# BEFORE THE
# COMPETITION COMMISSION OF PAKISTAN

## IN THE MATTER OF

## ACQUISITION OF 79% SHARES OF M/S. AGRITECH LIMITED BY M/S. FAUJI FERTILIZER COMPANY LTD

(FILE NO. 324/MERGER/CCP/2010)

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| Dates of Hearing: | 19-08-2011, 06-09-2011, 21-10-2011 & 21-11-2011 |
| Present: | Ms. Rahat Kaunain Hassan<br>**Chairperson** |
| | Mr. Abdul Ghaffar<br>**Member** |
| | Ms. Vaddiya S. Khalil<br>**Member** |
| On behalf of<br>M/s Fauji Fertilizer Company | Mr. Imtiaz Siddiqui, Mr. Hasnain Kazmi, Advocate Supreme Court, Mr. Khalid Rohail Ansari and Mr. Inam-ur-Rehman Siddiqui |
| M/s Agritech Limited.: | Mr. Salman Akram Raja, Advocate Supreme Court & Mr. Umar Akram Chaudhary, Advocate |

# **O R D E R**

1. In pursuance of the Order dated 26-07-2011 passed by the Honourable Supreme Court, the Competition Commission of Pakistan (the '**Commission**') through this Order will dispose the matter to the extent of conditions imposed in its Order dated 26-01-2011 in the matter of acquisition of 79% shares of M/s Agritech Limited (the '**Agritech**') by M/s Fauji Fertilizer Company Limited (the '**FFC**').

**BACKGROUND:**

2. The Commission after hearing all the parties in the matter of acquisition of 79% shares of Agritech by FFC, issued an N.O.C to FFC on 26-01-2011 and imposed the following conditions:

> *(1) FFC shall maintain "tara" and "sona" brands separately for two years and there shall be a price cap on the price increase of "tara" product by FFC for a period of one year (although with efficiencies claimed we expect that the price for "tara" shall go down). The maintenance of the two brands shall be subject to review after a period of one year or any time later but prior to two years; provided the market share of Urea acquired by FFC i.e., 6% drops from the existing market share through distribution or redistribution amongst existing and upcoming players in the fertilizer sector. (It may be noted that the 6% is taken from the Applicant's estimate of the share in the market, prior to the revised percentage i.e. 5.2%).*
>
> *(2) FFC shall maintain transparency for any change in price in all its fertilizer products and shall for the period of three years intimate to the Commission any price escalation along with reasons for such price increase (if any) within seven days of such increase.*

*(3) Subject to review of this decision as stipulated below, the Commission if deemed necessary may require FFC to divest a portion of shareholding in Hazara.*

*(4) In terms of sub-section 11(b) of Section 11 this approval is subject to review within one year under sub-section 13 of the said section. For the purpose of review, the following shall be considered as a yardstick which may include but shall not be limited to the monitoring of:*

*a) unexplained escalation in price levels;*
*b) tendency of price parallelism;*
*c) changes in market share and levels of concentration;*
*d) new investments made in Balancing Modernization Replacement of the target firm by the acquirer leading to enhancement of production capacity; and*
*e) commitment to nondiscriminatory behavior.*

*(5) FFC shall file its commitment within four weeks from the date of issuance of this decision to comply with all the conditions stipulated herein above, in letter and in spirit and the clearance/approval given here under shall only be deemed effective upon the filing of the commitments.*

3. FFC impugned the conditions and not the entire Order dated 26-01-2011 before the Honourable Islamabad High Court. The Honourable Islamabad High Court after hearing both the parties i.e. FFC and the Commission dismissed the Writ Petition No. <u>543/2011</u> vide its judgment dated 16-05-2011. The Honourable Islamabad High Court observed in its judgment that under the provisions of Regulation 11(5)(b) of the Competition (Merger Control) Regulations, 2007 (the '**MCR**') the Commission is empowered to impose the conditions. It was also

observed that under the provisions of Section 11(13) of the Competition Act, 2010 (the '**Act**') read with Regulation 17 of the MCR the Petitioner has the right to file the review within one year of the Order of the Commission.

4. FFC assailed the Order passed by the Honourable Islamabad High Court before the Honourable Supreme Court of Pakistan in C.P. No. 752/2011. The Honourable Supreme Court of Pakistan after hearing both FFC and the Commission observed the following in its Order dated 26-07-2011:

> *In view of the contentions so raised by both the learned counsels for the parties, we set aside the order of the Commission dated 26-01-2011 to the extent of imposing of the conditions and remand the case to the Commission* ***to dispose off the matter in relation to the imposing of the conditions, after hearing the parties; where after the Commission shall issue a certificate holding as to whether the conditions are to be imposed or not.(emphasis added)*** *This exercise shall be completed within a period of one month. Consequently, the impugned judgment of the learned High Court dated 16-05-2011 is set aside; petition is converted into appeal and disposed of in terms of the above Order.*

**HEARING & SUBMISSIONS OF THE PARTIES:**

5. In pursuance of the Order of the Honourable Supreme Court, hearing notices were issued to parties for 16-08-2011 and parties were directed to furnish their submissions in writing before the Commission with respect to validity and/or applicability of conditions imposed by the Commission, latest by 12-08-2011. However, upon request of Mr. Salman Akram Raja, the hearing was re-scheduled for 19-08-2011.

6. On 19-08-2011 Mr. Hasnain Kazmi, Advocate Supreme Court, Mr. Khalid Rohail Ansari and Mr. Inam-ur-Rehman Siddiqui appeared on behalf of FFC and Mr. Salman Akram Raja, Advocate Supreme Court appeared on behalf of Agritech. The counsel appearing on behalf of FFC stressed that once the Commission comes to a conclusion that the proposed merger does not lessen competition, it cannot impose conditions.

7. After the first hearing FFC was required to propose conditions which were amenable to them, while taking into account Commission's concern which was shared during the hearing and are mentioned in para 8.1 of this Order. FFC, accordingly, submitted its written submissions on 25-08-2011 along-with the proposed amendments in the conditions, which are as follows:

    1) *FFC shall maintain TARA Brand (or any other brand for instance FFC Urea) and SONA brand separate till such time the quality of TARA brand has been brought to internationally recognized quality standards close to SONA brand. This quality enhancement shall be certified by an industry consultant/expert. Further the price difference between both brands at the time of acquisition (if any) shall be maintained by FFC, till such time the above certification is done.*

    2) *During the period two brands are being kept separate, FFC shall voluntarily bring to the notice of the Commission any price revision of the two brands;*

    3) *The condition no. 3 has become redundant as per the observation made by the Commission in the hearing on 19-08-2011.*

    4) *FFC shall maintain best business practices during the acquisition of Agritech and the approval of acquisition may be reviewed within one year should the same violate any provision of the Competition Act, 2010 and the Regulations thereunder.*

5) *Upon acceptance of the above proposal, FFC shall give its commitments within four weeks from the date of issuance of this decision to comply with the conditions stated above in letter and spirit.*

8. On part of FFC it has been contended that if the Commission comes to a conclusion that there's no lessening of competition and assuming that the Commission can impose conditions then there must be a reasonable analysis with relation to the proposed transaction. We would, therefore, take each of the conditions imposed by the Commission in its Order dated 26-01-2011 against the conditions proposed by FFC and would address these in seriatim:

8.1 With reference to condition (i) FFC was explained the rationale for requiring maintenance of separate brands; as FFC in its previous hearings before the Commission (with respect to seeking N.O.C in the subject acquisition) had repeatedly purported superiority of its brand SONA over TARA and had also stated on record that the up gradation and quality enhancement of TARA would require a minimum period of two years. These submissions on behalf of FFC were made in the context when the then Bench required FFC to explain as to why Agritech was offering TARA on a more competitive price in the absence of economies of scale. In this background, the Commission deemed it important to cap the increase in price of TARA so that consumers were not deprived of the product option at a lower price until such quality enhancement was achieved.

8.1.1 FFC's response in this regard is that Agritech on its own has done major quality enhancement which may be completed even within six months period, hence it should not be time capped. It was further submitted that FFC is willing to maintain a price difference (if any) between the two brands i.e. SONA and TARA at the time of acquisition. Accordingly FFC's revised wording for condition (i) was as follows:

*FFC shall maintain TARA Brand (or any other brand for instance FFC Urea) and SONA brand separate till such time the quality of TARA brand has been brought to internationally recognized quality standards close to SONA brand. This quality enhancement shall be certified by an industry consultant/expert. Further the price difference between both brands at the time of acquisition (if any) shall be maintained by FFC, till such time the above certification is done.*

8.1.2 In this regard the Commission inquired from FFC as to what price difference existed (if any) in the last one year. It is pertinent to add that the price tables and charts provided by FFC vide their letter dated 05-09-2011 indicated almost parallel and identical pricing, as provided here under (where the prices have varied the other brand has followed it within few days):

**(Comparative Price List of SONA UREA & TARA UREA Provided by FFC)**

| FFC SONA UREA | | AGRITECH TARA UREA | | DIFFERENCE |
|---|---|---|---|---|
| **Price per 50 kg bag in Pak Rupees** | **Effective date** | **Price per 50 kg bag in Pak Rupees** | **Effective date** | **In Pak Rupees per 50 kg bag** |
| 1020 | 01-01-2011 | 1020 | 01-01-2011 | Nil |
| 1020 | 16-03-2011 | 1155 | 16-03-2011 | 135 |
| 1155 | 21-03-2011 | 1155 | 21-03-2011 | Nil |
| 1155 | 15-04-2011 | 1225 | 15-04-2011 | 70 |
| 1225 | 17-04-2011 | 1225 | 17-04-2011 | Nil |
| 1215 | 01-07-2011 | 1215 | 01-07-2011 | Nil |
| 1360 | 16-07-2011 | 1215 | 16-07-2011 | 145 |
| 1360 | 18-07-2011 | 1360 | 18-07-2011 | Nil |
| 1360 | 09-08-2011 | 1378 | 09-08-2011 | 18 |
| 1378 | 17-08-2011 | 1378 | 17-08-2011 | Nil |

8.1.3. It is also important to highlight that at the time of filing of initial pre-merger application as well as during the hearing of that application, there admittedly existed a significant price difference between the two products, which as per the letter dated 20-10-2010 of Agritech on the record is as follows:

**<u>Current urea prices in the market</u>**

| Companies | Rs/Tons | Rs/bag |
|---|---|---|
| Fauji Fertilizer | 16,600 | 830 |
| Fauji Bin Qasim | 16,600 | 830 |
| Agritech Limited | 15,600 | 780 |

8.1.4 Presuming that the prices quoted by FFC are correct, we are not satisfied with the revised wording proposed by FFC with respect to condition (i); The statement that *"the price difference between both brands at the time of acquisition (if any) shall be maintained by FFC, till such time the above certification is done"*, perhaps would only serve a cosmetic purpose with no benefit going to the consumer. As per FFC's earlier submissions during this proceeding vide letter dated 12-10-2011 no price difference exists in the price of SONA and TARA. However, after the hearing on 21-10-2011, the Commission received a letter dated 17-11-2011 from the counsel of FFC stating that the dealer transfer price of TARA is Rs. 20/- higher than the price of SONA. Upon receipt of this letter, an emergent hearing for 21-11-2011 was called to conclude the matter. During the hearing the representatives of the applicant i.e. FFC for subject acquisition were present along with their counsel. No representative was present on behalf of Agritech.

8.1.5 The Bench invited comments on this recent development. The FFC team suggested they were not in a position to comment and that this is a question perhaps best to be answered by Agritech. The Commission dilated on this keeping in view the facts as are available on record. Various factors are important to be pointed out. At the time of hearing of initial application of acquisition the price difference between the two SONA and TARA was Rs.50 as per the letter dated 20-10-210 of Agritech with SONA, being more expensive. However, during the period January to September, 2011 both products became equal in price, and now, in November, 2011 TARA is Rs.20 higher than SONA (dealer transfer price) as asserted by FFC. The Commission is of the considered view that this could be due to considerations such as: i). the price increase of TARA may be dependent on factors including the crisis and demand for the urea product which has further strengthened the sellers market for urea; and ii). the fact that the production for TARA had gone very slow in the last six months, be it financial constraints or shortage of gas or both (as disclosed during the hearing). In view of the above, the Bench, therefore, inquired from FFC whether it could, because of; economies of scale, better expertise, purported superiority of the product and dominant status, be able to ensure that TARA does not sell at a price higher than SONA in a post merger scenario. FFC was not amenable to this proposal but was not able to suggest and counter any satisfactory explanation. Accordingly, we are revising condition (i) as follows:

*"FFC shall maintain TARA Brand and SONA brand separate till such time the quality of TARA brand has been upgraded to the recognized quality standards of SONA brand (as purported by FFC). This quality enhancement shall be certified by third party independent industry consultant/expert detailing the quality enhancement aspects in the certification report that is acceptable to the Commission. Provided that the ex-mill dealer tranfer price difference between the TARA brand, if lesser than SONA brand, on the date of acquisition/merger taking effect, shall be maintained until TARA achieves quality enhancement/up-gradation as*

*envisaged above." Provided further, that in the event on the date of acquisition/merger taking effect, if price of TARA Urea is higher than SONA Urea; notwithstanding such price difference, FFC shall only be entitled to sell/offer TARA Urea product at the ex-mill price not higher than SONA Urea as long as it maintains these two separate brands.*

8.2 With reference to condition (ii) FFC's counsel submitted that the said condition implies FFC is doing something wrong and so they need to keep reporting. Therefore, such reporting should be required from all producers. The counsel for Agritech Mr. Salman Akram Raja added that in a free market, price escalation is not only driven by cost factors but it could be because of supply and demand or various other factors. Requiring the parties to report the price increase alongwith reasoning may become too cumbersome without serving the actual purpose. It was, therefore, proposed that FFC would voluntarily submit such price increase during the period the two brands are kept separate. While we are accepting this modified condition, we would further add the requirement on part of FFC to submit a quarterly price report with respect to all its fertilizer products for a period of two years. This will enable the Commission to closely monitor and prevent any likely abuse of dominant position in terms of Section 3 of the Act. We note that FFC in its written submissions dated 21-09-2011 has expressly stated that 'market share of FFC has increased from 47% to 51%,' without even acquiring Agritech. The Commission has not been informed about any specific reduction in the market share of Agritech, while the same has generally been asserted on the grounds of shortage of raw material i.e. gas. It is plausible that the post acquisition share of FFC in the relevant market may accordingly increase further and may result into different dynamics. However, for the purposes of these proceedings, we are restricting ourselves to reviewing the conditions alone.

8.3 As informed by the parties, with respect to the third condition owing to the change in circumstances i.e. merger of M/s Hazara Phosphate Fertilizers (Pvt.) Ltd (the '**HAZARA**') into Agritech, we agree that this condition is no more relevant and applicable.

8.4 The counsel for FFC contended that the sub-sections of condition no. (iv) do not apply to FFC because there is no finding of a violation. However, it was clarified by the Bench that imposition of such conditions does not have to meet any such requirement. Notwithstanding any such condition, the Commission in terms of the provisions of Section 11 (13) of the Act, is empowered to review the order of approval of merger on its own. Moreover, as for the power of the Commission to impose conditions; the same is envisaged under the law i.e. Section 31(d)(i) of the Act read with Regulation 11(5)(b) of the Competition (Merger Control) Regulations, 2007 even where the Commission finds that there is no substantial lessening of competition. The Honourable Supreme Court has not barred the Commission from imposition of any condition, but has required the Commission to hear the parties on the conditions imposed.

8.5 As for condition (iv) in Commission's Order dated 26-01-2011, we are of the considered view that this only enumerates factors and aspects which would be taken under review which at best facilitate the acquirer i.e. FFC in ensuring compliance with regulatory agency's concerns. The objective is that while increase in market share is being allowed to a dominant player in the relevant market it is expected from such undertaking to demonstrate its commitment to good governance and transparency. Hence, the condition (iv) of the earlier Order dated 26-01-2011 will continue conditions, whereas, condition (v) is not required under the given facts and circumstances.

9. It is relevant to add that the actual scope of the *'special responsibility'* imposed on an undertaking in a dominant position in the competition regimes need to be considered in light of the specific circumstances of each case. Keeping in mind that there is a limited number of urea producers in the relevant market and the fact that demand exceeds the supply of the product in question, dictating prices is quite possible. Also, the fact that there are barriers to entry in terms of heavy capital investment and the allocation of gas to fertilizer plants is under the control of Government which is leading to the gap of supply and demand and has led to increasing import despite the claim of production capacity by local manufacturers.

10. The Commission would therefore, closely monitor compliance with the conditions in letter and in spirit to avert any possible risk to competition in the relevant market. We reiterate as observed earlier that *"the eventual benefit, from the consumer's perspective, is to see whether these efficiencies would result in lower prices, improved quality, enhanced services or new products. The Commission hopes that this decision will help achieving economies of scale in the fertilizer industry leading to decrease in consumer prices without substantially lessening competition. The Commission is also of the view that free trade ensures competition, keeps competitive pressure on the local industry and protects consumers from possible exploitation."*

11. Therefore, keeping in view the above, the N.O.C to the bidding by FFC for the proposed merger shall be subject to following conditions:

> *"FFC shall maintain TARA Brand and SONA brand separate till such time the quality of TARA brand has been upgraded to the recognized quality standards of SONA brand (as purported by FFC). This quality enhancement shall be certified by third party independent industry consultant/expert detailing the quality enhancement aspects in the certification report that is acceptable to the Commission. Provided that the ex-mill rate price difference*

*between the TARA brand, if lesser than SONA brand, on the date of acquisition/merger taking effect, shall be maintained until TARA achieves quality enhancement/up-gradation as envisaged above." Provided further, that in the event on the date of acquisition/merger taking effect, if price of TARA Urea is higher than SONA Urea; notwithstanding such price difference, FFC shall only be entitled to sell/offer TARA Urea product at the ex-mill price not higher than SONA Urea as long as it maintains these two separate brands.*

*(2) FFC shall maintain transparency for any change in price in all its fertilizer products and shall for the period of two years submit a quarterly price report with respect to all its fertilizer products.*

*(3) In terms of Section 11(13) of the Act, this approval is subject to review within one year. For the purpose of review, the following shall be considered as a yardstick which may include but shall not be limited to the monitoring of:*

*a) unexplained escalation in price levels;*
*b) tendency of price parallelism;*
*c) changes in market share and levels of concentration;*
*d) new investments made in Balancing Modernization Replacement of the target firm by the acquirer leading to enhancement of production capacity; and*
*e) commitment to nondiscriminatory behavior.*

12. Order accordingly.

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|---|---|---|
| (RAHAT KAUNAIN HASSAN) CHAIRPERSON | (ABDUL GHAFFAR) MEMBER | (VADIYYA S. KHALIL) MEMBER |

**Islamabad the November 23, 2011.**