

Most Immediate

**Government of Pakistan
Ministry of Information Technology
(IT & Telecomm Division)**

No.1-32/2002-DL

Islamabad the 22nd January 2016

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**Mr. Javaid Basini,
Secretary General,
International Chamber of Commerce,
Karachi**

Subject: **INTERNATIONAL AND DOMESTIC BUSINESS AND INVESTOR'S
SERIOUS CONCERNS OVER THE PREVENTION OF ELECTRONIC
CRIMES BILL "BILL"**

Kindly refer to Pakistan International Chamber of Commerce letter dated 15th December 2015 on the subject noted above.

2. Detailed response to the concerns raised by ICC Pakistan on the Prevention of Electronic Crimes Bill are enclosed for your information.


(Asif Mahmood)
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CC:

1. Mr. Tariq Mahmood Pasha, Additional Finance Secretary/Special Assistant to Finance Minister, Finance Division, Room No.414, Block 'Q', Pak. Secretariat, Islamabad.
2. Mr. Muhammad Fazal-e-Majid, Director (Lit), National Crises Management Cell, Ministry of Interior, Islamabad w.r.to their U.O. No.2/1/2015-(Lit)-2659/Pt dated 30th December 2015.
3. SO to Secretary IT.

Subject: International and Domestic Businesses' and Investor's Serious Concerns over the Prevention of Electronic Crimes Bill ("Bill")

Reference letter received on the subject from ICC Pakistan National Committee (ICC Pakistan) communicating observations on the Prevention of Electronic Crimes Bill, 2015 (the PEC Bill) as concerns of the Businesses' and Investor's alongwith an itemized list of objections to PEC Bill. The communiqué, though based on general assertions, declares PEC Bill being inconsistent with the international best practices and the widely accepted convention on the subject such as the Budapest Convention. However, to the contrary, the PEC Bill has been proposed keeping in view the laws of developed legal jurisdictions and international conventions notably the Budapest Convention. The development of PEC Bill has been a product of multi-stakeholders' consultation over a period of more than 2 years. The mix of interveners contributing to the PEC Bill includes industry representatives, technical experts, legal experts and representatives from general public making a clause by clause analysis before the same was approved by the National Assembly Standing Committee and laid before the National Assembly. The National Assembly is yet to have a debate on the PEC Bill by the elected representatives of the people of Pakistan. Once it is passed by the National Assembly, the Senate, upper house of the Parliament would get another chance to get PEC Bill reviewed by its Standing Committee and later by the honourable Senators of the Senate of Pakistan. A chronology of steps undertaken to date in respect of the PEC Bill is attached as Annexure I.

The alleged lacunas, though not identified specifically by ICC Pakistan, have been adequately filtered during the process as mentioned above briefly and utmost care and attention has been adverted to align the new bill with current cyber crime related laws in the world while remaining within the Constitutional and legal framework of the country. Thus the fundamental rights to free speech, to do business etc. subject to law, ensured under the Constitution of Pakistan off-line are proposed to be preserved on-line, as well. It is, therefore, apparent that ICC Pakistan has not gathered its information on the PEC Bill from reliable sources and an incorrect representation has been forwarded devoid of critical legal understanding on the subject.

The clause based review of PEC Bill by ICC Pakistan, presenting a general commentary on 3 chapters of the PEC Bill with specific reference to some of its clauses, is also analysed below.

Chapter 1 In accordance with the standard pattern of laws, this section of the PEC Bill provides definition of terms used in its later sections. Being a critical area of every piece of legislation, the definitions part of the PEC Bill is in line with other applicable substantive and procedural laws of the country such as the Pakistan Penal Code, 1860 (XLV of 1860) and the Code of Criminal Procedure, 1898 (V of 1898) besides ensuring compliance with the Budapest Convention and other relevant international conventions. For example, the Budapest Convention provides 4 set of definitions which are also provided under the PEC Bill with the difference that PEC Bill's point of reference is an information system and not a computer system, since it is the information which is the center of attention in cyber-crimes and the same has also been defined in all its manifestations.¹

Chapter 2 The instant communication at the outset declares PEC Bill to be in contradiction with the Budapest Convention, whereas, following on the scheme outlined under the latter convention, itself, the PEC Bill aligns the provisions of the substantive penal laws of the country with the new penal provisions being introduced under the PEC Bill. Hence, clause 9 and 10 are reinforcing the provisions of Anti-terrorism Act, 1997 in order to combat terrorism by penalizing use of cyber space by proscribed entities and their supporters. It is also in line with Article 20 of International Covenant on Civil and Political Rights (ICCPR) which reads as follows:

Article 20

1. *Any propaganda for war shall be prohibited by law.*
2. *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*

¹ i) Computer System, ii) Computer Data – Information System and Data (PEC Bill), Service Provider and Traffic Data (Both addressed in almost similar manner)

Moreover, comments concerning clause 10 of the PEC Bill are also based on lack of proper understanding of the relevant definition of "critical infrastructure". According to the said definition of "critical infrastructure" an infrastructure shall be treated as critical infrastructure only when the Government had, in advance, designated the same as such in accordance with the prescribed rules. This provision is essential for ensuring that the infrastructures of public importance owned/managed by government or private sector can be protected.

With respect to clause 18 and 19, safeguarding the dignity and modesty of natural persons, PEC Bill attempts to preserve the sanctity of a natural person and *inter-alia* penalizes child pornography as required under Article 9 of the Budapest Convention. The said provision is also in line with Article 19 (3) of ICCRP which is reproduced as follows for ready reference:

Article 19

1. *Everyone shall have the right to hold opinions without interference.*
2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*
3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
 - (a) *For respect of the rights or reputations of others;*
 - (b) *For the protection of national security or of public order (ordre public), or of public health or morals.*

Furthermore, clause 18 relates to only "false information" and fair criticism, opinion or true assertions do not fall within the purview of this provision. Thus, it is not likely to have any impact on investigative work/journalism.

Cyber-Stalking covered under clause 21 considered similar legal provisions in Australian and Canadian jurisdictions etc. For addressing concerns regarding existence of lacunas highlighted in the above mentioned clauses without citing any instance of purported gap or legal vacuum, it may be placed on record that all material details are provided in these provisions and have been thoroughly reviewed by renowned legal experts of the country. Unfortunately, instances of hacking and defacement of publicly accessible websites and social networking platforms displayed hereunder, are totally misplaced and devoid of any remotest connection with the existing provisions of the PEC Bill. As otherwise, the relevant provisions of the PEC Bill should have been identified in the ICC Pakistan communication. Hence instead of dispersing baseless fear and mistrust in respect of PEC Bill, ICC Pakistan National Committee should have undertaken an independent analysis of its provisions. Being local chapter of an international forum, ICC Pakistan is duty bound to act upon credible sources of information or embark upon an unbiased examination of the subject, thus ensuring its highest degree of integrity and worthiness.

Chapter 3 Providing details of establishment of prosecution and investigation agency and procedural powers of investigation, Chapter 3 establishes basic principles of investigation and prosecution while remaining within the overall framework of the Code of Criminal Procedure. Hence apprehensions regarding clause 30 (powers of search and seizure under warrant only) are again misplaced and the incidence of search and seizure without warrant under 30(2) is only limited to clause 10 offences i.e., cyber-terrorism.

Article 34 – Powers given to PTA for on-line content management are again in line with the emerging legal framework on the subject such as Article 19 of the Constitution of the Islamic Republic of Pakistan that protects freedom of speech and media. The relevant clause 34 of the PEC Bill aims at structuring the powers of PTA and ensuring their exercise in a judicious and fair

manner. This provision further obligates PTA to develop proper legal framework for performing its functions strictly in accordance with the Constitution. Political comment or criticism on the government cannot be blocked under this provision.

Any person aggrieved by any order of PTA can file an appeal before the High Court or a tribunal constituted under Pakistan Telecommunication (Re-organization) Act, 1996. An aggrieved person may also file a writ petition under Article 199 of the Constitution before High Court against any order passed by PTA; whereas, similar powers are provided to the central government and law enforcement agencies in some other countries who may exercise such powers without any judicial scrutiny.

Therefore, it may not be correct to state that the PTA has been empowered to perform these functions without any judicial oversight. The Honourable Supreme Court of Pakistan has also directed Pakistan Telecommunication Authority (PTA) to check unlawful content on the internet. Moreover, **the Islamabad High Court (IHC) vide its order dated 20.01.2015 has also directed PTA to undertake actions in respect of objectionable material assessable through internet. This order is in response to the petition filed by a NGO and this instant order of the IHC affirms the above position, disregarding stance of the NGO with respect to PTA's powers to manage on-line content.** Thus anything contrary to the Constitution and applicable legal framework would otherwise be amenable to legal challenge and declared extra-constitutional.

Article 35 – Intermediaries The concerns raised under the instant clause also san substance and merit as the term “service provider” used in the PEC Bill, as due for debate in the National Assembly, is in fact in conformity with the Budapest Convention.² It is otherwise a widely used term under the current legal framework of Pakistan and the Telecom Industry. This may also be clarified that *service provider* covers intermediary, as well.

² Article I (c) of the Budapest Convention.

The perceived fears regarding non-application of indemnity granted to service providers under this clause are also unfounded as the jurisdiction of PEC Bill is limited to the territories of Pakistan. It may also be placed on record that the PEC Bill has been extensively discussed amongst the service providers and industry experts and all its up to date versions remained displayed on the website of the Ministry of IT and Telecom, from time to time. However, till to date no concern has been voiced against the instant clause exhibiting a tacit approval of the indemnity afforded to service providers and intermediaries, alike.

The scope and extent of the lengthy deliberations on PEC Bill can be gauged from the fact that initially, the Government consulted the stakeholders, civil society and general public while drafting PEC Bill. Later on, the National Assembly Standing Committee for IT also consulted all the stakeholders. Some representatives of NGOs and stakeholders formed an alliance with the name of Joint Action Committee (JAC) who provided an alternate draft of PEC Bill. Each and every provision of the draft provided by JAC was also discussed while their lawyer participated in a meeting of the Standing Committee sub-committee. Various provisions from the draft provided by JAC were also incorporated in the PEC Bill and some other provisions were amended to accommodate the amendments proposed by JAC. Thus PEC Bill is the product of an exhaustive consultative process both by the Government and later by the National Assembly.

The Government of Pakistan would take this opportunity to draw your attention towards certain recent developments such as WISIS+10 event wherein countries have been urged to take steps in their jurisdictions for countering cyber terrorism and other crimes committed in the cyber space thus safeguarding rights under the United Nations Universal Declaration of Human Rights, 1948. Similarly, Cyber Violence Against Women and Girls Report recently released by the United Nations Broadband Commission, reveals that almost three quarters of women online have been exposed to some form of cyber violence, and urges governments and industry to work harder and more effectively together to better protect the growing number of

women and girls who are victims of online threats and harassment.³ ICC Pakistan National Committee is expected to appreciate the continued efforts undertaken by the Government for securing on-line freedom of fundamental rights guaranteed under the Constitution of the Islamic Republic of Pakistan, augmenting global efforts for a secured cyber space congenial for supporting businesses and e-commerce.

³ <http://www.unwomen.org/en/digital-library/publications/2015/9/cyber-violence-against-women-and-girls#sthash.r2DF9lwJ.dpuf>