



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

**IN THE MATTER OF
SHOW CAUSE NOTICES NO. 20 OF/2010
ISSUED TO**

**M/S TETRA PAK PAKISTAN LIMITED
(FILE NO. NO. 02/DIR(INV)/TETRA PAK/CCP/08)**

Dates of hearing: 15-06-2010 & 18-06-2010

Present: Ms. Rahat Kaunain Hassan
Chairperson

Ms. Vadiyya S. Khalil
Member (Mergers & Acquisitions)

On behalf of
M/s Tetra Pak Pakistan Limited: Mr. Syed Ali Zafar
Advocate Supreme Court
Ms. Huma Ejaz Zaman
Advocate
Mr. Azher Ali Syed
Managing Director
Mr. Yasir Jumani
Legal Counsel

ORDER

1. This order shall dispose of the application made under Regulations 30-33 & 37 of the Competition Commission (General Enforcement) Regulations, 2007 filed by M/s Tetra Pak Pakistan Limited (hereinafter referred to as the 'TPPL') in the proceedings pursuant to Show Cause Notice No. 20 of 2010 dated May 24, 2010 (hereinafter referred to as 'SCN') issued to TPPL, for *prima facie* violation of Section 3 of the Competition Ordinance, 2010 (hereinafter referred to the '**Ordinance**').

FACTUAL BACKGROUND

2. The Consumer Awareness and Welfare Association (the 'CAAWA') in its letter dated 16-10-08 addressed to the Competition Commission of Pakistan (the 'Commission') alleged that TPPL was unjustifiably raising prices of their packaging products and, as a consequence, fruit juice and milk producers were reducing the quality of their products to offset these price increases. In its another letter dated 1-11-08 addressed to the Commission CAAWA requested to take necessary action to eliminate the monopoly of TPPL in Pakistan.
3. Subsequently, CAAWA in its letter dated 22-01-09 addressed to the Commission alleged that TPPL was 'abusing its dominant position' in Pakistan, stating therein that TPPL was '*the only company in Pakistan, which supply packing machines and, which only used packing material supplied by them...The users of their packing machine has no other choice then to buy from them the packing material at whatever prices they demand.*'
4. The Commission took notice of the said letters and initiated a preliminary probe into the allegations of unreasonable increase in the prices of packaging products. Subsequently, the Commission initiated a *suo motto* enquiry under the provisions of Section 37 (1) of the Ordinance against TPPL and pursuant to the provisions of sub-section (2) of Section 28 of the Competition Ordinance, 2010 (the '**Ordinance**') appointed Enquiry Officers and initiated an enquiry under the provisions of Section

- 37 of the Ordinance to (i) determine the relevant market, (ii) whether TPPL has a dominant position, (iii) whether TPPL has abused its dominant position in the relevant market, and has thereby violated Section 3 or any other provisions of the Ordinance, and to prepare a report thereof and submit it to the Commission.
5. For the purposes of enquiry TPPL along with all its customers were required to provide copy of agreement (s) executed *inter se* the TPPL and the milk processors and/or the fruit juice manufacturers¹ pertaining to sale/purchase and/or lease of the packaging machines used by the milk processors and/or the fruit juice manufacturers, or any other agreement ancillary thereto.
 6. The milk processors and/or the fruit juice manufacturers provided following agreements which were executed between TPPL and them, they are: **(i)** Equipment Sale Agreement, **(ii)** Machine Rental Agreement, **(iii)** Agreement for the Installation and Commissions, and **(iv)** Tetra Pak Maintenance Systems Service Agreement.
 7. TPPL responded vide their Counsel's letter bearing no M&Z/Hum/HB/12998 dated 22-01-10 wherein requests for extension to file the requisite documents till 08-02-10 and for a meeting on 02-02-10 to discuss the sufficiency and object of the information required by the Commission were made. The requests were acceded to and a meeting was scheduled for 02-02-10. In the meeting with the counsels for TPPL the sufficiency and object of the information required by the Commission was discussed and they were also informed to provide any or all agreements with the milk and fruit juices processors with reference to the packaging machine and the packaging material.

¹ M/s Benz Industries Limited, M/s Cider Foods (Pvt.) Ltd., M/s Engro Foods Limited, M/s Famous Minta Foods (Pvt.) Ltd., M/s Faraz Fruits (Pvt.) Limited, M/s Frooto Industries (Private) Limited, M/s Haleeb Foods Limited, M/s Juice Pack Industries (Pvt.) Ltd., M/s Maaher Food Industries Limited, M/s Nestle Pakistan Limited, M/s Nirala Dairy (Pvt.) Limited, M/s Noon Pakistan Limited, M/s Mehran Bottlers (Pvt.) Limited, M/s Popular Juice Industries (Pvt.) Limited, M/s Premier Dairies, M/s Shezan International Limited, M/s Standard Fruits Limited, M/s Tops Food & Beverages Ltd. and M/s Vita Pakistan Limited.

8. TPPL's Counsel *vide* its letter bearing no. M&Z/SAZ/Hum/13048 dated February 12, 2010 provided copies of (i) Service Agreement (standard agreement), (ii) Equipment Sale Agreements executed with Faraz Foods (Pvt.) Limited, Cider Foods (Pvt.) Limited and Minta Foods (Pvt) Limited, (iii) Installation and Commissioning Agreement with Cider Foods (Pvt.) Limited, (iv) Machine Rental Agreements with Engro Foods, Maheer Foods Industries and Popular Group of Industries. Subsequently *vide* letter bearing no. M&Z/13091 dated February 18, 2009 sent a copy of the Sale purchase agreement executed between TPPL and Nestle Pakistan Limited.

9. The Enquiry Officers after analyzing all the material/documents available on the record completed the Enquiry by producing Enquiry Report dated 19-05-10 (hereinafter referred to as the '**Enquiry Report**'). The Enquiry Report concluded as follows:
 - a. *TPPL holds a dominant position in the market of beverages products packaging industry in Pakistan. Given that TPPL has virtually no competition in Pakistan, it faces a lesser threat of substitution of packaging material by its customers, which gives it the ability to "influence" the market. Consequently, TPPL has been able to ensure that only TPPL cartons are used by its customers and that these were not obtained through other sources. TPPL has also tied its machine sale/lease to an exclusive right to provide maintenance and repair services, effectively barring other firms specializing in providing such services. The exclusive right to supply spare parts is also reserved by TPPL;*

 - b. *In view of Para 35 to 40 above, prima facie, it appears that TPPL holds more than 40% of the relevant market's share in Pakistan and has the ability to behave to an appreciable extent independently of its competitors, customers, consumers and suppliers. Therefore, it unambiguously holds a dominant position in the relevant market;*

 - c. *In terms of Para 44 to 46 above, the Trade Compliance clause in the Equipment Sale Agreement, prima facie, appears to be in violation of basic principle 'ignorance of law is no excuse', and also prima facie appears to be unfair towards the customers of TPPL and in violation of Section 3(1) & 3(2) read with Section 3(3)(a) of the Ordinance on the part of TPPL;*

 - d. *In terms of Para 47 to 49 above, it appears that TPPL by tying the lease of the Rented Equipment with the machine maintenance/ service*

agreement and by making conclusion of the agreement subject to enter in to a separate service (maintenance) agreement, in the relevant market for the maintenance & repairs of the aseptic packaging machines using aseptic cartons, prima facie, has violated provisions of Section 3(1) and Section 3(2) read with Section 3(3)(c) & (d) of the Ordinance by foreclosing the choice of the milk/fruit juice processors and thereby any competition;

- e. In terms of Para 50-52 above, prima facie, it appears that TPPL is tying the sale of the packaging machine with packaging material (aseptic cartons) in its Agreement for the Installation and Commission, and thereby abusing its dominant position in terms of Section 3 (1) and 3(2) read with Section 3(3) (c) of the Ordinance;*
- f. In terms of Para 53 to 55 above, it appears that by not providing the copy of the agreement and the information requisitioned by the Commission, such withholding of information by TPPL, prima facie, is in violation of clause (c) of sub-section (1) of Section 38 of the Ordinance.*

10. On the above said findings and in light of public interest it was recommended in the Enquiry Report to initiate proceedings under Section 30 of the Ordinance against TPPL.

11. The Commission taking into account the findings of the Enquiry Report, decided to initiate proceedings under Section 30 of the Ordinance against TPPL. Hence, SCN was issued to TPPL. TPPL was required to file written replies to the SCN on or before 07-06-10 and an opportunity of hearing was also provided to them on 07-06-10. Relevant paragraphs of the SCN are reproduced below:

7. WHEREAS, in terms of the Enquiry Report, prima facie, it appears that the Undertaking is abusing its dominant position in terms of Section 3(1) read with Section 3(2) of the Ordinance and has contravened the provisions of the Ordinance as follows:

(a) Paragraph 44 to 46 of the Enquiry Report, the Trade Compliance clause in the 'Equipment Sale Agreement', reads as follows:

Trade Compliance:

Section 10.1: *Customer is aware that the sale, export and other distribution of TPPL's products may be subject to national and international export or trade control laws and regulations. Customer agrees to comply fully with all such relevant export or trade control laws and regulations;*

10.2: *If any delivery from TPPL including but not limited to deliveries of the equipment and future deliveries of spare parts and other equipment, at any time would be in conflict with any applicable and relevant export laws or regulations, TPPL may in its own discretion, wholly or partially, cancel the delivery. The customer hereby irrevocably waives any and all remedies and claims due to such non-performance of TPPL, including but not limited to any remedies for breach of contract, delays, shortage, fault and defects and claims for compensation for direct and/or indirect losses due to such non-performance.*

10.3: *However, this section shall not apply in case it is proved by the customer that TPPL was aware of the relevant export laws or regulations at the time of the conclusion of this contract.*

The above provision appears to be in violation of the basic principle 'ignorance of law is no excuse', and appears to be an imposition of an unfair trading condition on its customers placing the onus to prove that the undertaking was aware of such laws hence it is prima facie in violation of Section 3(3)(a) of the Ordinance;

- (b)** *In terms of paragraph 47 to 49 of the Enquiry Report, it appears that the Undertaking by tying the lease of Rented Equipment with the machine maintenance/ service agreement it is, making it incumbent on its customers i.e. milk/juice processors to enter into a separate service (maintenance) agreement in order to conclude the machine rental agreement, which results in foreclosing the choice of its customers and thereby restricting competition for such services in the relevant market apart from imposing it unfairly on its customers and prima facie, is violative of the provisions of 3(3)(c) & (d) of the Ordinance;*
- (c)** *In terms of paragraph 50 to 52 of the Enquiry Report, prima facie, it appears that the Undertaking is tying and imposing on its customers the sale of the packaging machine with packaging material (aseptic cartons) in its 'Agreement for the Installation and Commission' during Commissioning and Validation period, which is itself a distinct product and prima facie, tied selling seems to have been imposed on its customers, in violation of Section 3(3) (c) of the Ordinance;*

8. WHEREAS, *in terms of paragraph 53 to 55 of the Enquiry Report, it also appears that the Undertaking upon being requested to furnish certain information by the Commission vide its letters dated January 21, 2010 and February 08, 2010 did not provide copies of all the agreements entered inter se the Undertaking and its customers i.e. milk/juice processors and such withholding of the information on part of the Undertaking prima facie is in violation of clause (c) of sub-section (1) of Section 38 of the Ordinance;*

9. **WHEREAS**, in view of the foregoing, it appears to the Commission that the Undertaking may have engaged in practices prohibited under the Ordinance which has the object or effect of preventing, restricting or reducing competition within the relevant markets as aforesaid and it prima facie constitutes violations of Section 3 (1) and 3(2) read with Section 3(3) (a), (c) & (d) of the Ordinance and Section 38 (1) (c) of the Ordinance;

10. **AND WHEREAS**, it is the responsibility and obligation of the Commission under the Ordinance to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviors.

11. **NOW THEREFORE**, you, M/s Tetra Pak Pakistan Limited, as an Undertaking is called upon to show cause in writing on or before **June, 07, 2010** and to appear and place before the Commission, facts and materials in support of your contention and avail the opportunity of being heard through an authorized representative on **June 07, 2010 at the Office of the Competition Commission of Pakistan, 4-C, Diplomatic Enclave, Sector G-5, Islamabad at 10.00 a.m.** and explain as to why an appropriate order under Section 32 and/or clause (a) of Section 31 of the Ordinance may not be passed and/or penalty for the abovementioned violations be not imposed under Section 38 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.

12. Thereafter, Mandviwala and Zafar; the counsels for TPPL vide their letter dated 29-05-10 requested for an extension in time to file the written reply and also requested for extending the date of hearing till 21-06-10. The Commission only acceded to extend the time till 14-06-10 for filing of written reply and the date of hearing was also rescheduled for 15-06-2010.

13. The counsels for TPPL on 14-06-10 filed an application under Regulations 30 -33 and 37 of the Competition Commission (General Enforcement) Regulations, 2007, proposing the commitments on part of TPPL to obtain a favorable decision. The contents of the application in brief are as under:

That TPPL has made all the reasonable measures to ensure that the provisions in the agreements mentioned in the SCN are compliant with Pakistan laws and were never intended to impose upon TPPL's customers any unreasonable conditions. TPPL firmly believes and is committed to ensuring that there is free and fair competition in the market;

That in pursuance to Regulation 31(1), prior to determining whether a situation has arisen or is likely to arise which shall reduce, prevent, restrict or distort competition in any relevant market and before deciding the SCN or the issues raised in the Enquiry Report on merits, TPPL, without prejudice to the right, defense and legal position relating to the relevant market, dominant position and abuse of dominant position, is willing to make commitments in true letter and spirit of the Competition Ordinance and the Regulations made thereunder.

Accordingly, TPPL is ready to delete/reword in order to clarify the provisions of the agreements mentioned in the SCN as follows. Furthermore, TPPL is ready to clarify these provisions of the agreement as may be deemed necessary by the Commission;

Equipment Sale Agreement:

Section 10.3 of the Equipment Sale Agreement can be deleted

Machine Rental Agreement:

TPPL agrees to change the word 'shall' in Section 4.1 to 'may', which will now be read as follows:

"The customer may execute a service agreement with TPPL for the Rented Equipment which should conform with Tetra Pak Maintenance System (TPMS).

Agreement for installation and commissioning:

TPPL is willing to add at the end of exhibit 5 as follows:

"The customer is under no obligation to purchase packaging material from TPPL once the commissioning is complete"

That if the Commission accepts this commitment from TPPL, then the SCN may be withdrawn or disposed of under Regulation 37;

It is understood that if the commitment is not acceptable to the Commission, TPPL, shall have an opportunity to file a detailed reply on the merits of the SCN and raise all rights, defenses and legal position in accordance with the law. The Commitment is without prejudice to these rights.

14. On 15-06-2010 Mr. Syed Ali Zafar, Counsel for TPPL, Mr. Azhar Ali Syed, Managing Director TPPL and Mr. Mr. Yasir Jumani, Legal Counsel of TPPL appeared for and on behalf of TPPL before the Commission. The counsel for TPPL mainly submitted that, without going into the merits of the case i.e. the relevant market, the dominant position and abuse of dominant position as alleged in the SCN and the Enquiry Report, TPPL wishes to address the concerns of the Commission in

the form of the commitments filed by them. It was further added that, TPPL is ready to clarify these provisions of the agreements as may be deemed necessary by the Commission. It was further stated that, if the Commission accepts these commitments then the SCN either be withdrawn or disposed of under Regulation 37 of the Competition Commission (General Enforcement) Regulations, 2007 (the 'GER'). The representatives further requested that they be given an opportunity to explain the background of the provisions of the agreements and the commitments made or amendments suggested in order to clarify the situation. Their request was acceded to by the Commission and they were directed to explain the background of the provisions of the agreements and the commitments made and amendments suggested on the next date of hearing i.e. 18-06-10.

15. On 18-06-10, Mr. Syed Ali Zafar, and Ms. Huma Ejaz Zaman of Mandviwalla & Zafar, along with Mr. Azhar Ali Syed, Managing Director TPPL and Mr. Yasir Jumani, Legal Counsel TPPL appeared for and on behalf of TPPL before the Commission. The counsel for TPPL submitted that he is not challenging the findings in the Enquiry Report; and only addressing the background of the provisions and clarifications thereon. It was submitted that, TPPL has no intent of violating any law, including the Ordinance and during the drafting phase of the agreements, the same were reviewed by the legal experts and was cleared by them that they are not in violation of any law. It was submitted that TPPL's primary business in Pakistan is that of packaging material and secondary business is packaging machines. He added that initially the enquiry was conducted on the pricing of the packaging material but nothing came out, however, this enquiry interestingly has given adverse findings. The counsel for TPPL explained and elaborated in detail the background and the rationale for the clauses in the agreements, which are discussed herein below.

16. We have heard the representatives in detail and have also gone through all the documents available on the record. It would be appropriate to focus on the clauses of the agreement(s) which were found to be *prima facie* and in violation of the Ordinance. These are as follows:

TRADE COMPLIANCE CLAUSE IN THE EQUIPMENT SALE AGREEMENT:

17. For the sake of brevity and ease of reference, the Trade Compliance clause in its relevant parts is reproduced herein below:

Section 10.1: Customer is aware that the sale, export and other distribution of TPPL's products may be subject to national and international export or trade control laws and regulations. Customer agrees to comply fully with all such relevant export or trade control laws and regulations;

10.2: If any delivery from TPPL including but not limited to deliveries of the equipment and future deliveries of spare parts and other equipment, at any time would be in conflict with any applicable and relevant export laws or regulations, TPPL may in its own discretion, wholly or partially, cancel the delivery. The customer hereby irrevocably waives any and all remedies and claims due to such non-performance of TPPL, including but not limited to any remedies for breach of contract, delays, shortage, fault and defects and claims for compensation for direct and/or indirect losses due to such non-performance.

10.3: However, this section shall not apply in case it is proved by the customer that TPPL was aware of the relevant export laws or regulations at the time of the conclusion of this contract.

18. The Enquiry Report states the above provision appears to be in violation of the basic principle 'ignorance of law is no excuse', and appears to be an imposition of an unfair trading condition on its customers placing the onus to prove that the undertaking was aware of such laws hence it is *prima facie* in violation of Section 3(3)(a) of the Ordinance.

19. In this regard, the counsel for TPPL submitted that the Trade Compliance Clause (sec. 10 of the Equipment Sale Agreement) pertains to the rights of the customer relating to remedies for breach of contract, delays, shortage, fault, defects and claims for compensation for direct and/or indirect losses due to such non-performance are waived if it is caused due to the prohibition in export laws and this condition is not applicable if the customer proves that TPPL was aware of the law. The counsel added that, in fact TPPL did a favour to its customers through insertion of the condition which enabled its customers to get some compensation upon breach of contract.

However, in order to do so the ‘buyer has to prove that TPPL was aware of the relevant export laws at the time of conclusion of the contract’. Had this condition not been inserted the buyer would have been left with no option, would have had suffered losses as he could not place any burden for such change of the law. Although TPPL is of the view that the clause is in fact in favour of the customers, yet, TPPL in terms of their commitments is willing either to reword the clause or to remove clause 10.3 from the agreement which shifts the onus to the customers. However, it was reiterated that removing of Clause 10.3 from the original clause would prejudice the case of the customers.

20. We find merit in the submissions of the counsel for TPPL and are of the considered view that, the findings in the Enquiry Report with reference to the Trade Compliance clause are not premised on sound reasoning. TPPL may keep the Trade Compliance clause in its present form and is not required to amend the same.

MANDATORY MAINTENANCE CLAUSE IN THE MACHINE RENTAL AGREEMENT:

21. For the sake of brevity and ease of reference, the relevant clause in its relevant parts is reproduced herein below:

4. Maintenance of Equipment.—

4.1 Parties hereto agrees and understand that the Rented Equipment is of extreme importance and hence should only be run and maintained by properly trained and qualified staff. The Customer shall execute a service agreement with TPPL for the Rented Equipment which should conform with Tetra Pak Maintenance System (TPMS);

4.2 The Customer shall at its own expense ensure the proper use and day-to-day maintenance of the Rented Equipment strictly in accordance with the instructions, directions and recommendations of TPPL. The cost of spare parts and expenses of these services will be borne by customer. Upon incurring any cost or expense of this nature TPPL shall forward a separate invoice for its reimbursement.

22. We note that, with reference to the above clause, the Enquiry Report has stated that, it appears that TPPL by tying the lease of Rented Equipment with the machine maintenance/ service agreement is making it incumbent on its customers i.e.

milk/juice processors to enter into a separate service (maintenance) agreement in order to conclude the machine rental agreement, which results in foreclosing the choice of its customers and thereby restricting competition for such services in the relevant market apart from imposing it unfairly on its customers and *prima facie*, is violative of the provisions of 3(3)(c) & (d) of the Ordinance.

23. In this regard, the counsel for TPPL has submitted that the purpose of having this clause in the Machine Rental Agreement is to ensure the safety of the Rented Equipment. Since, the Rented Equipment is used in packaging of food, hence requires extensive care and at the end of the rental agreement the Rented Equipment is to be returned to us, therefore, it is incumbent upon us to ensure the quality of the equipment throughout the lease period. The counsel further added that, despite the above position, which entitles TPPL to have a mandatory maintenance agreement, it has not been made mandatory on the customers to enter into a mandatory maintenance (service) agreement of the Rented Equipment with TPPL. It was further added that, in clause 4.2 relating to the maintenance of the rented equipment, the customer has been given an option to get the maintenance of the equipment on its own. The counsel for TPPL added that, presently only 5 machines are on rental/lease and the period of rental is normally not more than one year. It was also submitted that TPPL has assisted Technical Education and Vocational Training Authority (the 'TEVTA') to develop, organize and impart customized trainings fro TEVTA students on Tetra Pak filling machines, in this regard an Memorandum of Understanding was also entered *inter se* TPPL and TEVTA called MOU No. 081014 TEVTA/Tetra Pak. The representative further added during the course of hearing that they are willing to amend the clause as the Commission deemed appropriate.

24. While it is maintained by TPPL that it has not been made mandatory upon its customers to enter into a separate maintenance service agreement with TPPL, in our considered view the wording of the above clause (Para 21 above) in particular, the word "shall" gives only a compulsory connotation. Such a requirement that the customer must obtain maintenance service exclusively from TPPL closes the door to any competitor on the maintenance and repair services market. In this regard, it was specifically asked from the representatives of TPPL that when a similar clause was

declared illegal in the EU Decision dated 24-07-1991, than why this clause was incorporated in the agreements entered into Pakistan?

25. The counsel for TPPL submitted that in EU, the agreement under review was of sale and purchase of the Equipment and not the Lease Rental Agreement or Agreement for Installation and Commissioning. However, upon review of the EU Decision dated 24-07-1991 in the matter of Tetra Pak II (the ‘**EU Decision**’), it transpires that Machine Rental Agreement was also under review along with the Equipment Sale Agreement, reference in this regard has to be made to Para 31-40 & 108-109 & 132 of the EU Decision. With reference to the mandatory maintenance condition in the EU Decision it was observed:

“(iv) Exclusive maintenance and repair services

(108) This clause applies beyond the guarantee period for the entire life of equipment and is therefore not justified by the contractual responsibility which the guarantee imposes on Tetra Pak.

Such a requirement that the customers obtain maintenance and repair services exclusively from Tetra Pak closes the door to any competitor on the maintenance and repair services market.

It also binds the customer completely to Tetra Pak, not allowing him any freedom to make his own choice - whatever it may be - and not even giving him, except in certain limited cases of small-scale maintenance specifically referred to, any possibility of having maintenance and repair services provided by his own technical staff.

Finally, it gives Tetra Pak an indirect means of control over the customer to ensure than he complies with various other contractual obligations (such as those relating to equipment configuration analysed in recital (107)).” (Emphasis added)

26. However, we have examined the EU Decision and the current proceedings and note some distinguishing features e.g. (a) in EU Decision the minimum period of lease was from 3 years to 9 years, however, in Pakistan the minimum period of lease is one year, and (b) in Pakistan only five (5) machines are on lease/rental and out of these five (5) machines, three (3) machines are leased out to one customer, whereas, in the EU Decision there was a large number of machines on lease/Rental in various countries i.e. Italy, Denmark, Ireland, Portugal and United Kingdom to various

customers, hence, it can be said that the effect of this clause i.e. mandatory maintenance service obligation does not have that substantial impact on the competition as it had in the EU Decision. Nonetheless, we are of the considered opinion that the Maintenance clause cannot continue in its present form and therefore, TPPL is directed that the same be amended in terms of the following:

Maintenance of Equipment.—

Parties hereto agree and understand that the Rented Equipment is of extreme importance and hence should only be run and maintained by properly trained and qualified staff. The Customer shall at its own expense ensure the proper use and day-to-day maintenance of the Rented Equipment, through any independent service provider, in accordance with the specifications and recommendations of TPPL.

PERFORMANCE CRITERIA IN THE AGREEMENT FOR INSTALLATION AND COMMISSIONING

27. For the sake of brevity and ease of reference, the clause in its relevant parts is reproduced herein below:

Exhibit – 5 Performance Criteria

...

Packaging material

Customer acknowledges that it is essential that all packaging material used in conjunction with the equipment be suitable for the safe packaging of food products and efficient operation of the equipment, and undertakes, during Commissioning and Performance validation, to use with the equipment only packaging material which has been supplied by TPPL.

28. In this regard it has been alleged in the Enquiry Report that, TPPL in the aforesaid clause has made it mandatory for its customers to use with the equipment only such packaging material which has been supplied by TPPL. Hence, *prima facie*, it appears that the Undertaking is tying and imposing on its customers the sale of the packaging machine with packaging material (aseptic cartons) in its ‘*Agreement for the Installation and Commission*’ during Commissioning and Validation period. The

packaging material is itself a distinct product and *prima facie*, tied selling seems to have been imposed on its customers, in violation of Section 3(3) (c) of the Ordinance;

29. The counsel for TPPL submitted that the purpose of the Agreement for Installation and Commissioning is to install, start and demonstrate to its customers that the equipment is capable of performance up-to the claimed level. It was further submitted that since TPPL has to show the peak performance of the equipment installed therefore, for the purposes of commissioning of the equipment it uses its own material. It was argued that since commissioning is only for a period of 2 weeks, therefore, using of such reliable is essential. The representatives of TPPL were asked to confirm with reference to the Agreement, the two weeks commissioning period. However, the representatives were no able to verify the position. In our considered view, by requiring use of TPPL's packaging material, TPPL is implying that the machine can only perform to the fullest with the use of the packaging material of TPPL, which should not be the case. In this regard, we appreciate that TPPL expressed its willingness to amend the said provision and remove such conditionality. We are hereby directing TPPL not only to lift the restriction but also to ensure providing the specifications of the packaging material in the agreement itself for the purposes of commissioning.

30. Given the representation made by the counsel, his repeated assurance for the undertakings' commitment to ensure compliance with the Ordinance and TPPL's determination to resolve the issue and to address the concerns of the Commission, we are inclined to accept the application of TPPL made under Regulation 30-33 & 37 of the GER, subject to the following conditions:

- (i) The Mandatory Maintenance clause shall be re-worded as directed above in Para 25 above and be intimated to all the parties concerned;
- (ii) The Agreement for Installation and Commissioning of the equipment shall be amended to the satisfaction of the Registrar of the Commission, so as to remove the condition of using only TPPL packaging material during the commissioning period under the said Agreement;

(iii) The above amendments and consequential changes (if any) in the aforesaid agreements, shall be intimated to the customers of TPPL and given effect in all such agreements with the existing customers of TPPL.

31. The above conditions were agreed to and accepted by the representatives of TPPL on the date of hearing.

32. TPPL is hereby directed that compliance report in terms of the above conditions shall be filed with the Registrar of the Commission, within a period of six (6) weeks from the date of the issuance of this decision, failing which the Commission will resume the proceedings under the show cause notice issued to TPPL. However, upon compliance of this Order, the SCN shall stand disposed off.

(RAHAT KAUNAIN HASSAN)
CHAIRPERSON

(VADIYYA S. KHALIL)
MEMBER (M & A)

Islamabad the August 13th, 2010