

COMPETITION COMMISSION OF PAKISTAN

ENQUIRY REPORT

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

**IN THE MATTER OF COMPLAINT FILED BY DIGITAL RESEARCH
LABS(PRIVATE) LIMITED AGAINST UTILITY STORES CORPORATION OF
PAKISTAN (PRIVATE) LIMITED FOR ALLEGED ANTI-COMPETITIVE CLAUSES
IN TENDER FOR IMPLEMENTATION OF ENTERPRISE RESOURCE PLANNING
SOFTWARE**

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Dated: 16 December, 2016

Background

1. The Competition Commission of Pakistan (the '**Commission**') received a complaint from Digital Research Labs (Pvt.) Ltd. (Herein referred to as '**Complainant**'), on 10 August, 2016 against Utility Stores Corporation of Pakistan Pvt. limited, (the '**Respondent**' or '**USC**') regarding implementation of Enterprise Resource Planning software ('**ERP**') at USC.(Copy of the Complaint is attached as Annex 'A').
2. The Commission on 11 August, 2016 initiated an enquiry under Section 37(2) of the Competition Act, 2010 (hereinafter referred to as the 'Act) and appointed Ms Maliha Quddus, Deputy Director and Ms Aqsa Suleman Management Executive (the 'Enquiry Committee') to investigate the matter for possible violations of the Act, and to submit a report to the Commission.
3. The Complainant states that USC issued an advertisement on 19 May, 2016 inviting request for proposals ('RFP') for the procurement of Enterprise Resource Planning ('ERP') software, hardware, and implementation services on turnkey basis.
4. The Complainant alleges that RFP contained qualifications criteria that were unfair and discriminatory towards local vendors and it appears that certain criteria are tailor made to favor a particular vendor. It further notes that these apprehensions were raised before the Respondent in pre-bid meetings and before the Ministry of Industries and Production. As per the advice of the Ministry, the Respondent made changes in the RFP however, the Complainant alleges that these changes were inconsequential and failed to address the issues under contention.
5. The Complainant submitted that the said project was previously floated on two occasions first in the year 2010 and then again in 2013 with minor modifications. On both occasions approximately 20 bidders participated in the bidding process (both local and foreign) and on both the occasions the Complainant was declared finalist. However, both the tenders were annulled due to insufficient funds and other reasons.

6. The Enquiry Committee wrote a letter to respondent i.e. USC on 11 August, 2016 asking them to respond to the allegations made in the complaint.
7. USC submitted its response on 24 August, 2016 (Annex 'B') by stating that USC, being a procuring agency has taken into considerations of the factors including;
 - a) Relevant expertise and past performance
 - b) Capabilities with respect to personnel, equipment and Plant;
 - c) Financial position
 - d) Appropriate managerial capability, and
 - e) Other factors that a procuring agency should deem relevant, not inconsistent with the PPRA Rules.
8. USC stated that it desires to have reliable, scalable and robust system. To make sure the right selection, a criteria has been defined which will give USC an understanding about existing deployment in public sector and large enterprises plus the capability to perform a sizeable project through getting idea about financials and already performed projects in Pakistan. However RFP is governed through PPRA rules and all decision will be made as per PPRA rules.
9. In response USC stated that twice before the procurement proceedings were scrapped due to the project being abandoned and not for any other reason. However, USC Board of Directors (BOD) in its 125th meeting held on 30 April, 2015 discussed the implementation of ERP in USC and directed that internationally accredited software should be preferred over in house development and USC should focus on new technologies for data warehousing in order to have minimum investment on hardware.

ISSUE

10. The question before the enquiry committee is whether there is any violation of Section 3 of the Act has taken place. To answer this question we pursue the following lines of inquiry:
- a. To assess whether USC is dominant in the relevant market;
 - b. If yes whether the Request for Proposal ('RFP') contains clauses which constitute abuse in terms of Section 3 of the Act.

Relevant Market

11. USC was established in July 1971, by taking over 20 retail outlets from the Staff Welfare Organization. Passing through various stages of expansion and reorganization, the Corporation at present is operating 5,939 stores throughout the country with an annual sales turnover of around Rs.60 billion. The corporation is governed by the Board of Directors and day to day management is handled by Managing Director¹.

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

"any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association or undertakings".

13. Therefore, it is stated that USC is an undertaking in terms of Section 2(1)(q) of the Act.

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

*the market which shall be determined by the Commission with reference to a **product market** and a **geographic market** and a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers*

¹<http://www.usc.org.pk/content/about-usc>

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;

15. In light of this definition relevant market entails:

- a. A product market; and
- b. A geographic market.

16. This particular case involves procurement markets and a scenario where USC, an undertaking in terms of Section 2 (1)(q) of the Act, through its actions is allegedly influencing competition in a supply market. The market definition is thus based on the ability of suppliers to switch to alternative sales opportunities².

17. According to the RFP Clause 2.1-- Project Overview:

"..The overall goal of this project is to devise an automated system for enterprise resource planning on the Cloud. An ERP system along with retail management system, which can simply, standardize, and automate business processes, helping USC to take full advantage if growth opportunities".

18. Enterprise Resource Planning (ERP) is a category of business-management software—typically a suite of integrated applications—that an organization can use to collect, store, manage and interpret data from many business activities, including: product planning, purchase, manufacturing or service delivery³.

² 'Buyer Power in Competition Law-- Status and Perspectives', Background Paper, BundesKartellamt, 2008

³ <http://searchsap.techtarget.com/definition/ERP>.

19. As per Clause 3.0 USC requires the ERP to perform the certain functions which are summarized below:
- a. Finance i.e. general ledger, accounts payable, accounts receivable, financial reporting etc.
 - b. Purchasing i.e. electronic approvals and workflow, accurate supplier database, integration with invoice payments/accounts.
 - c. Inventory i.e. costing, stores, movement, issuance etc.
 - d. Payroll
 - e. Human Resource
 - f. On premise retail management system: Point of Sales (POS) transactions, cash management, offline processing, integration with cloud ERP.
20. It is noted that some of the ERP functional requirements are generic such as financial, payroll, human resource however, other requirements are geared specifically to retail solutions i.e. purchasing, inventory, on premise retail management system.
21. In addition there are certain hardware requirements which include items to be used at the retail stores level. These include POS with LED display (1550 quantity), bar code scanners (1700 quantity), thermal printer (1550 quantity), bar code printers (1140 quantity), UPS (1065 quantity), Switch racks, networking, wiring, civil works etc. (1,000), cash drawers (1550 quantity), internet connectivity (1200 quantity), LaserJet printer (50 quantity), servers (as per requirement), desktop (290 quantity).
22. Therefore based on the findings of paragraphs 14-21 above, we conclude that the relevant product market is the market for ERP retail based solutions including all software and hardware requirements.
23. The tender is a national level tender limited to the territory of Pakistan therefore the relevant geographic market is the whole of Pakistan.

24. Based on the findings of paragraphs 14-23 above, the relevant market is the market for ERP retail based solutions including all software and hardware requirements in Pakistan.

DOMINANT POSITION

25. In terms of Section 2(1)(e) of the Act the

‘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’.

26. In procurement markets a company's power to supply cannot only be limited by competitors but under certain circumstances, also by buyer power. A powerful buyer has the ability to favor one or certain suppliers over others. If one supplier has better procurement conditions than other suppliers he can use these to strengthen his position in the market by squeezing out other competitors.

27. USC has a network of 5,939 stores throughout the country with an annual sales turnover of around Rs.60 billion thus making it the largest retail chain store in the country. The Government also uses the store as a platform for provision of certain essential consumer commodities such as sugar at subsidized rates. Certain Ramzan relief packages are also introduced exclusively through the USC network. We find no other example of a retail chain store with such a large network of branches in Pakistan.

28. There are two types of business models for the sale and purchase of groceries/essential food items in Pakistan. The first model comprises of the traditional neighborhood *kiryana* stores for non-perishable items (like spices, flour, sugar, tea and pulses) and small trader/stall holders for fruits and vegetable. The second model is supermarket chains which sell a wide range of non-perishable and perishable items under one roof.

A majority of the sales in Pakistan, according to some estimates over 90 per cent, are made through the traditional model with large supermarket chains catering to a very small urban consumer niche.

29. The traditional model has a very different business and cost structure from the latter with an average shop size of 10x12 meters, basic layout and little mechanization. Supermarket stores are of two types- multinational operated cash and carry and local supermarket chains. Multinational chains such as Metro and Hyperstar have an average floor space of 10,000 square meters with multiple electronic point of sales and computerized procurement and other functions. Metro operates a total of 9 stores in Pakistan⁴and Hyperstar a total of 4⁵. Other supermarket stores are mainly local with a one or few branches concentrated in a single city such as Madina cash and carry and Punjab Cash and Carry. CSD stores are present in all the major cantonments across Pakistan and number 110 stores⁶.None of these are as large as USC's network of stores.
30. ERP retail based solutions can also be used by chain stores selling other items such as clothing. The numbers of outlets operated by some of such leading chain stores are as follows: Outfitters 32⁷, Khaadi37⁸. Based on the number of stores therefore, it can be concluded that USC, with a network of more than 5000 stores and with 1000 stores being initially automated, is a dominant player in the retail chain store market and that it is *prima facie* dominant in the relevant market being the largest procurer of ERP retail based solution in Pakistan including POS and all integrated hardware.

⁴ <https://www.metro.pk/stores>. 4 in Lahore, 3 in Karachi and 1 each in Islamabad and Faisalabad.

⁵ <http://www.hyperstarpakistan.com/location/en.html>. 2 in Lahore and 1 each in Karachi and Islamabad.

⁶ <http://www.csd.gov.pk/outlets.html>

⁷ <http://brandspakistan.pk/Outfitters-outlet-29.aspx>

⁸ <http://www.khaadionline.com/pk/storelocator/>

Whether certain clauses of USC's RFP for procurement of ERP Software and Implementation Services are anti-competitive in terms of Section 3 of the Act

31. The following clauses of the RFP were alleged to be anti-competitive we look at the contentious clauses one by one: (RFP attached as Annex 'C')
32. 4.2 Selection criteria-Pre-qualification (mandatory clauses) Clause 8:
"Solution should fall in Tier 1 category of the ERP Cloud Solution and available as software as a service model in cloud. Reference able through leading research companies like Gartner, IDC etc. For local companies having presence only in Pakistan must be CMMI level III or above".
33. 4.2 Selection criteria-Pre-qualification (mandatory clauses) Clause 9:
"For authorized partner documentary evidence of Gold/Tier 1 or equivalent level of partnership with proposed technology solution in Pakistan for last three (03) consecutive years will be required. (Manufacturer Authorization Letter from OEM in the name of USC). For local companies having presence only in Pakistan must be CMMI level III or above".
34. The Complainant submitted to the Enquiry Committee that the term 'Tier 1 ERP' has been used which is only used by a selected group of consulting firms who are direct beneficiaries and part of the ecosystem of these international software providers. 'Tier 1 ERP' is not at all a standard term used or acknowledged by any accredited international authority like International Standard Organization ("ISO") or Institute of Electrical and Electronics Engineers ("IEEE") and is therefore, discriminatory.
35. The Complainant has argued that the term 'Tier 1' is not a standard industry term. The RFP documents cite 'Gartner and IDC etc' as a reference. After a review of Gartner publications on ERP the Enquiry Committee has observed that the term Tier 1 or Tier 2 is seldom used. Gartner instead employs a system of ratings known as the 'Magic Quadrant' which are for specific functions and/or firm size. For example, 'Magic Quadrant for Single-Instance ERP for Product-Centric Midmarket Companies'. The

- magic quadrants position vendors as either leaders, visionaries, niche players or challengers⁹.
36. The International Data Corporation (IDC) is the other reference cited in the RFP. The Enquiry Committee found that IDC uses a system called 'IDC MarketScape' which is a graphical vendor assessment tool¹⁰.
37. The previous RFP had also stated Forrester as a reference however, the name was subsequently withdrawn in the amended RFP. The Enquiry Committee noted that Forrester uses a 'Forrester Wave' which evaluates vendors based on different criteria¹¹.
38. Other sources of information regarding Tier 1 vendors were also researched and show different results for Tier 1 vendors. According to Ultra Consultants five vendors that can currently be classified as Tier 1 are: SAP, Oracle EBS and JDE, Microsoft Dynamics AX, Infor LN and M3, IFS¹².
39. Another source Panorama Consulting Solutions states Tier 1 ERP Software vendors are a select group comprised only of SAP, Oracle and Microsoft Business Solutions / Microsoft Dynamics¹³.
40. According to an article in Enterprise Apps Today SAP and Oracle are the biggest two players followed by Epicor, Infor and Microsoft and after these five there are a host of Tier 2 players¹⁴.

⁹ Research Methodologies -Gartner Magic Qaudrant,

http://www.gartner.com/technology/research/methodologies/research_mq.jsp

¹⁰ IDC MarketScape-A comprehensive Vendor Assessment, <http://www.idc.com/MarketScape/index.jsp>

¹¹ The Forrester Wave Methodology Guide, <https://www.forrester.com/marketing/policies/forrester-wave-methodology.html>

¹² Tier 1 ERP Vendors, Ultra Consultants, 2016, <http://www.ultraconsultants.com/erp-vendors/erp-vendors/tier-i-erp-vendors/>

¹³ Tier 1 ERP Software -Panorama Consulting Solutions, 2016, <http://panorama-consulting.com/erp-vendors/tier-i-erp-vendors/>

¹⁴ ERP Buying Guide: Top Tier Vendors, Enterprise Apps Today, September 23, 2015, <http://www.enterpriseappstoday.com/erp/erp-buying-guide-top-tier-vendors.html>

41. In the queries raised by different vendors with regards to the RFP (Annex 'C1') the Complainant and another vendor had raised questions regarding the requirement of Tier 1 as mandatory in response to which USC has indicated Gartner and IDC as references however, from the abovementioned paragraphs we did not find the use of the term Tier 1.
42. Therefore, it appears that Tier 1 is not a standard term, instead companies such as Gartner, IDC (cited in the RFP) as well as Forrester have their own rating methodologies for ERP software based on business type and sizes. Gartner uses the Magic Quadrant, IDC uses IDC MarketScape and Forrester uses the Forrester Wave. The Tier 1 list varies for the other sources searched however the common vendors in all include SAP, Oracle and Microsoft.
43. Moreover, according to Gartner, the type of ERP deployed depends on the functional needs of different sized companies¹⁵. Panorama Consultancy notes that Tier 1 ERP systems are generally used by fast-growing multinational companies¹⁶. They are designed to service the needs of Fortune 1000 companies, which for the most part are complex, large businesses that have many departments and global locations¹⁷.
44. In Clause 4.2 for local companies having presence only in Pakistan the condition of CMMI level III or above is required. According to the CMMI Institute, the Capability Maturity Model Integration (CMMI) is a capability improvement model that can be adapted to solve any performance issue at any level of the organization in any industry. The Model provides guidelines and recommendations for helping an organization diagnose problems and improve performance and has 05 different levels of maturity¹⁸.

¹⁵ Magic Quadrant for Single-Instance ERP for Product-Centric Midmarket Companies, Gartner, 09 December, 2015

¹⁶Evaluating the Four Horsemen of Tier 1 ERP: SAP, Oracle, Microsoft, Infor, Asug News, 02 November, 2015.

¹⁷The Difference Between ERP Tier 1, ERP Tier 2, and ERP Tier 3, March 2013 Compu Data.

¹⁸<http://cmmiinstitute.com/what-is-cmmi>

45. The Complainant has submitted that there are only five companies in Pakistan, which are certified by CMMI institute at level 3, out of which four companies are telecom and engineering service providers only one company is a software service provider.
46. As per research by Enquiry Committee the CMMI Institute on its website shows that in Pakistan there are three companies that are CMMI level 3 certified out of which one is a telecom company (Telenor) and the other two are software companies. (A copy of the search result is attached as Annex 'D'). Therefore, it appears that the condition for CMMI level 3 would make only two local companies eligible for participation in the tender.
47. 4.2 Selection criteria-Pre-qualification (mandatory clauses) Clause 15 states:
"Vendor should be ISO 9001 or ISO 27001 or CMMI or IEEE certified. Having any one certification will be accepted".
48. The RFP has made it mandatory in Clause 15 for the vendor to have any one of these certifications. International Standard Organization ("ISO") or Institute of Electrical and Electronics Engineers ("IEEE") are internationally accredited authorities.
49. ISO is an independent, non-governmental international organization with a membership of 163 national standards bodies. Through its members, it brings together experts to share knowledge and develop voluntary, consensus-based, market relevant International Standards that support innovation and provide solutions to global challenges. ISO has published more than 21000 International Standards and related documents, covering almost every industry, from technology, to food safety, to agriculture and healthcare¹⁹.
50. Following ISO standards are applied on software installation at different levels which include:

¹⁹<http://www.iso.org/iso/home.html>

- a. ISO 9001 for Software Development²⁰
- b. ISO 27001 Information Security Management²¹
- c. ISO 25030 for Software product Quality Requirement and Evaluation²²
- d. ISO/IEC 29119 for Software testing²³

51. IEEE is the world's largest technical professional organization dedicated to advancing technology. There are more than 420,000 IEEE members in over 160 countries. IEEE publishes a third of the world's technical literature in electrical engineering, computer science, and electronics and is a leading developer of international standards that underpin many of today's telecommunications, information technology, and power-generation products and services²⁴.

52. Following IEEE standards were applicable on Software industry at different levels:

- a. IEEE 730 standard for software quality Assurance Process²⁵
- b. IEEE 12207 standard for Information Technology Software life cycle standard²⁶
- c. IEEE 1012 Standard for software verification and validation²⁷

53. It is noted that ISO and IEEE are globally recognized standards if a vendor is meeting these standards why would USC require them in addition to these standards to achieve certifications like CMMI level 3 or belong to Tier 1.

54. As per the findings in paragraphs 31-53 above, it appears that the use of the term Tier 1 limits the number of competitors in the market by restricting it to essentially four international players. Furthermore, the addition of CMMI level 3 for local companies

²⁰http://www.oskarsson.se/useful_info/ISO9000/Ch2.htm

²¹<http://www.iso.org/iso/home/standards/management-standards/iso27001.htm>

²²http://www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=35755

²³<http://www.softwaretestingstandard.org/>

²⁴<https://www.ieee.org/about/index.html>

²⁵<https://standards.ieee.org/findstds/standard/730-2014.html>

²⁶<https://standards.ieee.org/findstds/standard/12207.0-1996.html>

²⁷<https://standards.ieee.org/findstds/standard/1012-2012.html>

restricts the number of players to essentially 2. We find that the use of the term Tier 1 is not a standard industry practice and instead ERP software is ranked based on a number of factors depending on the size of the client and the type of business. Even if we assume that Tier 1 is a standard industry term we find that such ERP software is complex and used by large multinational organizations. The conditions of Tier 1 and CMMI 3 are required in addition to internationally recognized standards such as ISO and IEEE.

55. It appears that Clauses 8 and 9 of 4.2 Selection criteria-Pre-qualification (mandatory clauses) are unfair and restrict competition in the relevant market by foreclosing entry by other players and are therefore, a *prima facie* violation of Section 3(3)(a) and (g) read with Section 3(2) of the Act which constitutes a violation of Section 3(1) of the Act.

56. 4.2 Selection criteria-Pre-qualification (mandatory clauses) Clause 5:

"ERP Solution should be Cloud base (Software as a Service, SAAS) and the Principal should manage Cloud Principal website reference".

4.2 Selection criteria-Pre-qualification (mandatory clauses) Clause 6:

"ERP cloud solution should have local and global deployments. (Documentary evidence in the shape of Purchase Order from minimum one local company of quoted Principal, Contract or Letter of completion, website reference or on the letter head of principal for global references)".

4.2 Selection criteria-Pre-qualification (mandatory clauses) Clause 16:

"Vendor already has experience similar size projects in Pakistan or region of proposed solution and technology (1 cloud based ERP PO Contract or certified cloud resources".

57. As per Clause 2.1 Project Overview of RFP, USC mentions that it requires certain functions on the cloud and others on premise as follows:

- a. Finance --on cloud;

- b. Purchasing -- on cloud;
- c. Inventory solution --on cloud;
- d. Payroll -- on premise;
- e. Human Resource -- on premise;
- f. Retail Management System-- on premise;
- g. Project Management -- on cloud.

58. USC stated that there could be different options than cloud solution to achieve the USC automation objectives. However, after evaluation management has decided to go on the cloud based ERP and on premise retail management system and HR solution.

59. The Enquiry Committee is of the opinion that USC has the right to prefer cloud based model and does not debate the issue of cloud vs. on-premise solutions.

60. It is observed that cloud solution is just one part of the tender. As per the specifications provided by USC on the request of potential bidders the following estimated quantities are noted:

- a. Cloud subscription license for financial module --40;
- b. Cloud subscription license for Supply Chain Modules covering Procurement, Stores/Warehouse management system, inventory management systems --80;
- c. Cloud subscription license for Planning, Budgeting, Business Intelligence Module -- 40;
- d. Cloud subscription License project management system -- 10;
- e. Cloud subscription Licenses for CRM -- 10; and
- f. Server operating licenses -- as per design;

61. The following quantities are required for the on-premise part of the tender:

- a. Licenses for Retail Management Services: 1,000;
- b. Licenses for Backed Servers for Retail Management System (RMS): as per design;

- c. Licenses for Database Servers (As per below mentioned specifications): as per design; and
- d. Licenses for warehouse management system: 70

62. It is evident that a major portion of the project (i.e. 1000 users) comprises of the on-premise Retail Management System and from the requirements of USC it appears that the ERP cloud functions would be used by a small number of users (maximum 80 for procurement and warehouse management) whereas a large component of the project appears to be the point of sales/Retail Management System which would be deployed in 1000 stores. However, the mandatory evaluation criteria in the RFP seem to focus on cloud capabilities.

63. It is noted that whereas USC has the right to opt for a cloud based ERP solution cloud technology is relatively new and the capabilities of Pakistani vendors are still at a nascent stage. This fact has been highlighted not just by the Complainant but a number of other potential vendors in their queries to USC which are recorded below:

- a. *Oratech: Since cloud based solution (i.e. comparatively new than traditional ERP Solution) is required it is requested to review the criteria (both mandatory and evaluation), as most of these local companies are keen to work on these assignments and are currently in the capacity building phase to deliver such kind of projects.*
- b. *Kazmi& Co: From analysis of the RFP only one OEM can bid on this project, Oracle. SAP being the only true competitor to Oracle in essentially a two player market in ERP is knocked out due to lack of maturity in their cloud based solutions in Pakistan.*
- c. *GulfNet: Instead of looking for global cloud operators and international cloud based ERP vendors has USC seriously explored the possibility of working with domestic software industry to create a model for managed services based on comparable Pakistani software products. These managed services can also be provided on cloud services offered from domestic facilities as mentioned in*

point 6 above. This approach will be more cost effective for USC both in the short and long term.

d. Abacus: Confirmation that USC would like to pursue the SaaS cloud model as it comparatively costly to other options available.

64. Clause 6 of the mandatory criteria asks for ERP cloud should have local and global deployments. Similarly Clause 16 calls for experience of similar sized projects in the region or Pakistan. The Enquiry Committee is of the view that this clause appears to be restrictive for local vendors since they are unlikely to have global deployments of their ERP cloud solutions. In fact from the abovementioned issues raised by potential vendors indicate that local vendors have not deployed ERP cloud solutions in Pakistan let alone internationally.

65. Similarly the requirements of Clause 5 require that the Principal should manage the cloud. It is noted that cloud is a relatively new technology and a vendor with ERP experience may not necessarily be managing a cloud or vice versa. Although the revised RFP includes the option of a Joint Venture, it is noted that the mandatory requirements under Clause 5 still do not reflect these and therefore, limits the number of companies that can meet the pre-qualification criteria.

66. USC has stated that it is incorrect that the RFP is tailor made to select a specific service provider, excluding local service/solution providers such as DRL from the relevant market or it has the object or effect of reducing or lessening competition or does not provide a level playing field. Unfortunately, no local company has been able to demonstrate that it has implemented a sustainable and globally tried and tested system appropriate for an organization similar in size to the USC.

67. The Complainant in response dated 04 October, 2016 (Annex 'E') submitted that other public sector organizations such as NADRA and FBR have implemented indigenous systems based on their particular needs and that if USC wanted a globally tried and

tested system it should have opted for international bidding procedures instead of tendering at a local level.

68. Based on the findings of paragraphs 56-67 above it appears that USC has designed the mandatory pre-qualification criteria focusing on cloud services which form only a small part of the overall tender/project a majority of which deals with ERP/Retail management system. The focus on experience in managing cloud services excludes a majority of local as well as foreign vendors from participating in the tender. Therefore, it appears *prima facie* that Clauses 5, 6 and 16 of 4.2 Selection criteria-Pre-qualification (mandatory clauses) are unfair and restrict competition in the relevant market by foreclosing entry by other players and are therefore, a *prima facie* violation of Section 3(3)(a) and (g) read with Section 3(2) of the Act which constitutes a violation of Section 3(1) of the Act.

69. 5.1Solution/ Product Evaluation Criteria Clause 1:

"Should be a pre-integrated cloud solution owned and offered and managed by single Principal directly covering updates, upgrades and future enhancements of the proposed ERP solution (elaborated in the cloud section as well as referred to cloud definition at clause Cloud Services).

IAAS 10 marks

(Infrastructure and VMs are being managed by Principal, however Middleware, Data, Runtime, Data, Runtime and application is being managed by its partner)

PAAS 20 marks

(Infrastructure, VMs and middleware are being managed by Principal, however Data, Runtime, and application is being managed by its partner)

SAAS 30 marks

(Infrastructure, VMs, middleware, Data, Runtime, and application are being managed by Principal)"

70. 5.1Solution/ Product Evaluation Criteria Clause 2:

"Local and global references of ERP Cloud offered as software as service (SAAS)

5 points for each reference (total marks 30").

71. It appears that the solution/product evaluation criteria award greater marks/weightage to cloud service experience. Even if the mandatory pre-qualification criteria allow for the participation of local firms the evaluation criteria is designed so as to favor larger global vendors with experience in cloud services.
72. Although USC has subsequently allowed for a JV highest marks will be awarded to a vendor that offers the solution on a SAAS model (i.e. principal managing the entire solution). Similarly as per Clause 2 a vendor who has ERP cloud experience both locally and globally would score high marks. As already mentioned in paragraphs 64 and 65 above cloud is a relatively new technology with very few firms having ERP cloud experience. Greater marks for local and global references appear to favor international firms since it is obvious that a global player would have more references and experience in this regard and since this model is relatively new especially in Pakistan local firms would not have much experience. Therefore, this places local vendors at a competitive disadvantage as compared to international vendors.
73. Based on the foregoing in paragraphs 69-72 above, it appears that Clauses 1 and 2 of the Solution/Product Evaluation Criteria place local vendors at a competitive disadvantage as compared to international vendors and are a *prima facie* violation of Section 3(3)(e) read with Section 3(2) of the Act which constitutes a violation of Section 3(1) of the Act.

CONCLUSION:

74. Based on the findings of paragraph 13 above, USC is an undertaking in terms of Section 2 (1) (q) of the Act.
75. Based on the findings of paragraph 24 above, the relevant market is the market for ERP retail based solutions including all software and hardware requirements in Pakistan.
76. Based on the findings of paragraph 25-30 above, USC is a dominant player in the retail chain store market and that it is *prima facie* dominant in the relevant market being the largest procurer of ERP retail based solution in Pakistan including POS and all integrated hardware.
77. Based on the findings of paragraph 55 above, It appears that Clauses 8 and 9 of 4.2 Selection criteria-Pre-qualification (mandatory clauses) are unfair and restrict competition in the relevant market by foreclosing entry by other players and are therefore, a *prima facie* violation of Section 3(3)(a) and (g) read with Section 3(2) of the Act which constitutes a violation of Section 3(1) of the Act.
78. Based on the findings of paragraph 68 above, it appears that USC has designed the mandatory pre-qualification criteria focusing on cloud services which form only a small part of the overall tender/project a majority of which deals with ERP/Retail management system. The focus on experience in managing cloud services excludes a majority of local as well as foreign vendors from participating in the tender. Therefore, it appears *prima facie* that Clauses 5, 6 and 16 of 4.2 Selection criteria-Pre-qualification (mandatory clauses) are unfair and restrict competition in the relevant market by foreclosing entry by other players and are therefore, a *prima facie* violation of Section 3(3)(a) and (g) read with Section 3(2) of the Act which constitutes a violation of Section 3(1) of the Act.

79. Based on the findings of paragraph 73 above, it appears that Clauses 1 and 2 of the Solution/Product Evaluation Criteria place local vendors at a competitive disadvantage as compared to international vendors and are a *prima facie* violation of Section 3(3)(e) read with Section 3(2) of the Act which constitutes a violation of Section 3(1) of the Act.

80. In view of the preceding findings, it is proposed that proceedings may be initiated against USC in terms of Section 30 of the Act for a prima facie violation of Section 3(1) of the Act.

Maliha Quddus
Enquiry Officer

Aqsa Suleman
Enquiry Officer