BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF
SHOW CAUSE NOTICE ISSUED TO

OIL COMPANIES ADVISORY COUNCIL (OCAC)
(FILE NO. 186/OGRA/C&TA/CCP/2018)

Date(s) of hearing:	22-01-2019 14-02-2019
Commission:	Ms. Vadiyya Khalil **Chairperson** Dr. Muhammad Saleem **Member** Dr. Shahzad Ansar **Member**
Present:	
	Noman A. Farooqi **Chief Prosecutor General, CCP** *Assisted by:* Ms. Sophia Khan **Prosecutor, CCP**
M/s Oil Companies Advisory Council (OCAC)	Mr. Aziz ul Haque Nishtar Advocate, *Nishtar & Zafar* Mr. Asif Ansari, Secretary Mr. Zawar Haider, Chief Executive Officer

Ministry of Energy (Petroleum Division)	Malik Amjad Saleem *Director General (Oi)* Ms. Nayab Sarmad, *Deputy Director (R-II)*
M/s Hydrocarbon Development Regulatory Institute of Pakistan (HDIP)	Mr. Sagheer Hussain Malik, *General Manager, PTRL* Muhammad Azam Khan, *Director General*
M/s Oil & Gas Regulatory Authority (OGRA)	Mr. Ishtiaq Ul Haq *Deputy Executive Director (Oil)*
M/s Authentix	Mr. Chad Crouch *Vice President Sales* Mr. Iftikhar Ahmad, *Managing Director* *Middle East & North Africa* Mr. Ali Murtaza, *Director* *Def-Tech International* Mr. Ahsan Raza Zaidi, *Director Finance & Coordination*

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN ★ ISLAMABAD ★

ORDER

1. This order shall dispose of the proceedings initiated by the Competition Commission of Pakistan (hereinafter the '**Commission**'), in pursuance of the Show Cause Notice dated 2nd January 2019 (the **'SCN'**), bearing no. 03/2019, issued to the M/s Oil Companies Advisory Council (hereinafter the **'OCAC'**) for *prima facie* violation of Section 4 of the Competition Act, 2010 (hereinafter the **'Act'**).

FACTUAL BACKGROUND

A. ENQUIRY, SHOW CAUSE NOTICES AND WRITTEN REPLIES:

2. On 26th January 2018, the Commission received a copy of Transparency International's (hereinafter the '**TI**') letter addressed to the Chairperson of Oil and Gas Regulatory Authority (hereinafter the '**OGRA**'). In the said letter, it was primarily alleged that the OCAC awarded Fuel Marking Contract for kerosene without any competitive bidding process. The assertions made in the aforesaid letter are summarized as follows:

   (a). The tender notice was not floated in any national newspaper;
   (b). The whole process was managed by OCAC;
   (c). OCAC identified six (6) companies who were given the prequalification and Expression of Interests (EOI);
   (d). Third party consultant was hired to develop instructions to bidders;
   (e). Only two companies responded to instruction to bidders;
   (f). Final bid was only submitted by one firm; and
   (g). The contract was awarded without a tender process.

3. On 31st May 2018, after considering the preliminary probe, the Commission on the concerns raised by the TI, initiated an enquiry under Section 37 (1) of the Act. The Enquiry Report examined; whether the selection of the Fuel Marking Contract, procurement methodology adopted, and determination of price can be considered as 'decisions' by OCAC and if so whether these conditions were a *prima facie* violation of Section 4 of the Act. The enquiry was concluded vide Enquiry Report

dated 28th November 2018 (hereinafter the '**ER**'). The conclusion and the recommendations made in the ER were as follows:

> *50. The Enquiry Committee examined whether the selection of the FMC, procurement methodology adopted, and determination of price can be considered as 'decisions' by OCAC and if so whether these decision were a prima facie violation of Section 4 of the Act.*
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> *51. Based on the findings of paragraphs 21-23 above OCAC is prima facie an association of undertakings in terms of Section 2(1)(q) of the Act being a representative body of the downstream oil industry whose members are undertakings engaged in refining, marketing and distribution of petroleum products.*
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> *52. Based on the findings of paragraphs 24-29 it appears that the entire bidding process leading to selection of the bidder was managed and controlled by OCAC contrary to the decision of meeting held on 13th December, 2016, which called for all members of the TC to be taken on board throughout the process. Therefore, Selection of the bidder is prima facie a decision by an association.*
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> *53. Based on the findings of paragraphs 30-33 it appears that OCAC decided to adopt a procurement method that did not involve publishing an advertisement even though the decisions taken in the meeting held on 13th December, 2016 call for the TC to finalize the bidding process and the selection of the FMC through advertisement.*
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> *54. Based on the findings of paragraphs 30-33 it is noted that all of the decision by OCAC, including the selection of FMC and the procurement methodology adopted have a direct bearing on the final price of kerosene therefore, it appears*

that OCAC has taken a decision with regards to the price of kerosene.

55. *Based on the finding of paragraph 37 the relevant market appears to be the market for provision of fuel marking services in Pakistan.*

56. *Based on the findings of paragraphs 38 to 49 the decision by OCAC to select the FMC, to adopt a procurement method whereby no advertisement is published and to fix the price of kerosene are a prima facie violation of Section 4 (1) read with Sub-section (2) (a)of the Act.*

57. *The Enquiry Committee recommends that in view of the prima facie violation of selection 4 of the Act, the Commission may consider initiating proceedings against OCAC under Section 30 of the Act.*

4. Based on the *prima facie* findings of the ER, the Commission initiated proceedings under Section 30 of the Act against OCAC. For ease of reference, SCN in its relevant parts is reproduced herein below:

> *"5.* ***WHEREAS****, in terms of the Enquiry Report in general and paragraphs 24-49 in particular, it appears that the entire bidding process leading to selection of the bidder was managed and controlled by OCAC is prima facie a decision by an association which appears to have the object and effect of preventing, restricting or reducing competition for provision of fuel marking services, is prima facie contravention of subsection (1) of Section 4 read with clause (a) of subsection (2) of Section 4 of the Act; and*
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> *6.* ***WHEREAS,*** *in terms of the Enquiry Report in general and paragraphs 30-49 in particular, it appears that OCAC decided to adopt a procurement method that did not involve publishing an advertisement contrary to decision taken in the*

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN * ISLAMABAD *

meeting held on 13-12-2016, which appears to have the object and effect of preventing, restricting or reducing competition for provision of fuel marking services, and is in prima facie contravention of subsection (1) of Section 4 read with clause (a) of subsection (2) of Section 4 of the Act; and

7. ***WHEREAS,*** *in terms of the Enquiry Report in general and paragraphs 34-35 and 38-49 in particular, it appears that all the decisions by OCAC including the selection of Fuel Marking Company (FMC), to adopt a procurement method whereby no advertisement is published and to fix the price of kerosene, are prima facie in contravention of subsection (1) of Section 4 read with clause (a) of subsection (2) of Section 4 of the Act; and"*

5. OCAC filed their written reply to the SCN vide their letter dated 15th January 2019 which was received on 18th January 2019. The submissions made in the written reply are summarized as follows:

(a). No contract has been executed with any fuel marking company and no decision regarding price fixing was made by any refinery or government body. Since no arrangement or contact for price fixing was executed, therefore, no violation under Section 4 of Act has been committed.

(b). OCAC, being a representative body, was only entrusted with the task to interact with oil refineries and fuel marking companies viz., the fuel marking program. However, each oil refinery has to enter into contract with the fuel marking company individually and OCAC is not going to incur any financial obligation in the process.

(c). No agreement was signed with individual oil refineries. As per standard operating procedures, before signing of the agreement, legal department of the respective oil refineries will be taken on board. If any reservation would have been made regarding violation of the Act then obviously the matter would have been taken up with the Commission and OCAC or Ministry of Energy would have applied for exemptions under Section 9 of the Act.

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN * ISLAMABAD *

(d). Oil refineries are not permitted to fix or vary kerosene price because it is regulated by the Federal Government. Since the price of kerosene is considerably low, therefore, Federal Government decided to initiate a pilot project of fuel adulteration so that initial experience in the Fuel Marker Program can be gained. Obviously, introduction of fuel marker system would have required resultant increase in kerosene price, therefore, it could not be taken without the involvement of the government.

(e). Since, Fuel Marker Program for locally produced kerosene was a pilot project therefore, period of engagement of fuel marking company was restricted to only one year. Furthermore the price of kerosene is fixed by the Government and not by OCAC, therefore, allegation in Para 49 of the ER is against the facts of the case.

(f). The ER and SCN emphasized on publishing of the advertisement, which is only required under the Public Procurement Regulatory Authority Rules, 2004, which is not applicable on OCAC. Furthermore, OCAC being association of undertakings is not required to publish advertisements for procurement of different services i.e. hiring of tax consultants or lawyers. Moreover, OCAC acted with belief that engaging any person for negotiation is not an unlawful activity, unless the object is to harm the competition. However, OCAC after going through the process sought proposals from six reputed undertakings engaged in the provision of fuel marking services.

(g). Private parties can hire a service provider without advertisements and bidding process. Furthermore, after initiation of enquiry by the Commission, OCAC immediately halted the process and did not proceed with the matter as evident from the letter dated 23rd February 2018.

(h). The Commission took notice of complaint filed by TI which was based on violation of Public Procurement Regulatory Authority Rules, 2004. It is submitted that the cost of services to be provided by fuel marking company in the Fuel Marking Program is to be paid by the oil refineries and no public

funds were involved in the process, therefore, this procurement does not fall with the purview of PPRA Rules.

(i). ER in para 37 and 49 identifies two different relevant markets and cannot be treated in conjunction to infer anti-competitive behavior. Provision of fuel marking services is one market whereas, sale of kerosene is another market. If the relevant market is fuel marking services then there is no question of price fixing; as expression of interests were obtained from different service providers and the best price was accepted. The other market is sale of kerosene, where the price is regulate by the Government.

(j). The entire process was supported by the Economic Coordination Committee (the '**ECC**') and Ministry of Energy which is also evident from joint meeting held by Ministry on 25th April 2018, where the government fully backed up the entire process. Said meeting was also attended by the Director General of the Commission.

(k). Para 49 of the ER singled out OCAC for fixing the price, whereas the cost of Rs. 1.22/liter for provision of fuel marking service is approved by ECC and the price of kerosene is to be fixed by the Federal Government. Therefore, if anyone is to be held liable for fixing the price, it is the Federal Government and its role should be taken into account.

(l). If by any stretch of imagination, hiring of fuel marking company is anti-competitive then this decision was taken by the Federal Government. OCAC was directed only to implement the decision of the Federal Government for selecting the fuel marking company.

(m). Without prejudice to above, mere fixing of price or entering into an agreement does not violate Section 4 of the Act, unless this results in prevention, restriction or distortion of the competition. In this case there is a simple selection of a fuel marking company for the purpose of providing the fuel marking services, which does not restrict competition in the relevant market.

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN * ISLAMABAD *

(n). The show cause notice asserts violation of Section 4(2)(a) of the Act, however, it does not disclose how the competition has been prevented, reduced or distorted. The Government introduced Fuel Marking Program for the benefit of the consumers.

(o). The show cause notice expressed that the Commission may pass an order under Section 31 of the Act which requires actions restoring competition or annulment of the prohibited agreement. In this matter there is no such violation.

(p). The show cause notice expresses Commission's intention to impose penalty under Section 38 of the Act, which can be imposed if any provision of the Act is violated. In the instant matter no fuel marking program has been implemented by OCAC. Rather OCAC has acted strictly under the directions of the Government.

(q). Being a responsible entity, OCAC has always complied with the laws and directions issued by any regulator. OCAC has fully co-operated with the Commission during the enquiry. It also refrained from proceeding with the matter after the Commission took up the issue. However, if there were any inadvertent violation of the Act, still OCAC is entitled for a lenient treatment.

6. After initiation of proceedings under Section 30 of the Act, notices were also issued to MEPD, OGRA, Hydrocarbon Development Regulatory Institute of Pakistan (hereinafter the '**HDIP**') and M/s Authentix. Through the said notices the parties were required to file their written comments in the matter, if any, before the scheduled date of hearing. However, except M/s Authentix no other party had filed their written comments during the proceedings under Section 30 of the Act.

7. Subsequent to the first hearing, M/s Authentix vide their letter dated 11th February 2019 submitted its written reply, which for ease of reference is summarized herein below:

(a). After attending the meeting at the DG Oil's Office with the MD/CEO of HDIP a thank you letter was issued on 06 June 2016. The meeting was

convened to address queries of MD/CEO HDIP regarding the use of 'Fuel Marking Service' as a technology in Pakistan. He was informed that this is highest level of covert marking technology to stop adulteration by both 'quantitative' and 'qualitative' testing across the globe.

(b). The ITB[1]/RFP was developed by ENAR Petrotech an independent contractor engaged by OCAC.

(c). The Commission's enquiry letter dated 06 July 2018 pertained to documentation as it related to the "Kerosene Marking Program Contract" procurement process. The formal process of said program was initiated upon the issuance of EOI[2] by OCAC in December 2016.

B. HEARINGS IN THE MATTER:

8. On 22nd January 2019, Mr. Aziz Nishtar, Advocate and Mr. Muhammad Hafeez, Advocate from Nishtar & Zafar appeared on behalf of OCAC. Mr. Asif Ansari, Secretary OCAC was also present. Mr. Nishtar presented his preliminary arguments and submitted that, if the Bench is satisfied with the reply filed by OCAC then the matter may be disposed of, or else they need adjournment for detailed arguments. The Chief Prosecutor General in attendance highlighted that notices may also be issued to all other concerned parties i.e. MEPD, OGRA, HDIP and Authentix (successful bidder). We deemed it appropriate to adjourn the matter for 29th January 2019. The Registrar was directed to issue notices to all the concerned parties i.e. MEPD, OGRA, HDIP and M/s Authentix (Pvt.) Limited for next date of hearing.

9. On the request of Mr. Chadwick Crouch, Vice President Sales, Authentix and on the request of counsel for OCAC for rescheduling of hearing due to their prior engagement before Islamabad High Court, the hearing was re-scheduled and fixed for 14th February 2019.

10. On 14th February 2019 the authorized representative of OCAC and all the representative of concerned parties i.e. MEPD, OGRA, HDIP and Authentix

[1] ITB= Instructions to Bidders, RFP= Request for Proposal
[2] Expression of Interest

attended the hearing and made submissions. The representative of OCAC reiterated their stance communicated to the Commission through their written reply.

11. Mr. Ishtiaq Ul Haq, Deputy Director (Oil), OGRA submitted that being a regulator OGRA refrained from participating in the procurement process; as it was an independent commercial arrangement between the fuel marking company and the oil refineries. The Director General Oil Mr. Malik Amjad Saleem, endorsed OGRA's stance viz., their absence from the process of procurement. He further submitted that locally produced kerosene oil is a non-taxable product, therefore, the Fuel Marker Program was initiated from locally produced kerosene with good intention. In response to the Chairpersons' query of what constitutes the Technical Committee, the he responded the representation from OCAC, OGRA, HDIP and oil refineries. OGRA and HDIP did not participated in the bidding process. OCAC after completing the process on its own recommended Athentix as successful bidder and recommended that contract for fuel marker may be awarded to Authentix. ECC after considering the recommendations of OCAC, gave its approval. Though next step in the process was execution of the contract between oil refineries and selected fule marking company i.e. Authentix, however, the process was stopped once the Commission intervened. He categorically submitted that no contract with successful bidder is executed for provision of fuel marking services. Ministry took the cost of provision of fuel marking service to ECC, which was endorsed by them. The rate of Rs. 1.22/liter for fuel marking service was finalized through a commercial bid, keeping in view the volume while calculating the final number. The Bench inquired regarding the non-involvement of all members of the Technical Committee during the initial stages. He responded by submitting that though other members of Technical Committee i.e. OGRA and HDIP did not participated in the procurement process, however, they were updated about the process regularly.

12. The representative of OGRA further stated that once the proposed price was endorsed by the ECC, the summary was then forwarded to OGRA that usually holds public meetings for price determination. As a regulator, this falls within their domain under the Oil and Gas Regulatory Authority Ordinance, 2002.

13. The Chief Prosecutor General, assisted by the Prosecutor, submitted that the relevant market has to be defined while keeping in view clear and unambiguous

provisions of Section 2(1)(k) of the Act. In addition, he also submitted that OCAC, though had made submissions *viz.*, compulsion by Government, however, they have failed to justify the standard for the application of the said test. The Chief Prosecutor General submitted that the State Compulsion Test adopted by the Commission in its **Order dated 30th April 2013 in the matter of Show Cause Notice issued to LDI Operators** and **Order dated 8th March 2009 in the matter of Show Cause Notices issued to Karachi Stock Exchange, Lahore Stock Exchange and Islamabad Stock Exchange** reported as **2010 CLD 1410**, be followed and applied in the instant matter. While stressing upon the importance of procurement in the market for procurement of Fuel Marker Services for the local kerosene oil, he submitted that OCAC has blatantly not only violated the basic principles of open competitive bidding, but they have also violated the directions contained in the Minutes of Meeting dated 13th December 2013, in particular, Para 6(ii) of thereof. Hence, OCAC, based on the documents available on record, violated provisions of Section 4 of the Act.

ISSUES AND ANALYSIS

14. On careful review of the Enquiry Report, the SCN and the submissions made before us, the substantive issues in the instant matter are as follows:

(i). Whether OCAC has violation the provisions of Section 4 of the Act?

(ii). Remedies.

15. The principal issue in the matter is violation of Section 4 of the Act, however, in order to determine this we deem it appropriate to refer to the prohibition provided in Section 4 of the Act, which for ease of reference is reproduced herein below:

> ***4. Prohibited agreements.***— *(1) No undertaking or association of undertakings shall enter into any agreement or,* ***in the case of an association of undertakings, shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition within the***

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN * ISLAMABAD *

relevant market unless exempted under Section 5*.(emphasis added)*

(a). ASSOCIATION OF UNDERTAKINGS:

16. From the bare reading of Section 4(1) of the Act, it is clear that the '*association of undertaking*' should not make any decision which may affect the competition in the relevant market. The '*association of undertaking*' is defined under the Act with reference to '*undertaking*'. The term *'undertaking'* is defined under Section 2 (1)(q) of the Act in the following terms:

> *"Any **natural or legal person**, the 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 of undertakings**." (emphasis added)*

17. The key ingredient to determine whether an entity falls within the above-mentioned definition, is that entity is engaged in an economic activity i.e. production, supply, distribution of goods or provision or control of services; regardless of the legal status, profitability, formal structure or the way it is financed. We also would like to refer to one of our earlier orders i.e. ***Order dated 10 April 2015 in the matter of Show Cause Notice Issued to Pakistan Automobile Manufacturers Authorized Dealers Association (PAMADA) & its member undertakings***, reported as **2016 CLD 289**, wherein while defining the association of undertaking, the Commission observed as follows:

> *13. PAMADA has been described as an 'association of undertaking' by the Enquiry Report. The term 'association of undertaking' has been included in the definition of 'undertaking' under Section 2(1)(q) of the Act. It has also previously been defined by the Commission through multiple orders. In the Appellate Order in the matter of **the Institute of Chartered Accountants of Pakistan** (hereinafter the '**ICAP Order**') for example, it was stated that in the absence of a legal definition of the term 'association', it is the*

ordinary dictionary meaning of the word that is referred to. It further provide that an ordinary meaning of association includes 'a gathering of people for a common purpose'. The form and purpose of such a gathering is not relevant for the purposes of the Act.

18. Keeping in view the above standard and precedent of the Commission, we note that the members of OCAC currently comprise of the country's Five Refineries (Pak-Arab Refinery Limited PARCO, National Refinery Limited NRL, Pakistan Refinery Limited PRL, Attock Refinery Limited ARL and Byco Petroleum Pakistan Limited BPPL) Twenty Five Oil Marketing Companies: (Attock Petroleum Ltd, Be Energy Limited, Byco Petroleum Pakistan Ltd, Gas & Oil Pakistan Ltd, Hascol Petroleum Limited, Oilco Petroleum (Pvt.) Ltd, Pakistan State Oil Co. Ltd, Puma Energy Pakistan (Pvt.) Ltd, Shell Pakistan Ltd, Total-Parco Pakistan Ltd, Zoom Petroleum Limited, Askar Oil Services (Pvt.) Limited, Horizon Oil Company Pvt. Limited, OTO Pakistan (Pvt.) Limited, Quality 1 Petroleum (Pvt.) Limited, Zoom Marketing Oil (Pvt.) Limited, The Fuelers Pvt. Limited, Al Noor Petroleum Private Limited, Kepler Petroleum (Private) Limited, Petrowell Private Limited, Jinn Petroleum Pvt. Ltd, My Petroleum Pvt. Ltd, Laguardia Petroleum Private Ltd, Oil Industries Pakistan (Pvt.) Ltd, Exceed Petroleum Pvt. Ltd.) and One Pipeline Transportation Company (Pak-Arab Pipeline Co. Limited PAPCO). New entrants in the downstream oil sector are coming in the country and the number of member companies is likely to increase[3]. OCAC, on behalf of oil industry, acts as a focal body for the Government and other agencies. The objectives of OCAC, which are listed on their website, are as follows:

(a). To represent the Downstream Oil Industry at various forums in matters of common interest affecting their operations in Pakistan,

(b). To establish short/long range demand/supply balances for various oil products and advise the Government and Member Companies in this respect.

[3] http://www.ocac.org.pk/

(c). *To pro-actively plan any Infrastructure Upgrades De-bottlenecking needed as per medium/long term petroleum product availability projections.*

(d). *To collect, prepare and circulate various trade statistics and other relevant information to Member Companies as well as the Government.*

(e). *To comment on and convey collective views of various members on matters concerning the Oil Industry's wellbeing such as proposed legislation relating to taxation and other fiscal measures.*

(f). *Develop plans/suggestions to help Government to streamline the oil and gas sector.*

19. When we apply the standard to determine the status of OCAC on the touchstone of earlier case i.e. **2016 CLD 289**, OCAC possess all the traits and features of an *'association of undertaking'*. Furthermore, OCAC in their submissions have also conceded that it is an association of downstream oil industry. Foregoing in view, we are of the considered opinion that OCAC falls clearly under the *de jure* definition of *'association of undertaking'* and hence, is an undertaking in terms of Section 2 (1)(q) of the Act.

(b). RELEVANT MARKET:

20. The second element in order to determine whether Section 4 of the Act is violated or not, we need to ascertain the relevant market. Although, the relevant market has been defined in the Enquiry Report, however, OCAC in its reply has submitted that if the relevant market is that of fuel marking service then there is no question of price increase as the price is to be determined by Federal Government and OCAC has no role in it. Further, OCAC has also submitted that price fixing as alleged will affect the market for sale of kerosene oil. Having gone through the submissions of the Parties during hearing and the material available on the record, we need to clarify that the action of any undertaking under review, may affect one or two relevant markets.

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN * ISLAMABAD *

21. The relevant market is defined under the Act with reference to Section 2(1)(k) of the Act. The relevant part of the provision is reproduced herein below:

> *"relevant market" means the market which shall be determined by the Commission with reference to a product market and a geographic market and a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products' characteristics, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those areas;"*

22. From a perusal of the above definition of the '*relevant market*', there is no doubt that the relevant market has two components (i) the relevant product market and (ii) the relevant geographic market. The relevant market is determined in Para (37) of the ER, which is reproduced herein below:

> *Before proceeding with the analysis of whether OCAC's decision is anticompetitive in terms of Section 4 of the Act, the relevant market has to be defined in terms of Section 2(1)(k) of the Act. For the purposes of this enquiry the relevant market appears to be the market for provision of fuel marking services in Pakistan which entails the following services:*
>
> *a. Procuring and preparing the chemical additives and delivering it to the refinery;*
> *b. Introducing chemical additive to SKO at the refinery stage*
> *c. Field and lab testing to check adulteration.*

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN * ISLAMABAD *

23. In order to analyze the determination of the relevant market in the ER, we deem it appropriate to analyze the relevant documents available on the record. The most

relevant document available on the record in this regard is the copy of Minutes of Meeting dated 13th December 2016 (hereinafter the '**Decision**') held under the Chairmanship of the then Minister for Petroleum and Natural Resources. In the said meeting the fuel adulteration issues were discussed and the participants were informed that the Ministry intends to adopt a Fuel Marking Program, which is to start with a simple program by adding marker to the locally produced kerosene. Subsequent to the discussion on the subject, following was decided:

> 6. *Secretary (MPNR) explained that various OMCs have mobile fuel testing facilities which may also be utilized for field testing to detect kerosene adulteration.*
>
> i. *Selection of FMC should be in an open and transparent manner through advertisement and competitive bidding only, adopting company policy/procedures; single selected FMC will operate for all refineries.*
>
> ii. *A technical Committee (TC) comprising representation from OGRA, all oil refineries and HDIP to be headed by representative of OCAC was constituted to manage the affairs related to implementation of kerosene FMP, OCAC will liaison with representatives of TC, FMC and relevant government authorities in respect of implementation of the said program. Initially, TC will finalize a specific Standard Bidding Process (SBP), terms and conditions of the agreement to be executed between FMC and refineries as well as standard operating procedures (SOP) specifying all activities along with role of the relevant parties at different stages of kerosene FMP which will be a part of the above said agreement.*
>
> iii. *The cost of marker will be included in the ex-depot price of Kerosene. In this regard, OGRA will issue price adjustment directive.*

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN ★ ISLAMABAD ★

iv. HDIP will be involved for technical expertise

v. Technical Committee will submit its final recommendations in the next meeting to be held after two weeks for consideration.

vi. The program shall commence after necessary approval of the ECC of the Cabinet.

24. From the above, it becomes clear that in order to implement the Fuel Marker Program, the procurement / selection process was to be initiated and hence, a Technical Committee was formulated under Clause 6(ii) above. Annual production of superior kerosene oil (hereinafter the '**SKO**') was approximately 140,000-150,000 metric tons. All SKO is being produced locally and is not dyed. The present price differential between SKO and high speed diesel (hereinafter the '**HSD**') is approximately Rs 31.40 per liter, which provides temptation/potential for adulteration in HSD by adding kerosene, which not only lowers the availability of SKO to the intended beneficiaries i.e. the poor man for domestic consumption, but also impacts government revenues on HSD. Therefore, the Ministry of Petroleum and Natural Resources (the '**MP&NR**') came up with the idea of introducing Fuel Marker Program for SKO. Generally speaking, fuel markers involve different detection methods, including clear and identifiable chemical colors and sophisticated molecular technology using chromatography-mass spectrometry technology and forensic laboratories that can detect fuel adulteration. Substitutability of the Fuel Marker Solution depends on the consumer/clients' need. The fuel markers are a standardized solution providing a foundation for an effective quality monitoring system by:

(i). Offering consumer quality assurance and protection for products at the final dispensing outlet.

(ii). Checking/controlling malpractices that result in loss of government revenue and a secondary effect of interfering with product quality.

(iii). Increased tax base & revenue.

(iv). Reduced smuggling.

(v). Fair business competition.

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN * ISLAMABAD *

25. Fuel marking is the introduction of a unique identifier (bio-chemical liquid) in trace quantities into petroleum products at depots before distribution into the market. The marker creates "finger print" and provides a secure, tamper-proof method of authentication. Marked fuel can be distinguished from unmarked fuel through a process of testing using specialized detecting equipment (LSX2000 and MSX1000). The purpose of Fuel Marking is to:

(i). Preserve and Protect the quality and purity of petroleum products.
(ii). Detect and prevent the adulteration of petroleum products.
(iii). Monitor the quality and purity of petroleum products.

The objectives behind the implementation of the Fuel Marking Program is to curb adulteration in the petroleum products, enhance revenues for the Government, ensuring that the industry continues to be efficient and profitable whilst consumers are satisfied.

26. In terms of Section 2(1)(k) of the Act, we acknowledge that the relevant market has two components (i) relevant product/service market, and (ii) relevant geographic market. The instant matter pertains to procurement of fuel marking services, which are standardized solutions, in order to detect and curb adulteration in SKO and to increase government revenues. We are also of the view that from the **demand side substitutability** it is highly unlikely that fuel marking services is substitutable with any other solution. Therefore, in terms of Section 2(1)(k) of the Act, the relevant product market in the instant matter is the ***market for procurement of Fuel Marker Services for SKO***. Since, the conditions of competition throughout Pakistan viz., the Fuel Marker Program remains the same i.e. presence of national regulator OGRA and application of same set of laws throughout Pakistan, therefore, the ***geographic market in the instant matter is Pakistan***. Regarding the argument of OCAC of two separate relevant markets in the matter i.e. procurement of fuel marking service and sale of kerosene oil. We note that, in case the fuel marking service is procured at a higher cost, it will impact the price of kerosene and will ultimately affect the other relevant market i.e. the relevant market for sale of SKO in Pakistan. We also appreciate that the price of kerosene is to be determined by OGRA under the Oil and Gas Regulatory Authority Ordinance, 2002, hence, in the

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN ★ ISLAMABAD ★

determination of final price of SKO, though OCAC is not involved directly, but if fuel marking services are procured at a higher cost, ultimate price of SKO will also be set at higher level, after taking into account the costs thereof.

(c). ***Procurement Process for Selection of Fuel Marking Company:***

27. The entire process for procuring the services of a Fuel Marking Company (hereinafter the '**FMC**') was triggered subsequent to the decision made in the Meeting dated 13th December 2016 held under the Chairmanship of the then Minister for Petroleum and Natural Resources. The decision is already reproduced in Para 23 *ibid.* The entire process was to be supervised by the Technical Committee headed by OCAC and comprised of representatives from OGRA, Oil Refineries and HDIP.

28. We note that OGRA vide its letter dated 26th January 2017 addressed to Director General (Oil) recused itself from the procurement process by stating that any arrangement / agreement between the fuel marking company and oil refinery to check adulteration in SKO is a commercial activity and should be carried out by the oil industry on its own. There is another letter dated 12th September 2018 issued by HDIP to the enquiry committee wherein it has been categorically stated that they were not involved in the bidding process for procurement of services of fuel marking company. It is evident that the entire process of procuring the services of fuel marking company was carried out by OCAC.

29. We also note that the purpose behind introducing the Fuel Marker Program is to avoid the loss to the public exchequer in lieu of tax collection due to adulteration in different categories of petroleum products in the instant matter SKO and HSD. Governments around the world adopt fuel marking scheme as a tax administration measure to prevent fuel fraud and smuggling due to unequal tax rates imposed on different kinds of fuels. It is intended to monitor the correct payment of taxes and prevent revenue loss arising from illicit transfer of fuel. According to the Asian Development Bank (the '**ADB**'), all countries are susceptible to fuel fraud; but for developing economies in which every dollar counts, fuel fraud can substantially reduce a government's total revenues. It also noted that the Philippine foregoes

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN * ISLAMABAD *

revenue amounting to USD 750 Million annually due to fuel adulteration and smuggling[4].

30. OCAC has mainly submitted that the bidding process was transparent and competitive as all the FMC's operating worldwide were invited, but Authentix was the only FMC that showed keen interest due to their presence in the region and expertise. We are conscious of the fact that procurement is the process of purchasing goods or services. The primary objective of an effective procurement policy is the promotion of efficiency, i.e. the achievement of the best '*value for money*'. Both public and private undertakings often rely upon a competitive bidding process to achieve better value for money in their procurement activities. Low prices and/or better products are desirable because they result in resources either being saved or freed up for use on other goods and services. However, the competitive process can achieve lower prices or better quality and innovation only when companies genuinely compete, that is, they set their terms and conditions honestly and independently.

31. While OCAC has mainly stressed that they have not undertaken any activity on their own and all the decisions taken by them are subject to the approval of the Federal Government. However, we note that OCAC has violated the first condition of the decision of the meeting held on 13th December 2016 i.e. open competitive bidding. From the document available on the record, it is clear that the no competitive bidding process was undertaken, rather a select circulation was carried out and that too without the consent and approval of other Technical Committee Members.

32. We are constrained to hold that the decision of OCAC to carry out the selective procurement process without following the instructions / directions contained in the Minutes of Meeting held on 13th December 2016 has the object of preventing, restricting or reducing competition within the ***market of procurement of Fuel Marker Services for SKO in Pakistan***, in violation of Section 4 of the Act. This

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN ★ ISLAMABAD ★

[4] Asian Development Bank 2015, Fuel-Marking Programs: Helping Governments Raise Revenue, Combat Smuggling, and Improve the Environment, https://www.adb.org/sites/default/files/publication/1747731 governance-brief-24-fuel-marking-programs.pdf, accessed on 6 October 2016).

also have the effect of influencing the prices of SKO, the higher the price of Fuel Marking Services the higher the price of SKO will be.

33. We also note that OCAC is taking the defence that it was the decision of the Government to introduce FMP which compelled them to follow the process of procurement of services. We strongly, disagree with the submissions made by OCAC in this regard, we deem it appropriate to refer to one of our earlier **Order dated 30th April 2013, in the matter of Show Cause Notice issued to LDI Operators**, wherein it was held:

> *125. The EU State Compulsion test as stated in Hajj Fares case is as follows:*
>
> *60. In the E.U., to plead the defense of state compulsion successfully, the party claiming the defense must satisfy the following three points:*
>
> *i. That the state must have made certain conduct compulsory: mere persuasion is insufficient;*
>
> *ii. That the defense is available only where there is a legal basis for this compulsion; and*
>
> *iii. That there must be no latitude at all for individual choice as to the implementation of the governmental policy.*
>
> *[Footnotes Omitted]*

34. In the following paragraphs we will apply the above conditions in order to see whether there was any compulsion on OCAC to carry out the procurement on its own and in the manner which has been called in to question through these proceedings:

(i). *That the state must have made certain conduct compulsory: mere persuasion is insufficient*:

35. The word 'state' encompasses here any public authority, including ministries of the Federal Government and other regulatory authorities established under statute, which exercise its powers on behalf of the State. The public authority must have

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN * ISLAMABAD *

been duly delegated this responsibility. In this regard we deem it appropriate to refer to the Decision, which for ease of reference is reproduced herein below:

KEROSENE FUEL MARKING PROGRAM – MINUTES OF THE MEETING HELD ON 13TH DECEMBER 2016

A meeting under the Chairmanship of Honorable Minister for (P&NR) was held on 13th December 2016 in the Committee Room of Ministry of Petroleum and Natural Resource "A" Block Pak Secretariat, Islamabad also attended by Secretary (MPNR), DG (Oil), Deputy Director (R-II), representatives of OGRA, all oil refineries, HDIP and OCAC to discuss a way forward regarding implementation of kerosene fuel marketing program. List of participants is attached.

2. At the outset, Secretary (MPMR) welcomed the Honorable Minister and all participants of the meeting. The honorable Minister welcomed the participants and asked DG(Oil) to take-up the agenda for discussion. Thereafter, DG (Oil) after recitation of verses from Holy Quran conveyed that main purpose of the meeting is to introduce fuel markers to detect and prevent fuel adulteration. In this regard it has been decided to add fuel market in the locally produced kerosene which is suspected to be used to adulterate other fuels due to the significant price differential between these fuels.

3. The Chair elucidated that fuel adulteration is a major issue and to combat it MPNR wants to adopt Fuel Marketing Programs (FMP). In this regard, strategic approach is to start with a simple program by adding marker to locally produced kerosene, consequent upon successful implementation of the said program further programs for marking other fuels will be undertaken. The Chair advised refineries to participate to resolve the adulteration issue in the national interest.

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN ★ ISLAMABAD ★

4. Participants expressed their view in the matter such as fuel marker's nature, estimated volume, procurement, cost and installation of its dosing and blending facility, role of Fuel Marking Company (FMC), differentiation between adulterated & on spec fuels, legal requirements to penalize culprits etc.

5. All refineries conveyed that they have no objection to use fuel marker in kerosene.

6. Secretary (MPNR) explained that various OMCs have mobile fuel testing facilities which may also be utilized for field testing to detect kerosene adulteration.

i. Selection of FMC should be in an open and transparent manner through advertisement and competitive bidding only, adopting company policy/procedures; single selected FMC will operate for all refineries.

ii. A technical Committee (TC) comprising representation from OGRA, all oil refineries and HDIP to be headed by representative of OCAC was constituted to manage the affairs related to implementation of kerosene FMP, OCAC will liaison with representatives of TC, FMC and relevant government authorities in respect of implementation of the said program. Initially, TC will finalize a specific Standard Bidding Process (SBP), terms and conditions of the agreement to be executed between FMC and refineries as well as standard operating procedures (SOP) specifying all activities along with role of the relevant parties at different stages of kerosene FMP which will be a part of the above said agreement.

iii. The cost of marker will be included in the ex-depot price of Kerosene. In this regard, OGRA will issue price adjustment directive.

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN ★ ISLAMABAD ★

iv. HDIP will be involved for technical expertise

v. Technical Committee will submit its final recommendations in the next meeting to be held after two weeks for consideration.

vi. The program shall commence after necessary approval of the ECC of the Cabinet.

36. Bare perusal of the above clearly shows that in the meeting held on 13th December 2016 a **consultative approach** (emphasis added) was taken and rather an effort was made to **reach a consensus** (emphasis added) and in this regard all the refineries were requested to participate in the Fuel Marker Program. Further, the decision in itself was conditional; as the FMC was to be selected after following agreed procedure as detailed in Para 6(i) & (ii) of the Decision. However, modification in the said directions were made by OCAC on its own. From the language used in the Decision, were are constrained to hold that the introduction of the Fuel Marker Program for the SKO was persuasive in nature and not compulsory. Accordingly, the conduct under review failed to meet the first condition of the state compulsion test.

(ii). The defense is available only where there is a legal basis for this compulsion:

37. Although, first condition is not met, still we deem it appropriate to address the second condition. We note that the Fuel Marker Program was not introduced as a result of any legislative measure. Further, we fail to understand why OCAC excluded HDIP during the bidding stage, whereas the Decision categorically states that HDIP is included in the Technical Committee for its technical competence. No plausible reasoning has been forwarded in order to justify the exclusion of HDIP. We are also cognizant of the fact that OGRA termed the entire activity as a commercial activity and recused itself from participation in the bidding process. At best OCAC should have informed the MP&NR that the process cannot be carried out as the Technical Committee Members i.e. OGRA and HDIP have not participated in the process. No correspondence have been placed on record by

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN * ISLAMABAD *

OCAC intimating the aforesaid anomaly to the concerned ministry i.e. MP&NR. Rather, OCAC on its own started the entire process in patent violation of the Decision. Hence, we are of the considered view that OCAC has also failed to satisfy the second condition of the state compulsion test.

(iii). <u>There must be no latitude at all for individual choice as to the implementation of the governmental policy</u>:

38. Since, the first two conditions of the state compulsion test are not met, even if the third condition is met the defence cannot be made applicable in the instant matter. However, we note that even if it is assumed that the directions in Meeting dated 13th December 2016 were issued by State representatives, the same were not complied with. Most importantly, the condition of open competitive bidding was done away by OCAC on its own. Here we cannot ignore that the decision in the meeting dated 13th December 2016 was rather a consensus of the Downstream Oil Industry with other Government Officials from Ministry of Petroleum and Natural Resources, OGRA & HDIP. This in itself cannot be termed as a legally issued directive by the State Representatives. Further, it is clear from the record that the directions issued were not complied with. In fact the Technical Committee never convened any meeting to comply with the condition of open competitive bidding as provided in Para 6(ii) of the Minutes of Meeting. Hence, we are constrained to hold that the third condition is also not met in the instant matter.

39. In view of the foregoing, OCAC' actions, therefore, not only fail the test of state compulsion, but in fact are also violative of the basic decision, the cover whereof is taken by OCAC to justify their actions. We further note that the activities carried out by OCAC are also fundamentally beyond the scope of activities which OCAC can perform and are listed on their website. Hence, for the foregoing, we are constrained to hold that the conduct of OCAC to take decision viz., the procurement of fuel marking services for the Fuel Marker Program has the object of preventing, restricting or reducing competition in the relevant market and accordingly is in violation of Section 4 of the Act.

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN * ISLAMABAD *

REMEDIES/ ORDER

40. After examining all the facts and material available on the record, we hereby hold that the entire process of procurement undertaken by OCAC for procurement of Fuel Marking Company is in violation of Section 4 of the Act. Therefore, the Invitation for Expression of Interest for Kerosene Marker Program for Pakistan and any decision or steps taken thereafter are declared illegal and hereby annulled.

41. In terms of section 38 of the Act, the Commission is empowered to impose such financial penalties upon the contravening party(s), as deems fit in the circumstances which may be up to 75 million or 10 % of the annual turnover of undertakings concerned. However, in this regard, it is noted that subsequent to initiation of the enquiry and issuance of the SCN the process of procurement of Fuel Marker was put at halt. Therefore, in view of the compliance oriented approach of OCAC and the fact that the contract for provision of fuel marking service was not executed, we are of the considered view not to impose any financial penalty on OCAC in this instance.

42. Before parting with the Order, we deem it appropriate to issue guidelines for future compliance and in this regard refer to one of our earlier **order dated 15th December 2017, in the matter of Show Cause Notice issued to Utility Stores Corporation of Pakistan (Pvt.) Limited**, reported as **2018 CLD 292**, wherein following was held:

> *...In this context, the Commission finds it pertinent to refer to the Public Procurement law of Pakistan as well as the Directive 2014/24/EU of European Parliament and of the Council dated 26th February 2014 on public procurement, bh which provides the following key principles to be adhered to by the procuring agencies while drawing technical specification(s) and evaluation criteria of a bid:*
>
> *The technical specification drawn up by public purchasers needs to allow public procurement to be open to competition as well as to achieve objectives of*

sustainability. To this end, it should be possible to submit tenders that are reflective of the diversity of technical solutions standards and technical specifications in the market place, including those drawn up on the basis of performance criteria linked to the life cycle and the sustainability of the works, supplies, and services.

ii. *Consequently, the technical specification should be drafted in such a way which avoids artificially narrowing down competition through requirements on a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by the economic operators.*

iii. *Drawing up the technical specifications in terms of functions and performance requirement generally, allows the objective to be achieved in the best way possible. Functional and performance related requirements are also appropriate means of favouring innovation in public procurement and should be used as widely as possible.*

iv. *It follows from the above that technical specification in a bidding document should be based on relevant characteristics and/or performance requirement. References to brand names or similar classification should be avoided. If it is necessary to quote a brand name etc., to clarify an otherwise incomplete specification the words "or equivalent" should be added after such reference. The specification must permit the acceptance of an offer of goods or services by the bidder which have similar characteristics and is able to provide performance at least substantially equivalent as specified.*

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN ★ ISLAMABAD ★

v. *With regard to evaluation criteria, the aforementioned Directive provides that "...it should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio, which should always include a price or cost element. It should equally be clarified that such assessment of the most economically advantageous tender could also be carried out on the basis of either price or cost effectiveness only...to ensure compliance with the principle of equal treatment in the award of contracts". Meaning thereby, the procuring agencies must ensure transparent evaluation criteria or scoring methodology.*

93. *With reference to the Procurement Laws in Pakistan, the Commission notes that Rule 10 of the Public Procurement Regulatory Authority Rules, 2004 (the '**PPRA Rules**') also mandates that "specification shall allow the widest possible competition and shall not favour any single contractor or supplier nor put others at a disadvantage. The specification shall be generic and shall not include references to brand names, model numbers, catalog number or similar classification. However, if the procuring agency convinced that use of a reference to a brand name or a catalog number is essential for completing an otherwise incomplete specification, such use or reference shall always be qualified with the words "or equivalent". Where reference is made to an international or national standard, tenders based on equivalent arrangements ought to be considered by the procuring agency. It should be the responsibility of the economic operator to prove equivalence with the requested label.*

94. In view of the above, we hereby directs OCAC and all other parties of the instant proceedings which *inter alia* include Ministry of Energy (Petroleum Division),

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN ISLAMABAD

OGRA and HDIP to be mindful of the above broad guidelines/directions while drafting future tenders, be it in the instant matter or otherwise, in order to provide a level playing field and not to hamper the competition in the relevant market. OCAC is reprimanded and is hereby directed to refrain from following, adopting, implementing or carrying out any activity, which constitutes a violation of the Act.

44. In terms of the above, the SCN is hereby disposed of.

45. Ordered accordingly.

(Vadiyya Khalil)	(Dr. Muhammad Saleem)	(Dr. Shahzad Ansar)
Chairperson	*Member*	*Member*

SEAL OF THE COMPETITION COMMISSION OF PAKISTAN ★ ISLAMABAD ★

ISLAMABAD THE 20th JUNE 2019