Limited
- (v) Askari Bank Limited
- (vi) Soneri Bank Limited
- (vii) NIB Bank Limited
- (viii) United Bank Limited
- (ix) Standard Chartered Bank Pakistan Limited
- (x) Faysal Bank Limited
- (xi) Bank Al Habib Limited.
- (xii) Albaraka Bank Pakistan Limited
- (xiii) Burj Bank Limited
- (xiv) Meezan Bank Limited
- (xv) Bank Islami
- (xvi) Khadim Ali Shah Bukhari Bank Limited
- (xvii) Habib MetroPatan Bank Limited
- (xviii) The Bank of Khyber
- (xix) Dubai Islamic Bank Pakistan Limited

- (xx) JS Bank Limited
- (xxi) Silk Brink Limited
- (xxii) The Bank of Punjab
- (xxiii) Citi Bank Pakistan
- (xxiv) Samba Bank Limited
- (xxv) Sindh Bank Limited
- (xxvi) Barclays Bank PLC, Pakistan Limited
- (xxvii) Tameer Microfinance Bank Limited
- (xxviii) Summit Bank Limited
- (xxix) Kashf Micro Finance Bank, hereinafter collectively referred to as ("Member Banks")

For *prima facie*, fixing the charges of ATM cash withdrawal services, Utility Bill Payment Services (UBPS) and Inter-bank Fund Transfer services (IBFT) along with the Exemption Applications (Files Nos.2(317) and (316)/Agr/EXM/Reg/ CCP/2012) filed by 1-Link under section 5 of the Act during the course of subject proceedings in respect of agreements for ATM cash withdrawal services and IBFT.

I. UNDERTAKINGS

2. 1-Link (Guarantee) Limited is a registered company, Incorporated under the Companies Ordinance of 1984. 1-Link provides the platform for the sharing of ATM network of the Member Banks. Hence 1-Link is an undertaking In terms of the definition of Undertaking provided under section 2(l) (p) of the Act.

3. Member Banks: Members of 1-Link are banking companies which transact the business of banking in Pakistan and are registered under the Banking Ordinance, hence are undertakings in terms of the definition of undertaking provided under section. 2(l)(p) of the Act.

II. BACKGROUND

4. The Competition Commission of Pakistan (the "Commission") took notice on its own of ATM cash withdrawal charges implemented by banks in Pakistan. It was observed that banks are charging' uniform .amount of Rs. 15 for ATM cash withdrawal transaction despite having non-uniform business dynamics regarding the; aforesaid service.

5. During preliminary fact finding it was found that in Pakistan ATM cash withdrawal service is provided by two ATM networks/switch namely: 1-Link and Mnet. The State Bank of Pakistan has mandated that all commercial banks in Pakistan, both foreign and domestic, have to become members of one or the other switch to provide ATM services to their own Customers as well as customers of other banks. Additionally,- these two switches have been interconnected in 2006, which means that a consumer holding an ATM or debit card issued by any bank in Pakistan may use any ATM located throughout the country.

6. 1-Link is a shared ATM network and owns and operates the largest representative shared financial services network of Pakistan. It is a consortium of 11 major banks of the country and operates through a Chief Executive Officer. The company has a Board, consisting of 11 Directors, one

Humble Supreme Court of Pakistan further held as follow:--

"It is a settled principle of law that valuable right accrues to the other side by lapse of time and each day's delay has to be —satisfactorily explained It was argued that valuable right of the petitioner is involved but this does not furnish a proper ground for condo nation of delay in civil matters.

In the light of the above authoritative pronouncement of law, the order passed by the learned Additional District Judge seems to be unexceptional and needs no interference on this score.

9. The contention of the learned counsel for the petitioner that the document forming basis of the suit Instituted by the respondent is not a promissory note as it is described as "Iqarnama" has no substance in the eye of law. The term "Iqarnama" means the document in which there is an assurance or an undertaking to pay a specified amount at a specific time to the lender. The definition of promissory note as given in section 4 of the Negotiable Instruments Act XXVI of 1881 is very important. Section 4 of the Act of 1881 is reproduced as below:--

"A "Promissory note" A "promissory note" is an Instrument in writing (not being a bank note or a currency-note containing an unconditional undertaking, signed by the maker, to pay demand or at a fixed or determinable future time a certain sum of money only to, or to the order of a certain person, or to the bearer of the instrument.

The term "Iqrarnama" Is exactly the vernacular translation of the term "promissory note" as it refers to an unconditional assurance or undertaking to pay a specified amount at a fixed or determinable future time to the other side. A copy of the document dated 11-7-2003 has been placed on the record of the Instant petition in which an unconditional Undertaking and assurance is Incorporated that an amount of Rs. 15,00,000 is payable by the petitioner and shall be paid to the respondent on two specific dates i.e. Rs.5,00,000 shall be paid till 31-12-2003, remaining Rs. 10.00,000 shall be paid till 30-6-2004 and the entire amount shall be paid till 31-12-2004. The contents of the document dated 11-7-2003

are fully covered by the definition of promissory note as defined in the Negotiable Instruments Act XXVI of 1881, The case-law reported as pir Saber Shah v. Shad Muhammad khan Member Provisional Assembly N.W.F.P and another (PLD 1995 SC 66), relied upon by the learned counsel for the petitioner does not help the case of the petitioner. It Is observed that the document dated 11-7-2003 is a promissory note, the cognizance of the suit bailed upon which has been rightly taken by- the learned Additional District Judge, Faisalabad and the entire proceedings have been conducted by the learned Additional District Judge in accordance with the relevant law The learned Additional District Judge, has rightly passed ex parte Judgment and B decree dated 11-11-2009 against the present petitioner. It is also observed that the learned Additional District Judge for valid .and lawful reasons dismissed the application of the petitioner under Order XXXVII, Rule 4 of C.P.C. In exercise of my revisional Jurisdiction under section 115 of C.P.C., I am not persuaded to interfere in the matter. The instant civil revision being devoid of any legal substance is accordingly dismissed in limine.

MH/M-119/L

Revision dismissed.