

Inquiry Report

In the matter of Complaint filed by M/s Fecto Belarus Tractors (Pvt.) Limited against Shahzad Trade Links in respect of Exclusive Agency Agreement with M/s Minsk Tractor Works.

1. This Inquiry Report is prepared pursuant to a complaint under section 37 (2) of the Competition Ordinance, 2007 (hereinafter the “Ordinance”), filed by M/s Fecto Belarus Tractors (Pvt.) Limited (hereinafter the “Complainant”) on 11th August 2009 before the Competition Commission of Pakistan (hereinafter the “Commission”) against Shahzad Trade Links (hereinafter the “Respondent”) for entering into an exclusive agency agreement with M/s Minsk Tractor Works (hereinafter “MTW”) in violation of section 4 of the Ordinance.
2. MTW and the Respondent signed an exclusive agency agreement (hereinafter the “Impugned Agreement”) on 2nd February 2009 to sell and service Belarus tractors in the territory of Pakistan for one year. The Complainant was informed by MTW on 2nd February 2009 that its contract (a non-exclusive agency agreement) with MTW dated 8th December 2008 and addendum to the contract was annulled due to the failure of Complainant to fulfil its purchase obligations.
3. The Complainant, a private limited company incorporated under the laws of Pakistan and engaged in the business of import, manufacture and sale of tractors in Pakistan, is an Undertaking as per the definition given in section 2(1)(p) of the Ordinance.¹ Similarly, the

¹ Undertaking” means any natural or legal person, governmental 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 of services and shall include an association of undertakings.”

Respondent, a sole proprietorship engaged in the business of import and sale of tractors in Pakistan, and MTW, a corporate entity under the laws of Republic of Belarus engaged in the business of manufacturing and exporting tractors, are also Undertakings as defined in the Ordinance.

4. Section 2(1)(k) of the Ordinance contains the definition of the Relevant Market.² For the purposes of this Inquiry Report, the relevant product market consists of Belarus tractors and substitutable tractors such as Massey Ferguson, Fiat, Hero Russi, Euro, Universal, Alitrac Changfa locally manufactured or imported tractors in Pakistan. The relevant geographic market is the whole of Pakistan.

I. Complaint

5. In its complaint to the Commission, the Complainant stated the following:
 - a. The Complainant has been the sole agent of MTW for import and sale of Belarus/MTZ tractors in Pakistan and has also set up a plant with the collaboration of MTW for local manufacture of Belarus/MTZ tractors in 1981.
 - b. Lately, the agency of the Complainant has been non-exclusive. Other entities were also granted non-exclusive licenses by MTW. The last agreement between the Complainant and MTW was signed on 8th December 2008 wherein MTW agreed to sell to the Complainant a total quantity of 1,500 Belarus/MTZ tractors of a total value of US\$ 13,680,000. Deliveries were to be made under the agreement between January and December 2009.

² “Relevant Market” means the market which shall be determined by the Commission with reference to a product market and a geographic market and product market comprises all those products or services which are regarded as interchangeable or substitutes by the consumer 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 homogeneous and which can be distinguished from neighbouring geographic areas because, in particular, the conditions of competition are appreciably different in those areas.”

- c.* Around January 2009 the Government of Pakistan started working on the “Benazir Tractor Scheme” to provide tractors on subsidized rates to farmers whose names are selected by balloting. With a view to capture the entire market of Belarus Tractors in Pakistan and to dictate terms to the Government, the Respondent persuaded MTW to breach its agreements with other importers in Pakistan and entered into the Impugned Agreement.
 - d.* The Impugned Agreement is a prohibited agreement under section 4 of the Ordinance in that the object of the agreement is to prevent, restrict and reduce competition in the business of selling Belarus/MTZ tractors in Pakistan and is calculated to impose their own terms on the Government which will be inviting tenders for purchase of tractors under the Benazir Tractor Scheme.
 - e.* On 15th July 2009 a meeting was held at the Ministry of Food, Agriculture and Livestocks to consider suppliers of tractors for the Benazir Tractor Scheme. The Complainant and other dealers of Belarus tractors also participated in the meeting. However, due to Impugned Agreement the Ministry was constrained to observe that The Complainant and other dealers can participate in the Scheme only if they are authorised by the MTW.
 - f.* If the Impugned agreement is left in effect it would enable the Respondent to abuse its dominant position in the market of Belarus/MTZ tractors. It would be in the interest of the Benazir Tractor Scheme and the poor farmers of this country that competition in the scheme is allowed.
 - g.* The Complainant has filed Suit No.517/2009 in the High Court of Sindh at Karachi for damages and cancellation of the Impugned Agreement. However, the Impugned Agreement contravenes the provisions of the Ordinance, it also falls in the domain of the Commission, the statutory authority to take notice of all such agreements in the public interest.
6. The Complainant also filed an application for interim order under section 32 of the Ordinance wherein the Commission was requested to restrain the Respondent from collecting

any monies from third parties under the Benazir Tractor Scheme on the basis of the Impugned Agreement.

7. The application for interim relief was fixed for hearing on 20th August 2009 and hearing notices in the matter were issued to the Complainant and the Respondent. On the date of hearing the Respondent sought adjournment, which was granted by the Learned Member hearing the matter.

II. Reply to Complaint

8. The Respondent was sent a copy of complaint vide letter dated 13th August 2009 and was required to submit comments on the complaint. A reminder was also sent on 31st August 2009. Preliminary objections and para-wise reply to the complaint was received from the Respondent on 2nd September 2009, which are summarized as under:

Preliminary Objections:

- a.* The complaint is liable to be dismissed for non-joinder of principal as a necessary party.
- b.* The complaint is frivolous and vexatious.
- c.* The Commission has no jurisdiction on the matter as contract was executed outside Pakistan.
- d.* The Complainant has come to the Commission with unclean hands.
- e.* No order has been passed by the Commission for inquiry to be conducted. It is submitted that Respondent is provided with copy of inquiry order otherwise it will be presumed that no inquiry is pending. Impugned agreement does not come within the definition of relevant market defined in the Ordinance as the subject matter of the Impugned Agreement is only two models of MTW.

Para-wise Reply

- i. The Complainant claims to be the sole agent of MTW for 35 years and when the Respondent was appointed as the sole agent of MTW in Pakistan for a period of one year for the import of only two models of tractors, he was alleged to have violated the Ordinance. The Complainant used all conceivable foul methods to prolong and continue with his sole agency but failed when its agreements were rescinded by the principal (MTW) on account of failure to fulfil the contractual obligations.
- ii. The contents of para 3 of the complaint are not true. It is specifically denied that the Complainant has a non-exclusive agency as stated in para 3 of the complaint. It is submitted that the Complainant entered into an agreement on 18th December 2008 with MTW which specifically provided for purchase of 100 tractors every month. The agreement also provided for cancellation of contract in the event of violation of purchase obligation. The Complainant failed to fulfil his obligations in the contract which necessitated revocation of contract by MTW.
- iii. The Impugned Agreement was entered into at Belarus for selling Belarus 510 and 520 tractors for a specified period of one year and not to the exclusion of any other brands of tractors importable, manufactured and sold in Pakistan. The Complainant can choose from wide range of tractors available in different brands in the market.
- iv. Para 4 of the complaint is denied. Benazir Tractor Scheme was widely publicised and participated by prospective suppliers. It is not restricted to any particular brand of tractors, rather it is all encompassing scheme to include all brands of tractors. Director General, Federal Water Management Cell specifically stated in the meeting of the Food, Agriculture and Livestock Ministry (hereinafter “MINFAL”) that tractors of makes and models registered with Zarai Taraqati Bank Limited (hereinafter “ZTBL”) will be supplied to the farmers and by that

token it was open to all suppliers of the tractors registered with ZTBL to participate in the bidding and such fact alone excludes this authority to adjudicate upon the matter.

- v. Para 5 of the complaint is denied. It is submitted that the Complainant and other traders are eligible to participate in the Benazir Tractor Scheme upon meeting the requisites laid down by the government. In addition, it is totally in the discretion of the farmers that which model and make they want to purchase and therefore the Complainant can not be said to be aggrieved in any matter.
- vi. Para 6 of the complaint is denied. The Impugned Agreement does not fall under section 4 of the Ordinance. It is submitted that the import of Belarus tractors is not prohibited by the agreement of Respondent. The buyers can be benefited from Belarus tractors through Respondent who is the sole agent of MTW in Pakistan rather than importing them directly from Belarus. It is denied that the Impugned Agreement restricts competition and therefore does not fall within the four corners of section 4 of the Ordinance.
- vii. It is submitted that the Complainant along with other dealers have formed a cartel to oust Respondent from the business. Letters and emails have been sent to MTW by these members of cartel persuading it to sell Belarus tractors to them.
- viii. Para 7 of the complaint is denied. At the time of meeting with the Ministry regarding Benazir Tractor Scheme, the agreements of the Complainant and other dealers were cancelled by MTW. This fact was not disclosed to the relevant government authorities.
- ix. Para 8 of the complaint is denied. Respondent did not persuade MTW to cancel agreement with the Complainant rather it was the failure of the

Complainant to fulfil its obligations which entailed termination of the agreement.

III. Benazir Tractor Scheme

9. ZTBL provided details of the Benazir Tractor Scheme in their letter dated 27th August 2009, which are summarized as under:
- a.* To increase the productivity of crops, Federal Government has decided to provide 10,000 tractors at subsidized rates to farmers.
 - b.* All the popular makes/models of tractors (locally manufactured as well as imported) duly registered with ZTBL for financing purposes will be eligible for supply under the scheme. However, after balloting successful applicants will opt for their chosen makes/models of tractors.
 - c.* On receipt of applicant's choice the Bank will place supply order on the selected manufacturer/supplier. The tractor company will deliver the tractor to the applicant claiming encashment of draft from ZTBL.
 - d.* In case of local manufacturers/importers of tractors, major requirements for registration are as follows:
 - i.* Whether supplier is a sole proprietor or partnership or company and whether supplier is a manufacturer/importer/distributor/agent.
 - ii.* In case of local manufacturers, authentic copy of agreement between the principal and local manufacturer and a copy of certificate from Engineering Development Board allowing the manufacturer to manufacture/assemble the respective make/model.
 - iii.* In case of importers, copy of the contract between principal and importer and an open ended bank guarantee worth Rs.5 million.

- iv. Other complete details of the supplier regarding contact, location, manufacturing items, annual income/sales, banker, references, minimum amount of balance to be maintained with ZTBL etc.

IV. ISSUE

10. In this matter it is pertinent to consider the following issue: Whether exclusive agency agreement entered into between MTW and the Respondent restricts competition in violation of section 4 of the Ordinance?

V. ANALYSIS

11. In the light of foregoing, the Impugned Agreement i.e. exclusive agency agreement is analysed as under:

A. Complainant's Conduct

12. The Complainant has been the exclusive agent of Belarus tractors in Pakistan for a considerable time. Though the complaint does not mention the number of years of being an exclusive agency, the certificate at Annex B/1 of the complaint issued on 31st May 1999 by MTW in favour of the Complainant states that “we have one and the only Sole and Authorized Agents in Pakistan namely M/s Fecto Belarus Tractors Ltd. 245/1/X, PECHS, Bloc-6, Karachi for the last 35 years”. This exclusive agency contract came to an end as noted in MTW's letter to the Complainant dated 11th October 1999, which stated:

All mentioned above proves that we can not rely on Fecto as an honest financially string and reliable partner. The present letter is an official document in which we notify you of your agency right cancellation in three months of the present letter date which is in conformity with Article 10 of Agency agreement dated September 11, 1994.

This fact was not mentioned in the complaint by the Complainant.

13. After their exclusive agency agreement was cancelled, the Complainant went into protracted litigation and filed civil suits in 2003 (Suits No. 1369/2003 and 1146/2003) claiming specific performance before Sindh High Court along with an application to seek interim relief. At that time, the Complainant did not divulge the fact that the exclusive agency agreement had been terminated by the principal i.e. MTW. Seized with the matter, the Hon'ble Justice, Mubashir

Alam, declined to give any relief under a stay application. The operative parts of the order passed in these suits are reproduced as under:

It is also a fact that the Defendant No.1(MTW) revoked the agreement as far back as on 11/10/99 which fact the plaintiff (Fecto Belarus) suppressed from the Court and justification was offered only when the Defendant No.2 (Shehzad Trade Links) brought such fact on record through their counter affidavit.

No imports have been made by the Plaintiff since 1994 as reflected from para 13 of the plaint which was one of the cause for revocation of Agreement, though cancellation was suppressed by the Plaintiff.

Whether it was suppression of fact or false statement let it be decided at trial and an issue can always be framed to decide such matter. At this juncture I do not deem appropriate to enter into such controversy. Application is dismissed.

14. From 2003 onwards, MTW sold Belarus tractors in Pakistan through various non-exclusive agents including the Respondent, Adil & Rahil International, G.M. International Trading Co., Mian Shafiq Business International and others. In February 2009 the Complainant and M/s G.M. International Trading Co. were informed by MTW through letters dated 2nd February 2009 that their agreements have been terminated for their failure to comply with the purchase obligations under their respective agreements. Mian Shafiq Business International was also informed in a letter dated 4th February 2009 that MTW would not be signing a contract with them as an exclusive agent had already been appointed for Pakistan.
15. In January 2009, Government of Pakistan launched the Benazir Tractor Scheme to provide subsidized tractors to farmers. The MINFAL called a meeting of all the approved suppliers of tractors on 15th July 2009 to give a presentation on the said scheme. Before participating in this meeting, the Complainant, Universal Tractors Pakistan Private Limited, Avanti Corporation, G.M. International Trading Company, and Mian Shafique Business International sent a joint letter to MTW containing a proposal for the import of 11,244 tractors along with a table showing their individual purchase figures. This letter also requested to MTW to send fresh contracts for the period starting from 1st July 2009 to 30th June 2010.
16. Individual letters were also sent to MTW by the Complainant, Universal Tractors Pakistan Private Limited, Avanti Corporation and Mian Shafique Business International on 13th July

2009 and by G.M. International on 23rd July 2009 requesting to sign agreements with them for the import of Belarus tractors. These letters are indicative of a situation where the complainant and the other undertakings have colluded to allocate market shares of tractors between themselves and persuade MTW to enter into agreements with them.

B. Section 4

17. The existing exclusive agency agreement to sell Belarus tractors in Pakistan, which has been impugned in the complaint, was signed between the Respondent and MTW on 2nd February 2009 and requires the Respondent to import a total of 8,232 tractors of model 510 and model 520 during the year 2009.
18. Agreements and arrangements which have as their object or effect to exclusively deal with a buyer/supplier, are representative of restrictive practices explicitly proscribed under Section 4 of the Ordinance, reproduced here:

4. **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 their object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5 of this Ordinance.

(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;

19. Prohibited agreements are generally reviewed at under two categories of competitive analysis. In the first category are the agreements whose nature and necessary effects are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality –they are ‘illegal *per se*’. In the second category are agreements whose competitive

effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.³

20. Exclusive dealing agreements are only prohibited when they are unreasonable i.e when they restrict, reduce or prevent competition in terms of section 4 of the Ordinance. Evaluation of the ‘unreasonableness’ of exclusive dealing agreements is done on the basis of number of factors that includes percentage of market foreclosed, barriers to entry, term of the agreement, the ability to terminate the agreement, availability of other distribution channels, the nature of the purchaser, the nature of the product and actual competitive effects .
21. Determination of market foreclosure is a fundamental feature in the analysis of an exclusive dealing agreement as such an agreement is considered unreasonable only when the portion of the market foreclosed to other sellers or buyers is substantial enough to adversely affect competition. The market for tractors in Pakistan consists of locally manufactured tractors – Massey Ferguson, Fiat, Euro, Hero Russi, Universal and Arzoo – and other imported tractors including Belarus, Agro JD, Framtrac and Alitrac tractors. The current annual demand of tractors in Pakistan is estimated between 50,000⁴ to 60,000⁵ units. The most popular brands in the country among all these tractors are Massey Ferguson and Fiat tractors, manufactured by Millat Tractors Limited and Al-Ghazi Tractors Limited respectively. According to the historical data available on the website of Pakistan Automotive Manufacturers Association, annual sales of tractors by Millat Tractors Limited and Al-Ghazi Tractors Limited in the year 2008-09 are 30,000 units each. Therefore, Massey Ferguson and Fiat tractors collectively comprise a market share of 90%. In this scenario, the other tractor brands, including Belarus tractors and other imported tractors, occupy only a small fraction of the market. Therefore,

³ In the matter of *The Institute of Chartered Accountants of Pakistan (File No. 03/Sec-4/CCP/08)*, reliance placed on *National Soc’y of Professional Eng’rs v. United States*, 435 U.S. 679 at 692, 98 S.Ct. 1355 at 1365,(1978). The rationale for *per se* rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct. See, e. g., *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 350-351 (1982); Under the usual logic of the *per se* rule, a restraint on trade that rarely serves any purposes other than to restrain competition is illegal without proof of market power or anticompetitive effect. See also, *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 (1958).

⁴ <http://www.millat.com.pk/Overview.asp>

⁵ <http://www.pakissan.com/english/news/newsDetail.php?newsid=20313>

the exclusive agency agreement between the Respondent and MTW forecloses an insignificant part of the relevant market and denies the Complainant less than 10% of Market share of the tractors in the country.

22. High entry barriers make it more likely that existing firms will exploit their power to raise price above the competitive level. However, given that there are no restrictions on import of tractors and there has in fact a new market entrant from China, the Impugned Agreement can not be said to be a barrier to entry. A list of manufacturers/suppliers with different makes and models approved under the Benazir Tractor Scheme by MINFAL and issued by ZTBL vide letter dated 12th September 2009 contains approximately 36 models by 10 different manufacturers or suppliers. This indicates that the market for tractors is highly competitive with low entry barriers.
23. The time period of the Impugned Agreement is one year only which, in itself, is a short duration for foreclosure and makes it less likely to be unreasonable. There are several other distribution channels available for the Belarus tractors' competitors to reach the market. The list of manufacturer/suppliers approved by MINFAL under the Benazir Tractors Scheme and issued by ZTBL on 12th September 2009 shows four importers and seven local manufacturers of tractors in the country who have their own distribution sources.
24. We also do not see any adverse effect on the inter-brand competition in different makes of the tractors that could be caused by the Impugned Agreement. Regardless of whether they are sold through a sole agent or through many non-exclusive agents in Pakistan, Belarus tractors face fierce competition from a number of suppliers, two of which are major players in the relevant market. Thus in view of the foregoing, the Impugned Agreement does not constitute violation of section 4 of the Ordinance.
25. The Complainant has raised the concern that the Impugned Agreement may have an adverse effect on the Benazir Tractor Scheme and that Respondent will abuse its dominant position in the market of Belarus/MTZ tractors by imposing its own terms on the Government of Pakistan. We have already defined the relevant market in para 4 above which states that the relevant product market in the instant matter consists of all locally manufactured and imported tractors which can be substitutes for the Belarus tractors and that the relevant

market is not confined to Belarus tractors only. The market share of Belarus tractors in the relevant market is very limited and is not enough to constitute a dominant position as defined in Section 2 (e) of the Ordinance:

"dominant position" of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent.

Both the criteria of "behaving appreciably independent of competitors/consumers" and "40% market share" given in the definition are not met in the instant matter. The Respondent cannot be said to hold a dominant position in the market of tractors in Pakistan.

26. We have also looked into details of the procurement process to be followed under the Benazir Tractor Scheme. ZTBL has approved a list of makes/models of tractors (locally manufactured as well as imported) that are eligible for purchase under the said scheme. These makes and models of tractors are to be selected by the farmers who will be shortlisted under a process of balloting. Once the successful applicants' choices for tractors are received, ZTBL will issue purchase orders to the selected manufacturers/suppliers who in turn will deliver the required models and number of tractors through their authorised dealers/agents directly to the farmers.
27. The Benazir Tractor Scheme respects the choice of the farmers and gives them complete discretion to choose from any of the different makes of the tractors. This fact is clearly noted in ZTBL's letter to the Commission dated 27th August 2009 (para 9) and is also confirmed from the letter issued by MINFAL and the minutes of the Policy Guidelines Committee meeting with tractor manufacturers and suppliers held on 15th July 2009 at MINFAL. Belarus tractors will be procured under the scheme only if they are selected by the successful farmers. Therefore, it cannot be said that the Respondent will be able to monopolise the Benazir Tractor Scheme and impose his own terms and conditions on the Government.

VI. Conclusions

28. In light of the foregoing, it is concluded that complaint is not substantiated with *prima facie* evidence. The Complainant has failed to establish its case against the Respondent. The exclusive agency agreement impugned in the complaint does not result in any substantial foreclosure of the market and also does not affect inter-brand competition of tractors in Pakistan. Therefore, the Impugned Agreement is not restrictive of trade and does not constitute violation of section 4 of the Ordinance.
29. During the course of inquiry it was noted that material facts were suppressed by the Complainant. In addition, the past conduct of the Complainant to pressurise MTW to sign an exclusive agency agreement through litigation and its current collusion with four other dealers to persuade MTW to sign agreements to import Belarus tractors shows *mala fide* intent of the Complainant.

VII. Recommendations

30. In view of the foregoing, since the complaint failed to make out any violation of chapter II of the Ordinance, therefore, proceedings under Section 30 cannot be initiated. It is, therefore, recommended that the complaint may be dismissed.

Nadia Nabi
Joint Director (Investigation)
29 September 2009