

COMPETITION COMMISSION OF PAKISTAN

ENQUIRY REPORT

(Under Section 37(1) of the Competition Act, 2010)

**IN THE MATTER OF ALLEGED VIOLATION OF THE COMPETITION ACT, 2010
BY OIL COMPANIES ADVISORY COUNCIL**

Shaista Bano | Syed Umair Javed | Maliha Quddus

Dated: 28 November 2018

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BACKGROUND & FACTS

1. On 26th January, 2018 the Competition Commission of Pakistan ('the Commission') received a copy of a letter authored by Transparency International addressed to Chairperson Oil and Gas Regulatory Authority ('OGRA') alleging that the award of Fuel Marking Contract by Oil Companies Advisory Council ('OCAC') was done without a competitive bidding process. The specific allegations are summarized as follows:
 - a. The tender notice was not floated in any national newspaper;
 - b. The whole process was managed by OCAC;
 - c. OCAC identified 6 companies who were given the prequalification and Expression of Interest ('EOI');
 - d. Third party consultant was hired to develop Instructions to Bidders ('ITB');
 - e. Only 2 companies responded to the ITB;
 - f. Final bid was only submitted by one firm; and
 - g. The contract was awarded without a tender process (Annex 'A').
2. On 30th January, 2018 the Commission wrote a letter to OGRA requesting their comments on the matter however, OGRA subsequently forwarded it to the Ministry of Energy Petroleum Division ('MEPD') which was the relevant Ministry for approving the Fuel Marker Programme ('FMP'). The response from MEPD copied to the Commission provided documents pertaining to the matter including minutes of meeting and copies of its correspondence with OCAC and OGRA. On 30th April, 2018 a letter was written to MEPD regarding information regarding the pricing and recoupment mechanism for the FMP and a response was received from MEPD vide letter dated 17th May, 2018.
3. On 30th April, 2018 a letter was written to OCAC seeking clarification on the following issues: Role of OCAC in implementation of FMP; whether it would be possible for refineries to procure and implement their own FMP and details of the procurement process adopted and the justification for not adopting an open competitive bidding process. OCAC's response was received vide letter dated 10th May, 2018. OCAC's response is discussed in further detail in the subsequent sections of this Enquiry Report.
4. On 31st May, 2018 the Commission initiated an enquiry under Section 37(1) of the Competition Act, 2010 ('the Act') to assess whether there was a *prima facie* violation of Section 4 of the Act and appointed the following officers to the Enquiry Committee:
 - a. Shaista Bano, Director General (Cartels & Trade Abuse);
 - b. Syed Umair Javed, Director (Cartels & Trade Abuse);and
 - c. Maliha Quddus, Deputy Director (Cartels & Trade Abuse)

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5. The Enquiry Committee wrote to MEPD, OCAC, Hydrocarbon Development Institute of Pakistan ('HDIP') and M/s Authentix (the selected Fuel Marking Company). Meetings were also held with MEPD, OCAC and M/s Authentix. This Enquiry Report relies on documents/information received, correspondence and meetings with the said parties. Based on this information the following facts are established with respect to the FMP:

Minutes of Meeting held on 13th December, 2016

6. A meeting was held at MEPD wherein it was decided to introduce a FMP for Super Kerosene Oil ('SKO') in order to discourage fuel adulteration and tax evasion. The need for a FMP arose due to the practice, by certain unscrupulous elements, of mixing SKO with petroleum products made possible primarily because of the price differential between SKO and other deregulated petroleum products. Under the FMP if SKO is used to adulterate any petroleum product the chemical marker (added to SKO at the refinery) could be detected via mobile testing laboratories throughout the petroleum supply chain i.e. local refineries, OMC depots and retail outlets. A number of important decisions were taken w.r.t the FMP which were:
- a. Selection of a Fuel Marking Company ('FMC') in an open and transparent manner through advertisement and competitive bidding only, adopting company policy/procedures; single selected FMC will operate for all refineries.
 - b. Formation of a Technical Committee ('TC') to manage the affairs related to implementation of kerosene FMP. The TC comprised of representation from OGRA, all refineries, HDIP ('HDIP') and headed by OCAC. OCAC will liaise with representatives of TC, FMC and relevant government authorities in respect of implementation of FMP. TC will finalize a specific Standard Bidding Process, terms and conditions of the agreement to be executed between FMC and refineries as well as Standard Operating Procedure specifying all activities along with role of the relevant parties at different stages of FMP.
 - c. The cost of the marker will be included in the ex-depot price of kerosene. In this regard, OGRA will issue price adjustment directive.
 - d. HDIP will be involved for technical expertise.
 - e. TC will submit its final recommendations in the next meeting to be held after two weeks for consideration.
 - f. The programme shall commence after necessary approval of the ECC of the Cabinet. (Minutes of Meeting Annex 'B').
7. On 26th January, 2017 OGRA wrote to MEPD excusing itself from the bidding process citing the reason that this being a commercial activity should be done by the oil industry itself. (Annex 'C')



8. On 22nd June, 2017 OCAC wrote to MEPD informing that it had sent the Expression of Interest and Instruction to Bidders documents to 6 companies. Out of this response was received from only 02 parties and only one bid was received i.e. from M/s Authentix UK. OCAC requested MEPD to call a meeting of the TC to open the commercial bid received and to decide on further course of action. (OCAC Letter Annex 'D').
9. On 7th July, 2017 a meeting was purportedly held at MEPD where the Technical Bid was evaluated by CEO OCAC and the refineries and the Commercial Bid was also opened. Minutes of Meeting held on 7th July 2017 were not made available to the Enquiry Committee. In its letter dated 7th September 2018 MEPD informed that the said meeting was neither a formal call by this Division nor this Directorate General participated in the said meeting. OCAC, however, in its letter dated 27th August informed that the said meeting was held however, no Minutes of Meeting were issued. Reference to the meeting is also made by CEO OCAC in his letter to DG MEPD dated 25th July, 2017.

ECC Summary & Decision

10. On 09th September, 2017 MEPD forwarded the draft summary for ECC titled "Addition of Fuel Marker in SKO to counter adulteration". The summary recommended:
 - a. OGRA may supervise/monitor all activities relating to the implementation of FMP and may act as focal point with all concerned stakeholders for effective enforcement.
 - b. OCAC may execute the contract with the successful bidder to implement FMP.
 - c. The actual cost of the fuel marker obtained through tendering process by OCAC may be included in the ex-depot sale price of SKO through existing monthly pricing mechanism. The cost quoted by the successful bidder is PKR1.22 per liter of marked product for six months trial period. M/s Authentix committed to provide 3% price reduction for increase of programme duration beyond trial period.
 - d. Initially the FMP would be implemented for one year and then depending on the efficacy of the programme it would be extended accordingly with the consent /approval of OGRA or fresh tendering process may be initiated by OGRA through OCAC.
 - e. OGRA may ensure that the SKO has been marked before leaving the refinery and may independently inspect the quality of SKO, HSD and MS with the help of HDIP and other third party inspectors.
 - f. On successful implementation of FMP, MEPD may initiate such programmes for other regulated petroleum products.



- g. For deregulated products OMCs may be directed to arrange fuel marking services out of their own margins. (Annex 'E')

On 28th Nov, 2017 the ECC meeting was held and gave approval for the recommendations forwarded in the summary dated 9th September, 2017.

11. On 3rd Nov, 2017 Transparency International addressed a letter to OGRA on award of Fuel Marking Contract without open competitive bidding which was forwarded by OGRA to MEPD for comments. The award of the contract was put on hold following the notice taken by CCP in the matter.

OGRA

12. Post the meeting held on 13th December, 2016 OGRA recused itself from the selection process vide letter dated 26th January, 2017 addressed to MEPD it stated:
"OGRA is of the view that selection of Fuel Marker Company (FMC) through Standard Bidding Process and any agreement between Oil Refineries & Fuel Marking Company (FMC), being a commercial activity should be done by the oil industry itself. Subsequent to that OGRA and its Third Party Inspector for quality i.e. HDIP will participate in the subject programme at implementation phase". (Annex 'C')
13. OGRA's comments were also sought by MEPD prior to sending the summary for ECC approval wherein it states:
"OGRA is bound to follow PPRA Rules. Therefore, prior to inclusion of fuel marker price in kerosene price, OCAC being representative of Oil Sector must ensure to adopt bidding process/procedure as prescribed in PPRA Rules. In case OCAC does not follow the procedure for bidding process, OGRA will be constrained to include Rs. 1.22/liter in kerosene price. Further, as one company prequalified for this, it may be prudent to re-advertise on a larger forum to have a competitive selection to avoid market monopoly". (Annex 'F').

HDIP

14. In its response submitted by HDIP to the Enquiry Committee HDIP states:
"HDIP was member of Technical Committee (TC) and the said committee was assigned to finalize specific standard bidding process, term and condition of the agreement between FMC and Refineries. However HDIP was not involved in the process of bidding". (Annex 'G').

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15. On 07th June, 2017 HDIP wrote a letter to CEO OCAC on the subject of FMP the contents of which are reproduced below:

"I am directed to refer to your email dated 01.06.2017 on the subject and subsequently opening of the bid for evaluation. The preliminary comments on the subject are as follows:

- i. Since, OCAC, all refineries, HDIP and OGRA were members of the Technical Committee (TC) and as per the minutes, the committee members were required to be assigned, finalization of specific standard bidding process; terms & conditions of the agreement to be executed between Fuel Marking Company (FMC) and the refineries, as well as a Standard Operating Procedure (SOP) specifying all activities along with role of the relevant parties at different stages of kerosene Fuel Marking Program (FMP) which will be part of the above said agreement.*
- ii. However, HDIP was not consulted or taken on board, at any stage of the bidding process, against the stipulation in the minutes, and its first involvement began with the opening of single technical bid on June 2, 2017....*
- iii. Moreover, reasons for the absence of other technical committee members including OGRA have not been defined in the bidding documents.*
- iv. Since, the bidding process has been completed; OCAC and HDIP has already opened the technical bid document in compliance of instructions from Directorate of Oil vide letter no.... dated May 30, 2017 therefore, OCAC may ensure that the competitive bidding process is in accordance with the decision of the meeting. Moreover, OGRA being member of TC may also be involved in bid evaluation process (both technical and financial) so that the process could be completed as early as possible. In this regard CEO OCAC may convene a meeting of TC for evaluation of technical bid and opening of financial bid, if approves/satisfied with technical bid". (Annex 'G1').*

MEPD

16. MEPD's stance on the matter as explained vide its response to the Enquiry Committee is that it (MEPD) advised OCAC to select the FMC through a standard bidding process, adopting company policy/procedures. It also states:

"This division was not part of the bidding process, the whole bidding process for selection of fuel marking company was undertaken by OCAC and the ECC Summary was based on bid evaluation results provided by them". (Annex 'H')



OCAC

17. OCAC, making reference to the Minutes of Meeting held on 13th December, 2016, has noted that it was advised by the MEPD to select the Fuel Marking Company through standard bidding process, adopting company policy/procedures. It was also advised that the FMP will start after the necessary approval of the ECC of the Cabinet.
18. CEO OCAC, vide letter vide dated 10th May, 2018 addressed to Director General (C&TA, CCP), stated:

"The Bidding process adopted by OCAC was, in our opinion, a very open and competitive one. Although OCAC is a Consultative Forum of the Downstream Oil Industry, an independent (not Government) Body and therefore not bound by PPRA Rules, the procedure followed was strictly professional and met all criteria when compared with Rule 23 of PPRA Rules 2004"¹. (Annex 'I').

19. OCAC was also of the opinion that since the FMP was a pilot programme they approached only those companies that had a proven record and experience in the field.

ISSUES

20. Based on the aforementioned facts of the case the Enquiry Committee will be pursuing the following lines of inquiry:
- Whether OCAC is an association of undertakings in terms of Section 2(1)(q) of the Act;
 - Whether the selection of Fuel Marking Company ('FMC'), procurement methodology adopted, and determination of price can be considered as 'decisions' by OCAC;
 - If yes, whether these decisions are anti-competitive in terms of Section 4(1) of the Act.

ANALYSIS

Whether OCAC is an 'association of undertakings' in terms of Section 2(1) (q) of the Act;

21. Section 2(1)(q) of the Act reads as follows:

¹ Para C OCAC Letter to DG (C&TA) dated 10th May, 2018.

“undertaking” 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 and shall include an association or undertakings;”

22. OCAC is a representative body of the downstream oil industry and its members include Pakistan’s five oil refineries, sixteen oil marketing companies (‘OMCs’) and one pipeline transportation company.² OCAC is governed by an Executive Committee comprising of the Chief Executives of each of the member companies. A Chairman, who is nominated from among the member companies for a working term of one calendar year, heads the Executive Committee. OCAC's overall functioning is the responsibility of the Chief Executive Officer who is assisted by a Secretary General and a Secretary³.
23. It is noted that OCAC’s member companies, are engaged in refining, marketing and distribution of petroleum products and are therefore, *prima facie* undertakings as per the definition provided in Section 2(1) (q) of the Act. Secondly, the decision making body of OCAC i.e. the Executive Committee is composed of these member companies/undertakings therefore, OCAC is *prima facie* an association of undertakings in terms of Section 2(1)(q) of the Act.

Whether the selection of FMC, procurement methodology adopted, and determination of price can be considered as ‘decisions’ by OCAC;

24. We revert to the decisions made in the Minutes of Meeting held on 13th December, 2016 w.r.t selection of FMC. Paragraphs 7(ii) pertains to the role of the TC in the matter and is reproduced below:

7(ii) A Technical Committee (TC) comprising representation from OGRA, all oil refineries and HDIP to be headed by representative of OCAC was constituted to manage the affairs related to implementation of kerosene FMP. OCAC will liaison with representatives of TC, FMC and relevant government authorities in respect of

² 05 refineries include: Pak-Arab Refinery Limited PARCO, National Refinery Limited NRL, Pakistan Refinery Limited PRL, Attock Refinery Limited ARL and Byco Oil Pakistan Limited BOPL).

16 OMCs include: Pakistan State Oil Co. Limited PSO, Shell Pakistan Limited SPL, Total Parco Marketing Limited TPML, Attock Petroleum Limited APL, Total Parco Pakistan Limited TPPL, Admore Gas (Pvt.) Limited AGPL, Hascol Petroleum Limited HPL, Byco Oil Pakistan Limited BOPL, Bakri Energy (Pvt.) Limited BEPL, Zoom Petroleum Limited ZOOM, Gas & Oil Pakistan Pvt. Limited GO, Oilco Trading Company (Pvt.) Limited OILCO, Askar Oil Services (Pvt.) Limited AOSPL, Horizon Oil Company Pvt Limited HORIZON, Outreach (Pvt) Limited OTO, Quality 1 Petroleum (Pvt) Limited. 01 Pipeline Transportation Company (Pak-Arab Pipeline Co. Limited PAPCO).

³ <http://www.ocac.org.pk/>

implementation of said program. Initially TC will finalize a specific Standard Bidding Process (SBP), terms and conditions of the agreement to be executed between FMC and refineries as well as Standard Operating Procedure (SOP) specifying all activities along with role of the relevant parties at different stages of kerosene FMP which will be part of above said agreement”.

25. The decision in Paragraph 7(ii) clearly mentions that the bidding process will be finalized by the TC headed by OCAC; subsequently OGRA recused itself from the process citing the reasons that it was a commercial activity and should be performed by the industry itself. However, it appears that the other member of the TC i.e. HDIP was not taken on board, by OCAC, in the bidding process. HDIP’s letter to CEO OCAC (reproduced in paragraph 14 above and referred to here again) notes:

“However, HDIP was not consulted or taken on board, at any stage of the bidding process, against the stipulation in the minutes, and its first involvement began with the opening of single technical bid on June 2, 2017”.

26. The remaining members of the TC were refineries who are all members of OCAC, therefore, after the recusal of OGRA and non-involvement of HDIP it appears that the process was undertaken solely by OCAC. OCAC vide its letter dated 10th May, 2018 addressed to Director General (C&TA, CCP) elaborated its role in the implementation of FMP as follows (Annex ‘I’):

“OCAC was advised by the Petroleum Ministry to select Fuel Marking Company (FMC) through standard bidding process, adopting company policy/procedures. It was also advised that the Fuel Marking Program (FMP) will start after necessary approval of the ECC of the Cabinet. Thereafter, the steps followed by OCAC were:

- 1. Seeking Expression of interest (EOI)*
- 2. Pre-Qualification*
- 3. Development of Instructions to Bidder (ITB) Document through an independent Consultant. Said Bid Document was also shared with MNPR*
- 4. Invitation to Bids from Pre-qualified Bidders: separate Sealed Bids, Technical and Financial, were invited*
- 5. Receipt of bids*
- 6. Bids Evaluation: Evaluation of first the Technical Bid; thereafter opening of the Financial Bid of the successful Bidder after ensuring that the Technical Bid submitted met all the ITB criteria*
- 7. Selection of the Bidder*

.....

Throughout the said process, MPNR (now MOE, Petroleum Division) was kept informed vide updates through email and other written correspondence”.

27. Furthermore, documents provided by M/s Authentix (the selected FMC) to the Enquiry Committee show that the Invitation for EOI was issued by OCAC (Annex ‘J1’), the EOI was submitted to OCAC (Annex ‘J2’) and the commercial and financial bid was submitted to OCAC (Annex ‘J3’). On 22nd June, 2017 a letter was written by CEO OCAC and addressed to the Director General, Ministry of Petroleum & Natural Resources informing the latter that only 2 parties submitted responses to the EOI sent by OCAC subsequent to which the ITB document was prepared (by OCAC through an independent Consultant) and the parties were requested to submit their technical and commercial bids and the bid was submitted by only one company. CEO OCAC then requests that a meeting of the TC be convened in where the results of the process (of selection of FMC) followed would be shared by OCAC and further course of action including opening of the bid received would be agreed to. (Annex ‘D’).

28. MEPD in its letter to the Enquiry Committee reiterates the role of OCAC in the process as follows:

“This Division was not part of the bidding process, the whole bidding process for selection of fuel marking company was undertaken by OCAC and the ECC Summary was based on bid evaluation results provided by them”. (Annex ‘H’).

29. From the foregoing it appears that the entire bidding process leading to selection of the bidder was managed and controlled by OCAC contrary to the decisions of meeting held on 13th December, 2016 which called for all members of the TC to be taken on board throughout the process. Therefore, selection of the bidder is *prima facie* a decision by an association.

30. Furthermore, it is noted that procurement methodology adopted did not involve publishing an advertisement. We make reference here to Paragraph 7(i) of the decisions contained in the Minutes of Meeting held on 13th December, 2016 which state the following:

“7(i) Selection of FMC should be in an open and transparent manner through advertisement and competitive bidding only, adopting company policy/procedures; single selected FMC will operate for all refineries”.

31. Whereas the decision requires advertisement and competitive bidding OCAC in its letter to Director General (C&TA, CCP) notes:

“Since this was a Pilot program, the target was to approach those parties that are involved in kerosene marking, that have their own proven technology, and that have at least 5 years of proven experience providing Fuel Markers successfully to Industry in various countries and in fostering a successful program. Being the first program of its kind, further, an independent Consultant was hired by OCAC to prepare a very robust ITB document”. (Annex ‘I’).

32. OCAC did not publish an advertisement and opted to issue EOI and prequalification documents to the following selected companies only:

- a. Petroleum Logistics UK;
- b. Innospec Singapore;
- c. SBZ Corporation, UK;
- d. John Hogg, UK;
- e. SGS (through their Karachi Pakistan office) and
- f. Authentix, UK.

33. The Enquiry Committee observes that OCAC decided to adopt a procurement method that did not involve publishing an advertisement even though the decisions taken in the meeting held on 13th December, 2016 call for the TC to finalize the bidding process and the selection of the FMC through advertisement.

34. The price quoted by the selected FMC is Rs. 1.22 per liter and since, kerosene is a regulated product, and this amount would be added to the final price payable by the consumer. When queried about the recouping mechanism for the FMP MEPD in its response states:

“The actual cost of the fuel marker as approved by the ECC @ Rs. 1.22 per liter, will be included in the Kerosene price at the refinery stage for onward payment to FMC. Thus, the cost of market will be borne by the general consumer; while refineries will receive their respective due amounts through payments from Oil Marketing Companies (OMCs)”. (Annex ‘K’).

It is noted that all of the decisions by OCAC, including the selection of FMC and the procurement methodology adopted have a direct bearing on the final price of kerosene therefore, it appears that OCAC has taken a decision with regards to the price of kerosene.

35. The Enquiry Committee has also observed that the selected FMC M/s Authentix had approached MEPD prior to the decisions of the meeting held on 13th December, 2016. A letter dated 6th June, 2016 from M/s Authentix to DG HDIP makes reference to a meeting

held by M/s Authentix with MEPD and of a directive issued by MEPD with regards to fuel marking of kerosene and Authentix approaching the refineries for developing a proposed business model for the same (Annex 'L'). This fact puts a question mark on the selection of M/s Authentix which was incidentally the only company to submit a commercial bid.

If yes, whether, the decisions are anti-competitive in terms of Section 4 (1), read with Sub-section (2) (a) of the Act.

36. Section 4 of the Act reads 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;*

37. Before proceeding with the analysis of whether OCAC's decision is anticompetitive in terms of Section 4 of the Act the relevant market has to be defined in terms of Section 2(1)(k) of the Act. For the purposes of this enquiry the relevant market appears to be the market for provision of fuel marking services in Pakistan which entails the following services:

- a. Procuring and preparing the chemical additive and delivering it to the refinery;
- b. Introducing chemical additive to SKO at the refinery stage;
- c. Field and lab testing to check adulteration.

38. The Commission has consistently held in its orders that associations of undertakings cannot take business decisions on behalf of their member undertakings. Doing so is a violation of Section 4 of the Act, particularly when such decisions have an impact on the pricing of goods and services offered by the association's members. Procuring fuel marking services on behalf of its members is a business activity that *prime facie* in violates that vires of Section 4 of the Act.

39. A competitive bidding process is one where all interested parties may bid for the contract and an essential component of this process is informing all undertakings in the relevant market through publication of an advertisement. The decision by OCAC regarding the

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selection of FMC without advertisement has an impact on the relevant market as well as the allied market for SKO. As determined in the foregoing paragraphs OCAC made the decision to not publish a newspaper advertisement and instead sent the EOI to six companies only. This decision by OCAC foreclosed the market for other companies operating in the relevant market of fuel marking services. The decision also resulted in the receipt of response from only 2 firms and bid submission by only one firm which was subsequently selected. A letter by CEO OCAC, dated 22nd June, 2018, addressed to DG MEPD notes:

“These parties were selected on the basis of a thorough research: it has to be a party that is involved in kerosene marking, that has its own proven technology, and that has at least 5 years of proven experience in providing fuel markers successfully to industry in various countries, and fostering a successful program”. (Annex ‘D’).

40. The Enquiry Committee notes that apart from the firms contacted by OCAC there are a number of other players providing the required services in the relevant market some of which include Dow Chemicals, SICPA, Johnson Matthey (Tracero), United Colour Manufacturing, Fuel Theft Solutions Ltd, A S Harrison & Co Pty Ltd, BASF SE, Sunbelt Corporation and Improchem Pty⁴. By not publishing an advertisement the aforementioned players, some of which are considered as industry leaders, were unable to participate in the tender. The principles of open competitive bidding ensure maximum participation which results in a good tender price or value for money.
41. It is noted that, since SKO is a regulated product which means that the price notification for it is issued by OGRA and as per the summary sent to ECC for approval the actual cost of the fuel marker obtained through the tendering process by OCAC would be included in the ex-depot sale price of SKO through the existing monthly pricing mechanism.
42. It is observed that the cost quoted by the successful bidder i.e. PKR 1.22 per litre (for six months trial period) would be recouped from the final consumer so the financial impact of the FMP for the first 6 months of the programme is approximately USD 1,107,750 or PKR 116,331,750⁵. Moreover, in the instant matter since only one party submitted its financial bid there was no price competition which could have resulted in a better price than the PKR 1.22 per litre and savings for the final consumer.

⁴ ‘Petroleum And Fuel Dyes and Markers Market: Global Industry Analysis and Opportunity Assessment 2016-2026’, Future Market Insights, <https://www.futuremarketinsights.com/reports/petroleum-and-fuel-dyes-and-markers-market>

⁵ Based on 75,000 tonnes of marked SKO. Commercial bid submitted by M/s Authentix.

43. As discussed above, OCAC has contended that all its decision relating to the matter were directed and approved by the Federal Government. OCAC is essentially pleading the state compulsion defense i.e. that the state made the anti-competitive behavior mandatory.
44. This defense cannot be accepted as it fails the test laid out by the Commission in various cases including the International Clearing House decision.⁶

125. The EU State Compulsion test as stated in Hajj Fares case is as follows:

60. In the E.U., to plead the defense of state compulsion successfully, the party claiming the defense must satisfy the following three points:

- i. That the state must have made certain conduct compulsory: mere persuasion is insufficient;*
- ii. That the defense is available only where there is a legal basis for this compulsion; and*
- iii. That there must be no latitude at all for individual choice as to the implementation of the governmental policy.*

45. Perusal of all the minutes of meeting submitted by the parties indicate that there was no compulsion at any stage of the process on OCAC. In fact the government in this case hardly had to persuade OCAC which, as discussed above, took decisions on its own rather than at the level of the Technical Committee formed by MEPD. HDIP is on record that it was never taken on board by OCAC regarding the bidding process. Furthermore, MEPD itself denies that it took part in a crucial meeting of 7th July 2018 being relied upon by OCAC.
46. Furthermore, while the ECC did indeed approve this scheme based on the recommendation of MEPD, this approval does not provide immunity to OCAC's anticompetitive behavior for which there is no legal basis. In fact, the decision itself to allow OCAC to take part in the process of selecting a fuel marking company is *prima facie* against the framework laid out in the Oil and Gas Regulatory Authority Ordinance, 2002 which empowers OGRA to take decisions relating to enforcement of standards etc. Moreover, where an act of a business is illegal under the law, a decision of the Federal Government cannot make it lawful.
47. Similarly, OCAC cannot claim that it had no latitude at all regarding how to implement that government's decision. Foremost, OCAC was never individually authorized to take decisions, but ended up doing so on its own volition as is clear by the documents on record. OCAC, knowing that associations cannot take part in business decisions of its

⁶ http://cc.gov.pk/images/Downloads/ich_order_30_april_2013.pdf



members, could have easily refused to get involved in the process of selecting the fuel marking company. Instead, it actively decided to solely go ahead with the process.

48. *Prima facie*, OCAC's conduct does not pass any limb of the state compulsion test and hence its contentions cannot be accepted.
49. In view of the discussion above the decision by OCAC to select the FMC, to adopt a procuring method whereby no advertisement was published and determining the price of kerosene are decisions by an association of undertakings that have the *object and effect of preventing, restricting, reducing, and distorting competition* in the relevant market, which *prima facie* is in violation of Section 4(1) of the Act. The decision also amounts to *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* which *prima facie* constitutes a violation in terms of Section 4(1) read with Section 4(2) (a) of the Act.

CONCLUSION & RECOMMENDATIONS

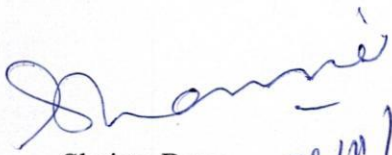
50. The Enquiry Committee examined whether the selection of the FMC, procurement methodology adopted, and determination of price can be considered as 'decisions' by OCAC and if so whether these decisions were a *prima facie* violation of Section 4 of the Act.
51. Based on the findings of paragraphs 21-23 above OCAC is *prima facie* an association of undertakings in terms of Section 2(1)(q) of the Act being a representative body of the downstream oil industry whose members are undertakings engaged in refining, marketing and distribution of petroleum products.
52. Based on the findings of paragraphs 24-29 it appears that the entire bidding process leading to selection of the bidder was managed and controlled by OCAC contrary to the decisions of meeting held on 13th December, 2016 which called for all members of the TC to be taken on board throughout the process. Therefore, selection of the bidder is *prima facie* a decision by an association.
53. Based on the findings of paragraphs 30- 33 it appears that OCAC decided to adopt a procurement method that did not involve publishing an advertisement even though the decisions taken in the meeting held on 13th December, 2016 call for the TC to finalize the bidding process and the selection of the FMC through advertisement.

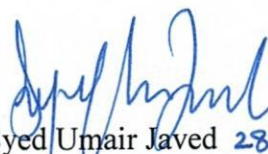


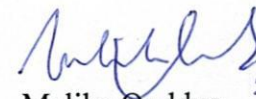
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54. Based on the findings of paragraphs 34-35 it is noted that all of the decisions by OCAC, including the selection of FMC and the procurement methodology adopted have a direct bearing on the final price of kerosene therefore, it appears that OCAC has taken a decision with regards to the price of kerosene.
55. Based on the findings of paragraph 37 the relevant market appears to be the market for provision of fuel marking services in Pakistan.
56. Based on the findings of paragraphs 38 to 49 the decisions by OCAC to select the FMC, to adopt a procurement method whereby no advertisement is published and to fix the price of kerosene are a *prima facie* violation of Section 4 (1) read with Sub-section (2) (a) of the Act.
57. The Enquiry Committee recommends that in view of the *prima facie* violation of Section 4 of the Act, the Commission may consider initiating proceedings against OCAC under Section 30 of the Act.


Shaista Bano 28/11/18
Enquiry Officer


Syed Umair Javed 28/11/18
Enquiry Officer


Maliha Quddus 28.11.18.
Enquiry Officer