

ENQUIRY REPORT

(Under Section 37(2) of the Competition Act, 2010)

**IN THE MATTER OF COMPLAINT FILED FOR ALLEGED ABUSE OF DOMINANT
POSITION BY INTERNATIONAL AIRLINES IN THE HANDLING OF MANGO
CARGO EXPORTS**

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Dated: 30th December 2019



BACKGROUND

1. This Enquiry Report is prepared pursuant to Section 37 (2) of the Competition Act, 2010 ('the Act') on a joint complaint filed by Air Cargo Agents Association of Pakistan and All Pakistan Fruit ('ACAAP') and Vegetable Exporters, Importers and Merchants Association ('PFVA') (hereinafter collectively referred to as 'the Complainants') against various foreign airlines operating in Pakistan including Emirates Airline, Qatar Airways, Oman Air, Turkish Airways, Gulf Air, Saudi Arabian Airlines, Etihad Airways (hereinafter collectively referred to as 'the Respondents') for alleged violation of Section 3 of the Act.
2. The complaint alleges that airlines are charging higher rates on the export of mangoes from Pakistan in comparison to the charges levied for exports from India for the same destinations despite the fact that the distance from Pakistan is less than the latter. Furthermore, exporters have to give undertaking of no claim which exempts airlines from loss incurred due to delay or damage caused during transit and handling. It is also alleged that export rates for fruits and vegetables generally remain at the same level throughout the year but during the mango season higher rates are announced by the airlines which is unfair and against business norms. The Complainants have contended that they are unable to compete in the international markets due to high cost of freight levied on the export of mangoes (A copy of the complaint is attached as Annex - A).
3. Keeping in view the above, an enquiry was authorized on 18th July, 2017, in accordance with Section 37 (2) of the Act read with Regulation 17 (2) of Competition Commission (General Enforcement) Regulations, 2007 and the following officers were appointed to the enquiry committee: Ms. Maliha Quddus then Deputy Director now Joint Director(C&TA), Mr. Irfan ul Haq, then Assistant Director now Deputy Director (C&TA) and Ms. Aqsa Suleman, then Management Executive now Assistant Director (C&TA) (hereinafter collectively referred to as the "Enquiry Committee") to determine whether any provision of the Act had been violated by airlines on the export of mangoes from Pakistan.



COMPLAINT, COMMENTS AND REJOINDERS

4. The allegations made by the Complainants are summarized as follows:
- a. Airlines are charging higher rate for export of mangoes from Pakistan in comparison to rate charged to Indian exporters, for international destinations that are at a less distance from Pakistan than India. For instance, rate charged from Bombay/ Delhi to United Kingdom destinations is US\$ 1.30/kg in comparison to US\$ 1.66/kg from Karachi/Lahore/Islamabad to United Kingdom despite the distance from Karachi to United Kingdom being less than 75 minutes less than Bombay/Delhi to United Kingdom. High freight rate implemented by the airlines raises the end price of mangoes resulting in competitive disadvantage for Pakistani exporters in the international mango market.
 - b. It is mandatory for fruit and vegetable exporters to give undertaking of no claim to airlines in case of delay in the shipment or damage caused during the transit due to negligence of any airline. The practice of undertaking of no claim is unfair for mango exporters for the reason that there is no accountability of the airlines for their negligence.
 - c. Dry cargo and mangoes are exported in the form of pallets. Mangoes offer high loadability in comparison to the dry cargo and enables air carriers to take twice as load in comparison the dry cargo which enables airlines to earn high profits. This method of charge puts Pakistani exporters at disadvantageous position as it raises the cost of mango at retail level and results in making Pakistani mango uncompetitive in the international market.

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- d. Airlines charge different freight rates for other fruits and vegetables throughout the year however for export of mangoes higher rates are announced which is unfair and against the business norms.
5. To seek comments of airlines on the concerns raised in the complaint, a copy of the Complaint was forwarded on July 24, 2017 to Pakistan International Airlines (PIA), M/s. Airblue Limited, M/s. Turkish Airways, M/s Thai Airways, M/s. Saudi Arabian Airlines, Emirates Airlines, Etihad Airways and Qatar Airways.
6. In response to the letter sent to airlines, Thai Airways vide letter dated July 27, 2017 stated that being a far eastern carrier, it does not carry fruits and vegetables to Europe, USA and Middle East destinations that are main markets of perishable products. Shipment rates implemented by Thai airways are based on head office policy, market demand and bench mark of PIA. Based on the demand/supply gap and shipment size discounts are also offered to shippers.
7. Qatar Airways in response vide letter dated July 28, 2017 stated: that it's pricing policy is comprised of several factors which includes factors such as capacity from origin, onward capacity trends and constraints to destinations, supply/demand situation based on historic data, achieving targets and available competition in the local market. Qatar airways exported around 2600 tons mango in 2016 from Karachi in comparison to 2200 ~~₹~~tons in 2015. In respect to the pricing policy in India, Qatar Airways has independent pricing policy that does not fall within the ambit of Qatar airways stations in Pakistan. For transportation fruits are vegetables are accepted under certain prescribed conditions set out in the carrier's regulations and in accordance with applicable law.
8. PIA through letter dated 4th August, 2017 stated the following: PIA rates are always lower than other foreign carriers with a maintained difference of 15-20 rupees. Indemnity bond is filled by agents/shippers not to claim in case of any damages, this is the requirement of catering the highly fragile nature of the commodity.



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9. Emirates vide reply dated August 18, 2017 denied the allegations leveled in the complaint. Following is submitted in the reply. Emirates pricing for air cargo from Mumbai to London is INR 106 per kilogram compared to Karachi to London which is Rs. 168 per kilogram Pakistani and Indian air freight export market is not comparable because of different conditions of supply and demand characteristics; Pakistani and Indian markets have different input costs (like re-screening mangoes ex-Pakistan in Dubai while this is not required for Mangoes ex India). The Pakistani and Indian mango seasons occur at different times of the year. Mango season in India is May to July, whereas the season in Pakistan is June to August. Pricing of air cargo is a complex procedure and is dependent on many factors which includes airline's geographical location, the equipment operated, the route operated, the operational efforts required for the relevant cargo, the costs incurred in complying with the various applicable regulatory security and safety regimes, an airline's handling facility and infrastructure costs, an airline's manpower cost, cost of capital, overheads, credit worthiness etc.
10. Etihad Airways in its reply dated August 22, 2017 submitted the following: Etihad is not dominant in the air cargo shipments between Pakistan and the United Kingdom. Its market share for air cargo shipped to UK is less than 4.9%, and market share for perishable cargo, of which mango represent less than 3.7% share.
11. Turkish Airlines in their letter dated September 22, 2017 stated: Turkish Airlines has fixed freight of mangoes on the basis of allocation settled by its revenue management after evaluation of price and space. Mango is a perishable commodity and falls within the heading of 'PFP' for which special care is required to be taken by the airlines and loading of mango is usually higher than rates of other cargo. Undertaking of no claim is taken to avoid any loss by the airlines due to wrong declaration by the shippers. Exporters export mangoes in small boxes and it is impossible for the carriers to inspect every box physically, they have to rely on the declaration of shippers and their agents.
12. CAA in response to the details sought regarding mango exports from Pakistan submitted the data of overall cargo uplifted by airlines along with total airport wise quantity of dry cargo, perishables and mangoes uplifted. Data submitted by CAA was in consolidated



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form that did not provide detail of mangoes uplifted by airlines from Pakistan. To avail the required information, the enquiry officers deemed it appropriate to seek details from airlines including Emirates, Qatar, Etihad, Turkish and PIA. In response to the required information each referred airline submitted the quantity of mango exported from Pakistan for period of last two years which is used in the assessment of market shares in the analysis portion of the enquiry.

13. Apart from the above details, Enquiry officers also sought information from the Complainants regarding the current rate of charges levied by their airlines from India on exports of mangoes and perishable items to global destinations along with the rates charged by each in Pakistan for international destinations.

ISSUES

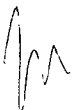
14. The questions before the Enquiry Committee are as follows:

- a. Whether any of the abovementioned airlines holds a dominant position in the relevant market; and
- b. If yes, whether its conduct i.e. charging exorbitant fares and requirement of indemnity bond constitute abuse in terms of Section 3 of the Act.

UNDERTAKINGS

15. 'Undertaking' as defined under Section 2(1)(q) of the Act 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 production, supply, distribution of goods or provision or control of services and shall include an association of undertakings”.



16. While assessing whether an entity is an undertaking for the application of the Act, a key consideration is whether it is engaged in commercial or economic activity in the relevant market. The Respondents are commercial airlines engaged in the provision of services including the carriage by air of passengers and cargo on various routes and therefore are undertakings in terms of Section 2(1) (q) of the Act.

RELEVANT MARKET

17. Section 2(1)(k) of the Act defines "relevant market" as:

“Relevant market” means 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;”

18. The contents of the complaint pertain to the shipment of perishable items particularly mangoes. A perishable item is defined as follows: “A perishable good is any product in which quality deteriorates due to environmental conditions through time, such as meat and meat by-products, fish and seafood, dairy products, fruit and vegetables, flowers, pharmaceutical products, and chemicals”¹. Perishable items can then be further bifurcated into fresh products such as fruits and vegetables and frozen products such as fruit concentrates and fruit pulps etc. Pakistani mangoes are exported in their ‘raw’ form and hence fall under the category of fresh fruits.

¹ <https://www.tibagroup.com/mx/en/transporting-perishable-goods>



19. A determination now has to be made on whether transport of mangoes for export forms a distinct category from other fruits. Looking at Pakistan's fresh fruit exports it is noted that 02 fruits i.e. citrus fruits (keenu, and other varieties of oranges) and mangoes account for approximately 74% of all exports in this category². Citrus fruits are available for export in the winter months October to March and do not compete with mangoes for cargo space. Therefore, mangoes for export are a distinct category from citrus fruits because of the temporal dimension since mangoes are available for export only between the months of May to September.
20. The next determination to be made is whether transportation of mangoes by air is substitutable for transportation of mangoes by sea. In the year 2016 the quantum of Pakistan's mango exports was 82,657,642 kilograms with an estimated value of USD 65,834,992³ out of this 64% is exported by sea and 35% by air.

Table 1		
Mode of Transportation for mangoes		
Mode	Quantity (kgs)	%age share of total
Sea	52900891	64
Air	28930175	35
Total	82,657,642	100

Source: Submission by Complainant

21. The UAE is the largest export market accounting for 42% of all exports followed by the UK (21%), Saudi Arabia (11%), Oman (6%), Qatar, Canada Norway, Germany and Bahrain with a share of 2% each⁴.

Table 2	
Top Export Destinations for Pakistani Mangoes	
Country	% age Share of exports
UAE	42
UK	21
Saudi Arabia	11
Oman	6

² Calculations based on data extracted from ITC Trade Map for 2015 and 2016.

³ Data extracted from UN Comtrade for the HS Code 080450, <https://comtrade.un.org/data>

⁴ Calculations based on data extracted from ITC Trade Map for the year 2016.

https://www.trademap.org/Country_SelProductCountry_TS.aspx?nvpm=1|586|||08045020||8|1|1|2|2|1|2|1|1

Qatar Canada, Norway, Germany & Bahrain	2 (each)
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22. It is noted that mangoes shipped via sea are destined for the Gulf market with 83% of all mango exports destined for the UAE and 13% for Oman. On the other hand, calculating the same for exports by air may be misleading since international airlines (mostly Gulf carriers) transit at their respective hubs before onward carriage to European and other destinations. However, based on overall export destination figures it can be assumed that transport by sea is used primarily Gulf countries (due to shorter distance from Pakistan) and air transport is used for Gulf, European and other destinations.
23. Due to its physical characteristics, to ensure high quality, it is important for the skin to be undamaged. Even the slightest injury would result in rapid spoilage with this very sensitive fruit. Care must also be taken to ensure that the fruit is not overripe, as this would have a negative impact on salability. The maximum duration of storage and transport is 14 - 25 days⁵. Mangoes require particular temperature, humidity/moisture, and ventilation conditions and must be protected from all forms of moisture (seawater, rain and condensation water) to prevent mold, rotting and spoilage. When time becomes a primary consideration for delivery, air transportation is the mode of choice as it can provide expedient delivery of goods when traveling great distances. Another factor to be considered is that for transport via sea mangoes have to be first transported to the ports which are located in Karachi, this further increases the travel time and may not be feasible for mangoes from Punjab which are further from the port. So, for destinations other than Gulf countries transport by sea is not feasible due to the short life of the product. Therefore, transport by sea could not be a substitute for mango exports by air in this respect.
24. In response to an increase in air freight rates could exporters theoretically switch to transport via sea? Based on the foregoing analysis it can be assumed that exports destined

⁵ http://www.tis-gdv.de/tis_e/ware/obst/mango/mango.htm

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for Gulf countries would switch to sea transport however, for other destinations air transport is the only option. Therefore, the transportation of mangoes by sea and air constitute separate relevant markets. Next a determination would have to be made regarding the substitutability between direct flights and flights with layovers. It is noted that for a highly perishable product like mangoes, an airline flying directly substantially lowers the travel time since hubbing/layovers increase the travel time and the number of times the cargo is handled for example, at Dubai airport mangoes would be offloaded from the plane arriving from Pakistan and then depending on the layover time would have to be stored and then reloaded on to the plane for its journey towards the final destination. Layover time for flights from Pakistan towards European/North American destinations range from 03 hours to 16 hours. Following is an approximate comparison between time difference between a flight flying directly between Lahore and Manchester and via Dubai:

Lahore to Manchester direct – Flight time 7 hours 45 minutes

Lahore to Dubai – Flight time 2 hours

Layover in Dubai (approx.) 3 hours

Dubai to Manchester 8 hours 30 minutes

Total time from Lahore to Manchester 13 hours and 30 minutes

25. Hubbing/layovers increase chances of spoilage and reduces shelf life. They are also expensive in terms of airport taxes as they entail payment of airport taxes, handling charges etc.

26. Another advantage of direct flights over flights with layovers is that for example, for Emirates, on the Islamabad to Dubai leg cargo to Manchester has to vie for space with cargo being transported to destinations all over the world and on the Dubai to Manchester it has to vie for space with cargo from destinations all over the world. Hence, demand and hence prices are driven by multiple factors. Therefore, generally speaking cargo transported on a direct flight would be cheaper than a flight with a layover(s).



27. Mangoes uplifted from Pakistan that are destined for international destinations are collected from all the major airports in Pakistan especially those located near the mango producing areas. Exporters also choose from the airports that cater to the flight operations of particular territory required by them. Therefore relevant geographic market for the purpose of this enquiry is that of Pakistan to international destinations.

28. Based on the findings of Paragraphs 17 to 27, it appears that the relevant market for the purpose of this enquiry is the market for transport of mangoes by air from Pakistan to international destinations.

DOMINANT POSITION:

29. Dominant position is defined in clause (e) of sub-section (1) of Section 2 of the Act, as follows:

'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';

30. In the instant matter we determine the dominance of firms by analyzing the market shares in the relevant market i.e. the quantum of mangoes uplifted by air from Pakistan for international destinations. To look into the aspect of dominance as a first step, the enquiry committee assessed market of overall cargo uplift, which includes dry and perishable goods, to highlight if there exists any dominance therein. From the data submitted by CAA it is noted that there are roughly 37 airlines engaged in uplifting of cargo from various Pakistani airports⁶ out of which share of the 10 airlines account for an average of 85.8% (Refer to Table 3 below).

⁶ Majority of the airlines are operating out of Jinnah International Airport, Karachi

Table 3			
Share of Airlines in Overall Cargo Uplifted from Pakistan			
Airline	2014-15	2015-16	2016-17
Emirates	27.3%	29.6%	26.9%
Qatar	13.7%	16.0%	18.6%
PIA	16.2%	11.7%	10.9%
Saudi Arabian	8.2%	7.1%	6.8%
Turkish	3.7%	4.9%	5.7%
Thai	4.8%	4.9%	5.6%
Etihad	5.0%	5.2%	4.3%
Shaheen	2.7%	2.2%	2.9%
Oman Air	1.3%	2.0%	2.4%
Air Blue	2.8%	2.6%	1.3%
Total share of Top 10	85.6%	86.3%	85.5%

Source: Calculations made on data submitted by CAA

31. Out of these 'top'10 carriers, at present, the following are uplifting mangoes from Pakistan to international destinations: PIA (the national carrier which is the only airline to operate direct flights to European destinations), Emirates, Etihad, Qatar, Saudi Airlines and, Turkish Airlines. Other Pakistani airlines like Airblue and Shaheen have limited flight operations mainly to Gulf countries⁷ and as per the response received from Airblue the airline has very limited capacity on its fleet to carry cargo and Shaheen has ceased operations. Thai Airways does not uplift mangoes for Pakistan's main export markets (Europe, USA and Gulf) because it is a Far Eastern carrier flying out of its hub in Bangkok.

32. All international airlines (uplifting mangoes from Pakistan) were asked to provide the quantity of mangoes they uplifted from all Pakistani airports for mango season (May to October) 2016 and 2017 and the data provided is collated in Table 4 below⁸.

⁷Airblue operates flights to Dubai, Abu Dhabi, Sharjah, Dammam, Medina, Riyadh, Jeddah and Muscat. Shaheen Air flies to Abu Dhabi, Al Ain, Dammam, Jeddah, Medina, Manchester, Guangzhou, Mashhad, Oman, Riyadh and Sharjah.

⁸ Data from Saudi Arabian Airlines is not available.

Table 4				
Airline wise Share of Mangoes Uplifted from Pakistan				
Airlines	2016 Mangoes uplifted (K.G's)	Percent Share 2016	2017 Mangoes uplifted (K.G's)	Percent Share 2017
Emirates	2440592	16.64%	3244183	29.53%
Qatar	5177000	35.31%	3764000	34.27%
Etihad	575604	3.93%	297919	2.71%
Turkish	657926	4.49%	n/a	n/a
PIA	5812000	39.64%	3678740	33.49%
Total	14663122		10984842	

Source: Collated from data submitted by airlines.

33. Compiled export data of mango submitted by each airline as mentioned in Table-2 shows that no airline has current share of up to or more than 40% of total mangoes uplifted. For the year 2017 Qatar has the highest share of 34.29% followed by PIA with share of 33.49%. While Emirates and Etihad hold a share of 29.53% and 2.71% respectively. Data reveals that between the year 2016 and 2017 there is a significant change in the share of airlines especially between PIA and Emirates. PIA had significant share of 39.64% in the year 2016 that reduced to 33.49% in 2017. Whereas between the same time period Emirates gained share notably from 16.64% to 29.53%. No single airline meets the 40% market share criteria for presumption of dominance in terms of Section 2(1) (e) of the Act. The fluctuations in market shares shows that the conditions of the market are such that no single airline has the ability to maintain its market share.

34. The Complainant has argued that the relevant market and dominance should be established w.r.t. transport of mangoes by air to UK/European destinations. The reasoning here is that the UK is the second largest market for Pakistani mangoes after the UAE and mangoes to the UAE are exported almost entirely via sea. The Enquiry Committee is of the opinion that this definition of relevant market is too narrow since data submitted by airlines, in the form of destination wise uplift of mangoes, shows this to be incorrect as mangoes are being transported to other destinations and the

Complainant has alleged that abusive conduct is taking place for all destinations. Quantity wise mango uplift for the UK/Europe are tabulated in Table 5 below:

Table 5: Transportation of mango to UK/European Destinations*	
Airline	Quantity in kgs
Emirates	2,863,982
Qatar	2,334,804
PIA	2,158,810
Etihad**	277,130

*Figures available for 2017 only. Figures for other airlines are unavailable.

**Figures available for 2016 only

The data shows that even if the market is defined in terms of the UK/Europe no single airline appears to be dominant.

35. Therefore, based on the findings in paragraphs 29-34 above, *prima facie* no airline is dominant in the relevant market in terms of Section 2(1)(e) of the Act.

ABUSE OF DOMINANT POSITION

36. As stated in Paragraph 35 above no airline holds a dominant position in the relevant market and hence there is no question of abuse by the latter however, without prejudice to the foregoing, the Enquiry Committee finds it prudent to still conduct an analysis of tariffs for Emirates to see if there were significant differences in freight rates as was being alleged.

37. Abusive practices are divided into two main categories: Exploitative and exclusionary. Exploitative abuse covers conducts that result in loss to consumers which includes excessive pricing and unfair discrimination. Whereas exclusionary abuse relates to the practices that impair the ability of competitors to compete in the market resulting in indirect harm to consumers. Provisions of Section 3 of the Act, relevant to the complaint are reproduced as below:

“Abuse of dominant position- (1) No person shall abuse dominant position.

(2) An abuse of dominant position is deemed to have been brought about, maintained or continued if it consists of practices which restrict reduce or distort competition in the relevant market.

(3) The expression: practices referred to in sub section (2) shall include, but are not limited to-

(a) limiting productions, sales and unreasonable increases in price or other unfair trading conditions;


38. The Complainants allege that the airlines are engaged in charging higher prices to mango exporters in Pakistan than India for shipment of mangoes to international destinations. Furthermore it is alleged that these airlines impose mandatory provision of signing indemnity of no claim on exporters in case of delay in the shipment or damage caused during the transit due to negligence of any airline. Airlines charge different freight rates for other fruits and vegetables throughout the year however for export of mangoes higher rates are announced which is unfair and against the business norms.

39. Regarding the allegation of excessive/unreasonable prices charged to mango exporters in Pakistan it is observed that the rates charged in India are used as a benchmark. It is pertinent to note here that the market dynamics of air cargo uplift in India are not comparable to Pakistan. According to responses of airlines, the rates charged for cargo depend on a number of factors such as: availability of space, day of week, airports served, supply and demand, frequency of flights, volume uplifted, operating costs, how far in advance the shipment is booked and competition between airlines. Therefore, these factors play an instrumental role in the determination of pricing and do not necessarily make the rates of both countries comparable. To strengthen this argument data of flight frequency of both countries was gathered. Data revealed that the total number of flights from Pakistan in 2015-16 to national, international destinations were 157,214⁹. Whereas total number of flights from top ten airports in India were roughly around 1500,000¹⁰.

40. Despite that the dynamics of cargo uplift market of Pakistan and India are not comparable due to the difference of economic conditions and market functionality that is independent

⁹ <http://www.caapakistan.com.pk/upload/AT/stats/2015%20-%202016-APT.pdf>

¹⁰ <https://www.statista.com/statistics/589232/india-airports-aircraft-movements/>



of each other, the Enquiry Committee as a sample compares the rates between India and Pakistan charged for mango uplift by Emirates for mango season 2017 for major export destinations. The rates quoted for Pakistan are in Pakistan Rupee (PKR) and for India are in Indian Rupee (INR) which these are both converted into US Dollars for comparison (*detailed destination wise rates are attached as Annex- B*). The calculations are summarized below:

Country	Airport	Rate charged PKR	PKR into USD	Rate charged in INR	INR into USD	Absolute Difference USD (Pak-Ind)
Dubai	DXB	79	0.75	65	1.04	-0.29
UK	MAN	174	1.66	74	1.184	0.47
UK	LHR	174	1.66	90	1.44	0.22
UK	LGW	174	1.66	74	1.184	0.47
UK	GLA	174	1.66	74	1.184	0.47
U.S	JFK	304	2.90	145	2.32	0.58
U.S	LAX	304	2.90	180	2.88	0.02
Germany	FRA	174	1.66	74	1.184	0.47
France	CDG	179	1.70	74	1.184	0.52

41. The data shows that the rates from Pakistan to Dubai are cheaper for Pakistan and for all other destinations such as the UK, US, Germany and France the rates for Pakistan are higher. However, it is noted that in absolute terms the maximum difference in rates is USD 0.58 (i.e. 58 cents) for New York. For London Heathrow the rate for Pakistani exports is 22 cents higher than for Indian exporters.

42. Therefore, from the data presented in Paragraphs 36-41 there is *prima facie* no evidence that, as compared to the rates for Indian exporters, Pakistani exporters are being charged unreasonable or exorbitant rates for mango exports.

43. With regards to whether the mandatory condition of indemnity bonds constitutes an unfair trading condition, the Complainants have noted that they are required to submit an

indemnity bond (on Rs 100 stamp paper) it also appears that the contents of the indemnity bonds are similar and identical for all the above cited airlines. The wordings of the indemnity bond, required by Emirates, are reproduced below (Copies of indemnity bonds for Qatar Airways attached as Annex 'C'):

“ This is to certify that the consignment of Fresh fruit/mangoes under Emirates AWB from (insert station name).... Accepted by Emirates SkyCargo and agreed to transport the same, provided no liability attached to Emirates SkyCargo for any loss or damage due to temperature excursion.

And whereas you have accepted the said consignment and agreed to transport the same, provided no liability attached to you for any loss or damage to the above said shipment containing Fresh Fruit/Mangoes.

Now therefore, I/We _____ the shipper/agent, hereby indemnify you and hold you harmless against all claims, loss and judgements (including costs) whatsoever from any person howsoever arising out of respect of the transportation of fresh fruit/mangoes Commodity under Emirates Airwaybills.

I/We further agree and confirm that we shall not claim any compensation from you for the loss/damage for any reason whatsoever for the above commodity.

I warrant and represent that am duly authorized and empowered to Indemnify Emirates Sky Cargo and this Indemnity is deemed to be valid in accordance with the laws of Pakistan”.

44. From the wording of the Indemnity bond it appears that the shipper/agent cannot claim any sort of compensation from the airlines in case of damage or loss resulting from whatever reason. The Enquiry Committee now proceeds to look at the pertinent international legal framework governing the transportation of cargo by air and the liabilities arising therein. According to a report by the UNCTAD Secretariat¹¹ the applicable international conventions are as follows:

- a. The Warsaw System Conventions and;

¹¹ Carriage of Goods by Air: A Guide to the International Legal Framework, UNCTAD Secretariat, June 2006.



b. Montreal Convention 1999.

45. Summarily, under these conventions the carrier airline is *prima facie* liable for the loss of or damage to cargo and for delay during the time the cargo is in the charge of the carrier. A monetary cap is fixed on the liability of the airline for any damage or loss arising therein.

46. The response of the airlines viz. indemnity bonds is as follows:

Emirates

“Given the perishable nature of cargo (fruits and vegetables in particular), a disclaimer (or release) from the shipper is required to ensure that carriers can continue to offer low freight rates to customers. If these disclaimers were not standard market practice, carriers would be forced to charge higher rates to provision (or insure) against losses incurred through poor handling by shippers/forwarders (or defects within the mangoes). Note that in accordance with the relevant international legal convention (e.g. the Montreal Convention 1999), the carrier is liable for all damage to the cargo whilst in the carrier’s care and the carrier bears the burden of proving that any cargo damage occurred before or after the cargo was in its care (or was caused by the shipper). Given the practical difficulties in establishing the above, the industry has standardized the risk allocation between shipper and carrier to minimize the total cost to the shipper (this is similar to market position for ground handling services – see the IATA Standardized Ground Handling Agreement).

It has been estimated that the alternative to the current cargo industry standard would be a rate increase of approximately 5% to 15% (to compensate carriers for the additional insurance premiums or self-insurance provisions that would be required). This alternative method would be economically inefficient and would cause profit/revenue leakage from the shipper”.

47. Since the airline had argued that such disclaimers were standard industry practice, the Enquiry Committee asked Emirates to provide a copy similar documents for other jurisdictions like India, Australia and Thailand. In its response the airline noted that it would have the exact same legal position regardless of whether the parties execute Emirates' standard global rates agreement or whether the shipper instead issues an indemnity bond. Local law and local market practice dictates that a carriers take indemnity bonds in certain markets (i.e. Pakistan) but these legal and market practice barriers are not applicable in all jurisdictions.
48. Citing the example of Australia it stated that in Australian law there was no need for any indemnity bond as Emirates would enforce its contractual indemnity in Emirates standard global rates agreement against the shipper. It further stated that the carrier's liability is governed by the Conditions of Contract on the reverse of the Airway Bill and Emirates General Conditions. The relevant portions of the General Conditions of Carriage viz. the carrier's liability are reproduced below:

'Article 11- Carrier's Liability

11.1 Carrier is liable to the shipper, consignee or any other person for damage sustained in the event of destruction or loss of, or damage to, or delay in the carriage of cargo only if the occurrence which caused the damage so sustained took place during the carriage as defined under Article 1.

11.2 Except as may be otherwise provided in any applicable Convention, carrier is not liable to the shipper, consignee or any other person for any damage, delay or loss of whatsoever nature arising out of or in connection with the carriage of cargo or other services performed by carrier, unless such damage, delay or loss is proved to have been caused by the negligence or wilful default of carrier and there has been no contributory negligence on the part of the shipper, consignee or other claimant.

11.3 Carrier is not liable if the destruction, loss of or damage to cargo is proved to have resulted solely from the inherent defect, quality, nature or vice of that cargo'.



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49. According to Article 2.1—Applicability of the General Conditions of Carriage:

“2.1 "General". These conditions shall apply to all carriage of cargo, including all services incidental thereto, performed by or on behalf of carrier; provided however that if such carriage is "International Carriage" as defined in the applicable convention (see 1.3) such carriage shall be subject to the provisions of the applicable Convention and to these conditions to the extent that these conditions are not inconsistent with the provisions of such Convention”.

The applicable convention referred to here is the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, 12 October 1929; (also referred to as the Warsaw Convention).

50. As argued above under the Warsaw Conventions the carrier airline is *prima facie* liable for the loss of or damage to cargo and for delay during the time the cargo is in the charge of the carrier. Emirates was asked to attach copies of indemnity bonds, similar to the one required for Pakistan, for India, Thailand and Australia. It has provided sample copy of three such indemnity bonds which includes: (i) shipment of herbs from Telangana, India, (ii) shipment of pharmaceutical products to Dhaka, Bangladesh and, (iii) shipment of day-old chicks from Paris France. It is only in the shipment of fresh herbs from India where a letter indemnifying Emirates for any loss or damage to cargo. Emirates was specifically asked to provide copies of indemnity bonds for mango exports from India which is a country with similar laws and weather conditions etc. however, it has failed to provide copies of the same. From this it can be assumed that such bonds are not required to be furnished by Indian exporters.

51. Emirates was asked to provide details of the claims made by Pakistani exporters for spoilage or loss of perishables over the last two years. The data submitted is as follows:

Emirates Claim Settlement Status		
Year	Claim Status	Total
2017	Claim Settled	05
	Claim Initiated	01
	Claim Rejected	01
	Pending Document Submission	01

Sub-total		08
2018	Claim Settled	06
	Claim Initiated	01
	Claim Rejected	08
	Pending Document Submission	01
Sub-total		16
Grand Total		24

It appears that over a two year period, Emirates has settled 11 claims for compensation and rejected 09.

52. In order to clarify Emirates' policy viz. indemnity bonds, the Enquiry Committee held a meeting with Emirates' representative on 8th May, 2019. As per the discussion during the meeting and the subsequent response submitted, vide letter dated 21st May 2019, Emirates stated the following:

“(i).Emirates no longer requires the execution of “Indemnity Bonds” in Pakistan (note that Emirates ceased this practice in 2018); and

(ii).Emirates adopts normal industry practice in each market it operates and has paid out on all genuine claims (in accordance with Emirates' General Conditions of Carriage for Cargo) irrespective of whether an “Indemnity Bond” was taken from a shipper/grower or not.”

53. From the meeting held with Emirates and the above cited response, the airline no longer requires the furnishing of indemnity bonds and it appears that the concern of the Complainants in this regard have been sufficiently addressed.

Qatar

54. Qatar Airways stated that its liability for spoilage/loss is governed by Article 11 of its Conditions of Carriage which is reproduced below:

‘Article 11-Carrier’s Liability





1. *Carrier is liable to the shipper, consignee or any other person for damage sustained in the event of destruction or loss of, or damage to, or delay in the carriage of cargo only if the occurrence which caused the damage so sustained took place during the carriage as defined under Article 1.*

2. *Except as may be otherwise provided in any applicable Convention, carrier is not liable to the shipper, consignee or any other person for any damage, delay or loss of whatsoever nature arising out of or in connection with the carriage of cargo or other services performed by carrier, unless such damage, delay or loss is proved to have been caused by the negligence or wilful default of carrier and there has been no contributory negligence on the part of the shipper, consignee or other claimant.*

3. *Carrier is not liable if the destruction, loss of or damage to cargo is proved to have resulted solely from the inherent defect, quality, nature or vice of that cargo'.*

The applicable convention referred to here is the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, 12 October 1929; (also referred to as the Warsaw Convention).

55. Qatar Airways was asked to provide copies of indemnity bonds for mango or perishable goods required from India, Thailand and Australia however, none were furnished.
56. In terms of claims made and settled w.r.t mango exports Qatar Airways has submitted the claims for 2017. A perusal of the data shows that information is submitted for 2017 only and shows that a total of 6 claims were made however no mention is made of whether the claims were settled or not.
57. A meeting was held with a representative of Qatar Airways wherein the Enquiry Committee was informed that the airline had discontinued the requirement of indemnity bond after introduction of the Default Insurance Programme (DIP) under the platform of IATA. Since the airline no longer requires furnishing of indemnity bonds, it appears that the concern of the Complainants in this regard have been sufficiently addressed.



Etihad

58. On the issue of indemnity bonds Etihad has stated:

“ACAAP takes issue with the indemnity that Etihad requires for the shipment of perishable goods. It offers no legal authority for its position: they simply say it must be the other way around. We are unable to respond to a claim that lacks logic or legal authority, and again remind the Commission that Etihad does not have market power in any market relevant to this issue”.

Turkish

59. Turkish Airline’s response is as follows:

“It is vehemently denied that the demand of undertaking and indemnity by the airlines is based upon the dominating and monopolistic attitude. It is submitted that exporters export mangoes in small boxes and it is impossible for the carriers to inspect every box physically and they have to rely on the declarations of shippers and their agents. The undertaking is taken in order to avoid any loss by the airlines due to wrong declaration by the shippers/agents; however in case of any negligence or unexpected delay during transaction on the part of Turkish Airlines it pays reasonable compensation to the exporters”.

PIA

60. According to the airline:

“Indemnity bond is filled by agents/shippers not to claim in case of any damages, this is the condition for catering the highly fragile nature of the commodity”.

61. A meeting was held with PIA wherein the representative noted that the airline was still requiring airlines to submit indemnity bonds. The reasons for doing so as claimed by PIA, is that the airline is not in possession of latest scanning equipment and every box of perishable items has to be checked manually which is a time consuming task. During this



time if there is some loss to this perishable cargo the airline cannot be held responsible for it. PIA continues to require exporters to furnish an indemnity bond.

62. It may be noted here that the Enquiry Committee, vide email and telephonic conversation dated 21.08.2019, asked the Complainants about their comments on the fact that Emirates and Qatar were no longer requiring indemnity bonds however, PIA was continuing the practice. No response was received from the Complainants in this regard. From the airlines' market share it appears that PIA does not hold a dominant position in the relevant market and with the resumption of operation of British Airways the share of PIA will reduce further as airlines would compete on the quality of services and cargo exporters will have the option to choose from the quality of services offered. Therefore, in view of the above, no question of abuse arises from the PIA's end.

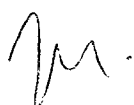
CONCLUSION & RECOMMENDATION

63. In terms of findings of paragraph 28 above it appears that the relevant market is the market for transport of mangoes from Pakistan by air to international destinations.

64. In terms of paragraph 29-34 above *prima facie* there is no airline dominant in the relevant market in terms of Section 2(1)(e) of the Act.

65. In terms of Section 3, from the data presented in Paragraphs 36-41 there is *prima facie* no evidence that, as compared to the rates for Indian exporters, Pakistani exporters are being charged unreasonable or exorbitant rates for mango exports. Therefore, no case of *prima facie* violation of Section 3(3)(a) of the Act is made out.

66. In terms of findings of Paragraphs 43-62 above it appears that contrary to international conventions and prevalent practice in other jurisdictions, Pakistani mango exporters were required to furnish an indemnity bond by all airlines (except Turkish) which absolves the airline of all responsibility of loss. However, this practice has been discontinued by two major airlines i.e. Emirates and Qatar. Since there is no *prima facie* evidence of any



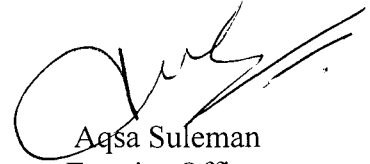
airline(s) being dominant in the relevant market therefore, no violation of Section 3(3)(a) of the Act is made out.



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