

COMPETITION COMMISSION OF PAKISTAN

ENQUIRY REPORT

IN THE MATTER OF ABUSE OF DOMINANT POSITION

BY

TETRA PAK PAKISTAN LIMITED

BY

IKRAM UL HAQUE QURESHI; NOMAN A. FAROOQI

Background

1. **Annex-I** is the letter dated 16-10-2008 of the Consumer Awareness and Welfare Association¹ (hereinafter ‘CAAWA’) addressed to the Competition Commission of Pakistan (hereinafter referred to as the ‘**Commission**’) wherein it has been alleged that Tetra Pak Pakistan Limited (hereinafter “**TPPL**”) was unjustifiably raising prices of their packaging products and, as a consequence, fruit juice and milk producers were reducing the quality of their products to offset these price increases.
2. **Annex-II** is the letter dated 1-11-2008 of CAAWA a request has been made to take necessary action to eliminate the monopoly of TPPL in Pakistan.
3. **Annex-III** is the letter dated 22-01-2009 of the CAAWA wherein it has been alleged that that TPPL was abusing its dominant position in Pakistan, stating therein that TPPL was “the only company in Pakistan, which supply packing machines and, which only used packing material supplied by them...The users of their packing machine has no other choice then to buy from them the packing material at whatever prices they demand.”
4. The Commission took notice of the Annex-III and initiated an enquiry into the allegations made against TPPL and pursuant to the provisions of sub-section (2) of Section 28 of the Competition Ordinance, 2010 (the ‘**Ordinance**’) appointed the undersigned officers as Enquiry Officers to (i) determine the relevant market, (ii) whether TPPL has a dominant position, (iii) whether TPPL has abused its dominant position in the relevant market, and has thereby violated Section 3 or any other provisions of the Ordinance, and to prepare a report under Section 37 of the Ordinance thereof.

The Issue

5. (i) To determine the relevant market, (ii) whether TPPL has a dominant position, (iii) whether TPPL has abused its dominant position in the relevant market, and has thereby violated Section 3 or any other provisions of the Ordinance and to prepare a report under Section 37 of the Ordinance thereof.

¹ CAAWA was established in 1984 in order “to provide, render and extend welfare, social and volunteer services to the citizens of Pakistan” when they act as consumers. Additionally, the group aims to promote “core consumers rights of safety, information choice, representation, redress, education, satisfaction of basic needs and a clean environment.” CAAWA states that one aim is “to help the consumers to provide the competitive prices and quality products” as well as to help consumers “from over-profiteering manufacturers...”

Tetra Pak Pakistan Limited

6. Tetra Pak Pakistan Limited (hereinafter referred to as ‘TPPL’) was established in 1982, and is a joint venture between Packages Limited and Tetra Laval International, S.A., the world’s leading liquid food packaging company².
7. Packages Limited was established in 1956 as a joint venture between the Ali Group of Pakistan and Akerlund and Rausing of Sweden to convert paper and paperboard into packaging for the consumer industry. Packages Limited is the only packaging facility in Pakistan offering a complete range of packaging solutions including offset printed cartons, shipping containers and flexible packaging materials to individuals and businesses world-wide³.
8. Tetra Laval International, S.A., holds major share holding in TPPL. Its registered office is in Switzerland, coordinates the policy of a group of companies, originally Swedish, which has acquired a global dimension. The Tetra Laval group specializes in equipment for the packaging of liquid and semi-liquid food products, mainly milk, in cartons. Its activities cover both the aseptic and the non-aseptic packaging sectors. They consist essentially in manufacturing cartons and, using the group’s own technology, carton-filling machines⁴.

Documents & Information requisitioned and received

9. For the purposes of enquiry TPPL along with all its customers were required to provide copy of agreement (s) executed *inter se* the TPPL and the milk processors and/or the fruit juice manufacturers⁵ pertaining to sale/purchase and/or lease of the packaging machines used by the milk processors and/or the fruit juice manufacturers, or any other agreement ancillary thereto.

² <http://www.packages.com.pk/globalpartners.htm>

³ <http://www.packages.com.pk/companyprofile.htm>

⁴ http://www.tetralaval.com/about_tetralaval/pages/default.aspx

⁵ M/s Benz Industries Limited, M/s Cider Foods (Pvt.) Ltd., M/s Engro Foods Limited, M/s Famous Minta Foods (Pvt.) Ltd., M/s Faraz Fruits (Pvt.) Limited, M/s Frooto Industries (Private) Limited, M/s Haleeb Foods Limited, M/s Juice Pack Industries (Pvt.) Ltd., M/s Maaher Food Industries Limited, M/s Nestle Pakistan Limited, M/s Nirala Dairy (Pvt.) Limited, M/s Noon Pakistan Limited, M/s Mehran Bottlers (Pvt.) Limited, M/s Popular Juice Industries (Pvt.) Limited, M/s Premier Dairies, M/s Shezan International Limited, M/s Standard Fruits Limited, M/s Tops Food & Beverages Ltd. and M/s Vita Pakistan Limited.

10. TPPL responded vide their Counsel's letter bearing no M&Z/Hum/HB/12998 dated January 22, 2010 wherein requests for extension to file the requisite documents till February 08, 2010 and for a meeting on February 02, 2010 to discuss the sufficiency and object of the information required by the Commission were made.
11. Their requests were acceded to and a meeting was scheduled for February 02, 2010. In the meeting with the Counsels for TPPL the sufficiency and object of the information required by the Commission was discussed and they were also informed to provide any or all agreements with the milk and fruit juices processors with reference to the packaging machine and the packaging material. It is worth mentioning here that in addition to that copies of the agreements were also requisitioned from the milk and fruit juice processors, which were accordingly filed with the Commission.
12. M/s Tops Food & Beverages Limited vide their letter bearing no. TR/TP/03/2293 dated 28-01-2010 submitted (i) Equipment Sale Agreement executed on 16-09-2009 between Tetra Pak Export, a Dubai based company (hereinafter referred to as 'TPE') and M/s Tops Food & Beverages Limited.
13. M/s Haleeb Foods Limited vide their letter dated 28-01-2010 submitted (i) Equipment Sale/Purchase Agreement – Agreement No: TPP/CDL – 0621 and (ii) Equipment Sale Purchase Agreement – Agreement No. TPP/CDL – 0312, executed between their company and TPE.
14. M/s Popular Juice Industries (Pvt.) Limited vide their letter dated 03-02-2010 submitted copy of the Equipment Sale/Purchase Agreements dated 03-04-2000 and August 2005.
15. M/s Noon Pakistan Limited informed vide their letter bearing no. 4404/125/CCP dated 03-02-2010 that they have purchased one TBA/19-200S, 030V from TPE in December 2008 and signed an Agreement for the Installation and the Commissioning of the packing machine mentioned above.
16. M/s Shezan International Limited vide their letter bearing no. SIL/ED/2009-10 dated 04-02-2010 informed the Commission that they have entered into an Equipment Sale Agreement with TPE and Agreement for Installation and Commissioning of equipment and Technical services in respect thereof with TPPL, a copy was also provided.
17. M/s Premier Dairies Limited vide their letter 05-02-2010 informed us that they have not entered into any agreement pertaining to sale/purchase and/or lease of the packaging equipment; however, maintenance

agreement regarding packaging machines are executed on regularly basis, a copy of the same was provided.

18. M/s Faraz Foods (Private) Limited vide their letter dated 15-02-2010 submitted copies of the (i) Installation and Commissioning Agreement dated September 12, 2007 and (ii) Equipment Sale Agreement dated September 04, 2008 executed between them and TPPL.
19. M/s Nestle Pakistan Limited vide their letter dated 19-01-2010 submitted copies of the Equipment Sale and Agreements dated 20-0-2007, 31-08-2007, 1-11-2007 & 01-10-2009 with TPE and Equipment Sale Agreement dated 01-10-2009 with TPPL, Fixed Price Maintenance Agreement 01-04-2009, Installation and Commissioning Agreement dated 13-07-2007.
20. M/s Engro Foods Limited vide their letter dated 03-02-2010 submitted copies of the (i) Machine Rental Agreement – Agreement Ref. No. TPP/Engro-0906 dated 02-02-2009 with TPPL, (ii) Equipment Sale Agreement – Agreement Ref: TP/Engro-0919 dated 24-09-2009 with TPE and (iii) Agreement for Installation and Commissioning – Agreement Ref# T.P/Engro-0926 dated 24-11-2009 with TPPL.
21. TPPL’s Counsel *vide* its letter bearing no. M&Z/SAZ/Hum/13048 dated February 12, 2010 provided copies of (i) Service Agreement (standard agreement), (ii) Equipment Sale Agreements executed with Faraz Foods (Pvt.) Limited, Cider Foods (Pvt.) Limited and Minta Foods (Pvt) Limited, (iii) Installation and Commissioning Agreement with Cider Foods (Pvt.) Limited, (iv) Machine Rental Agreements with Engro Foods, Maheer Foods Industries and Popular Group of Industries. Subsequently vide letter bearing no. M&Z/13091 dated February 18, 2009 sent a copy of the Sale purchase agreement executed between TPPL and Nestle Pakistan Limited. (copy of the letter is appended herewith as ‘**Annex-IV**’)

RELEVANT PRODUCT/SERVICE

22. Since the issue which needs determination under this enquiry is that of abuse of dominant position and in particular that of tying of products, before analysing the aforementioned agreements with reference to the issue, it would be appropriate to first determine the ‘relevant product’ and then the ‘relevant market’ for the purposes of this enquiry and the analysis conducted herein below.
23. The relevant products for the purposes of this enquiry are (i) aseptic packaging machines using aseptic cartons, (ii) maintenance service of aseptic packaging machines using aseptic cartons and (iii) aseptic cartons used in the aseptic packaging machines for filling and packaging of the processed milk and fruit juices.

24. The relevant products/services mentioned above are distinct according to their very nature and commercial usage.
25. Aseptic packaging can be defined as the filling of a commercially sterile product into a sterile container under aseptic conditions and hermetically sealing the containers so that re-infection is prevented. This results in a product which is shelf-stable at ambient conditions. In practice, generally there are two specific fields of application of aseptic packaging technology:
- (i) Packaging of pre-sterilised and sterile products. Examples are milk and dairy products, puddings, desserts, fruit and vegetable juices, soups, sauces, and products with particulates.
 - (ii) Packaging of non-sterile product to avoid infection by micro-organisms. Examples of this application include fermented dairy products like yoghurt.

RELEVANT MARKET

26. Relevant market is defined under clause (k) sub-section (1) of Section 2 of the Ordinance in the following words:

“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’ characteristic, 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 the Competition are appreciably different in those areas;

27. From the above definition it is clear that the relevant market has to be defined in two dimensions (i) Product market and (ii) Geographic market. In the following paragraphs the product as well as the geographic market has been defined:

RELEVANT PRODUCT MARKETS

28. Aseptic packaging machines using aseptic cartons (hereinafter referred to as the ‘**Product**’) are technically advanced machines that are able to

package aseptic liquids or semi-liquids into carton boxes whilst ensuring that no micro-organisms are introduced into the liquid in question. The machines are at present used to a large extent to package milk treated by the UHT (Ultra high temperature) process and aseptically treated juices. Possible substitutes for such machines are as follows:

- non-aseptic packaging machines using carton, glass or plastic.
- aseptic packaging machines using other packaging mediums such as glass or plastic;

The aforementioned are the closest possible substitutes for the Product and less perfect substitutes for the Product may be metal cans.

29. In the following paragraphs, the interchangeability or substitutability of other machines with the Product is analyzed:

(a) Non-aseptic packaging machines are not reasonable substitutes for aseptic packaging machines; The following elements show that the demand elasticity between these two categories is low, and thus they do not represent reasonable substitutes for each other:

(i) Nature of the end-product: shelf-life; Liquids that are packaged aseptically will have a much longer shelf-life than those packaged non-aseptically. Typically aseptic milk/juice will last six months whilst non-aseptically treated milk/juice will last less than one month.

(ii) Distribution method; The difference in the shelf-life and stability between the aseptically and non-aseptically packaged product has significant repercussions on distribution methods. Non-aseptically packaged juice and milk must at all times be kept refrigerated. Aseptically packaged products require no such care. This is one reason why it is very difficult for purchasers of the end product to switch orders from aseptically packaged products to non-aseptic ones in the short to medium term in response to a small but significant price rise. To undertake such a substitution they would also have to invest in new or additional refrigerated distribution and/or sales facilities.

(iii) Taste; The costs attributed to the non-aseptically packaged liquids is more than aseptically packaged ones, largely owing to higher distribution, storage, wastage and display costs. This is an indication that the nature of the finished product in taste terms and not the nature of the packaging process is of principal importance to a purchaser of the final product.

(iv) Price difference; As explained above, final customers and retailers view aseptic and non-aseptic end products only to a partial extent substitutable for each other, *inter alia* for reasons not

connected to price. Thus, a very large price rise in packaging cost for aseptic systems would be necessary to cause a significant shift in demand by retailers from aseptic liquid to non-aseptic liquid and thereby in due course from aseptic packaging machines to non-aseptic machines.

In the light of the above the, *prima facie*, it appears that non-aseptic packaging machines do not represent a realistic and reasonable substitute for aseptic packaging machines.

(b) Aseptic packaging machines using packaging mediums other than aseptic carton are not reasonable substitutes for carton-based systems; Aseptic liquids packaged in aseptic cartons represent almost 90 % of total aseptically packaged liquids. However, it is possible to package aseptic liquids in plastic pouches or glass bottles. Based on the present market characteristics and research conducted plastic and glass products do not form part of the relevant product market or markets for the purposes of this case and represent rather imperfect substitutes for carton packaging systems. Apart from the consumer preferences which is evident from the market trends, following are few reasons, which further supports that plastic and glass products/packaging materials are not a substitutes for a aseptic cartons:

(i) Physical characteristics of the package; Carton-packaged aseptic products are produced in 'bricks' (rectangular) form. This means that they can be transported, displayed and stored in a much smaller area than glass or plastic bottles. Furthermore, as a carton package is much lighter than a glass bottle, and takes up less space than a glass or plastic bottle, transport costs are lower for carton than for glass or plastic packaging.

(ii) Disposal of packaging mediums other than cartons; Although glass bottles might be considered to have a better environmental profile; however, the choices of the consumer is not dependent on the environment friendliness, rather it is dependent on their own preferences and the general trend of the consumers is towards purchase of aseptic cartons rather than the aseptic packaged glass bottles, therefore, it cannot be said that the other packaging material is a substitute for aseptic cartons.

(iii) Price difference; Packaging costs represent a small part of the total retail cost of aseptically packaged liquids. Thus, a decision by a retailer to purchase a liquid packaged in one or other medium will therefore be affected to a limited extent by a small but significant price increase in carton aseptic packaging systems. However, a sudden and substantial increase i.e. 20% to 30% or above in the price of aseptic carton packaged liquids would be a determining factor and would result in switching to glass and plastic packaged liquids.

30. In view of the foregoing *prima facie*, it appears that aseptic plastic and glass packaging machines do not constitute part of the same product market as aseptic carton packaging machines for the purpose of this case. Therefore, the relevant product market for the purpose of the subject enquiry is sale and lease of aseptic packaging machines using aseptic carton used for packaging and filling of milk and fruit juices.
31. In addition to the above, there exists another relevant product market and that is of maintenance services of the aseptic packaging machines using aseptic cartons. An aseptic packaging machine using aseptic cartons is complex machinery and the maintenance of the same requires technical know how along with the specifications and designs of the machinery, which in this market is possessed by TPPL.
32. The maintenance and repair services of the aseptic packaging machine using aseptic cartons is different than any other machinery owing to its complex nature, however, the maintenance and repair services provided by any vendor providing maintenance and repair services of any other machinery may be interchangeable and substitutable only if the requisite knowledge of the technological specifics along with relevant expertise exists. It is worth mentioning that entry into this market is virtually impossible as TPPL who possesses the technical know-how for the maintenance and repairs of aseptic packaging machines using aseptic cartons, foreclose the choice of its customers to get the maintenance and repair services from any other vendor, therefore, extremely high entry barriers exists in this market.

RELEVANT GEOGRAPHIC MARKET

33. The 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 can be distinguished from neighbouring geographic areas because the conditions of the competition are appreciably different in those areas.
34. Since the machines are imported into Pakistan by TPPL and the conditions of competition of supply of the Product throughout Pakistan are sufficiently homogeneous, the geographic market that is Pakistan can be distinguished from the neighbouring countries owing to the appreciable different conditions of competition in those countries. Therefore, the *geographic* market for the purposes of this Enquiry Report is all of Pakistan.

TPPL'S DOMINANT POSITION

35. Dominant position is defined in clause (e) of sub-section (1) of Section 2 of the Ordinance, as following:-

“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;

36. Reference has to be made to TPPL's letter⁶ dated 25-03-2009; through which they have provided the list of its customers. The list contains the name of almost all the milk and juice processors of Pakistan namely, Nestle Pakistan Limited, Engro Foods Limited, Haleeb Foods Limited from the milk processors which constitutes almost 80% of the relevant market in the market in the packaging of processed milk and Shehzan International Limited, Tops food & Beverages, Frooto Industries, Famous Minta Foods Private Limited, & Nestle Pakistan Limited from the juice processors are also shown as the customers of TPPL in that letter, the combine market share of these juice processors constitutes almost 60% of the relevant market of the juice processors.
37. From the above statistics and in terms of clause (e) of sub-section (1) of Section 2 of the Ordinance it can, *prima facie*, be inferred that TPPL holds more than 40% of the relevant market and is deemed to be a dominant undertaking in the relevant market. While milk and juice manufacturers in Pakistan do have alternative solutions available for their packaging needs, including the use of glass and plastic bottles, Combibloc and Pure Pak, however, the market share of the manufacturers of these alternatives of beverages products packaging industry pose no threat to TPPL as the consumer demand and the popularity of TPPL is immense in the relevant market.
38. The above mentioned fact in light of the TPPL's bearing no. MB/MAM/05-2009 (copy whereof is appended herewith as '**Annex-V**'), which shows clearly that almost all the major milk and juice processors are using TPPL supplied equipment and are also using their packaging material, which gives TPPL a dominant position.
39. Additionally, milk and juice producers may also use aseptic pouches, manufactured by E. I. Du Pont de Nemours and Company (popularly known as DuPont), for packaging which are available in the local markets. However, the quality assured and demand from the consumers of the processed milk and juices in TPPL aseptic cartons is much higher than that

⁶ Letter bearing no. MB/MAM/05-2009 dated 25-03-2009 of Tetra Pak Pakistan Limited

of any other packaged milk or juice. Therefore, it can be inferred that the use of aseptic pouches for packaging is very little.

40. In view of the above, *prima facie*, it appears that TPPL holds more than 60% of the relevant market share in Pakistan and has the ability to behave to appreciable extent independently of its competitors, customers, consumers and suppliers. Therefore, it unambiguously holds a dominant position in the relevant market.

Analysis

41. In the following paragraphs the Agreements and documents submitted by TPPL and other processed milk producers and fruit juice/nectar producers are analysed with reference to the issue in the enquiry.

ABUSE OF DOMINANT POSITION

42. The fact that an undertaking holds a dominant position is not in itself a violation of the Ordinance. However, an undertaking enjoying a dominant position is under a special responsibility not to engage in conduct that may distort competition. Even under the Ordinance, it is not the dominant position, but its abuse, which is prohibited under Section 3 of the Ordinance.
43. TPPL executes various types of agreements with its customers, including but not limited to the following: (i) Equipment Sale Agreement, (ii) Machine Rental Agreement, (iii) Agreement for the Installation and Commissions and (iv) Tetra Pak Maintenance Systems Service Agreement. TPPL along with milk and juice processors who are its customers was asked to provide copies of any agreements entered between TPPL and any other Undertaking pertaining to sale/purchase and/or lease of the packaging machines or any other agreement ancillary thereto, executed after October 2007. The agreements received were then analysed and reviewed keeping in view the issue under the enquiry.

ANALYSIS OF THE PROVISIONS OF EQUIPMENT SALE AGREEMENT

44. The clauses along with the analysis, which appears to be restrictive in nature in the Equipment Sale Agreement are as follows:

...
...

...

Trade Compliance

Section 10.1: *Customer is aware that the sale, export and other distribution of TPPL's products may be subject to national and international export or trade control laws and regulations. Customer agrees to comply fully with all such relevant export or trade control laws and regulations;*

10.2: *If any delivery from TPPL including but not limited to deliveries of the equipment and future deliveries of spare parts and other equipment, at any time would be in conflict with any applicable and relevant export laws or regulations, TPPL may in its own discretion, wholly or partially, cancel the delivery. The customer hereby irrevocably waives any and all remedies and claims due to such non-performance of TPPL, including but not limited to any remedies for breach of contract, delays, shortage, fault and defects and claims for compensation for direct and/or indirect losses due to such non-performance.*

10.3: *However, this section shall not apply in case it is proved by the customer that TPPL was aware of the relevant export laws or regulations at the time of the conclusion of this contract.*

(Copy of the latest equipment sale agreement is appended herewith as 'Annex-VI')

45. The clause related to Trade Compliance is unique in its nature as it provides that the rights of the customer relating to remedies for breach of contract, delays, shortage, fault, defects and claims for compensation for direct and/or indirect losses due to such non-performance are waived if it is caused due to the prohibition in export laws and this condition is not applicable if the customer proves that TPPL was aware of the law.

46. This very clause *prima facie* appears to be in violation of basic principle '*ignorance of law is no excuse*', and *prima facie* appears to be an unfair trading condition. Therefore, in violation of Section 3(1) & 3(2) read with Section 3(3)(a) of the Ordinance on the part of TPPL.

ANALYSIS OF THE PROVISIONS OF MACHINE RENTAL AGREEMENT

47. The clauses along with the analysis, which appears to be restrictive in nature in the Machine Rental Agreement are as follows:

...

4. Maintenance of Equipment.—

4.1 Parties hereto agrees and understand that the Rented Equipment is of extreme importance and hence should only be run and maintained by properly trained and qualified staff. The Customer shall execute a service agreement with TPPL for the Rented Equipment which should conform with Tetra Pak Maintenance System (TPMS);

4.2 The Customer shall at its own expense ensure the proper use and day-to-day maintenance of the Rented Equipment strictly in accordance with the instructions, directions and recommendations of TPPL. The cost of spare parts and expenses of these services will be borne by customer. Upon incurring any cost or expense of this nature TPPL shall forward a separate invoice for its reimbursement.

...

7. Removal of Equipment:

...

7.2 Before repossessing the Rented Equipment as mentioned in clause 7.1 above, Tetra Pak will replace any missing spare parts and perform the next/previous due TPMS service on the Rented Equipment to bring it to its normal operating condition. The customer agrees that the cost of these spare parts and expenses shall be borne by it.

(Copies of the latest Machine Rental Agreements are appended herewith as 'Annex-VII, VIIA & VIIB)

48. Tying occurs when the supplier makes the sale of one product (the tying product) conditional upon the purchase of another distinct product (the tied product) from the supplier or someone designated by the latter. Only the tied product can be bought separately. The clause 4.1 relating to the Maintenance/Service of the Equipment appears to be tying the Lease of the Rented Equipment (tying product) with the Maintenance/Service Agreement (the tied product), for the following reasons:

- (a) Dominant Position of TPPL: TPPL holds dominant position in the relevant market of aseptic packaging machines using aseptic cartons for packaging of processed milk and fruit juices as elaborated in Para 34 to 39 above;

- (b) Distinct Products/Services: It needs no emphasis that the Machine Rental Agreement for the Lease of Aseptic Packaging Machines using aseptic cartons and the Maintenance/service agreement for the Service and Maintenance of the Rented Equipment are two distinct products owing to the nature and use. The object of the Machine Rental Agreement is to take the equipment on lease, however, mandatory requirement by TPPL to enter into maintenance/ service agreement for the rented equipment during the tenure of the lease is a completely different thing.
- (c) Market Distorting Foreclosure Effect: TPPL by imposing such a condition has not only restricted the choice of the customer regarding conduct of maintenance of the equipment but has also virtually foreclosed the entry of any new entrant in the maintenance/ repair/ service market of the aseptic machines. Since, TPPL holds a dominant position in the upstream market i.e. the aseptic packaging machines using aseptic cartons and is making it obligatory and mandatory upon its customers to enter into the maintenance/repair/ service for the leased equipment and thereby restricting any possible entry in the market for maintenance of the aseptic packaging machines using aseptic cartons, thereby restricting the choice of the customers and foreclosing any type of competition in the relevant market. Further more, the language of the clause makes it amply clear that the customers have not been given any choice regarding the maintenance/ service of the machine rental agreement but it has been made mandatory upon the customers to enter into another agreement for maintenance and service of the Lease Agreement, as neither the same is required by the customer nor the maintenance/ service agreement for the Rented equipment by its very nature and commercial usage have any connection with the subject of the agreement. The safety and condition of the Leased Equipment can be assured through other means, for e.g. the method already available in Clause 7.2 of the Machine Rental Agreement.
- (d) Possible Commercial Justifications: The argument that the TPPL has only imposed this condition on its customer in order to ensure the condition of the equipment is not acceptable as Clause 7.2 of the same agreement provides that upon termination of after the expiry of the lease period TPPL will replace the missing spare parts and perform the next/previous due TPMS service on the rented equipment to bring it into its normal operating condition, whereas the cost for this replacement of spare parts and maintenance of the rented equipment will also be born by the customer. Therefore, in existence of clause 7, there seems no logical justification for making mandatory obligation on the customers to enter into the service agreement with TPPL for the Rented Equipment during the tenure of lease, especially where the customer has to pay additional charges for such services as well. It is certainly not required by the customer in the Machine Rental Agreement and which by its very nature and according to commercial usage have no connection with the subject of the agreement i.e. Machine Rental Agreement. TPPL's engineers bill every aspect related

to repair and maintenance to the end-user, including the travel, lodging, and food of the engineering staff, which can add to a considerable amount. TPPL's staff tends to stay in expensive hotels, use private transport, and choose many amenities which total to an exorbitant amount for what is basically a routine matter. In addition, we learned that previously, TPPL would maintain an inventory of parts in Pakistan, but since the last few years, parts are imported either from Dubai or from Sweden. The associated cost of transporting parts to Pakistan is also borne by the customer. This has resulted in increased overheads for users, making TPPL an expensive proposition when it comes to maintenance and repair.

49. Therefore, it appears that TPPL by tying the Lease of the Rented Equipment with the machine maintenance/ service agreement and by making conclusion of the agreement subject to enter in to a separate service (maintenance) agreement, *prima facie*, has abused its dominant position, which is likely to prevent, restrict, reduce and distort competition within the relevant market and *prima facie* is in violation of Section 3(1) and 3(2) read with 3(3)(c) & (d) of the Ordinance.

ANALYSIS OF THE PROVISIONS OF AGREEMENT FOR THE INSTALLATION AND COMMISSIONING

50. The clauses along with the analysis, which appears to be restrictive in nature in the Agreement for the Installation and Commission are as follows:

Exhibit – 5 Performance Criteria

Customer Service Technicians and operators working with the Equipment must have been trained and approved by a TPPL authorized instructor. A sufficient number of customer operators and maintenance personnel must have completed the training before the customer starts using the equipment for commercial production.

...

Only original spare parts supplied by TPPL or spare parts approved by TPPL (such approval not to be unreasonably withheld) may be used. An adequate supply of spare parts must be maintained on site according to TPPL recommendations;

All packaging materials and secondary packaging materials must comply with TPPL's minimum specifications

...

No modifications to the Equipment are allowed, either prior to or during the Performance Validation Procedure, unless authorized in writing by TPPL. TPPL has the right to access the Equipment during the Performance validation procedures.....

....

Parts and consumables

Only original parts supplied by TPPL or spare parts approved by TPPL (such approval not to be unreasonably withheld) may be used. An adequate supply of spare parts must be maintained on site according to TPPL recommendations. Customer shall only use consumables that fulfil specifications given by TPPL;

Packaging material

Customer acknowledges that it is essential that all packaging material used in conjunction with the equipment be suitable for the safe packaging of food products and efficient operation of the equipment, and undertakes, during Commissioning and Performance validation, to use with the equipment only packaging material which has been supplied by TPPL.

(Copy of the latest Agreement for the Installation and Commissions is appended herewith as 'Annex-VIII')

51. TPPL in its clause relating to the commissioning and performance validation has made it mandatory for the customers to use the packaging material supplied by TPPL with the aseptic packaging machines using aseptic cartons. Tying occurs when the supplier makes the sale of one product (the tying product) conditional upon the purchase of another distinct product (the tied product) from the supplier or someone designated by the latter. Only the tied product can be bought separately. In the instant case, the clauses related to the use of packaging material, appears to be tying the Aseptic Packaging Machines Using Cartons (tying product) with the Packaging Material/cartons (the tied product), for the following reasons:

- (a) Dominant Position: TPPL holds dominant position in the relevant market of processed milk and Fruit juice packaging machines market as elaborated in Para 34 to 39 above;
- (b) Distinct Products: It needs no emphasis that the Packaging Machine, Spare Parts and the Packaging Material are distinct products owing to the nature and use of the products;

- (c) Market Distorting Foreclosure Effect: Since the customers are forced by this clause to purchase and use only TPPL's packaging material during Commissioning and Validation, which is the same as requiring TPPL-supplied material all the time because customers are unlikely to try new material when the validation has only validated TPPL-supplied packaging. TPPL guarantees the performance of its machines only if it is used in conjunction with the packaging material supplied by TPPL itself. It seems that TPPL has instilled a perception among its customers that the efficient performance of the machine is dependent on the use of packaging material supplied by TPPL itself. Tying the purchase of the main product to the purchase of the packaging material (cartons) has given TPPL full control over what material is used by its customers and what price it can charge for it. This tying has been achieved by TPPL first requiring its customer to use only TPPL's cartons during Commissioning and Performance Validation Period and creating an impression that efficient performance can only be achieved by using TPPL's packaging material with its machine and then by only allowing the customer to obtain supplies from TPPL itself, or TPPL's approved suppliers. Therefore, by imposing such a condition on the customers TPPL has created an entry barrier to the market of packaging materials (aseptic cartons) and in such like circumstances no new entrant would take a risk to enter a market where its products won't be sold as the almost all the milk and fruit juice processors of Pakistan are using TPPL's packaging machine and in view of the above, are purchasing the packaging material from TPPL as well.⁷ Therefore, it appears that the practice of imposing purchases of packaging material (aseptic cartons) during commissioning and validation period on the customers along with the aseptic packaging machine using aseptic cartons have the market distorting foreclosure effect.
- (d) Commercial Justifications: The reason and justifications provided in the said agreement maintaining the quality of the food and efficient performance of the machine appears to be unjustified and aimed at only and only one thing that is creating an impression on the customer during the commissioning and validation period that the performance is validated only when TPPL's packaging material is used with the machine and not otherwise. We are of the view that, the choice to purchase and use any packaging material should have been left to the consumer, and any obligation to purchase solely from an undertaking which is in a position such as that occupied by TPPL should be prohibited, even during the commissioning and validation period. Furthermore, for the problems like the technical and, perhaps, public-health problems which might result from packaging not meeting the particular specifications of TPPL's machines and the related problems

⁷ EU Commission Decision of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV 31.043 - Tetra Pak II) OJ 1992 L72/1, upheld by the Court of First Instance in [1994] ECR II-755 and European Court of Justice in [1996] ECR I-5951

of determining reciprocal responsibilities and protecting the good name of the undertakings in question, there are adequate technical solutions (publication of standards and specifications to be complied with) and a legal framework (general legal liability) intended specifically to solve the problems which arise from the failure on the part of the parties concerned to implement these technical solutions. The proportionality rule excludes the use of restrictive practices where these are not indispensable. This rule is all the more vital in the case in hand since the restrictions of competition involved are particularly serious and result in creation of entry barrier and the customers of TPPL clearly are foreclosed to the potential competitors.

52. Keeping in view the above, *prima facie*, it appears that TPPL is abusing its dominant position by tying the sale of the packaging machine with packaging material (aseptic cartons), which prevent, restrict, reduce or distort competition in the relevant market and is in violation of Section 3 (1) and 3(2) read with Section 3(3) (c) of the Ordinance.

FAILURE ON PART OF TPPL TO PROVIDE COPIES OF THE AGREEMENT AND INFORMATION REQUISITIONED BY THE COMMISSION

53. The Commission vide its letter bearing no. 02/DIR(INV)TETRA PAK/CCP/09 dated January 21, 2010 required TPPL to provide copy of agreement(s) executed for and on behalf of TPPL with other companies pertaining to sale/purchase and/or lease of the packaging machine used by the milk processors and/or the fruit juice manufacturers, or any other agreement ancillary thereto. The letter was responded vide their Counsel's letter bearing no M&Z/Hum/HB/12998 dated January 22, 2010 wherein a request for a meeting on February 02, 2010 to discuss the sufficiency and object of the information required by the Commission. The counsels for TPPL were explained categorically that the documents were required under the enquiry and they were also told to provide copies of all the agreements and an extension to provide the requisitioned information was granted up-to February 08, 2010 as requested by the TPPL's counsel. In the meeting with the Counsels for TPPL the sufficiency and object of the information required by the Commission was discussed and they were also informed to provide any or all agreements with the milk and fruit juices processors with reference to the packaging machine and the packaging material. It is worth mentioning here that in addition to that copies of the agreements were also requisitioned from the milk and fruit juice processors, which were accordingly filed with the Commission.
54. TPPL's counsel vide their letter bearing no. M&Z/SAZ/Hum/13048 dated February 12, 2010 provided the copies of the (i) service agreement (standard agreement), (ii) Equipment Sale Agreements executed with Faraz Foods (Pvt.) Limited, Cider Foods (Pvt.) Limited and Minta Foods (Pvt) Limited, (iii) Installation and Commissioning Agreement with Cider

Foods (Pvt.) Limited, (iv) Machine Rental Agreements with Engro Foods, Maheer Foods Industries and Popular Group of Industries. Subsequently vide letter bearing no. M&Z/13091 dated February 18, 2009 sent a copy of the Sale purchase agreement executed between TPPL and Nestle Pakistan Limited.

55. It is pertinent to mention here that despite clear direction, TPPL did not provide us the copy of the Installation and Commissioning agreement executed between TPPL and Engro Foods on November 24, 2009 was not provided to us. In this agreement there were certain clauses which appear to be in violation of the provisions of the Ordinance as discussed in above Paras. Therefore, it appears that by not providing the copy of the agreement and the information requisitioned TPPL conduct entail invocation of the provisions of clause (c) of sub-section (1) of Section 38 of the Ordinance.

PAST CONDUCT OF TPPL'S PARENT GROUP COMPANY

56. In addition to the above, it is pertinent to mention here that, examining TPPL's parent company's – Tetra Pak – global conduct, Tetra Pak was fined ECU 75 million (approx. 2.2% of 1990 turnover) on the grounds that it had leveraged its dominant position in the aseptic packaging market and abused it in the non-aseptic packaging market; created obstacles to its competitors' activities in one market by tied selling its products in another, and by engaging in predatory pricing to drive a competitor out of market. Tetra Pak's appeal against this ruling in 1996 was dismissed and the fine upheld⁸. We also noted two other cases in which Tetra Pak was penalised:

- a) The European Commission fined Tetra Pak €90,000 for not providing complete information in the matter of acquisition of a French undertaking, Sidel in 2004,⁹ and
- b) The Italian Antitrust Authority fined Tetra Pak €5 million for violating the ban placed on it from acquiring Italtapak on the grounds "the acquisition would have strengthened Tetra Pak's dominant position on markets for packaging for liquid and semi-liquid food products."¹⁰

⁸ EU Commission Decision of 24 July 1991 relating to a proceeding pursuant to Article 86 of the EEC Treaty (IV 31.043 - Tetra Pak II) OJ 1992 L72/1, upheld by the Court of First Instance in [1994] ECR II-755 and European Court of Justice in [1996] ECR I-5951

⁹ Tetra Laval fined 90,000 Euros; http://www.mwponline.co.uk/News/tetra_laval_fined_90_000_euros

¹⁰ Italy's antitrust body fines Tetra Pak €5m for involvement with Italtapak; <http://www.beveragedaily.com/Financial/Italy-s-antitrust-body-fines-Tetra-Pak-95m-for-involvement-with-Italtapak>

Conclusions

57. Based on the information available on the record regarding TPPL's aseptic packaging machines using cartons and other packaging products in Pakistan and their analysis, we have reached to following conclusions:
- a) TPPL holds a dominant position in the market of beverages products packaging industry in Pakistan. Given that TPPL has virtually no competition in Pakistan, it faces a lesser threat of substitution of packaging material by its customers, which gives it the ability to "influence" the market. Consequently, TPPL has been able to ensure that only TPPL cartons are used by its customers and that these were not obtained through other sources. TPPL has also tied its machine sale/lease to an exclusive right to provide maintenance and repair services, effectively barring other firms specializing in providing such services. The exclusive right to supply spare parts is also reserved by TPPL;
 - b) In view of Para 35 to 40 above, *prima facie*, it appears that TPPL holds more than 40% of the relevant market's share in Pakistan and has the ability to behave to an appreciable extent independently of its competitors, customers, consumers and suppliers. Therefore, it unambiguously holds a dominant position in the relevant market;
 - c) In terms of Para 44 to 46 above, the Trade Compliance clause in the Equipment Sale Agreement, *prima facie*, appears to be in violation of basic principle '*ignorance of law is no excuse*', and also *prima facie* appears to be unfair towards the customers of TPPL and in violation of Section 3(1) & 3(2) read with Section 3(3)(a) of the Ordinance on the part of TPPL;
 - d) In terms of Para 47 to 49 above, it appears that TPPL by tying the lease of the Rented Equipment with the machine maintenance/ service agreement and by making conclusion of the agreement subject to enter in to a separate service (maintenance) agreement, in the relevant market for the maintenance & repairs of the aseptic packaging machines using aseptic cartons, *prima facie*, has violated provisions of Section 3(1) and Section 3(2) read with Section 3(3)(c) & (d) of the Ordinance by foreclosing the choice of the milk/fruit juice processors and thereby any competition;
 - e) In terms of Para 50-52 above, *prima facie*, it appears that TPPL is tying the sale of the packaging machine with packaging material (aseptic cartons) in its Agreement for the Installation and Commission, and thereby abusing its dominant position in terms of Section 3 (1) and 3(2) read with Section 3(3) (c) of the Ordinance;
 - f) In terms of Para 53 to 55 above, it appears that by not providing the copy of the agreement and the information requisitioned by the

Commission, such withholding of information by TPPL, *prima facie*, is in violation of clause (c) of sub-section (1) of Section 38 of the Ordinance.

Recommendations

58. Ensuring the competitive process is a matter of public interest, as the law is underpinned by the notion that competition serves as a powerful means to achieve a desirable public end. In view of the aforesaid, there is sufficient evidence that TPPL is taking advantage of its dominant position in Pakistan and abusing it by tying its Packaging Machinery with its Packaging Material i.e. cartons and tying its machine sale/lease agreements to an exclusive right to provide maintenance and repair services, effectively barring other undertakings specializing in providing such services.
59. Furthermore, the impact of TPPL's practices would not only be faced by the public at large, the sole beneficiary in the very case would only and only be TPPL, but also result in virtually foreclosing any potential competition on the relevant market, therefore, initiation of proceedings in the matter is in public interest.
60. Therefore, it is recommended that proceedings be initiated under Section 30 of the Ordinance against TPPL on account of the contraventions mentioned in the conclusions and in light of the public interest surrounding the case.

IKRAM UL HAQUE QURESHI
DIRECTOR GENERAL (LEGAL)

NOMAN A. FAROOQI
DEPUTY DIRECTOR (LEGAL)

Dated: May 19, 2010