BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF

Bahria University

(File No. 05/Sec-3/CCP/08)

Dates of hearing:	16th June 2008
Present:	Dr. Joseph Wilson Member
Present for the University:	Rear Admiral (retd.) Shahid Latif, Pro-Rector Cmdr (retd.) Mumtaz Raza, Registrar Captain (retd.) Tashfeen Riaz, Director Finance

ORDER

1. At issue in this case is whether the mandatory sale of laptop computers to incoming students by Bahria University constitutes tie-in amounting to abuse of dominant position under section 3 of the Competition Ordinance, 2007. I affirm.

Factual Background

2. Competition Commission of Pakistan took notice of a news item published in daily 'The News" dated February 16th, 2008, according to which Bahria University (the University) had made it mandatory for all incoming students to buy lap tops imported by the University. The University had

imported 4500 Acer Laptops in 2006 and started selling those laptops to the students during 2007 & 2008.

3. The practice of compulsory purchase of laptops sold by the University to the students amount to tying the sale of laptops with the provision of educational services appeared, *prima facie,* to violate Section 3 of the Ordinance, which in relevant part reads as follows:

> 3 Abuse of dominant position – (1) No person shall abuse dominant position.
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> 3(2) An abuse of dominant position shall be deemed to have been brought about, maintained or continued, if it consists of practices which prevent, restrict, reduce or distort competition in the relevant market.
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> 3 (3) The expression "practices" referred to in sub-section (2) shall include, but are not limited to:-
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> > (c) Tie-ins ,where the sale of goods or services is made conditional on the purchase of other goods or services;

4. An enquiry under Section 37 of the Ordinance was initiated and a notice was issued to the University on 4th March 2008, inviting therein the views of the University on the matter.

5. The University in its reply dated 11th April 2008 stated :

1(c) In order to provide education commensurate with international standards, Campuses of the university have been made WiFi. Accordingly availability of computers to all students was necessary to enable them to make optimal use of digital library of the University, E-teaching by the faculty and also for making presentations, conducting group seminars, preparation of technical/business reports, writing of projects and thesis and submission of on-line assignments/quizzes. To achieve this objective, Laptops were considered essential as teaching aids and their provision to all students was undertaken as a pilot project, which in fact, brought about a paradigm shift in the learning process.

(2) It may be mentioned here that admission is not linked with the procurement of computers as reported in the news paper . . . Admission is granted purely on merit, based on admission test, for each course. Laptops

are provided to students almost 3 months after the admission. Further information on the subject is also given below:

a. No student has ever been expelled from the University for the reasons of not having Laptop.
b. The University is not making any profits on the Laptop scheme as the money received from the students is transferred to Bank of Punjab which has financed the scheme.
c. Students are required to pay a mark-up when they opt for easy pay back in instalments spread over a period of 2-4 years. It is needless to add that the University is also paying a *hefty mark-up* to the Bank of Punjab which has provided the loan. (emphasis supplied)
d. The laptops have adequately been upgraded to negate obsolescence. Price of laptops have substantially been reduced for the students. Further the up gradation cost is not being charged from the students.
e. University has approached the Bank of Punjab to reduce mark up on the loan given to Bahria University of purchase of Laptops. Any concession/reduction achieved would be passed on to the students in order to alleviate their concern over enhanced price.

3. Notwithstanding the above, Bahria University has revised its policy on provision of laptops. From the next semester, students would not be required to mandatorily purchase laptops from the University stocks.

6. The Commission again issued a letter on 22nd April 2008 to the University, seeking (i) information whether the cost, or any portion thereof, of making and/or maintaining the campus WiFi being factored in the prices of laptops sold to the students under its compulsory purchase scheme; (ii) copy of the loan agreement of University with the Bank of Punjab; and (iii) details of prices on which laptops were being sold.

7. The university in its reply dated 30th April, clarified that all the expenditure to make the campus WiFi has been, and maintain it is, borne by the University from its maintenance budget and no portion of that cost was factored in the price of the laptops. And that the payments received from the students against the purchase of laptops are being diverted for the repayment of the Bank loan.

8. The University provided a copy of loan agreement with the Bank of Punjab and informed that it is charging Rs.45,000 for lump sum payments; Rs.56,640 for the instalments spread over one year; Rs.63,000 for the

instalments spread over two years; and Rs.76,320 for the instalments spread over 4 years. The payment by instalments has a mark up of 12.65 % factored in the price.

9. On 9th June 2008, a notice was issued to the University under Section 30 of the Ordinance, affording it an opportunity to present its case at a hearing scheduled for 12th June 2008.

10. The hearing of the case was held on 16th June 2008, which was presided over by me.

Analysis

11. In order to prove a claim of tying, the jurisprudence as developed in most mature competition law regimes, *i.e*., those of the United States and the European Union, requires, under the rule of reason[1], that the following five elements be proved: (1) a tie exists between two separate products; (2) the tying seller (University) has dominant position in the tying product (educational services) market so as to be able to prevent, restrict, reduce or distort competition in the tied product market (laptops); (3) coercion (or forcing) by the seller to purchase the two products; (4) the tie affects a "not-insubstantial" amount of commerce, or foreclosures competition to some extent, in the tied product; and (5) the tying seller has some economic interest in the sales of the tied product.[2]

12. Separate Products: Two products are distinct if, in the absence of tying, the buyer purchases them from two different markets. Here the tying product

[1] Under the rule of reason, the fact-finding weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

[2] *Eurofix-Bauco v Hilti*, *Commission Decision* 88/138/EEC; *Tetra Pak II*, Commission Decision 92/163/EEC, OJ 1992, L72/I; Reifert v. S. Cent. WLS Corp. 450 F.3d 312; 2006 U.S. App. LEXIS 14327; 2006-1 Trade Cas. (CCH) P75,283 (2006) *Cert* denied US Reifert v. S. Cent. Wi Mls Corp., 2007 U.S. LEXIS 2856 (U.S., Mar. 5, 2007). *See also Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co*., 758 F.2d 203, 208 (7th Cir. 1985); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)]; Moore *v*. Matthews & Co., 550 F.2d 1207, 1212 (9th Cir. 1977); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 35, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984).

is the provision of educational services, and the tied product is laptops. It is self-evident that the two products are distinct. The two products are so distinct that the students could not even foresee that they were forced to purchase the laptops, as opposed to a buyer of a machine who could reasonably foresee that the manufacturer of that machine might tie the sale of spare-parts with the service of the machine at a future point in time.[3]

13. The forced selling of laptops was targeted to the freshmen students only, that is, classification was based on the year of admission. Since not all students of the University were forced to purchase the laptops, the tying product therefore was provision of educational services and the year of admission. Although typically, tied products are sold together, but it is not always necessary. Tied product may be "deferred until some point after the tying product is purchased."[4] The University admitted that it provided laptops to the students after three months of admission.

14. Tied-products, which are sold together only constrain the "choice" of the buyer; however, deferred sale of the tie-product further limits the "information" available to the buyer, as to the probable sale of tied product in future, at the time of purchasing of tying product. Choice and information being the two, among others, important determinants of a competitive market[5], their foreclosure, to the consumers, alone amounts to distorting competition in the relevant market. The preceding statement finds support in the following excerpt from the treatise by Sullivan and Grime:

> There are two evident market imperfections that are directly relevant to the anticompetitive potential of tie-ins. They are informational deficiencies or voids

[3] *See* for example, *Eastman Kodak Company v. Image Technical Services*, Inc., et al., 504 U.S. 451; 112 S. Ct. 2072; 119 L. Ed. 2d 265; 1992 U.S. LEXIS 3405 (1992).

[4] Sullivan and Grimes, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK, 2nd edition (Thomas west, St Paul, Minnesota, 2006) at p. 445 §8.3c3iv.

[5] *See* Einer Elhauge and Damien Geradin, GLOBAL COMPETITION LAW AND ECONOMICS, 1 (Hart Publishing, USA) (2007) (In a world of perfect competition, life is good. Firms can enter and exit markets instantly and without cost, products are homogenous, and everyone is perfectly informed. Firms are so numerous that none of them is large enough to influence prices by altering output and all act independently).

> that a buyer confronts when making a purchase decision and motivational deficiencies or the consumer's lack of incentive to exercise cost-conscious behaviour when making a purchase decision. Although each is relevant to the competitive analysis of the ties, informational deficiencies are probably the most widespread and consequential in determining if a tie has anticompetitive consequences.[6]

15. Dominant position in the tying product: Bahria University offers undergraduate (Bachelors) and graduate (Master) level programs in the disciplines of Business Management, Engineering & Information Technology (IT) at its campuses in Islamabad and Karachi. The relevant product market in the case at hand is the provision of educational services at undergraduate and graduate levels in the disciplines of Business Management, Engineering and IT. In the Islamabad area, the other public sector universities offering such programs include National University of Science & Technology (NUST), COMSATS, Institute of Information Technology, National University of Computer and Emerging Sciences, Air University, International Islamic University. The admission records of the above universities show that the Bahria University holds a substantial market share of students in the programs it offers in the Islamabad area, and thus qualify has holding a dominant position in the tying product.[7] For taking cognizance under section 3 of the Ordinance, it is sufficient that Bahria University enjoys dominant position in the geographic area of one of its campuses.[8]

16. Moreover, section 2 (e) of the Ordinance defines dominant position as:

> "dominant position" of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers and the position of an undertaking shall

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[6] Sullivan and Grimes, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK, 2nd edition (Thomas West, St Paul, Minnesota, 2006) at p. 443 §8.3c3.

[7] Source: Higher Education Commission of Pakistan http://www.hec.gov.pk/

[8] See *United Brands Company and United Brands Continentaal BV v. Commission of the European Communities*, Case 27/76, 14 February 1978 [1978] ECR 207, [1978] 1 CMLR 429, CMR 8429.

> be presumed to be dominant if its share of the relevant market exceeds forty percent.

The real test of dominance is the ability to behave to an appreciable extent independent of competitors and customers (students). The University did have the ability to behave independently of its competitors and customer. By this count, Bahria University may then be considered to hold dominant position at both of its campuses in Islamabad and Karachi.

17. The third element necessary to prove an illegal tying arrangement is the ability of the University to coerce or force the students to purchase the laptops.

> In *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, the U.S. Supreme Court held that "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such "forcing" is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated."[9]
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> *Per se*[10] condemnation -- condemnation without inquiry into actual market conditions -- is only appropriate if the existence of forcing is probable. Thus, application of the *per se* rule focuses on the probability of anticompetitive consequences. Of course, as a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation. If only a single purchaser were "forced" with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law. It is for this reason that we have refused to condemn tying arrangements unless

[9] 466 U.S. 2, 35, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984).

[10] The rationale for *per se* rules in part is to avoid a burdensome inquiry into actual market conditions in situations where the likelihood of anticompetitive conduct is so great as to render unjustified the costs of determining whether the particular case at bar involves anticompetitive conduct. See, *e. g., Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 350-351 (1982); Under the usual logic of the per se rule, a restraint on trade that rarely serves any purposes other than to restrain competition is illegal without proof of market power or anticompetitive effect. See, *e. g., Northern Pacific R. Co. v. United States,* 356 U.S. 1, 5 (1958).

> a substantial volume of commerce is foreclosed thereby. [11]
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> When, however, the seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market.[12]

18. In *Jefferson*, the case involved the tying of surgical services with anaesthesia. The two products were offered in close proximity of time to the patients, who expected the products together. The court required probable forcing coupled with a foreclosure of substantial volume of commerce before condemning the tying arrangement *per se* illegal. In the instant case, however, the University had unfettered power to force the student to purchase the laptops, in addition to the fact that the mandatory purchase of the laptops from the University was not disclosed to the students at the time of the admission. The elements of force (restraining choice) and deferred sale (restraining information, particularly in a case where the buyer cannot foresee the tied sale, as in the instant case) are sufficient, in my opinion, without requiring a foreclosure of substantial volume of commerce to condemn the tying arrangement as *per se* illegal under section 3(1) of the Competition Ordinance without necessitating further inquiry into the effects of the tying arrangement, which may prevent, restrict, reduce or distort competition in the relevant market as required by section 3(2) of the Ordinance.

19. However, I will proceed with examining the remaining two elements in order to complete the "rule of reason" inquiry.

20. The fourth element of the illegal tie-in is whether a total amount of business, substantial in terms of money-volume so as not to be merely *de*

[11] *Jefferson, supra* note 9.
[12] Id. Quoting See *Fortner I*, 394 U.S., at 499-500; *Times-Picayune Publishing Co*. v. *United States*, 345 U.S., at 614-615.

minimus, is foreclosed to the competitors by tie.[13] The University took a loan of Rs. 220 million to purchase 4500 laptops. However, of the 4500 laptops the University was able to sell 3649 laptops under its mandatory purchase scheme. Out of the 3649 laptops, 2327 were sold on instalments and 1322 on lump sum payment. The sale of 3649 involved an estimated Rs.178 million, which is not a *de minimus* figure.

21. While the determination of money-volume is sufficient to prove the fourth element, I would nonetheless venture to ascertain the actual market share foreclosed by the University's tied selling. For the year ending 2007, the total import of PC servers in the country was 1,49,000.[14] Based on information received from computer sellers, it is fair to say that of the 149,000 PC servers, 10 per cent equalling to 14,900 were laptops. The University by purchasing and selling 4500 laptops effectively foreclosed at least 30% of the laptops market.

22. And finally, the University has indeed direct interest in tying the sale of laptops as it wants to clear the stock of laptops before they become obsolete.

23. Since the mandatory sale of laptop computers to incoming students by Bahria University constitutes an illegal tying arrangement under section 3 of the Competition Ordinance, 2007, I turn now to examine the question of anti-competitive injury suffered by the students.

Class Certification and Damages

24. Professor Hovenkamp in his article *Tying Arrangement and Class Actions* shed light on how the courts should classify the purchasers, who were the targets of tied selling. He noted :

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[13] *Fortner Enter., Inc. v. United States Steel Corp.*, 394 U.S. 495, 499-500, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969).

[14] http://www.app.com.pk/en_/index.php?option=com_content&task=view&id=34651&Itemid=2

> Tying arrangements occasionally affect all purchasers in the same way and present questions suitable for class action consideration. More frequently, however, the tying arrangement has the economic effect of dividing its 'victims' into groups. The tie-in disadvantages some groups more than others; some suffer no injury at all, and a few actually benefit from the alleged tying arrangement. In these cases class action certification is unsuitable unless the court can limit the putative class to a group of persons upon whom the tying arrangement has a similar and adverse impact.[15]

25. In the instant case, the students who were forced to purchase laptops can be classified into two categories. One class of students is those who purchased the laptops on lump sum basis. The other class is of those students, who purchased the laptops on instalments. This distinction is relevant, as the students who purchased the laptops on instalment, owing to their economic conditions could not purchase on lump sum, had to pay, in addition to the price of laptops, an extra 12.65% of mark up – a hefty mark up as admitted by the University.

26. The students who purchased on instalments thus suffer a double whammy: one, the forced purchase of laptops; second, the forced loan on unfavourable terms. This set these students apart from those students who were able, owing to their economic conditions, to purchase the laptops on upfront payment.

27. In competition cases, a court must make a just and reasonable estimate of damages based on relevant data.[16] In tying cases, the courts have measured the damages as the difference between the price actually paid for the tied product and the price at which the product could have been obtained on the open market.[17]

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[15] Herbert Hovenkamp, *Tying Arrangements and Class Actions*, 36 VAND. L. REV. 213 at 218 (1983).
[16] *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264, 66 S. Ct. 574, 579, 90 L. Ed. 652 (1946); *Gaines v. Carrollton Tobacco Board of Trade, Inc*., 496 F.2d 284, 286 (6th Cir. 1974).
[17] *Pogue v. International Industries, Inc*., 524 F.2d 342, 344 (6th Cir. 1975).

28. The University argued that the laptops were adequately upgraded to negate obsolescence, and they were offered to students at substantially reduced prices. The staff of the Commission conducted a market survey as to the price of the laptops in question, and verified the claim made by the University. Thus, no damages are being awarded to students for the price of the laptops.

29. As to the students who purchased laptops on instalments and were forced to accept loan on 12.65% interest rate, I find the loan conditions unfair to the students. While educational loans are not easily available in Pakistan, a survey of the regional markets suggests that an educational loan for up to Rs. 100,000/- are available to students at 0 to 5~8 percent. I am therefore inclined to give students a rebate, under section 31of the Ordinance, of approximately 5% out of the 12.65% interest rate charged by the University. Thus, the University shall pay back to the students, who purchased laptops on instalments, an amount totalling Rupees ten million (Rs. 10,000,000/-) pro-rated on the bases of the interest amount paid so far, and to be paid in future by each student.

30. The University had agreed in the hearing to pay back Rupees ten million back to the students who purchased the laptops on instalments. The University shall make a re-payment scheme and submit a compliance report to the Commission within one month from the date of this Order.

Penalty

31. The University has violated section 3 of the Ordinance, and therefore is liable to penalty under section 38 of the Ordinance. However, the University pleaded ignorance of the Competition Ordinance and violation of any of its provisions (which of course is no excuse) and submitted that as soon as it received the notice of the Commission, it stopped the mandatory sale of laptops to the incoming student. The University apologized for its conduct and the Pro-rector and other officials of the University extended full cooperation during the investigation, which I

commend. Further the University agreed to give a rebate to the students. In view of these facts, I am inclined not to impose any penalty on the University under section 38 of the Ordinance.

32. The University shall desist from making the purchase of laptops compulsory to the students in the future and shall pay to students rebate as mentioned in paragraph 29 above. The University shall also submit a compliance report in terms of paragraph 30 above.

33. It is so ordered.

(DR. JOSEPH WILSON)
Member

Islamabad the 24th of July 2008.