



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

**IN THE MATTER OF
SHOW CAUSE NOTICES NO. 21 & 22/2010 ISSUED TO**

**M/S FAUJI FERTILIZER COMPANY LIMITED &
M/S FAUJI FERTILIZER BIN QASIM LIMITED**

(FILE NOS. 8(576)/INV/CCAO/MCA/94 & 8/AC(R&I)/MCA/05)

Dates of hearing:

June 16, 2010 (Wednesday)

Present:

Mr. Khalid A. Mirza
Chairman

Mr. Abdul Ghaffar
Member (Cartels, Monopolies & Trade Abuses)

Ms. Rahat Kaunain Hassan
Member (Legal & OFT)

**On behalf of
Fauji Fertilizer Company Limited:**

Syed Shahid Hussain

Brig. Khalid Kibriya (Retd.)
Company Secretary

Mr. Zahir Riaz, Legal Counsel
Orr Dignam & Co.

Mr. Akbar Bilgrami

Fauji Fertilizer Bin Qasim Limited:

Syed Aamir Ahsan
General Manager

Mr. Tasneem Murad
Finance Manager

Lt. Col. Mohammad Iqbal Hashmi (Retd.)
Senior Executive (Legal)

ORDER

1. This Order will dispose of the proceedings pursuant to Show Cause Notices No. 21 & 22 of 2010 dated June 03, 2010 (hereinafter referred to as ‘SCNs’) issued to M/s Fauji Fertilizer Company Limited (hereinafter referred to as the ‘FFC’) & M/s Fauji Fertilizer Bin Qasim Limited (hereinafter referred to as the ‘FFBL’) under the provisions of Section 19 (1) of the Monopolies and Restrictive Trade Practices (Control & Prevention) Ordinance, 1970 (hereinafter referred to as the ‘MRTPO’) read with Section 59 of the Competition Ordinance, 2010 (the ‘Ordinance’), for not complying with the directions given by the Defunct Monopoly Control Authority (hereinafter referred to as the ‘Defunct Authority’) vide its Order dated April 29, 2008 (hereinafter referred to as the ‘Order’).

FACTUAL BACKGROUND

2. FFC & FFBL are engaged in manufacturing, purchasing and marketing of fertilizers and chemicals including investment in other fertilizer and chemical manufacturing operations, are Undertakings as defined under clause (m) of sub-section (1) of Section 2 of the MRTPO.
3. The Defunct Authority issued show cause notices to FFC and FFBL for *prima facie* violation of Section 3 of the MRTPO. Thereafter after the promulgation of the Ordinance the Competition Commission of Pakistan (hereinafter referred to as the ‘Commission’) was established on 02-10-07, as a successor of the Defunct Authority. The show cause notices issued to the Undertaking, was disposed off by the Commission under the provisions of Section 11 of MRTPO read with 59 of the Ordinance, vide its Order dated 28-04-2008 (hereinafter referred to as the ‘Order’).
4. In Para 41 of the Order, the Commission gave the following directions to FFC and FFBL:

- (i) *No individual will be a director of both Fauji Fertilizer Company Limited (FFC) and Fuji Fertilizer Bin Qasim Limited (FFBL) with the exception of (a) Chairman, (b) minority shareholders, (c) individual representing institutions other than the Fauji Group of Companies including but not limited to FFC & FFBL;*
 - (ii) *The Chairman of FFBL will not have a second or casting vote nor shall he hold the office of the Chief Executive Officer. So long he is also the Chairman of FFC;*
 - (iii) *In order to ensure good corporate governance and transparency, FFBL shall take necessary measures to ensure that there are three independent directors on its board in terms of Para 38 of the Order;*
 - (iv) *The Commission is agreeable to the proposed time period for the implementation of the aforesaid actions i.e., within a period of two years from the date of this Order as this appears to be reasonable.*
5. Both FFC & FFBL were also directed to submit an undertaking, within a period of three weeks for an on behalf of their Boards (along with copies of relevant Board Resolutions), assuring the Commission that due compliance with the terms of the Order will be ensured, which was duly complied with. However, the FFC & FFBL were required to report and confirm due compliance of the Order within two years from the date of the Order.
6. The commitments for and on behalf of the Boards of FFC and FFBL were filed on 04-09-2008 & 22-09-2008, respectively along with copies of the Board Resolution.
7. Upon expiry of the two years compliance period, the Commission received letters dated 28-04-2010 from FFC and FFBL (hereinafter referred to as the '**Extension Letters**'), wherein request for an extension in the compliance period up-to 30-06-2011 was made, to the Commission. However, there was no mention of any effort made by the Boards of FFC and FFBL for compliance or even achieving partial compliance of the Order; the Commission did not find the request satisfactory.

8. The Commission, therefore, deemed it appropriate to issue show cause notices to both, FFC & FFBL on 03-06-2010, for non-compliance of the Order in violation of Section 19 of MRTPO read with Section 59 of the Ordinance. FFC and FFBL were also required to file their written reply to the show cause notices on or before 15-06-2010 and an opportunity of hearing was also provided to them on 16-06-2010. The show cause notices in their relevant parts reads as under:

5. **WHEREAS**, upon expiry of the two years compliance period, the Undertaking vide its letter bearing no. 6.7/S/FFC dated 28-04-2010 (hereinafter referred to as the '**Extension Letter**'), requested for an extension in the compliance period up-to 30-06-2011;

6. **WHEREAS**, from the contents of Para (1)(e) of the Extension Letter, it appears that the Board of Directors of the Undertaking has failed to make any effort for compliance, either full or partial;

7. **WHEREAS**, prima facie, the Undertaking has not complied with the directions given in the Order, which is in violation of clause (a) of sub-section (1) of Section 19 of MRTPO read with Section 59 of the Ordinance;

8. **NOW THEREFORE**, you, M/s Fauji Fertilizer Bin Qasim Limited, as the Undertaking is called upon to show cause in writing on or before **Jun 15, 2010** and to appear and place before the Commission, facts materials in support of its contentions and avail the opportunity of being heard either in person or through an authorized representative **June 16, 2010 at the Office of the Commission, 4-C, Diplomatic Enclave, Sector G-5, Islamabad at 10.30 a.m.;** as to why a penalty for the abovementioned violations be not imposed on you under sub-section (1) & (2) of Section 19 of MRTPO read with Section 59 of the Ordinance. You are requested to provide the names of the authorized representative(s) appearing before the Commission along with their N.I.C. and vehicle registration nos., prior to the hearing date due to security reasons.

9. In response to the show cause notices FFC & FFBL filed their written replies on 15-06-2010. Since the written replies filed by FFC & FFBL were identical in nature, therefore, for the sake of brevity, the salient points of the reply filed by FFBL is reproduced hereunder:

(a) *FFC & FFBL have the highest respect for the Commission and that at no stage was there any intent to deliberately disobey or otherwise flaunt the requirement of the Order;*

(b) *Over the period, the market share of FFC and FFBL has reduced considerably due to the emergence of new players in the market;*

(c) *After considerable deliberation and research, the Boards of Directors of FFC, FFBL and their parent organization, Fauji Foundation, (“FF”) have decided to move into the field of wind generated electrical power. This decision was motivated by:*

(i) *Pakistan’s continuing energy crisis and the growing gap between demand and supply;*

(ii) *The use of a clean “green” fuel,*

(iii) *Most importantly, the hope that by pioneering this particular field, FFC would set the lead and allow other developers and investors to enter the market.*

(d) *The decision to move into the field of wind power generation was taken in principle by the Boards of FFC and FFBL in December 2009. Since then the Directors and the management of the Companies have worked tirelessly to further develop this area of business with a view to diversification in the types of business undertaken by FFC and FFBL in order to meet the objectives of the Competition Ordinance, 2010;*

(e) *For reasons set out below, it became increasingly difficult to implement the Order as a result thereof, before the expiry of the two (2) year period, FFC and FFBL approached the Commission to kindly review the position in view of difficulties being faced in this regard. The position here may be summarized as follows:*

(i) *Following the issuance of the Order in April 2008, all parties involved under took a review of the terms thereof with a view to diversifying investments away from the fertilizer sector to avoid a recurrence of the situation which led to the initial proceedings before the Monopoly Control Authority and, thereafter, the Commission. Given the number of options, this process continued for some time. However, in December 2009 an internal decision was reached to invest in wind generated power projects in which FFC and FFBL were to participate. Several projects were targeted but ultimately three were short listed as follows:*

- (a) *FFC Energy Limited*
- (b) *Beacon Energy Limited (acquisition from existing sponsors) (Beacon Project”)*
- (c) *Green Power Private Limited (Joint venture with existing sponsors) (“Green Project”) (collectively the “Diversification Projects”)*.

(ii) During the process of the implementation of the Diversification Projects, a board meeting of FFBL was held in 26 January 2010 followed by an Annual General Meeting of FFBL in March 16 2010 to approve the proposed investment of FFBL in the Diversification Projects was initiated in the Lahore High Court. This further delayed the process as the orders of the Hon’ able Court were vacated in May 2010.

(iii) While the Diversification Projects were being implemented, FFBL and FFC took steps in earnest to ensure compliance with the Order in regard to the composition of the Board of Directors of FFBL if the decision to proceed with the Diversification Projects had not been taken, the shareholders of FFBL had no reason to delay the implementation of the Order of the Commission. However, once this decision was taken, it became immediately apparent that the participation of certain Directors who had played a pivotal role in the development of these projects was essential;

(iv) Given the in-depth participation of these individuals in the Diversification Projects from the very time of their inception, it became increasingly difficult to envisage the continuation of the Diversification Projects in their absence. This is particularly due to the fact that two important milestones for the Diversification Projects need to achieve in the immediate future:

(a) Completion (for the Beacon and Green Projects) estimated on or about Jun-Jul 2010.

(b) LOS estimated in December 2010 & Financial Closing estimated in June 2011 for the three Diversification Projects.

(v) Effectively, the new Board would need to be briefed on the Diversification Projects. but would lack the overall depth that had been acquired by the existing Directors who had steered the companies through a process of diversification for the very first time in their respective histories. It is in view of this basic fact that an approach is being made to the Commission to revise the date(s) of implementation of the Order as stated in this letter.

(f) For the reasons set out in this letter, FFC & FFBL seek the indulgence of the Commission in modifying the Order only in terms of the time of implementation of the measures set out therein and in no other respect FFC respectfully suggests that the terms of the Order be amended so as to allow the induction of Directors to be phased-in, as per the timetable set out below for the consideration of the Commission:

- (i) The parties concerned will cause three (3) new independent Directors to be inducted onto the Board of FFBL, by way of an increase in the number of directors, immediately after compliance with only those requirements which are necessary under the Companies Ordinance, 1984.
- (ii) At the same time as the induction of the three (3) new independent Directors referenced above, the concerned parties will also take steps to immediately (subject only to such time requirements as are prescribed in the Companies Ordinance, 1984) to replace Brig Arif Rasul Qureshi ®. Accordingly, four directors on the Board of FFBL will change with immediate effect.
- (iii) For the reasons set out herein above, It is submitted that the presence of the following Directors on the Board of FFBL is deemed beneficial for the rapid development and implementation (till LOS Financial Close) of the Diversification Projects:

Mr. Qaider Javed till April 2011
Dr. Nadeem Inayat till December 2010
Brig Rahat Khan (R) till December 2010

It is, therefore, requested that they be permitted to remain on the board of Directors of FFBL till as Indicated by which date they shall be replaced by other directors.

- (iv) Finally it is requested that Lt. General. Malik Arif Hayat (R) be permitted to remain as a director on the Board of FFC until June 2011 given his continuing involvement in the Implementation of the Diversification projects and the achievement of Financial Close with respect thereto. The position here is different from that applicable to the directors named in sub paragraph (iii) as FFC & FFBL will be direct inventors in the Diversification Project and his role is critical to ensure that requisite Foreign shareholders continue to show their interest in the Projects by investing therein, thereby, ensuring the requisite degree of continuity as all the other directors involved in this process will have left by then.

10. Hearing in the matter was held on 16-06-2010 at the Office of the Commission. Mr. Zahir Riaz, of Orr Dignam & Co. along with Syed Shahid Hussain, Brig. Khalid Kibriya (Retd.), Company Secretary and Mr. Akbar Bilgrami appeared before the Commission for and on behalf of FFC and Syed Aamir Ahsan (General Manager), Mr. Tasneem Murad (Finance Manager) and Lt. Col. Mohammad Iqbal Hashmi (Retd.) (Senior Executive (Legal)) appeared before the Commission for and on behalf of FFBL, and argued the matter, reiterating arguments submitted in their written reply.
11. The Counsel for FFC & FFBL deeply regretted the unintentional delay caused in compliance of the Order. It was submitted that the undertakings in all earnestness intended to comply and shall comply with the directions of the Commission. The Counsel, urged that the undertakings be allowed and granted further time to comply with the directions of the Order until June 2011.
12. Keeping in view the facts on record, we do not find much merit in the grounds stated in the reply and must express our disappointment towards the casual approach of both the undertakings *viz-a-viz* the implementation of the Order passed by the Commission. Continued disregard of the Order is reflective of the conduct of the undertakings concerned, which to the minimum appears quite irresponsible if not utterly negligent. The fact that a period of two years was granted for compliance but not once the undertakings approached the Commission to inform of reasons for any expected delay and that they approached the Commission upon lapse of the compliance period on behalf of the undertakings- (as the letter dated 28.04.2010 was received by the Commission on 04.05.2010) further evidences the severity of the matter.
13. The Commission also asked the undertakings, whether any steps were taken for appointment of new/independent directors in pursuance of the Order. The Commission was informed that the names of the five (5) persons were suggested/ considered but only one name was finalized however, no corporate procedure for appointment of the director has been initiated so far. As to why the corporate

process was not started even after the receipt of show cause notice, no satisfactory response was afforded by the representatives.

14. In the given facts, we are not inclined to accede to the request for grant of extension until June 2011. However, keeping in view the representations made by the Counsel, his repeated assurance for the undertakings' commitment to ensure compliance with the Order and taking into account the plea for a lenient treatment, asserting determination to resolve the issue and to address the concerns of the Commission, we are inclined to grant extension only until 31-12-2010, subject to the following conditions, which conditions it must be recorded were accepted by the undertakings during the course of hearing:

- (i) An unconditional apology for and on behalf of the Boards of FFC and FFBL on its letter head shall be filed with the Commission, for the delay caused and the non-compliance with the Order;
- (ii) Commitments on behalf of the Boards of FFC & FFBL to comply with the Order dated 29-04-2008 read with this Order of the Commission, shall also be filed with the Commission;
- (iii) The appointment of the independent directors in-terms of the Order shall be carried out forthwith, without further delay subject to the due time required for completion of corporate procedures, such appointments in any event shall not be later than 31-08-2010;
- (iv) If FFC & FFBL fail to comply with any of the above and report compliance within the time allowed, both FFC and FFBL shall be liable to pay a penalty in the sum of Rs. 10,000/- per day from the date of first non-compliance of the Order. i.e. 30-04-2010.

15. As informed during the hearing, the Parties are hereby directed that the documents to be provided at (i) & (ii) above, shall be to the satisfaction of the Registrar of the Commission, and shall be filed along with the copy of the relevant board resolutions, within four weeks from the date of this order.

16. In terms of the above, the subject show cause notices issued to FFC & FFBL are hereby disposed.

(KHALID A. MIRZA)
CHAIRMAN

(ABDUL GHAFAR)
MEMBER (C&M)

(RAHAT KAUNAIN HASSAN)
MEMBER (LEGAL)

ISLAMABAD THE JULY 16, 2010