

COMPETITION COMMISSION OF PAKISTAN

ENQUIRY REPORT

(Under Section 37 of the Competition Act, 2010)

**IN THE MATTER OF ALLEGED INFRINGEMENT OF SECTION 4 OF COMPETITION
ACT, 2010 WITH RESPECT TO PROVISION OF AIRCRAFT FUELING SERVICES
AT JINNAH INTERNATIONAL AIRPORT KARACHI**

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Dated: February 12, 2019

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BACKGROUND:

1. This enquiry report is prepared pursuant to a formal complaint lodged before the Competition Commission of Pakistan (the "Commission") by M/s. Hascol Petroleum Limited ("Hascol") against Civil Aviation Authority ("CAA") under Regulation 17(2) of the Competition Commission (General Enforcement) Regulations, 2007 (the "Regulations"). Hascol, in its complaint has alleged that CAA is violating the provisions of the Competition Act, 2010 (the "Act") by not allowing it to set and operate fueling facility and awarding exclusive rights to Shell Pakistan Limited ("Shell"), Pakistan State Oil Company Limited ("PSO") and Total Parco Pakistan Limited (formerly Caltex Oil Pakistan Limited ("Total")) for refueling aircrafts at Jinnah International Airport, Karachi ('JIAP').
2. In 1994 CAA entered into a sale agreement with Shell, PSO and Caltex for supply of fuel to aircrafts through a Hydrant System installed by it at JIAP. A lease agreement for land on which fuel hydrant system was installed was also entered into between CAA and the referred parties for a period of 30 years. Hascol is aggrieved that CAA is not allowing it to install and operate its own facility due to exclusivity granted to Shell, PSO and Caltex to supply fuel at JIAP for a period of 30 years.
3. Keeping in view the submissions made by Hascol through formal complaint filed under Section 37 (2) of the Act read with regulation 17(2) of the Regulations in respect of alleged violation of the Act by CAA, the Commission exercising its power under Section 28(2) of the Act appointed Mr. Qasim Khan (Deputy Director), Ms. Maliha Quddus (Deputy Director) and Mr. Irfan ul Haq (Deputy Director) as enquiry officers (hereinafter the "Enquiry Committee") to prepare and submit a report in the matter.
4. For the purpose of this enquiry, letters were written to CAA for their comments and subsequently a meeting was also held with the Complainant and CAA for further clarity in the matter. Letters were also written to PSO, Shell and Total (formerly Caltex) for their comments. Contents of the complaint and responses received are summarized hereunder:

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Complaint

5. Hascol in its formal complaint (Annex A) made the following submissions:
- i. An agreement of sale was entered into between CAA as the Seller and Shell, PSO and Caltex as the Purchaser on 7th April, 1994 ('1994 Agreement'), for purchase of fuel hydrant system constructed by CAA, which specifically refers to the underground hydrant lines connected from depot to fuelling bays where aircrafts are parked. The agreement was entered into between the referred parties for a period of 30 years and places prohibition on 3rd parties other than PSO, Shell or Caltex to supply fuel through the Fuel Hydrant System at JIAP.
 - ii. Before the sale of hydrant facility, fuel was supplied under an agreement known as Eastern Joint Hydrant Agreement (' the 1961 Agreement') which allowed third parties access to the system upon payment of a throughput charge.
 - iii. In 2006 Hascol requested CAA for allotment of land measuring 8500 sq. yards for establishing aircraft fuel storage facility and fuel supply through bowsers at JIAP. Despite, receiving no response from CAA for its request, Hascol continued to pursue the matter by writing to CAA in 2009 and 2010. During this time a meeting was held with CAA, which proved to be ineffective.
 - iv. In 2010, CAA invited Expression of Interest (EOI) from companies capable of supplying and establishing storage facility of aviation fuel at JIAP. In response to the mentioned EOI, Hascol submitted all required documents to CAA, following which Hascol did not receive any reply. Upon continuous follow-up and approaching Ministry of Defense and Aviation Division

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regarding the establishment of fuel facility at JIAP, Hascol was informed that Eastern Joint Hydrant Depot and Fuel Hydrant System are headed by Shell under the joint venture with PSO and Caltex, having exclusive rights to the system due to which land cannot be leased. It was also informed that Hascol may approach Shell for this purpose.

- v. Hascol approached Shell to express its interest for supply of fuel using Eastern Joint Hydrant Depot on a suitable throughput charge and by using its own manpower and Aviation Browsers. Till date, Hascol has not received any response from Shell.
- vi. Exclusive rights granted by CAA to Shell, PSO and Caltex is in violation of Section 4 of the Act as none of the parties sought exemption from the Commission. *“The exercise of such conduct by CAA in addition to Section 4 is also against the spirit of Section 3 of the Act, particularly subsection 3(g) and (h) which relates to excluding any other undertaking from the production, distribution or sale of any goods or the provision of any service and refusing to deal, respectively”.*
- vii. It is prayed that the Commission may require (i) CAA to allot land to Hascol at Jinnah international Airport for setting up and operating a fueler system to provide fueling services to aircrafts in accordance with applicable requirements and direct CAA to not repeat such practice in any other geographical market in Pakistan, (ii) annul the agreement of sale or require the parties to amend the same in relation to the exclusivity practiced over 20 years on grounds of violation of Section 4 of the Act (iii) Prohibit CAA, PSO, Shell and Caltex/Chevron from continuing with the exclusivity conferred under the agreement of sale subject to grant of exemption for the same to safeguard third party rights.

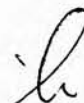
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Correspondence

6. A copy of the complaint was forwarded to CAA to seek their comments thereon to which a reply was received (Annex B) vide letter dated September 27, 2017. CAA strongly rebutted the allegations made in the complaint on the following grounds.
- i. Complaint is against the rationale of law and justice for the reason that Hascol is demanding allotment of land without any competitive process, which is evident violation of the Competition Act, 2010.
 - ii. The agreement of sale entered into between CAA with consortium of Shell, PSO and Caltex regarding fuel hydrant system was awarded after due competition.
 - iii. That the CAA invited Expression of Interest (EOI) on 17th July, 2010 for JIPA Karachi, keeping in view the future demand of fuel, where it was expressly mentioned that CAA may not accept/cancel any or all EOI without any reason. Thereafter the EOI was cancelled, and now the said system is providing required fuel, as per its demand. Whenever the demand so requires, a new EOI for JIAP will be floated.
 - iv. As per CAA Land Lease Policy 2012, the authority cannot allot any portion of land without open auction, open bidding or press tenders after pre-qualifying firms as may be required through wide publicity in the press or media. Complainant's request therefore cannot be entertained without prior competition. Even otherwise, Most of the CAA land parcels at JIAP are mortgaged under Sukook by Federal Government of Pakistan, hence land lease on long term basis cannot be granted.

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- v. The complainant was repeatedly informed that the subject facility is being run by a consortium comprising Shell, PSO and Caltex who have exclusive rights regarding the mentioned facility for a period of 30 years with effect from 19th August 1993. The complainant was however encouraged to participate in any such tender proceedings in future.
 - vi. That CAA always follows (EOI/Open tender/bidding etc) for establishing a new facility or extension in an existing one. EOI was published in 2010 due to a fuel shortage problem at that time, however the facility was extended to cater to the same at JIAP Karachi and since then there has been no complaint from any customer.
7. Comments received from CAA were forwarded to Hascol to seek their comments. Hascol vide letter dated October 12, 2017 submitted a detailed rebuttal (Annex C). Summarized comments of Hascol are hereunder:
- i. Hascol denies CAA's assertion regarding its alleged expectation of being allotted land without any competitive proceedings. Hascol in its representation has prayed that the Commission may 'require CAA to allot land to Hascol ... in accordance with all applicable requirements'. Rather Hascol is willing to participate in an open bidding process to compete with the existing and new market players. In 2010, when CAA invited expression of interest for supply of fuel, Hascol had submitted its formal proposal, however CAA cancelled that EOI. Only reason of refusal for the allotment of land maintained by CAA was that Shell, Chevron and PSO have exclusive rights to the Fuel Hydrant System. Emphasis on a bidding process and land mortgage under sukuk are fresh contentions, never mentioned in earlier years when Hascol attempted to negotiate with CAA. Relation of Sukuk and restriction on leasing land has not been substantiated by CAA through any explanation/evidence.

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- ii. CAA has entered into an exclusive agreement with PSO, Shell and Caltex for the supply of fuel through Hydrant System that bars any other suppliers to supply fuel through the hydrant system and to the knowledge of Hascol, no exemption has been sought for the exclusivity clause of the agreement from the Competition Commission. If CAA is admitting to the exclusive nature of the Agreement, then by that means the agreement impedes competition and stands void. While an exemption should be sought for the agreement of sale to comply with provisions of law, Hascol's primary interest has been to persuade CAA for allotment of land to it for refueling of aircrafts through its independent fueler system.

- iii. Problem of fuel shortage arises at least twice a year and has an adverse effect on the airline industry stakeholders. All the suppliers of fuel are dependent on the Pakistan Refinery Limited, whereas Hascol is not. With respect to demand for aviation fuel, if there is no demand, Hascol would suffer the loss and not CAA. CAA through its conduct is obstructing foreign investment and an alternate choice for its customers.

- iv. Pertaining to the supply of fuel, Clause F(ii) of the Eastern Joint Hydrant agreement allows third parties, subject to certain express conditions, to make a request to use the hydrant system. However, the consortium has been exercising exclusive right over the Eastern Joint Hydrant Depot and CAA has endorsed this position by not even allowing any third party to use the same for storage of fuel. Hascol, in any case is not interested in the use of depot and only wrote to Shell requesting use of the same on insistence of CAA.

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Meeting with the CAA and Hascol

8. A meeting with the representatives of Hascol and CAA was held to further understand the matter. Hascol representatives reiterated the arguments made in the Complaint filed with the Commission.
9. In response to the queries raised by Hascol, representative of CAA made the following arguments:
 - i. CAA cannot grant any facility to any entity without planning, need and competitive process. Hydrant Agreement entered in 1961 is not valid any more for the reason that CAA has entered into sale agreement with the purchasing parties in 1994 executed through due competitive process. Therefore, terms and conditions of the sale agreement are applicable.
 - ii. Current sale agreement was entered into between all the parties operational at the time and when competition law was not in place. Term time of the agreement was granted in accordance to the CAA policy and keeping in view the magnitude of the project.
 - iii. After the expiry of sale agreement a new tender for facility will be floated after due bidding process and policies prevailing at that time.
 - iv. Total Parco has purchased the shares of Caltex and is currently engaged in the supply of fuel along with other two players. Therefore stating that the facility is run by two payers is false. Currently there is no need for new facility as current demand is being fulfilled by existing players.
10. In response to the concerns raised during the meeting held with Hascol, Enquiry Committee sent a detailed questionnaire to CAA for their detailed response (Annex D).

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11. In response to the queries raised a detailed response was received from CAA vide letter dated October 31st, 2017 (Annex E). Para wise summaries of the submissions are as under.

- i. Regarding the status of Eastern Joint Hydrant Agreement, entered into between M/s Pakistan Burmah Shell Limited (now Shell), and its partners (ESSO & Caltex), CAA apprised that before its inception in 1982, all matters were dealt by the department of civil aviation under MoD, however old record reveals lease agreements in this regard between 1959 to 1979. Between 1979 and 1992 there was no formal agreement in place. After establishment of new airport and shifting of operation from old terminal to New Karachi Terminal Complex (QIAP) in the year 1992, a new hydrant facility was constructed by CAA that was sold to Shell PSO and Caltex through 'Agreement of Sale' made on 7th April 1994.
- ii. Clause-5 of the interim sale agreement specifically mentions that a sale agreement will be entered for Fuel Hydrant System between CAA and Shell, PSO and Caltex.
- iii. CAA did not enter into the process of tendering for the reason that sale was in result of negotiations between CAA and Oil Companies operating at that time.
- iv. As per Clause-4 of interim sale agreement and clause-1 of sale agreement, a separate lease agreement between the seller and purchaser was to be entered for area comprising 1514.72 square yards of land under the apron through which Fuel Hydrant System passes.
- v. The land under Fuel Hydrant System was property of CAA.
- vi. Current lease agreement is valid up till May 20, 2022. There is no 'right of first refusal (ROFR)' clause in the lease agreement. Under clause 7 of the

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lease agreement, the lessee (Shell, PSO and Caltex) is bound to peacefully hand over the premises along with all fittings, fixtures free of all costs.

- vii. Three months prior notices will be served to the concerned before the expiry of lease agreement. Simultaneously, tenders will be floated through open competitive bidding as per lease policies of CAA prevailing at that time.
- viii. Mechanism of new lease will be determined at the time of expiry as per approval of competent forum/authority and in accordance with CAA policies prevailing at that time.
- ix. PSO, Shell and Caltex are bound to peacefully handover the premises along with fittings and fixtures free of cost. Suppliers operating will have no preference in re allotment of land or fuelling services.
- x. This query pertains to the Oil Marketing Companies.
- xi. Allama Iqbal International Airport, Lahore and JIAP Karachi are being operated through Fuel Hydrant Systems. While aviation fuel is supplied through tankers/refuellers/bowzers at Benazir Bhutto International Airport and Bacha Khan International Airport, Peshawar.
- xii. OMCs are engaged in the provision of aviation fuel services to aircrafts/airlines. At new Islamabad International Airport, an agreement is entered between CAA and Joint venture comprising of Attock Petroleum and PSO on fuel throughput charges for a period of 30 years.
- xiii. Apart from JIAP Karachi and AIIAP Lahore, the other airports are joint user where land also belongs to PAF i.e. BBIAP Islamabad, QIAP Quetta, and BKIAP Peshawar.

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xiv. Land at Jinnah International Airport cannot be allotted to Hascol for the reason that direct request by Hascol before CAA for allotment of land instead of taking part in competitive bidding process violates competitive process. As per CAA policies in vogue and law of the land, the Authority cannot allot any portion of land without open auction, open bidding or public tenders. Current facilities are catering the customers satisfactorily and there is no demand/supply gap.

xv. Installation of alternative systems in the presence of existing facility requires assessment and feasibility study keeping in view the operational, financial aspects and regulations and no such feasibility is undertaken as there is no demand/supply gap.

xvi. No airport in Pakistan is using alternative system simultaneously. As far as international practices are concerned, countries are administering in accordance to their own aviation policies in place.

xvii. 1510 acres of CAA land at Jinnah International Airport is mortgaged under Sukuk to Pakistan Domestic Sukuk Company Limited as Agent of the Financial Institutions/Certificates holders. Area under Sukuk includes the airside area of Jinnah International Airport. Portion of available land which is not mortgaged under Sukuk could not be used for aviation fuel facility as the same is on land side.

xviii. Demand/supply of fuel varies from time to time. As per figure received from companies operating the hydrant system, 152 million liters of fuel was supplied through the Hydrant system from January 2017 to June 2017 .

12. The above Comments of CAA were forwarded to Hascol to seek their comments in the matter. Reply received from Hascol (Annex F) vide letter dated 17th November 2017 is summarized as under:

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- a. Hascol is willing to participate in the open bidding process for the allotment of land and plans to build its own storage facility and related infrastructure to supply fuel through fueler trucks instead of using the hydrant facility, similar to fueling services carried out at Benazir Bhutto International Airport, Islamabad and Bacha Khan International Airport, Peshawar.
- b. Despite the existence of an alternative method of fueling at other airports, it is unclear why CAA is not allowing the same system at Jinnah International Airport, Karachi. Hascol is willing to invest in the existing infrastructure, for instance, hydrant bays at Karachi Airport have been abandoned for a long period now.
- c. The problem of fuel shortage occurs at least twice every year and is a persistent issue for the reason that companies supplying aviation fuel are using the same source i.e. Pakistan Refinery Limited, whereas Hascol plans to supply fuel in collaboration with Vitol Aviation. Foreign investment made through Hascol would prove beneficial in creating a competitive environment and minimizing risks associated with shortages.
- d. CAA has failed to give relevant reasoning as to whether alternative fueling systems may be used at the airports. Status of fuel Hydrant System after the expiration of lease agreement in 20-5-2022 is also not addressed by CAA in its reply. Lease agreement for depot has been expired; still PSO and Shell are operating on the depot land without paying premium amount payable.
- e. Documents presented by CAA in support of mortgaged land does not present complete picture regarding which part of the airport has been mortgaged. Use of term airport has been vaguely used and can indicate to any airport land in Pakistan. Furthermore, CAA has failed to establish

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whether any right of Government to lease land under the Purchase Agreement has been hindered.

13. Letters were also written to PSO, Shell and Total in the matter (replies received from them are placed at Annex G1, G2 and G3 respectively). The position of PSO and Total viz. the matter is as follows:

“Since, the Participants owned and built the Fuel Farm, it is their discretion whether or not to allow any other entity to use the same. As regards the Fuel Hydrant, since, the same was lawfully purchased by the Participants for consideration, as with the Fuel Farm, it is owned by the Participants. Hence, notwithstanding any further right given by the CAA to them, it is at their discretion whether or not to allow any other party to use the same¹”.

ISSUES:

14. Based on the foregoing facts the Enquiry Committee pursues the following line of enquiry:
- a. Whether the Agreement of sale of Fuel Hydrant System (‘1994 Agreement’) entered into between CAA (as the seller) and PSO, Shell and Total formerly Caltex (as the purchasers) falls within the definition of a prohibited agreement in terms of Section 4 of the Act.
 - b. Whether the 1961 Agreement for the ownership and operation of storage and hydrant facilities between what was then Burmah-Shell, Standard Vacuum Oil Company incorporated and Caltex Oil Limited which are now Shell Pakistan Limited, Pakistan State Oil Company Limited and Total Parco Pakistan Limited, is in prima facie contravention of Section 4 of the Act.

¹ Para 8 of Total’s reply quoted. Also refer to para II(v) of PSO’s reply.

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UNDERTAKINGS:

15. Section 2(1)(q) of the Act defines an undertaking as follows:

'means 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'.

16. **Hascol:** Hascol is a publically listed Oil Marketing Company ('OMC') incorporated under Companies Ordinance 1984 in the year 2005 for purchase, storage and supply of petroleum products and is an undertaking defined in clause (q) of sub-section (1) of Section 2 of the Act.
17. **PSO:** PSO is a government owned and controlled OMC engaged in the storage, marketing and distribution of various petroleum products in Pakistan and is therefore, an undertaking defined in clause (q) of sub-section (1) of Section 2 of the Act.
18. **Total:** Total (formerly Caltex) is an OMC engaged in the marketing and distribution of various petroleum products and is an undertaking defined in clause (q) of sub-section (1) of Section 2 of the Act.
19. **Shell:** Shell is an OMC engaged in the marketing and distribution of various petroleum products and is an undertaking defined in clause (q) of sub-section (1) of Section 2 of the Act.
20. **CAA:** CAA is a public sector autonomous body established through the Pakistan Civil Aviation Ordinance, 1982 ('PCAA Ordinance') and working under the Federal Government of Pakistan through Aviation Division Cabinet Secretariat. Since the 1994 Agreement in its very essence is a concession agreement that involves the economic activity of refueling of aircrafts and through awarding this

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contract by means of the 1994 agreement, and having control over lease of land for the said activity, CAA has control over the provision of service in question, therefore CAA is an undertaking as per Section 2(1)(q) of the Act.

RELEVANT MARKET:

21. Section 2(1)(k) of the Act defines 'relevant market' as:

*the market which shall be determined by the Commission with reference to a **product market** and a **geographic market** and a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products' characteristics, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those areas;*

22. This particular matter refers to the provision of aircraft refueling services at JIAP Karachi. From discussions with the parties the Enquiry Committee was informed that at present in Pakistan there is one standard/quality of jet fuel i.e. Jet A1 being used for commercial aircraft. Airport fuel infrastructure has three basic components: Fuel Supply, Fuel Storage and Fuel Delivery (Into Plane). The Fuel Supply component is delivery of fuel from the refinery to the airport which in the case of JIAP Karachi is through a dedicated pipeline. The fuel delivered from the refinery is stored in large storage tanks also known as a fuel farm. This is the upstream activity with respect to the third component i.e. pumping this fuel into the aircraft. The latter is done through two known methods, Fuel Hydrant system or tankers/refuelers/bowzers.

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23. JIAP Karachi has a Fuel Hydrant System, which is a network of pipes under the apron connected to the fuel farm. Fuel is pumped from the fuel farm through the hydrant system to refueling pits at aircraft parking spots around the terminal and is loaded to the aircraft using hoses hooked up between the aircraft and the fuel pits (there are special trucks for this containing the connectors and control systems, delivery counters, etc.). At large international airports, aircraft can be refueled either by fuel trucks or using dedicated underground pipeline systems. According to discussions with CAA in infrequent cases (cargo or charter planes) when an aircraft is parked away from the fuel pits, tankers/refuelers/bowzers supply fuel directly to the aircraft. However, the primary mode of fuel supply for JIAP is through the hydrant system.

24. From the foregoing it appears that the relevant product market is the supply of jet fuel to aircraft. That for the purpose of this enquiry appears to consist of two submarkets that of supply of fuel into the tank farms (upstream activity) and supply of fuel into the plane (downstream activity). With respect to determination of the geographic market in terms of Section 2(1)(k) of the Act the Enquiry Committee notes that since the conditions of competition in the matter at hand are governed by the 1961 and 1994 agreement which are only applicable for JIAP, it appears that the relevant geographic market for the purposes of this enquiry is JIAP Karachi. Therefore, the relevant market appears to be a composite of the markets for supply of jet fuel into the fuel farm and supply of fuel into the aircraft at JIAP Karachi.

ANALYSIS:

a) Whether the Agreement of sale of Fuel Hydrant System ('1994 Agreement') entered into between CAA (as the seller) and PSO, Shell and Total formerly Caltex (as the purchasers) falls within the definition of a prohibited agreement in terms of Section 4 of the Act.

25. We now proceed to determine whether the 1994 Agreement entered into between CAA (as the seller) and PSO, Shell and Caltex now Total (as the purchasers) falls within the definition of a prohibited agreement in terms of Section 4 of the Act.

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26. Section 4 defines a prohibited agreement as follows:

Prohibited agreements.— (1) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings, shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5.

(2) *Such agreements include but are not limited to-*

(a) *fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any service;*

(3) *Any agreement entered into in contravention of the provision in sub-section (1) shall be void.*

27. Before proceeding further it would be pertinent here to establish certain facts with respect to the matter at hand. The 1994 Agreement was executed on 7th April, 1994 and covers the hydrant fueling system i.e. the system of underground pipes. The 1994 Agreement does not cover the land upon which the system was constructed for which a separate lease was signed between CAA and the Purchasers. Clause 1 of the 1994 Agreement states:

“This does not include any rent for use of the CAA land in connection with the System for which a separate Lease Agreement will be finalized between the parties to this Agreement which shall be read along with this Agreement. This aforesaid Lease Agreement shall be in accordance with Clause 4 of the Interim Sale Agreement executed between the Seller and Purchasers on 19th August, 1993 as enclosed in Appendix ‘F’”

Clause 4 of the Interim Sale Agreement reads as follows:

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“That a lease agreement for 30 years will be executed between the Seller and the Purchasers for the 13,632.50 sq. ft (1,514.72 sq. yd) of land under the apron through which the Fuel Hydrant System passes...”

28. Therefore, a separate lease agreement was signed between CAA and the Purchasers for the use of CAA land. Clause 2 of the Lease Agreement states that the term of the lease is 30 years from the 20th of May, 1992. CAA vide its response to the Enquiry Committee dated 31st October 2017, has also noted that the lease in question would expire on 20th May, 2022. Upon expiration of the lease as per Clause 7, of the Lease Agreement, the lessee is bound to peacefully hand over the premises along with all fittings, fixtures free of all costs.
29. No substitutes/alternate systems are available for provision of fueling services. According to CAA alternate systems are not feasible due to multiple reasons one of them being that the hydrant system is state of the art being used at airports worldwide and is sufficient to cater to the demand of aircrafts at JIAP Karachi. Tankers/refuellers/bowzers are however, used at smaller airports such as Peshawar, Quetta, Sukkur, Multan and at JIAP in infrequent cases when a charter or cargo plane is parked away from the terminal. As per CAA, use of tankers/refuellers/bowzers entails a separate protocol in terms of ramp congestion, fire safety and security and would not be feasible when a state of the art hydrant system that suffices the fuel requirement is already in place. Based on a research paper² on optimization of aircraft refuelling, Hydrant refueling, is considered to be an optimal fuelling method as it increases safety, shortens the aircraft turnaround time and cuts the overall costs. However, at smaller airports, implementation of this system can lead to high investment costs. Internationally 90 percent of large airports and 67 percent of medium sized airports deploy a hydrant system³. The research also took a sample of airports and found that all the airports with a fuel throughput higher than 420 million liters/year had installed a hydrant system, whereas no airport below 144 million liter/year had one. This seems to

² <http://yadda.icm.edu.pl/baztech/element/bwmeta1.element.baztech-0269da72-0918-4697-b410-a83b9532107e;jsessionid=777DEA2F217F704277C95962A2B5B3AE>

³ Commercial Aviation –Fueling Fundamentals, Airports Council International <https://www.aci-na.org/sites/default/files/straub.chris-hydrant.fueling-saturday.pdf>

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imply two things: (i) Airports only find installation of a fuel hydrant system practically feasible when a certain minimum threshold of fuel uplift is being carried out, for instance in the research study no airport with fuel uplift below 144 million/liter has installed a hydrant system (ii) a fuel hydrant system would seemingly suffice the fueling requirement of an airport with fuel uplift below 420 million liter/year. As per information from CAA, fuel uplift only in the six months between January and June 2017 amounted to 152 million litres at JIAP Karachi. Assuming constant factors and extrapolating it to one year would mean fuel uplift of roughly 300 million litres at JIAP Karachi.

30. The question of whether the 1994 Agreement is a prohibited agreement under Section 4 of the Act is due to the exclusivity granted, to PSO, Shell and Total, for use of the hydrant system under Clause 3 which is reproduced below:

“PURCHASERS BUSINESS RIGHTS

The seller undertakes that no company other than the Purchasers shall be permitted to supply fuel of any kind through the above said Fuel Hydrant System at Karachi International Airport”.

31. CAA has submitted that at the time the hydrant system was constructed in 1992-3 there were only 3 OMCs operational in Pakistan i.e. PSO, Total and Shell. No tender proceedings were held however the OMCs were invited by CAA to enter into negotiations for purchase of the hydrant system and the subsequent 1994 Agreement was approved/sanctioned by the competent authority.
32. It is noted that since the 1994 Agreement was executed there are now 22 licensed OMCs in Pakistan with 11 OMCs that have licenses for operations nationwide⁴ altering the conditions of competition in the relevant market.

⁴ ‘Oil Marketing Companies -- Sector update, JCR-VIS, October 2017
<http://jcrvis.com.pk/docs/OMCs%20201710.pdf>

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33. As per submissions/discussions with the parties, airlines are approached by OMCs to negotiate for fuel contracts or airlines may tender for the same. PSO and Total have stated that the arrangement between the three companies is purely operational in nature and that they compete with each other for the commercial aspects of the business i.e. independently approaching airlines and offering competitive prices. However, it appears that other OMCs cannot participate for this business due to the exclusive nature of the 1994 Agreement which forecloses the market for other entrants desirous of supplying fuel to airlines operating out of JIAP Karachi.
34. Based on the foregoing it appears that the 1994 Agreement in general and Clause 3.1 in particular confers exclusive rights on PSO, Total and Shell as operators for use of the Hydrant Fuel System at JIAP Karachi preventing competition with other OMCs willing to supply jet fuel to airlines.
35. Therefore, the 1994 Agreement is a *prima facie* prohibited agreement in terms of Section 4(1) read with 4(2)(a) of the Act as it has the effect of creating an entry barrier and restricting competition in the relevant market.
36. As per record available with the Enquiry Committee, none of the parties to the 1994 Agreement have either applied for or been granted an exemption for the said agreement under Section 5 read with Section 9 of the Act.

b) Whether the 1961 Agreement for the ownership and operation of storage and hydrant facilities between what was then Burmah-Shell, Standard Vacuum Oil Company incorporated and Caltex Oil Limited which are now Shell Pakistan Limited, Pakistan State Oil Company Limited and Total Parco Pakistan Limited, is in prima facie contravention of Section 4 of the Act.

37. Use of the fuel farm (i.e. the fuel storage tanks connected to the refinery via a pipeline) is governed through the 1961 Agreement. The 1961 Agreement was executed on 28th October 1961 and is for an indefinite period of time. It is signed between PSO, Caltex (now Total)

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and Shell and is for the ownership and operation of storage and hydrant facilities at Karachi Civil Airport which was also constructed by the three companies. Clause F (ii) of the 1961 Agreement allows third parties to use the 'system' upon payment of a throughput charge. This agreement came about before the inception of CAA when all such matters were dealt by Department of Civil Aviation working under the Ministry of Defence.

38. According to the response submitted by PSO and Total (vide letters dated 5th June 2018 and 4th June 2018 respectively) the 1961 Fuel Farm was and is entirely jointly and equally owned by PSO, Total and Shell. After the construction of JIAP (adjacent to the Karachi Civil Airport) the hydrant system mentioned in the 1961 Agreement became redundant. Based on the foregoing it appears that the 1961 Agreement pertains to the Fuel Farm that is now connected with the Fuel Hydrant System being operated under the terms of the 1994 Agreement.
39. Similar to the 1994 Agreement, the question of whether the 1961 Agreement is a prohibited agreement under Section 4 of the Act is due to the exclusivity granted through the latter Agreement to PSO, Shell and Total, for the ownership and operation of the Fuel farm facilities for an indefinite period of time under its clause F):

"Duration

This Agreement will become effective from the 15th May, 1961, and will remain in force for an indefinite period.."

40. Whereas in 1961, there were only 3 OMCs operational in Pakistan now known as PSO, Total and Shell and the 1961 Agreement itself states that the participants were required by the pertinent Government Authority to cooperate in the joint operation of airport storage and hydrant facilities at the Karachi Civil Airport, things have changed since then. Since the start of the fuel hydrant system, its mechanism and that of the storage fuel farms have been merged as upstream and downstream functions.

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41. Even though clause F(ii) of the 1961 Agreement states that:

In the event that any individual group or private corporation duly licensed by the local government to do business at Karachi Civil Airport, and able to deliver fuel of the proper quality into airport storage tanks, makes formal request to use this hydrant system for the purpose of supplying aviation fuels into aircraft of customers who have directly contracted with the requesting group or private corporation to be supplied with aviation fuel at Karachi Civil Airport, the requesting group or private corporation shall be permitted to do so on payment of throughput charges to the Operating Company, acting on behalf of the participants or by capital participation at the discretion of the majority of the original participants provided that the hydrant system has, at the time, adequate capacity.

42. The merging of the activities of delivering fuel into airport storage tanks and refueling through the fuel hydrant system, the latter under the terms of the 1994 Agreement, and the condition therein under the head of 'Purchasers Business Rights', that *no company other than the Purchasers shall be permitted to supply fuel of any kind through the above said Fuel Hydrant System at Karachi International Airport*, effectively prohibiting any company other than the Purchasers i.e. PSO, Total and Shell to enter into contracts for supplying fuel into aircrafts of any requesting group or corporation, renders clause F(ii) of the 1961 Agreement practically redundant.

43. Moreover, as mentioned above, since the 1994 Agreement was executed there are now 22 licensed OMCs in Pakistan with 11 OMCs that have licenses for operations nationwide⁵ altering the conditions of competition in the relevant market. It appears that any party/parties that have control over the fuel tank farm will also have an inherent advantage in controlling the supply of fuel downstream through the hydrant system. This arrangement may also favor them with regard to award of future tenders with respect to supply of fuel through the hydrant fuel mechanism in place. Since by virtue of the 1961 Agreement, the

⁵ 'Oil Marketing Companies -- Sector update, JCR-VIS, October 2017
<http://jcrvis.com.pk/docs/OMCs%20201710.pdf>

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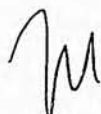
ownership and control of the fuel farm facilities rest with the 3 OMCs for an indefinite period of time and with the possibility of any other company's participation being made practically redundant as explained in paragraph 42, it appears to close this market for participation by any potential competitors in the future.

44. Based on the foregoing it appears, that clause F of the 1961 Agreement along with the prevailing terms of the 1994 Agreement, confer exclusive rights on the said OMCs for the ownership, operation and maintenance of the fuel farm facilities for an indefinite period of time, preventing other OMCs to compete for the same, of itself or for the purpose of any potential downstream activity.
45. Therefore, the 1961 Agreement *appears to be a* prohibited agreement in terms of Section 4(1) read with 4(2)(a) of the Act as it has the effect of creating an entry barrier and restricting competition in the relevant market.
46. As per the record available with the Enquiry Committee to date no exemption application has been filed, with the Commission, for the 1961 Agreement.
47. As for the decision by CAA to carry out allotment of land or otherwise for an alternate arrangement of fueling to any party based on need assessment/ feasibility of the same, it is ostensibly a planning decision with various considerations, that *prima facie* does not appear to attract contravention of any of the provisions of the Act and is therefore not discussed in this enquiry.


CONCLUSION & RECOMMENDATION:

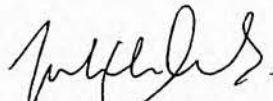
48. Based on the findings of paragraphs 22-24 the relevant market appears to be a composite of the market for supply of jet fuel into the fuel farm and supply of fuel into the aircraft at JIAP Karachi.


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49. Based on the *findings of paragraphs 25-35* it appears that the 1994 Agreement in general and Clause 3.1 in particular confers exclusive rights on PSO, Total and Shell as operators for use of the Hydrant Fuel System at JIAP Karachi, thus ostensibly restricting competition in the relevant market. Therefore, the 1994 Agreement is *prima facie* a prohibited agreement in terms of Section 4(1) read with 4(2)(a) of the Act.
50. Based on Paragraphs 37-45 in general and specifically with clause F(ii) of the 1961 Agreement having become practically redundant in the aftermath of 1994 Agreement, the 1961 Agreement appears to confer exclusive rights on PSO, Total and Shell to own, control and maintain the fuel tank farm for an indefinite period of time, thus ostensibly closing this market to other aspirants or potential competitors in *prima facie* contravention of Section 4(1) read with 4(2)(a) of the Act.
51. In light of the above mentioned findings, it is recommended that the Commission may consider initiating proceedings against CAA, PSO, Total and Shell for the 1994 Agreement and against PSO, Total and Shell for the 1961 Agreement under Section 30 of the Act.


Qasim Khan
Enquiry Officer


Maliha Quddus
Enquiry Officer


Irfan ul Haq
Enquiry Officer