



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

**IN THE MATTER OF SHOW CAUSE NOTICES ISSUED TO
M/s. Engro Chemicals Pakistan Limited
M/s. Fauji Fertilizer Company Limited
M/s. Dawood Hercules Chemical Limited
(File No. 3(25)/Dir(Law)/Urea/CCP/09)**

Dates of hearing: December 04, 2009
December 17, 2009
December 21, 2009

Present for Commission: Mr. Khalid A. Mirza
Chairman

Ms. Rahat Kaunain Hassan
Member (Legal/OFT)

Present for:
Dawood Hercules Ltd Mr. Shazada Dawood, Advocate
Syed Muhammad Asghar
Mr. Akhlaq Mazhar
Mr. Muhjtaba Jamal, Advocate
Mr. Jamal ud Din Khan Mamodot

Present for:
Fauji Fertilizer Company Ltd Mr. Abid Maqbool, Acting MD
Mohammad Munir Malik, G.M. Finance
Mohammad Salim Khan, Legal Advisor
Brig. Fiaz Ahme Satti (Rtd), CCO
Syed Mohd. Iqbal, Senior Marketing Manager
Mr. Inam-ur-Rehman,
Ms. Amber Dar, Counsel
Kazim Hassan

Present for:
Engro Chemicals Pakistan Ltd Mr. Asad Umar, CEO & President,
Mr. Andalip Alavi, GM (Legal),
Mr. Muhammad Khalid Mir, GM (Marketing),
Mr. Imran Hashmi, (Resident Manager),
Mr. Baddaruddin Fateh Ali Vellani, Advocate

ORDER

1. This is an order disposing of the proceedings initiated pursuant to the Show Cause No's. 66/2009, 67/2009 and 69/2009 issued to Dawood Hercules Chemical Limited (“**DHCL**”); Engro Chemicals Pakistan Limited (“**Engro**”); and Fauji Fertilizer Company Limited (“**FFC**”), respectively, for *prima facie*, abuse of dominant position by acting in contravention of Section 3 (1),(3) (a), (c) and (d) of the Competition Ordinance, 2010 (the “**Ordinance**”).

FACTUAL BACKGROUND

2. DHCL, Engro and FFC (collectively referred to as the “**Undertakings**”) are producers of chemical fertilizers and are undertakings in terms of clause (p) of sub-section (1) of Section 2 of the Ordinance.
3. The Competition Commission of Pakistan (the “**Commission**”) took *suo moto* notice of information sent by Secretary Agriculture, Government of Sindh vide its letter dated June 20, 2009, informing the Commission that complaints have been received from dealers of fertilizer companies, that sale of Urea (Nitrogen Fertilizer) is being tied up with sale of DAP (Phosphatic Fertilizer) by the fertilizer companies. Secretary Agriculture, requested the Commission to confirm whether the sale of Urea being made conditional on sale of DAP falls within the purview of Section 3 (3) (c) of the Ordinance and that necessary action may be initiated against any companies that have violated the law.

4. Under Section 37 of the Ordinance, the Commission appointed enquiry officers on June 26, 2009 to examine whether clause (c) of sub-section (3) of Section 3 had been violated by the undertakings, not only in respect of the province of Sindh but entire Pakistan. The Enquiry Report concluded that various documents provided by the fertilizer dealers and growers indicate abuse of dominance by the fertilizer producers, the relevant parts including the findings of the Enquiry Report have been reproduced below:

“6.1.8 The complaints regarding the practice of tie-in of the sale of Urea with DAP and its substitutes, were received by the Province of Sindh, which were forwarded to CCP by the Secretary (Agriculture) Government of Sindh, expressing concerns on such practices. Keeping in view the fact that Sindh only consumes about 21.3% of total fertilizer produced and imported in Pakistan, the enquiry was expanded to the whole of Pakistan, in particular, Punjab which consumes almost 70% of the total fertilizers produced and imported in the country. The remaining approximately 9% of the fertilizer is utilized in other two provinces i.e. NWFP and Balochistan, that is catered for by the fertilizer producers in Punjab and Sindh. So, the relevant geographic market is the market of whole of Pakistan. Thus, for the purpose of this enquiry, the product market is the Urea Fertilizer, as there is no demand or supply side substitutability and the geographical market is the whole of Pakistan. Accordingly, the relevant market for the purpose of this enquiry is Urea fertilizer in Pakistan.

6.1.9 As per the market structure provided above, FFC and FFC Jordan (FFC Jordan is a wholly owned subsidiary of FFC and both companies use a joint distribution network for distribution of fertilizer) are dominant players by having collective market share of 52.7% in the market of Urea. Even otherwise owing to the fact that all the fertilizer producers cannot meet the total demand of Urea in the country despite efficient utilization of capacity and the fact that only meager 10% of the total requirement has to be imported, clearly exhibits the fertilizer producer’s ability to behave to an appreciable extent independently from customers, consumers and suppliers. Hence each of these producers may be deemed to

have dominant position owing to the captive market³ they enjoy, as the fertilizer market is a seller's market⁴. Also, as mentioned above despite shortage of Urea supply to meet the demand, generally growers and dealers do not revert to using imported Urea as a preferred option – keeping in view its non-availability at time of need...

6.2.13 Taking all of the above facts and circumstances into account there clearly appears to be a practice on part of the fertilizer producers of tie-in in the sales of Urea with DAP...

7.1 Various documents provided during the enquiry by the fertilizer dealers and growers prima facie indicate abuse of dominance by the fertilizer producers through following practices:-

- *Tie-in*
- *Late delivery to the dealers (giving rise to more demand facilitated by less supply), thus imposing unfair trading condition on the dealers including subjecting the dealers to the unilateral change in price from the booking to deliver time and blocking funds of the dealers during the time period for which delivery is not made.*

7.2 Since the dealers purchase tied in products from the fertilizer producers, they are constrained to sell the tied in products to the growers who then suffer heavy losses by buying the products which are not required by them.

Agriculture is the backbone of our economy. Our farmers generally have little financial resources to buy expensive fertilizer for their lands and crops. The increase in the prices of fertilizer directly impacts the price of various essential commodities like wheat, rice, sugar, corn etc and has an effect on the lives of general people, as is evident from the rising prices of these commodities.

7.3 It is, therefore, recommended that proceedings may be initiated against the fertilizer, producing companies for prima facie

³ Captive markets are markets where the potential consumers face a severely limited amount of competitive suppliers; their only choices are to purchase what is available or to make no purchase at all. Captive markets result in higher prices and less diversity for consumers. The term therefore applies to any market where there is a monopoly or oligopoly

⁴ A seller's market can refer to any type of market for goods or services where demand exceeds supply. A market which has more buyer than sellers

violations of clauses (a), (c) and clause (d) of sub-section (3) of Section 3 of the Ordinance.”

5. On the recommendation of the Enquiry Report, Show Cause Notices were issued to the Undertakings on November 10, 2009. The Show Cause Notice in its relevant part reads as under. The content of the Show Cause Notices issued to Engro and FFC was also the same.

*“**WHEREAS**, it was deemed appropriate by the Commission to conduct an enquiry under sub-section (2) of Section 37 of the Ordinance. The enquiry was concluded vide Enquiry Report dated October 21, 2009 (hereinafter referred as the ‘**Enquiry Report**’ copy enclosed) which may be read as an integral part of this Show Cause Notice;*

***WHEREAS**, in terms of the Enquiry Report the relevant product market as defined in clause (k) of sub-section (1) of Section 2 of the Ordinance is the market for Urea and the relevant geographic market comprises all of Pakistan;*

***WHEREAS**, owing to the fact that all the fertilizer producers cannot meet the total demand of Urea in the country despite over utilization of capacity and the fact that only meager 10% of total requirement has to be imported, in terms of the Enquiry Report, this clearly exhibits the fertilizer producers ability including that of the Undertaking, to behave to an appreciable extent independently from customers, consumers and suppliers in the relevant market;..*

***WHEREAS**, in terms of Part 9 of the Enquiry Report the Undertaking, prima facie, appears to have abused its dominant position through engaging in the practice of tie-in, in the sale of Urea with DAP and/or its comparable fertilizer, forcing customers to purchase unrelated products with different usages, required at different times of the year, thereby acting in contravention of Section 3 (1) of the Ordinance read with Section 3 (3) (c) of the Ordinance;*

***WHEREAS**, in terms of Part 9 of the Enquiry Report the Undertaking prima facie appears to have abused its dominant position by imposing unfair trading conditions on its customers by,*

- *Subjecting dealers to unilateral changes in price from the booking to delivery time; and*
- *Blocking the funds of dealers during the time period for which delivery is not made.*

thereby acting in contravention of Section 3(1) of the Ordinance read with Section 3 (3) (a) of the Ordinance;

WHEREAS, *in terms of the Enquiry Report the Undertaking, prima facie, appears to have abused its dominant position by making the sale of Urea conditional on a supplementary obligation to purchase DAP or other fertilizers, thus making the conclusion of contracts subject to the acceptance of supplementary obligations which by their nature have no connection with the subject of the contract, thereby acting in contravention of Section 3 (1) of the Ordinance read with Section 3 (3) (d) of the Ordinance;..*

WHEREAS, *in view of the foregoing the Commission is satisfied that there has been and/or is likely to be a violation of sub-section (1) of Section 3 of the Ordinance in terms of clauses (a), (c) & (d) of sub-section (3) of Section 3 of the Ordinance;*

NOW, THEREFORE, *you..., as an Undertaking is called upon to show cause in writing within fourteen (14) days of this show cause notice and to appear and place before the Commission, facts and material in support of your contention and avail the opportunity of being heard in person or through an authorized representative on Decemeber 4, 2009 at 19th Floor, Meeting Room, Saudi Pak Towers, Blue Area, Islamabad at 11.00 a.m. as to why an appropriate order under clause (c) of Section 31 and/or Section 32 of the Ordinance may not be passed and/or penalty for the abovementioned violations be not imposed under Section 38 of the Ordinance;..”*

6. The Undertakings were called upon to show cause in writing within a period of fourteen (14) days and an opportunity of being heard was provided as to explain why an appropriate order under clause (c) of Section 31 and/or Section 32 of the Ordinance may not be passed and/or a penalty for alleged violations be not imposed pursuant to Section 38 of the Ordinance.

SUBMISSIONS BY UNDERTAKINGS

7. The Undertakings submitted their written replies to the Show Cause Notice issued to them, which briefly stated:

(a) **DHCL:**

- (i) It submitted that DHCL not being made part of the Enquiry Report was not only a violation of the Section 37 (2) of the Ordinance and Part III of the Competition Commission (General Enforcement) Regulations, 2007 but also the principles of natural justice.
- (ii) The Enquiry Report was not based on reliable data and that the Commission failed to appreciate that DHCL did not have a dominant position in the fertilizer market as it only holds about 10% of the market share.
- (iii) No evidence provided that shows the ability of DHCL to behave to an appreciable extent independently of competitors, customers, consumers and suppliers in the relevant market and the role of the Government as an importer of fertilizer has been ignored and the ability of DHCL to act in an appreciable extent independently of the Government has not been proved.
- (iv) It was also submitted that the definitions of relevant product market, relevant geographic market and relevant market do not meet the criteria prescribed by Section 2 (1) (k). It further submitted that as the Enquiry Report does not furnish evidence in respect of the fertilizer market in NWFP and Balochistan, it cannot form a cogent basis for issuance of the Show Cause Notice in the context of the relevant market i.e. the fertilizer market in Pakistan.
- (v) DHCL also denied that the fertilizer market in Pakistan can be regarded as a captive market and a sellers market as Government has the unfettered right to import and it is the Governments responsibility to import quantities to fill the supply-demand gap and avoid development of captive and sellers market.
- (vi) It also submitted that the Enquiry Report and the Show Cause Notice failed to acknowledge that DHCL sells fertilizer to distributors and not the farmers/growers.
- (vii) DHCL stated that it sold 529,450 metric tons of Urea and 9538 metric tons of DAP in the year 2008-09, which establishes a ratio of 56:1. Month wise detail sales of Urea and DAP for July 2008 show a ratio of 7:1. Therefore, there is no practice of tie in by DHCL and dealers supplied fertilizer according to their demand and availability.

- (viii) DHCL did not cancel any dealerships on account of refusal to buy DAP by dealers and did not determine prices unilaterally. The receipts issued to the dealers by DHCL state that the dealers will be charged according to the rate at the day the delivery is made. The dealers make advance payments voluntarily and are aware that DHCL is not bound to deliver the fertilizer within any specified period of time.
 - (ix) Furthermore, Government of Punjab has deputed Soil Fertility Officers (SFO) in various districts to monitor and collect information with regard to the daily dispatch of Urea from plants of manufacturers and one SFO is stationed at DHCL's premises to monitor the production, distribution and transportation of Urea and no complaint has been received against DHCL.
- (b) **Engro:**
- (i) Firstly it submitted that the Show Cause Notice and the Enquiry Report fails to fully appreciate the dynamics of fertilizer business in Pakistan, that in order to obtain optimum crop production, the land requires balanced fertilization. In the interest of enhancing agricultural productivity, Extension Wing of Agriculture Departments of Provincial Governments, as well as Engro and other private companies propagate the need for balanced fertilization and educate the farmers and dealers in this respect. For furtherance of this objective the Dealer Agreement of Engro requires dealers to purchase certain quantities of various fertilizers in respect of which Engro has obtained an exemption from the Commission.
 - (ii) Engro submitted that in summer-winter 2008 and first half of 2009 there was a shortage of Urea as there was a delay by the Government in importing Urea. The dealers took advantage of this shortage of supply and started charging well over the prices fixed by the local producers and indulged in black marketing. The Provincial Government in order to control and crackdown the black marketing started lodging FIRs and Engro sent letters to its dealers asking them to sell at the rates set by them or else their dealerships will be cancelled. Engro and other fertilizer manufacturers in consultation with Federal and Provincial Governments from August 2008 started sending to the DCOs of respective areas, dealer wise daily sales and shipment reports, in order to facilitate control by the local administrators of black marketing and hoarding by dealers and Engro understands that in certain areas such data was effectively used. Engro submitted that in retaliation to efforts made to control black marketing, dealers have falsely accused local producers, inter alia, of tie-in sales, delayed shipments and prices changes between placement of order

and delivery. Another reason for shortage of Urea can be attributed to the Government's efforts to deal with the black marketing by requiring local producers to supply fifty percent (50%) of their daily production to National Fertilizer Marketing Limited ("NFML") so that Urea could be sold at fixed rates.

- (iii) The provision of the Dealer Agreement requiring dealers to purchase specified tonnage of Urea and Phosphates, is not a tie- in or imposition of supplementary obligations on the ground that although the dealer is obliged to buy different types of fertilizers, this is to ensure balanced fertilization. It also submitted that in the event the demand of Urea is more than the supply, Engro will generally allocate on basis of past performance of its dealers in respect of their off takes of various fertilizers and this practice is not be considered as the practice of tie- in.
- (iv) Engro stated that the market share in respect of Phosphates dropped from 35% in 2007 to 16% in 2008 and there was also a shortage of supply of Urea, which led to the Urea to Phosphate ratio declined to 8.3:1 in 2008 from 2.4:1 in 2007. The figures show that even when Engro could have tied in sales of Phosphate with Urea, it did not do so. It was also provided that the sales figures of Phosphate showed that Phosphate business has its own dynamics and is not influenced by the demand- supply of Urea.
- (v) Engro stated that the local production of Urea is below the demand of Urea which can be dealt with by timely import by the Government. In view of this Engro cannot be regarded as having a dominant position due to its market share. It also clarified that the prices of Urea and Phosphate were not increased simultaneously and that in 2009 the price of Phosphates has dropped while the price of Urea has gone up. It stated that Engro did not fix prices of fertilizers in collusion with any other producers but determines prices of various fertilizers in line with its own business strategies. Engro submitted that no oligopoly existed in the fertilizer business in Pakistan which consisted of six to seven producers and multiple importers including the Government.
- (vi) It denied that it refused to supply to dealers, delayed supply to dealers or cancelled dealerships on the basis of dealers refusing to buy Phosphate with Urea or vice versa. It was also submitted the dealers were aware of the practice that when placing orders the dealers should check the availability, source of supply, pricing and expected date of delivery. It also stated that the Dealer Agreement provides that dealers should place orders at least one month in advance and if it takes longer the dealer is informed at the time of order. The Dealer Agreement also provides that the products will be supplied at the price prevailing at the time of supply and not the price at the time the order is placed.

- (vii) Engro submitted that the Show Cause Notice and Enquiry Report were not based on relevant or direct evidence and Engro not being made part of the enquiry is against the principles of natural justice. Engro stated that it would provide the Commission with any further evidence required in respect of assertions made.
- (c) **FFC:**
- (i) FFC submitted a written reply to the Show Cause Notice and the Enquiry Report, requesting that the Show Cause Notice and the Enquiry Report be withdrawn unconditionally and without any adverse implication.
- (ii) It was submitted that the Ordinance is *ultra vires* the Constitution as competition is neither listed in the Federal nor the Concurrent Legislative list, therefore, any action taken in pursuance of the Ordinance is illegal and void *ab initio*, the Ordinance has been re promulgated contrary to judgment of the Supreme Court in Sindh High Court Bar Association v. Federation of Pakistan and well established principles of law enunciated in The Collectors of Customers Karachi and other v. Messers New Electronics (Pvt.) Limited and others (PLD 1994 SC 363) and Pir Sabir Shah v. Shad Muhammad Khan (PLD 1995 SC 66), Sections 28 to 32 and 41 of the Ordinance, allow officers of the Commission, who are in fact members of executive to act as judges and are in violation of fundamental principle of separation of powers enshrined in Article 175 of the Constitution and Section 42 of the Ordinance purports to confer jurisdiction upon Supreme Court in violation of the Constitution and is therefore *ultra vires*, illegal and void *ab initio*.
- (iii) FFC submitted that the Enquiry Report and the Show Cause Notice were based on allegations not supported by any relevant or direct evidence, as FFC was not involved in the enquiry the findings of the Enquiry Report were one sided and liable to be rejected and that the dates of the letters from dealers in Sindh relied upon were synchronized which suggest that the letters are not genuine and fabricated to malign FFC.
- (iv) FFC stated that the Enquiry Report is *ultra vires* Section 37 of the Ordinance as it is in excess of the scope of the complaint made by the Government of Sindh which was in respect of the fertilizer market in the province of Sindh and not the fertilizer market in Pakistan.
- (v) It was denied that FFC and FFC Jordan are dominant players due to their market share of 52.7% and that FFC Jordan is a wholly owned subsidiary of FFC. It was clarified that reference was probably being made to Fauji Fertilizer Bin Qasim Limited (“**FFBL**”) which was a sister concern of FFC that shares a distribution network with FFC. Furthermore, it was denied that

FFC enjoyed dominant position as a result of captive or sellers market and that it has ability to behave to an extent independently from customers, consumers and suppliers. FFC relied upon the figures relating to the closing stock at end of each month, which it stated that if it were a captive or sellers market, FFC would have succeeded in off loading entire inventory irrespective of market conditions. As FFC is the only DAP producing plant in Pakistan, private importers of DAP have significant market. Dealers and growers prefer local produced DAP irrespective of its higher price because of confidence in the brand.

- (vi) FFC submitted that it does not impose Urea and DAP ratios upon dealers for its marketing objectives but merely makes fertilizer available to the dealers as per the recommendations of the Government for balanced crop growth. Quantity of fertilizer sold to a dealer is determined after consultation with the dealer and on basis of sales record of the region. Dealers are free to sell to growers in any manner they deem fit.
- (vii) It denied that FFC has in any way contributed to an artificial shortage by delivering in 60 days and that the real reason for shortage of Urea was due to failure of Government to timely import Urea. It was submitted that FFC informs the dealer of the approximate time of delivery at the time the dealer books an order and is dependent upon level of pending orders and inventory available with FFC. It was also stated that FFC cancels dealerships on basis of violation of Dealership Agreement or conviction by the courts and that although FFC retains the original Dealership Agreement, the terms are read out and explained to dealers and copies are provided. FFC also submitted that it was not responsible for actions of dealers, which were the real culprits and the Commission and Government of Sindh should take action against the dealers.
- (viii) Prices of Urea and DAP are fixed on basis of input and other costs with a view to company profitability and not in consultation with any other company. FFC submitted that it maintains complete record of all transactions and order entered and completed by it and is ready to make the same available to the Commission in respect of dealers making allegations.

8. Hearings in respect of the Show Cause Notices issued to the Undertakings were held by the Commission on December 17, 2009 and December 21, 2009, whereby the Undertakings were given an opportunity of being heard. The Undertakings at

the hearings were requested by the Commission to provide account statements for the top fifty (50) of their Urea and DAP dealers for the financial year July, 2008 to July 2009.

9. The Undertakings in accordance with the request made by the Commission at the hearings and letters dated January 6, 2010 and January, 8 2010, submitted the statement of accounts for their top fifty dealers for the years 2007, 2008 and 2009. The data received was in the form of an excel sheet displaying the total composition of fertilizer purchased by each of the top fifty traders.

ISSUES

10. The relevant issues that are raised in regard to the Show Cause Notices issued to the Undertakings on the basis of the Enquiry Report and in light of the replies submitted by the Undertakings are:
 - (a) What is the relevant market?
 - (b) Whether the Undertakings have a dominant position in the relevant market?
 - (c) Whether the Undertakings have abused their dominant position by tying in the sale of DAP with Urea?
 - (d) Whether the Undertakings have abused their dominant position by increasing prices unreasonably and subjecting dealers to unfair trading conditions?

11. The aspect regarding the Enquiry Report being in violation of the provisions of the Ordinance and the principles of natural justice needs to be discussed before the issues framed above are analyzed. DHCL submitted in its written reply to the Show Cause Notice that DHCL not being made party to the investigation resulting in the Enquiry Report was a clear violation of the principles of natural justice and mandatory requirements of the Ordinance. It also submitted that Section 37 (2) of the Ordinance does not envisage *suo moto* action by the Commission; therefore, the enquiry does not comply with the mandatory requirements of Section 37 (2) of the Ordinance and Part III of the General Enforcement Regulations, thus affecting the legal validity of the Enquiry Report and the Show Cause Notice. Engro in its written reply to the Show Cause Notice submitted that it not being made part of the enquiry carried out by the Commission was against the principles of natural justice. The objections raised by FFC in its written reply to the Show Cause Notice were that the Enquiry Report was *ultra vires* Section 37 of the Ordinance as the Enquiry Report was in excess of the complaint made by the Government of Sindh which was in respect of the fertilizer market in the province of Sindh and not the fertilizer market in Pakistan.

12. Section 37 of the Ordinance reads as follows:

“37. Enquiry and studies. – (1) The Commission may, on its own, and shall upon a reference made to it by the Federal Government, conduct enquiries into any matter relevant to the purposes of this Ordinance.

(2) Where the Commission receives from an undertaking or a registered association of consumers a complaint in writing of such facts as appear to constitute a contravention of the provisions of

Chapter II, it shall, unless it is of the opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by prima facie evidence, conduct an enquiry into the matter to which the complaint relates.

(3) The Commission may outsource studies by hiring consultants on contract.

(4) If upon the conclusion of an inquiry under sub-section (1) or sub-section (2), the Commission is of the opinion, that the findings are such that it is necessary in the public interest so to do, it shall initiate proceedings under section 30.”

Sub-section (1) of Section 37 of the Ordinance provides the Commission the power to initiate a *suo moto* enquiry in to any manner relevant for the purposes of the Ordinance, while sub-section (2) provides the Commission to conduct an enquiry in respect of a written complaint received from an undertaking or a registered association of consumers that appears to constitute a contravention of the provisions of Chapter II of the Ordinance. DHCL as mentioned above submitted that Section 37 (2) does not envisage *suo moto* action by the Commission which affects the legality of the Enquiry Report and the Show Cause Notice issued to DHCL. We note that although the Enquiry Report does not specify whether the enquiry was initiated under sub-section (1) or (2) of Section 37 of the Ordinance but in the Show Cause Notices issued to the Undertakings it has been provided that it was deemed appropriate by the Commission to conduct an enquiry under sub-section (2) of Section 37. Both the Enquiry Report and the Show Cause Notice state that the Commission took *suo moto* notice of the information provided by the Secretary Agriculture, Government of Sindh vide his letter dated June 20, 2009. We find that although reference has been made to

Section 37 (2) in the Show Cause Notice, the enquiry was conducted in accordance with the powers available to the Commission under Section 37 (1) of the Ordinance. We are of the considered view that mere error in quoting the right sub-section would not thwart the entire process. DHCL also submits that the Enquiry Report does not comply with the mandatory requirements of Part III of the General Enforcement Regulations, albeit, the relevant regulations that have allegedly been violated by the Commission when conducting the enquiry have not been cited. According to DHCL the Commission not making DHCL part of the enquiry initiated by it was in violation of Section 37 of the Ordinance. Section 37 of the Ordinance does not mandatorily require the Commission to inform or make any of the parties related to the matter in respect of which an enquiry is being initiated, part of the enquiry. Furthermore, the aspect of violation of principles of natural justice has been at length dealt with by the Commission in the matter of Jamshoro Joint Venture Limited and LPG Association of Pakistan (the “**JJVL-LPGAP Order**”). It was held by the Commission in the JJVL-LPGAP Order that from a reading of the Ordinance and General Enforcement Regulations it is clear that there is no mandatory requirement on the Commission to issue a notice/hold a hearing at the enquiry stage. Therefore, the requirements of natural justice (a hearing) do not apply at the initiation of, and during an enquiry, by the Commission. The Commission in drawing this conclusion relied upon local and foreign precedents. *In Commissioner of Income Tax and Others v Messrs Media Network and Others; 2006 PTD 2502* the Supreme Court of Pakistan has held that rules of natural justice are not cast in a rigid mould and that depending upon

the facts and circumstances of each case, there is no mandatory requirement of natural justice that in every case the other side must be given a notice before preliminary steps are taken. As per the Honourable Supreme Court, it might suffice if reasonable opportunity of hearing is granted to a person before an adverse action or decision is taken against him. In Rees and Others; (1994) 1 All E.R. 833 at page 842-845, it was held by the Privy Council that there were many situations in which natural justice did not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the Courts to that conclusion had included the fact that the investigation was purely preliminary, that there would be a full chance adequately to deal with the complaints later, that no penalty or serious damage to reputation was inflicted by proceeding to the next stage without hearing, that the statutory scheme properly construed excluded such a right to know and to reply at the earlier stage.

13. In light of the Commissions findings in the JJVL-LPGAP Order and the decisions cited above, as no adverse action was taken against the Undertakings by initiating an enquiry and before providing the Undertakings an opportunity of being heard, in our considered view, there seems to be no violation of the principles of natural justice.
14. In respect of the objection raised by FFC that the Enquiry Report was in excess of the complaint received by the Commission from the Secretary Agriculture,

Government of Sindh, FFC have failed to point out as to how the provisions of the Ordinance impose any restriction on the Commission in respect of scope of the enquiry being conducted by the Commission, notwithstanding even if the concern has come across from any particular quarter/territory.

A. Relevant Market

15. Section 2 (1) (k) of the Ordinance defines the term “relevant market” which has been reproduced 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 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 homogeneous and which can be distinguished from neighboring geographic areas because, in particular, the condition of competition are appreciably different in those areas;”

In light of the definition provided under Section 2 (1) (k) of the Ordinance, relevant market for a product entails two factors, one being the relevant product market and the other the relevant geographic market. DHCL in its written reply to the Show Cause Notice submitted that the definitions of relevant product market, relevant geographic market and relevant market do not meet the criteria prescribed by Section 2 (1) (k) of the Ordinance. These allegations were not cogently substantiated. No explanation has been given in this regard in the written

reply to the Show Cause Notice or the preliminary written arguments submitted by DHCL.

Relevant Product Market

16. As per the Enquiry Report the relevant product market in this case is the Urea fertilizer market, which is a nitrogen fertilizer. According to the Enquiry Report, the locally manufactured substitutes of Urea are Calcium Ammonium Nitrate (CAN) and Ammonium Sulfate (AS), but the local supply of AS has reduced considerably and CAN is not generally preferred as it has less nitrogen content compared to Urea and is also more expensive. Although FFC in its written reply to the Show Cause Notice claims that a bag of CAN is cheaper than a bag of Urea, while this has not been substantiated. FFC does admit that Urea is the most efficient source of nitrogen for crops and most readily usable in combination with other essential fertilizers like DAP. According to the Competition Assessment Study of the Fertilizer Sector in Pakistan published by the Commission (the “**Fertilizer Study**”), Urea’s nitrogen content is 1.7 times higher than that of CAN and the usage of CAN as compared to that of Urea has gradually declined as CAN has continued to become pricier against Urea in relative terms. Keeping the above in view, the information relating to CAN’s significant difference between the nitrogen content and the price between CAN and Urea shows that CAN is not a viable substitute for Urea.

17. As per the information provided in the Enquiry Report and the Fertilizer Study the demand for Urea fertilizer exceeds the total installed capacity and local production of Urea. On average about four percent (4%) of the demand for Urea in Pakistan for the past 5 years has been met through imports. In the year 2008-09 about ten per cent (10%) of the total demand of Urea had to be met through imports despite the fact that the local producers of fertilizer were operating at more than hundred percent (100%) production capacity. FFC submits that in the year 2009 the Government intends to import about Twenty-Six per cent (26%) of the total demand of Urea.
18. As asserted by FFC, even if about Twenty-Six per cent (26%) of the total demand of Urea is to be imported, the majority of the demand for Urea is met through local production, which according to the Enquiry Report is preferred over imported Urea owing to the continuous supply flow of local production. Therefore, the relevant product market is the Urea fertilizer market.

Relevant Geographic Market

19. As maintained by the Commission in earlier decisions, the geographic market consists of all the areas where there are homogenous conditions of competition. Two areas are said to have homogenous conditions of competition as long as regulation, availability and pricing of the product in the two areas is such that consumers from region A can buy the product from region B, and vice versa, without incurring significant differences in price. As was in the case of LPG, the

local demand for Urea exceeds the local supply of Urea, therefore, there is no scope for exports. As mentioned above, imports on average constitute only about four percent (4%) of the local demand for Urea. Therefore, similar to the case of LPG the business of Urea is largely composed of inland trading. Nothing has even been brought on record to indicate that the product supplied to all four provinces have any significant price differential, in particular by Engro and FFC who have presence in all four provinces. Also, the factors: that Pakistan's economy is heavily dependent on agriculture, the use of the product remains the same, the price of Urea is less likely to be substantially different from one area to the other and that no barriers exist on the movement or transportation of the product, strengthen and support that the relevant geographic market is the whole of Pakistan and the relevant market as defined under the Ordinance, for the purpose of this case is the Urea fertilizer market in Pakistan.

B. Dominant Position

20. Once the relevant market has been determined, it needs to be established that the Undertakings in question, have a dominant position in the relevant market. The Ordinance under Section 2 (1) (e) defines dominant position as follows:

“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 in an appreciable extent independently of competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent;”

21. The Commission in the matter of Karachi Stock Exchange (Guarantee) Limited (the “**KSE Order**”) in the abuse of dominance case, discussed the definition of dominant position in which it was stated that Section 2 (1) (e) has two parts. The first being the presumption of fact and the latter being the presumption of law. The first part of the provision relates to the deeming clause and the dominant position of an undertaking can only be deemed to exist if and only if upon an analysis of the facts it is concluded that an undertaking has the ability to behave, to an appreciable extent, independently of its competitors etc. Therefore, in order to find out whether an undertaking is deemed to be in a dominant position for the purpose of the first part of the above provision, one has to take into account activities of such an undertaking and if after thorough research in this regard it is revealed that such undertaking can act to an appreciable extent independently of its competitors only then it can be deemed/assumed that the undertaking is in a dominant position. We are in agreement with the findings in the KSE Order that the second part of the provision under consideration provides that if an undertaking’s share of the relevant market exceeds 40%, it *shall* be presumed to have the “dominant position”. In the first part of the provision an analysis of facts is required before something is deemed. In the latter part, all that is required is the existence of certain percentage of the market share and after that no further analysis is required. Once you cross the forty percent (40%) threshold, there is only one inference and that is of dominance. The only way of rebutting such a presumption is to prove that a party has less than forty percent (40%) of the share in the relevant market. However, it can always be argued that despite the

- dominant position no abuse or violation in terms of the Ordinance has been committed.
22. The Enquiry Report states that a total number of 7 fertilizer producing companies operate in the fertilizer market of Pakistan and according to the company wise sales figures provided by NFDC the market share in respect of Urea for the year 2008-09 is 52.51% for FFC, 16% for Engro and 9% for DHCL, which makes a combined share of 77.51%.
23. FFC through its written reply to the Show Cause Notice vehemently denied that FFC has the ability to behave to an appreciable extent, or to any extent whatsoever, independently from the customers, consumers and suppliers in the relevant market and that FFC's share in the market is 52.51% as stated in the Enquiry Report. FFC denied the findings of the Enquiry Report in respect of FFC Jordan being a wholly owned subsidiary of FFC and that both FFC and FFC Jordan use a joint distribution network and have a collective share of 52.7% in the Urea market in Pakistan. FFC submitted that the Enquiry Report was probably referring to Fauji Fertilizer Bin Qasim ("FFBL") which is a sister concern of FFC and shares a marketing network with FFC. Furthermore, FFC in its written reply also denied that FFC and FFBL collectively hold 52.7% of the market share of the Urea market in Pakistan. FFC stated that the figures quoted in the Enquiry Report appeared to be computed on the basis of the financial year from July to June, while FFC's financial year runs from January to December. It submitted that for

the year 2008, the market share for Urea (both locally produced and imported) was 43.49% and FFBL's market share was 12.73% and for the first 10 months of 2009, FFC's market share was 40.01% and FFBL's market share was 10.03%.

24. Although FFC has denied the figures relied upon in the Enquiry Report, there is however, no doubt that the market share held by FFC alone according to its own submissions meets the threshold of forty percent (40%) of the market share for the year 2008 and 2009. FFC is presumed to hold a dominant position in the Urea market in Pakistan and this presumption of dominance can only be rebutted if FFC could have shown that the market share of FFC was below forty percent (40%). As for the plea that it does not have the ability to behave to an appreciable extent, or to any extent whatsoever, independently of the customers, consumers and suppliers in the relevant market, it is a misplaced reliance; this test is prescribed for undertakings holding less than forty percent (40%) of the market share, where the onus is on the Commission to establish their dominance. We concur with the observation in the KSE Order in this regard, and are of the considered view that in terms of Section 2 (1) (e) of the Ordinance, the presumption in law is that forty percent (40%) in the relevant market constitutes dominant position; the dominance can not be rebutted except by establishing a lesser share in such market. Such a presumption is similar to those irrebuttable presumptions in law e.g. Section 32 of PPC which states that nothing is an offence which is done by a child of under 7 years of age, based on the presumption that child can do no wrong or has no guilty mind. Also Articles 55 and 128 of the

Qanun-e-Shahadat Order, 1984 are an instance of irrebuttable presumption (Ref: 2009 PCR. LJ 1319). In this regard it may be relevant to refer to the definition of irrebuttable presumption as provided hereunder:

“Irrebuttable or conclusive presumptions (*presumptiones juris et de jure*) are absolute inferences established by law; they are called irrebuttable because evidence is not admissible to contradict them. Thus an infant under the age of seven years is presumed to be incapable of committing a felony, and the presumption cannot be rebutted by the clearest evidence of a felonious intention. (Best Eve. 418 co Litt. 373 a.) Irrebuttable presumptions are more properly called rules of law or fictions of law, according as the fact is presumed is probably true or is known to be false.” *

Also in 1995 PTD (Trib.) 797 it was observed:

“...[A] presumption juris et de jure or an irrebuttable presumption is the one which the law will not suffer to be rebutted by any counter-evidence but establishes as conclusive; while a presumption juris tantum is one which holds good in absence of evidence to contrary but may be rebutted...”

25. Coming now to the market share of DHCL and Engro which is well below the forty percent (40%) mark provided in the second part of the definition of dominant position, in order to determine whether DHCL and Engro hold a dominant position, the first part of the Section 2 (1) (e) would apply and whether on analysis of the facts it may be concluded that DHCL and Engro have the ability to behave, to an appreciable extent, independently of their competitors etc.

* (Ropalje, Stewart and Lawrence, Robert L. A Dictionary of American and English Law with Definitions of the Technical Terms of the Canon and Civil Laws - Volume 1)

26. In the written reply to the Show Cause Notice, DHCL submitted that in the absence of overwhelming empirical evidence which suggests otherwise, to hold a dominant position in a market is virtually impossible with a market share of less than ten percent (10%) and that it must be shown that DHCL has the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers in the whole and not any segment of the market. DHCL stated that the Enquiry reports provides no data or empirical evidence to prove the ability of DHCL to behave in such manner and also ignores the role of the Government as an importer of fertilizer in the relevant market and the ability of the DHCL to behave independently of the Government which is a key player in the relevant market.
27. Engro submitted in its written reply to the Show Cause Notice that as the Government can ensure that demand for Urea is met through timely import of Urea, Engro cannot be said to hold a dominant position at all times.
28. According to the Enquiry Report the local demand for Urea in 2008-09 was about 5.2 million tones per annum and local production was about 4.8 million tones. These figures show that although, local producers of Urea operate beyond their maximum production capacity, the demand for Urea exceeds the local supply, as a result of which Urea is imported by the Trading Corporation of Pakistan (“TCP”) and sold by the distribution network of National Fertilizer Marketing Limited (“NFML”) which is a government owned company. Irrespective of the

need to import Urea to meet the total demand, the majority of the total demand for Urea is met by local supply and also imported Urea is not readily available, therefore, the Urea market in Pakistan is regarded as a captive market. Although, the Undertakings in their replies to the Show Cause Notices deny that the fertilizer market can be regarded as a captive market. Engro particularly submitted that no oligopoly existed in the fertilizer business in Pakistan which consisted of six to seven producers and multiple importers including the Government.

29. In order to assess whether the Urea fertilizer market is a captive market, the concept of a captive market needs to be understood. A captive market has generally been defined in the following manner:

“A market where purchasers are obliged, either through legislation or lack of alternatives, to buy a particular item, range of products or type of securities...”*

“Potential customers who are constrained to purchase a good or service from a particular supplier because of (1) shortages, (2) competitors' high prices, (3) lack of competition, (4) unique feature or benefit of the item, or (5) the seller owning the buying entity.”*

30. In general, a captive market subsists when due to paucity of choice, or other special circumstances, buyers are forced to meet their product or service requirements from a single supplier or a very small group of suppliers who consequently enjoy the economic powers to be able to dictate terms. The essential factors that seem to constitute captive market, in our understanding are where: (a)

* The Language of Money – Edna Carew

* Business Dictionary.com

purchasers are obliged through lack of alternatives to buy a particular product; (b) there is lack or absence of price competition; (c) there is economic viability for the product irrespective of small market share and (d) the undertakings are in a position to dictate prices including other terms and conditions.

31. Generally, a market that has a total number of less than four (4) suppliers is to be regarded as a captive market. In the instant case, there are a total of seven (7) suppliers in the Urea fertilizer market but three (3) of the suppliers in the Urea market hold about 77.51% of the total market share and on average only about four percent (4%) of the total demand for Urea in Pakistan is met through imports. As per the Enquiry Report, TCP imports Urea in accordance with the recommendations of the Fertilizer Review Committee (“**FRC**”) of the Ministry of Food and Agriculture (“**MINFA**”). The FRC is comprised of the fertilizer producers, importers and representatives of MINFA. None of the Undertakings raised any objections in relation to the findings of the Enquiry Report in respect of the role of FRC and the mechanism in place for the import of fertilizers, including Urea. We consider that in light of the procedure in place for the import of fertilizers, Urea will only be imported once the local supply of Urea has been exhausted. Moreover, as much as there may be an increase in import, under the given facts it only reinforces the fact that the demand of the product is more than the supply. This, in our view, by no means places the Government in the position as a strong competitor, *vis-a-vis* the producers. Owing to the limited number of suppliers present in the Urea fertilizer market, notwithstanding the percentage of

market share held by these suppliers as well as the mechanism for import of Urea does not rule out the existence of a captive market in this product.

32. As the number of suppliers in the Urea fertilizer market is limited and the Undertakings hold about 77.51% market share, Urea could be priced by the Undertakings in isolation of the market conditions. However, it has been asserted by FFC and Engro that prices of Urea are not fixed in collusion or consultation with other producers and suppliers of Urea and DHCL in its written reply to the Show Cause Notice submitted that the prices of fertilizer fluctuate due to independent economic factors, such as rise in prices of gas, fluctuation in foreign exchange rate and rise in fuel prices which effect transportation costs. While FFC claimed that prices of Urea and DAP are determined on basis of input and other costs with a view to company profitability, Engro stated that it determines prices of various fertilizers in line with its own business strategies. The Enquiry Report states that the dealers assert that the prices of Urea and DAP are simultaneously increased by the Undertakings and that Engro is the first to increase its prices. This has been denied by the Undertakings which they state that they fix/determine the price at which the dealers have to sell the fertilizer to the growers/farmers but due to excess demand the dealers take advantage of the situation and sell the fertilizer to the growers at a price higher than that determined by the Undertakings.

33. Another factor that may lead to the absence of price competition is that most of the demand for Urea in Pakistan is met through local production which leads to a very low quantity of Urea being imported which in turn means that the relevant market is not affected by the international prices and other market factors that may influence the international price of Urea.
34. The Government of Pakistan also provides the manufacturers of fertilizers, including the Undertakings, a subsidy on feed stock gas which is an essential raw material for the production of Urea, which has the effect of lower costs of production for local Urea manufacturers as compared to Urea manufacturers and suppliers in the international market. Therefore, the prices of locally produced Urea are not competing with the international market prices. The factors mentioned above as well as in the existence of price parallelism, the prices of Urea are clearly not competitive.
35. The third factor, in our view to be considered when determining the existence of a captive market is the ability of undertakings that have a smaller market share to remain economically viable. This means that undertakings even with a lower market share as compared to other undertakings are able to cope with considerable variations in the price of raw materials. An essential feature of the Urea market in Pakistan is the subsidy provided on feed stock gas by the Government of Pakistan to the producers of Urea. This provides producers and suppliers like DHCL, which according to the Enquiry Report and its own

submission only holds about 9% of the market share in respect of Urea sales in Pakistan, to supply fertilizer to the dealers on the same conditions relating to price as FFC and Engro which have much larger market shares.

36. However, a captive market can be said to exist where the undertakings operating in the market provide the product or service on similar commercial terms. This means that the terms seem to be collectively established by the undertakings and no undertaking supplies the product or service on terms independently developed by it. Upon perusal of the agreements, all the Undertakings in Urea fertilizer market seem to have rather similar commercial terms that they bound their dealers to e.g. charging the price prevalent at the date of supply and not the date of the order, not being bound by any time period for the delivery of fertilizers to the dealers and indicating prices that are to be charged by the dealers when selling to the growers.

37. In our considered view, keeping in mind: that there are limited number of suppliers in the Urea fertilizer market, there appears to be no price competition amongst the Undertakings concerned, dictating prices is quite possible, there generally exists a commonality in the terms at which Urea is being supplied to the dealers by the Undertakings and most importantly the fact that demand invariably exceeds the supply of the product in question while the imports remain on the increase; all this makes the Urea fertilizer market clearly captive. Notwithstanding 16% or 9% of the respective shares of Engro and DHCL, the

undertakings are clearly in a position to behave to an appreciable extent independently of competitors, customers, consumers and suppliers. The fact that even the undertakings having smaller market share like DHCL are able to sustain their business irrespective of increase in costs or other factors - is primarily because of the captive nature of the Urea fertilizer market.

C. Practice of Tie-in

38. Clause (c) of sub-section (3) of Section 3 read with Section 3 (1) of the Ordinance prohibits the abuse of dominant position by the practice of tie-in, where the sale of goods or services is made conditional on the purchase of other goods or services. Relevant parts of the above mentioned sections of the Ordinance are reproduced below:

“3. Abuse of dominant position. — (1) No Person shall abuse dominant position.

(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.

(3) The expression "practices" referred to in sub-section (2) shall include, but are not limited to...

(c) tie-ins, where the sale of goods or service is made conditional on the purchase of other goods or services;..”

39. The fact that an undertaking holds a dominant position is not by and of itself a violation under the Ordinance. As mentioned and relied upon in KSE Order, the

Court of First instance in the case of Case 322/81, Michelin v Commission [1983]

ECR 3461, at paragraph 57 held that:

“[F]inding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.”

40. In the case of Bahria University, based on the jurisprudence that has so far emerged, the Commission laid down pre requisites for establishing that practice of tie in exists. The five (5) elements are (a) a tie exists between two separate products; (b) the tying seller has dominant position in the tying product market so as to be able to prevent, restrict, reduce or distort competition in the tied product market; (c) coercion (or forcing) by the seller to purchase the two products; (d) the tie affects a “not-insubstantial” amount of commerce, or forecloses competition to some extent, in the tied product; and (e) the tying seller has some economic interest in the sales of the tied product.

Separate Products

41. Two products are regarded to be separate, if in the absence of the tie-in practice, they would be purchased from different markets.* In this instant case, the tying product is Urea and the tied product is DAP. As Urea is a nitrogen fertilizer and DAP is a phosphatic fertilizer, it is very clear that Urea is not a substitute for DAP or vice versa. The products are not substitutes of each other and they are not

* Bahria University Order

always used as a combination. In many parts of the country the farmers only use Urea and no DAP owing to the reason that DAP is expensive and they cannot afford it. Only 30% of total requirement of DAP is produced locally, while remaining 70% is imported. Anyone is allowed to import DAP and subsidy on its price is rarely awarded, whereas Urea is imported by Government and is distributed through the dealership network of fertilizer producers. Therefore, both of them have separate markets as they are used for different purposes.

Dominant Position

42. As has been discussed and established in paras. 24 and 37 above that the Undertakings have a dominant position in the Urea fertilizer market as they hold a major part of the market share in the Urea market and also as the Urea fertilizer market is a captive market, the Undertakings have the ability to behave in an appreciable extent independently of competitors, customers, consumers and suppliers. Keeping in mind that the Undertakings, have dominant position in the tying product market (Urea market), they are in a position to effect competition in the market of tied product market (DAP market) as DAP is also supplied by the Undertakings through their distribution networks, although most of the total demand of DAP is met through imported DAP.

Coercion

43. For the practice of tie-in to be proved it has to be established that the seller is forcing consumers to purchase both the tying and tied product together, which in this case would be Urea and DAP. The dealers that have complained to the Government of Sindh have alleged that they are forced by the Undertakings to buy a bag of DAP for every 3 to 4 bags of Urea. These allegations have been denied by the Undertakings. Engro submitted that although the Dealership Agreement entered into by Engro with its dealers requires that the dealers purchase specified tonnage of Urea and Phosphates, this does not mean that supplementary obligations have been imposed on the dealers and the rationale for this requirements is to ensure balanced fertilization and also that the Commission has already provided an exemption to Engro in respect of the Dealership Agreement. It also submitted that in the event the demand of Urea is more than the supply, Engro will generally allocate Urea on basis of past performance of its dealers in respect of their off takes of various fertilizers and this practice is not be considered as the practice of tie- in.
44. In order to determine whether the sale of DAP was tied in with the sale of Urea, the Commission requested the Undertakings to submit the statement of accounts for their top fifty dealers for the years 2007, 2008 and 2009. The data received was in the form of an excel sheet displaying the total composition of fertilizer purchased by each of the top fifty traders and the ratio of Urea to DAP was calculated.

45. On analyzing the data, the Commission found that there were certain limitations and data constraints. The sample of fifty top dealers in the case of FFC was not a true representation of the population of traders. The reason for this being that according to the Enquiry Report the bulk of fertilizer consumption takes place in Sindh at 21.3 percent and Punjab at 69.4 percent, whereas Khyber Pakhtoonkhwa accounts for 6.2 percent and Balochistan accounts for 3.1 percent of consumption. These statistics should have been reflected in the sampling technique such that the majority traders in the representative sample operated in the Sindh and Punjab province and a negligible amount from the Balochistan and Khyber Pakhtoonkhwa province should have been included in the sample.

Provincial Distribution of Traders of FFC:

Year	Punjab (traders)	Sindh (traders)	Khyber Pakhtoonkhwa (traders)	Balochistan (traders)	total
2007	27	5	7	11	50
2008	25	10	13	2	50
2009	29	5	12	4	50

The figures computed from the data showed that traders from Sindh (consumption 21.3 percent) are under represented in the sample in the years 2007, 2008 and 2009. While the traders from Khyber Pakhtoonkhwa, (consumption of 6.2

- percent) are over represented in all three years suggesting a bias in the representative sample.
46. Another limitation that was associated with the overall size of the representative samples of both Engro and FFC. Given that there were around 2000 dealers in 2008 of Engro and more than 2000 of FFC, drawing a generalization from a sample of fifty dealers becomes problematic as reliability and accuracy become questionable. In addition to this, the ratios of Urea to DAP calculated for both Engro and FFC are rounded off figures that provide a rough indication as opposed to the precise amount of fertilizer purchased.
47. Since the preliminary data received by the Commission from the Undertakings under represented the Sindh region further data for the years 2008 and 2009 was requested for fifty traders of Sindh.
48. In this regard, we refer to the relevant part of the written reply to the Show Cause Notice submitted by DHCL which is reproduced below:

“The contents of the corresponding paragraph of the Notice are denied. The Report admits that during the year 2008-09, the Company sold Five Hundred Thirty Three Thousand Four Hundred and Sixty (533,460) Metric Tons of Urea (actually Five Hundred and Twenty Nine Thousand Four Hundred and Fifty (529,450) Metric Tons) and only Nine Thousand Five Hundred and Twenty (9,520) Metric Tons of DAP (actually Nine Thousand Five Hundred and Thirty Eight (9,538) Metric Tons); a ratio of about 56:1. Even a cursory glance at these figures reveals that the Company did not practice tie-ins. The month-wise details of the

*sale of Urea and DAP by the Company during 2008-09 period is enclosed as **Annexure-B**. Furthermore, the break-up of the sale of Urea and DAP in the month of July 2008 is also attached as **Annexure E**. In July 2008, the Company sold Sixty Six Thousand Three Hundred and Twenty (66,320) Metric Tons of its own Urea and Nine Thousand Two Hundred and Eighty (9,280) Metric Tons of DAP, still a high ratio of 7:1. Even the dealer wise comparison of the sale of Urea and DAP by the Company in the month of July 2008, proves that there was no tie-in at all by the Company. These sets of figures clearly prove that there was no –co-relation between the sale of Urea and DAP. Furthermore, the Company has not cancelled any dealership on account of refusal to buy Urea and DAP.”*

After reviewing the Annexes, it is clear that even according to the figures provided by the Enquiry Report and the figures submitted by DHCL, the ratio of sale of Urea to DAP for the year 2008-09 comes around to 56:1 and the monthly ratio calculated for July 2008 is about 7:1. It is not clear how a Show Cause Notice was issued to DHCL in respect of abuse of dominance by the undertaking alleging the practice of tie-in. The Enquiry Report itself provides that from the statement of fertilizer dealers, the ratio at which DHCL sells Urea and DAP seems to be 1:1, however, the figures are blatantly otherwise. Mere assertion without *prima facie* evidence could not have resulted in the Show Cause Notice. Hence, issuance of such notice in the instant case was clearly unwarranted and uncalled for.

49. In the case of FFC, it is evident from the data that there is no significant pattern across traders for setting the ratio of Urea to DAP at 4:1. In 2007, eight (8) traders- Faran Traders, Rana Rashid Khad Traders, Raza Traders, Waqar and Co., Qamar and Co., Akram and Sons, Haji Muhammed Ikram and Co. and Arrain

Brothers- out of fifty purchased Urea and DAP at the ratio 4:1 , that is for every four bags of Urea they purchased one bag of DAP. Seven (7) traders purchased Urea and DAP at the ratio 3:1 and sixteen (16) traders purchased Urea and DAP at the ratio 2:1, the remaining nineteen (19) traders purchased urea and DAP in varying proportions ranging from 488:1 to 1:1. In 2008, eleven (11) different traders bought Urea and DAP at the ratio 4:1 these included Tanveer Brothers, Khushboo Enterprises, Maywish Enterprises, Taj Fertilizer Agency, M/S Waheed & Brothers, Waqar and Co, Danish Traders, Zahid Corporation, Anwar-e-Madina, New R.S Fertilizer Agency and Shan Traders. Fifteen (15) traders purchased Urea and DAP at the ratio 3:1 and six (6) traders purchased Urea and DAP at the ratio 2:1. In 2009, there was no significant evidence of traders purchasing Urea at the ratio 4:1 either as only one (1) trader purchased Urea and DAP at this ratio, while seven (7) traders purchased at the ratio 8:1 and another seven (7) purchased at the ratio 7:1 and five (5) purchased at the ratio 9:1 suggesting an increase in demand for Urea compared to 2007 and 2008.

50. Even the data submitted by Engro did not show a clear indication of traders setting the ratio of Urea to DAP at 3:1 in making purchases. In 2008, only two (2) traders- JDW Sugar Mills and Venus Chemical Pvt. Ltd- out of fifty (50) purchased Urea and DAP at the ratio 3:1. In 2009, the number of traders purchasing Urea at 3:1 increased to ten (10) including Khalool Zari Services, Sughnichand Fertilizer Agency, Haji Munir Ahmed & Bros, New Shahdani Fertilizer, Jawaharlal Fertilizer Agency, Habib & Company, Sacho Satram

Fertilizer Agency, Kumar Fertilizer Agency, Atumal & Sons and Jafria Traders. Ten (10) traders purchased Urea at the ratio 4:1 and nine (9) traders purchased Urea at the ratio 5:1. Hence, no significant pattern can be concluded from the data obtained from Engro for the years 2008 and 2009.

51. The new data obtained from FFC and Engro was also analyzed to find evidence of the purchase of Urea and DAP at the ratio 4:1 and 3:1. However, it was found that the data was non indicative of any such pattern.
52. In light of the conclusion drawn from the analysis of the data relating to the sale of Urea and DAP, irrespective of the claims made by the distributors in respect of tying in of sale of DAP with Urea, it cannot be substantiated that the Undertakings coerced or mandatorily tied the purchase of Urea with DAP for the distributors.
53. In our considered view, the pre-requisites that need to be met in order to establish the practice of tie-in under Section 3 (3) (c) have not been satisfied. Even apart from coercion factor, since the alleged practice of tying the sale of Urea with DAP is not made out from the evidence, there seems to be no proof that the same substantially affects the amount of commerce or forecloses competition in the DAP market.

D. Unfair Trading Conditions

54. As the Undertakings hold a dominant position in the relevant market, it needs to be determined whether the Undertakings imposed any unfair conditions on the distributors when selling Urea and DAP and whether they make the conclusion of the distributor agreements subject to acceptance by the distributors of supplementary obligations which by their nature or commercial usage have no connection with the subject of the contracts between the Undertakings and the distributors. Section 3 in its relevant parts reads as under:

“3. Abuse of dominant position.- (1) No person shall abuse dominant position...

(3) The expression “practices” referred to in sub-section (2) shall include, but are not limited to -

(a) limiting production, sales and unreasonable increased in price or other unfair trading conditions;..

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of the contracts;..”

55. The distributors complained of the practice of the Undertakings to change the price of the fertilizers from the date of order to the date of delivery, the delayed supply of the fertilizers and the practice of taking payments in advance. The Commission was also informed by the distributors that they did not have a copy of the Dealership Agreements entered between the distributors and the Undertakings.

56. DHCL submitted that the receipts issued to the dealers state that the dealers would be charged the rate prevalent at the date of delivery and that the dealers made advance payments voluntarily and were aware that DHCL was not bound to deliver the fertilizer within any specified period of time. A copy of the receipt issued to the dealers was attached with the reply submitted by DHCL which set out the terms of pricing and delivery at the back. These appear to be the commercial terms to be decided inter se the parties. The element of abuse is not evident to us in the given facts. Hence, no violation with regard to imposition of unfair trading condition can be said to have been committed on part of the undertaking concerned.

57. Engro submitted that the standard Dealer Agreement entered between Engro and its dealers required the dealers to purchase certain quantities of fertilizers with a view to promoting balanced fertilization and that Engro had obtained an exemption in respect of such standard Dealer Agreements from the Commission. The Commission on May 2, 2008 granted an exemption in respect of the standard Dealer Agreement submitted by Engro, pursuant to the powers conferred under the Ordinance from the provisions of Section 4 of the Ordinance. . We consider it relevant to point out that while the present exemption is valid till February 2011 and the way the agreement is structured/worded, the competition concerns may not be that evident. However, in view of the fact that Engro itself has admitted in its application for exemption that it “...obligates the dealers to buy different kinds

of fertilizers in specific quantities as these fertilizers when used together have a greater chance of ensuring balanced fertilization. This in turn results in the end consumers – the farmers – producing better crop and improving production yields, which is to their benefit and to the overall benefit of the agricultural sector. To improve yields of crops, three types of fertilizers are required, namely Nitrogenous (Urea), Phosphatic (DAP & MAP) and Potassic (MOP, SOP & NPK). Balanced use of these three is being promoted by the Government of Pakistan. Infact, the Government is providing subsidy for Phosphatic and Potassic fertilizers.” In view of this intent express in the application, the tie-in of two distinct products is certainly envisaged and could be imposed through the agreement. We are a little disturbed that this was not addressed by the Commission through an appropriate conditionality at the time exemption was granted.

58. The explanation provided by Engro that it promotes balanced fertilization by requiring dealers to purchase certain quantities of Urea and DAP, is not a valid, in our considered view, reason for any such imposition. We fail to understand how requiring dealers to purchase balanced quantities of Urea and DAP ensure balanced fertilization by farmers. Moreover, it seems to be beyond their mandate. Therefore, this needs to be suitably dealt with when any extension is considered. We also consider it relevant to point out (although this is not subject of the proceedings) that the provision pertaining to maximum price where, under the agreement, the dealers are not merely acting as agents for the producers but

purchasing the same as buyers and are still subject to the price dictated by the company raises competition concerns that need to be addressed at the time of grant of extension (if any). Similar clause exists under the Dealership Agreement of FFC which calls for scrutiny by the department concerned.

59. The terms of Clause 3 of the standard Dealership Agreement entered into between FFC and its dealers which is reproduced below:

“The dealer shall purchase from the company in each calendar year; during the term of this Agreement, such minimum quantities of the products which the company may from time to time specify. This minimum quantity may, at the request of either party be reviewed and adjusted at the end of each year as the parties may mutually agree upon.”

Notwithstanding the fact, that no empirical evidence has come across from the data for tie-in of Urea with DAP; we have no doubt that such a clause duly empowers producers/suppliers to impose and/ or tie-in different products for purchase by the dealers. FFC is therefore, required to remove the anomaly to the satisfaction of the Registrar of the Commission with immediate effect in the continuing Agreements. The fact that the dealers have to pay producers in advance for any orders made but are liable to be charged prices prevalent on the day of invoice, that they have the authority to vary the price any time before the date of dispatch, that they are not bound by any time period in respect of delivery of the fertilizers and may also cancel an order at any time before acceptance - are all terms that may individually appear to be commercial terms mutually agreed

between the parties. However, the clubbing of all these onerous provisions is rather peculiar, and suggests a situation of economic power being abused. In the given facts, while such provisions taken together may smell foul, these may not *per se* constitute the basis of abuse with competition concerns and would need to be examined further at the investigation level.

60. It has already been stated above that from the records made available to the Commission by FFC and Engro, there is no pattern established which indicates the tie-in of the sale of DAP linked with the sale of Urea.

61. It has been brought to our notice that Show Cause Notices were erroneously issued to Fatima Fertilizer Company Limited and Azgard Nine Limited which were later withdrawn. The reason for the erroneous issuance of the Show Cause Notices was that the Enquiry Report does make reference to Pak-Arab Fertilizer as part of the Fatima Group but through out the Enquiry report reference has been made to Fatima Fertilizer Limited which is in the process of setting up its fertilizer plant but has not started production. In the case of Pak-American Fertilizer, it has only been mentioned as the plant of Azgard Nine Limited situated in Daudkhel, which resulted in issuance of show cause notice to Azgard Nine Limited which is a textile producer and not a fertilizer producing company. Since, these Show Cause Notices were prima facie to be issued to Pak-Arab Fertilizer and Pak-American Fertilizer, respectively, we direct that the concerned department should benefit from the findings of this Order and first call for

information from the undertakings concerned to verify its findings in terms of this Order.

62. The subject show cause notices are disposed of in terms of this Order.

KHALID A. MIRZA
Chairman

RAHAT KAUNAIN HASSAN
Member (Legal)

Islamabad the July 23, 2010