



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

**IN THE MATTER OF SHOW CAUSE NOTICE ISSUED TO
M/S JCR-VIS CREDIT RATING COMPANY LIMITED FOR
ALLEGED VIOLATION OF SECTION 3 OF THE COMPETITION ACT, 2010**

(File No. 67/PACRA/C&TA/CCP/2016)

Dates of hearing: 15.11.2016
24.01.2017

Adjudicating Members: Dr. Shahzad Ansar
Member

Mr. Ikram Ul Haque Qureshi
Member

On behalf of M/s Pakistan
M/s. JCR-VIS Credit Rating Company

Mr. Ijaz Ahmed, Advocate Supreme Court
Mr. Habib Ahmed, Advocate
Mr. Akhalq Ahmed, Advocate
Mr. Mahmood Ashraf

**M/s Pakistan Credit Rating Company
Agency Ltd**

Rahat Kaunain Hassan, Advocate
Hassan Kaunain Nafees

Ms. Gulalay Zeb, Advocate
Hassan Kaunain Nafees, Advocate

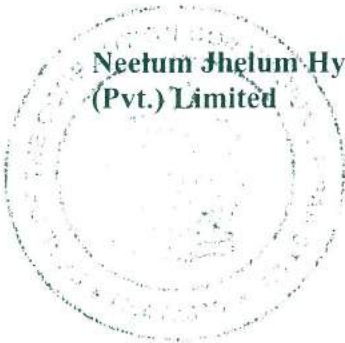
Mr. Adnan Afaq, Managing Director

Ms. Humera Jamil, Compliance Officer

Mr. Hamza Hussain

**Neelum Jhelum Hydropower Company
(Pvt.) Limited**

Mr. Shakeel Ahmd
Additional DG (Finance)



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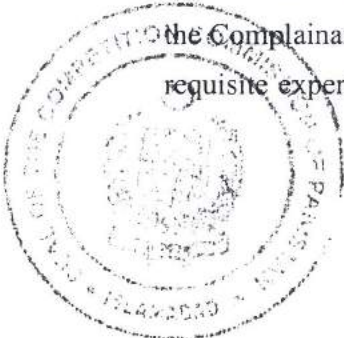
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Order

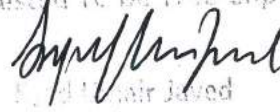
1. This Order shall dispose of the proceedings initiated pursuant to Show Cause Notice No. 22 of 2016 dated 15.07.2016 (the 'SCN') issued to M/s JCR-VIS Credit Rating Company Limited ('JCR' or the 'Respondent') for, *prima facie*, violation of Section 3 of the Competition Act, 2010 (the 'Act').
2. The SCN was issued pursuant to the Enquiry Report dated 01.07.2016 (the 'Enquiry Report'), wherein an enquiry was carried out after a Complaint filed by M/s Pakistan Credit Rating Agency Limited ("PACRA" or the 'Complainant') on 19-04.2016 under Section 37(2) of the Act.

The Background

3. The Complainant has alleged that the credit rating award to the Respondent dated 23.06.2016 for a sum of PKR 1,100/- (the 'Impugned Bid') for the proposed issue of Sukuk comprising of PKR 100 billion by Neelum Jhelum Hydropower Company (Private) Limited ('NJHPC') is too low or below the cost bidding in contravention of Sections 3 and 4 of the Act.
4. In the Impugned Bid, both the Complainant and the Respondent participated in procuring credit rating assignment for Sukuk issue of PKR 100 billion by NJHPC. The Complainant quoted PKR 7.22 million, whereas the Respondent quoted a total of PKR 1,100 (an initial fee of PKR and surveillance fee of PKR 100 per annum) for the rating assignment spanning 10 years.
5. The Complainant alleged that the token bid by the Respondent is devoid of any legitimate business justification or lacks a commercial sense thereof and was solely made to oust its competitor from the bidding. The Complainant further alleged that the Respondent has acted in contravention of Section 4 and since the bid is far too low, it also amounts to predation in violation of Section 3 of the Act.
6. The Complainant further alleged that in the initial bid carried out for the same project, the Complainant had been awarded the assignment for being the lowest bidder and having the requisite expertise rating projects of such a magnitude. However owing to certain procedural



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irregularities by NJHPC alleged by the Respondent, the award was cancelled and rebidding was announced which then resulted in the aforementioned situation.

7. On the basis of the above-mentioned allegations, the Commission initiated an enquiry on 20.04.2016 pursuant to Section 37(2)¹ of the Act and appointed officers (the 'Enquiry Committee') to investigate the matter for possible violations of provisions of the Act.

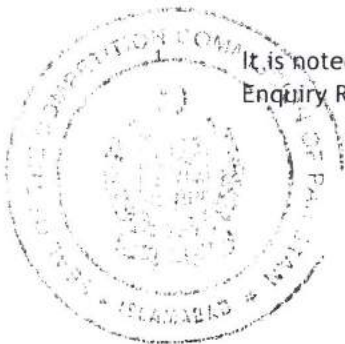
8. The Enquiry Committee thereby corresponded with the Respondent and NJHPC seeking their comments/submission with respect to the allegations made in the Complaint. NJHPC was specifically directed to furnish details in respect of both rounds of bidding.

9. A perusal of the information received revealed that even though the initial bidding resulted in the rating mandate being awarded to PACRA, there was a clear difference of opinion as to who was the lowest bidder from amongst the evaluators within the procuring entity i.e. NJHPC, for the foremost whether or not certain taxes being included in the calculations. Furthermore, even though financial experts representing the NJHPC were of the opinion that the Respondent was the lowest bidder, calculations by WAPDA however, showed, PACRA to be the lowest bidder. To address the allegation levelled by the Respondent, a Grievance Redressal Committee (GRC) was formed and the Complainant's contract was cancelled in favour of a fresh bidding which was called under the Public Procurement Rules.

10. Before the second round of bid, NJHPC vide its letters dated 08.12.2015 communicated to the Complainant and the Respondent that *"The earlier quote dated 29.09.2015 is quite on the higher side, therefore in view of the budgetary constraints besides national importance of the Project, we anticipate that you will provide your services at bare minimum cost"*. A fresh invitations to bid were issued on 08.03.2016 in response to which the Respondent submitted the bid of a total cost PKR 1,100, whereas the Complainant quoted PKR 7,220,000.

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It is noted that Section 37(1) of the Act was erroneously referred in paragraph 3 of the Enquiry Report.



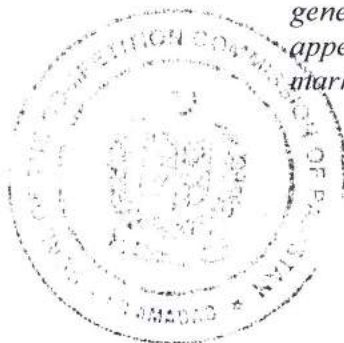
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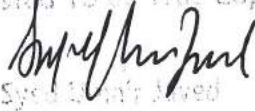
11. Based on the above information and submission of the parties to the bid, the Enquiry Committee observed that *"the general approach with regards to predatory pricing is that prices are assumed to be predatory if they are below average variable costs. In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking. Secondly, prices below average total costs but above average variable costs are only to be considered abusive if an intention to eliminate can be shown"* (para. 38).

12. In line with the above observation, it was concluded that *"by JCR's own admission it was submitting a bid that did not reflect its cost and rather it was submitting a token bid. It is noted that PKR1,100 for credit rating over a period of ten years is insufficient to cover JCR's cost and the sum is so nominal so as to assume that it is below its average variable cost. As for the JCR's claim that it has quoted such a low bid in consideration of this project bearing national importance, the question arises as to why JCR did not quote such a low price or something close in the earlier bidding and whether the same was an afterthought to justify it's almost free offer. Based on the standard for predation, the bid amount submitted by JCR is without any shred of doubt below its average variable cost which could have no other economic purpose but to eliminate a competitor"* (para. 42). It is, therefore, the Enquiry Report proposed that the Commission may consider initiating proceedings against the Respondent for a *prima facie* violation in terms of subsection 3(3) (f) read with subsections 3(2) and (1), which constitute a violation of Section 3 of the Act. Consequently, the SCN was issued to the Respondent wherein it was required to respond in writing within fourteen (14) days, as well as to appear before the Commission on 02.082016 to avail the opportunity of being heard and place facts and materials in support of its contentions. The relevant portions of the SCN are reproduced below:

“5. *AND WHEREAS, in terms of the Enquiry Report in general and paragraphs 23-31 thereof in particular, the market for provision of credit rating services in Pakistan has been identified as the 'relevant market' in terms of Section 2(1)(k) of the Act;*

6. *AND WHEREAS, in terms of the Enquiry Report in general and paragraphs 32-35 thereof in particular, it appears that the Undertaking is dominant in the relevant market;*



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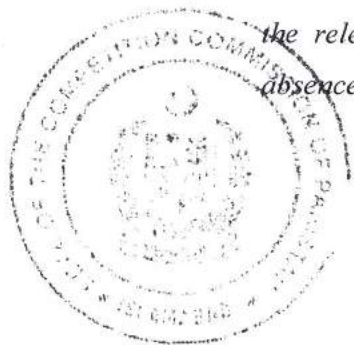
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7. *AND WHEREAS, in terms of the Enquiry Report in general and paragraphs 36-43 thereof in particular, the submission by the Undertaking of a token bid of PKR 1,100 for a rating assignment regarding Sukuk issue of PKR 100 billion for NJHPC is prima facie predatory in terms of Section 3(3) (f) read with Section 3(2) which constitutes a violation of Section 3(1) of the Act;"*

The Submissions

13. On 16.08.2016, the Respondent filed its written reply to the SCN and subsequently, made its submissions, along with the Complainant during the course of the hearings before the Commission on 15.11.2016 and 24.01.2017. In the second hearing, NJHPC was also called upon to make, *inter alia*, its submission with regard to the both rounds of the bids.-A combined summary of the submissions made by the parties during the conduct of the enquiry as well as thereafter up to the hearings before the Commission is as follows:

- i). *The Complainant contended that the relevant market is that of "credit rating services" in Pakistan and consists of only two market players i.e. PACRA and JCR, hence it takes the form of an oligopolistic market.*
- ii). *The Respondent, however, submitted that the relevant market with respect to NJHP is the credit rating assignments for debt instruments within the public sector only.*
- iii). *The Complainant averred that the Respondent's market share in the credit rating services market is 45 percent based on the spread of ratings done by the Respondent. Furthermore, in accordance with Section 2(1)(e) of the Act, the Respondent is a dominant undertaking and has the ability to behave to an appreciable extent independently of its competitors, customers, and consumers.*
- iv). *The Respondent denied that its market share is less than 40 percent because the relevant market is that for public sector credit rating services. In the absence of a dominant position, the issue of breach of Section 3 of the Act*



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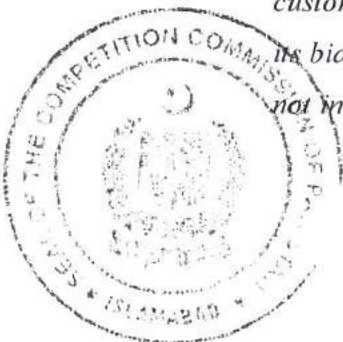
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does not arise at all. It was submitted by the Respondent that its share in the relevant market was zero prior to the NJHPC mandate, using the standardized method for computing market shares in the market for public sector bonds. It further submitted that the Enquiry Report's finding that the Respondent has a dominant position is against the letter and spirit of the Act, as the Respondent being the smaller market participant cannot be treated as dominant undertaking when compared to the Complainant. The Respondent claimed that the threshold indicated in the definition of the term "dominant position", in Section 3 of the Act has no relevance or application to the present case, as its literal interpretation and application would negate the very purpose for which the Act was promulgated.

v). In relation to abuse, the Complainant submitted that where prices are unreasonably low or below costs by means of which a dominant undertaking seeks to eliminate competitors, such conduct is prohibited under Section 3 of the Act. In line with this submission, it was further contended that the Respondent's act of bidding as low as it did, is abusive in itself and is predation with the sole objective of obtaining the mandate from NJHPC and excluding the Complainant. Such behaviour has potential to distort competition as well as harm customers and consumers in violation of Section 3(3)(b), 3(3)(e), 3(3)(f) and 3(3)(g) of Section 3 of the Act. In this regard, the Complainant contended that it won the award in the first round because the Respondent had quoted higher rates, the Respondent's offer for a token charge/ fee in the second round is an outright attempt to undercut and exclude the competitors in an unfair and unjust manner. The Respondent's conduct to win the bid tantamount to securing undue benefit for itself. Furthermore, the Respondent's quotation is devoid of any legitimate business justification.

vi). On the other hand, the Respondent submitted that while the Complainant was successful in the initial bid, the process of this award was cancelled by the customer i.e. NJHPC. The Respondent has submitted that it is confident that its bid was lower in the initial round too. Moreover, in the second round, it did not intend to undercut its own initial bid and in its own estimation, it was also



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a fair bid. With regard to predatory pricing, the Respondent submitted that the token price quoted to NJHPC was for the sole reason of working on a project of national importance on a pro bono basis and it had not engaged in any anti-competitive practice. With specific reference to Section 3(2) of the Act, the Respondent submitted that the real question to be addressed was whether there existed any "practices" which prevented restricted or distorted competition in the relevant market. It further stated that there was no allegation of any such practice and that a single instance, even if assumed to be predatory pricing, cannot constitute "practices" for the purposes of Section 3 of the Act. In addition, it was submitted that the Enquiry Report has failed to consider the necessary ingredients of Section 3(2) and Section 3(3) in terms of preventing, restricting, reducing or distorting competition in the "relevant market" and "driving competitors out of the market, prevent new entry and monopolise the market".

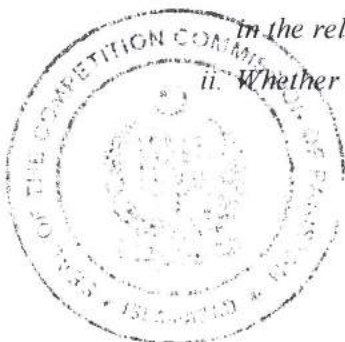
- vii). *The Complainant submitted that it had shared its concerns with NJHPC as to the lack of commercial sense in the Respondent's bid as the price quoted may result in a potential conflict in executing the assignment at par with other commercially executed assignments.*

- viii). *With regard to "commercial sense," the Respondent stated that rating agencies are geared to undertake assignments that may not have any bearing on profitability. It was further submitted that works of significant national importance and others are often undertaken without any fee consideration and that the Complainant too had reduced its cost to 50% from its initial bid.*

Issues

14. The material issues that emerge from the facts and submission made by the parties are as follows:

- i. *What is the relevant market and whether the Respondent holds a dominant position in the relevant market; and*
- ii. *Whether the Respondent has acted in contravention of Section 3 of the Act?*



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Analysis

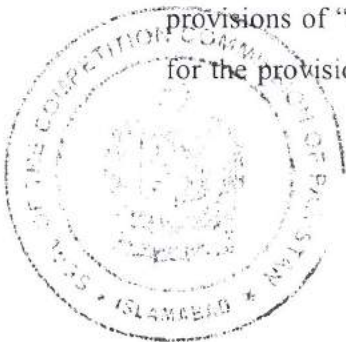
15. To examine an alleged abuse of dominant position, it is imperative to delineate the relevant market. Section 2(1)(k) of the Act provides:


*“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 of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products’ characteristics, price 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 condition of competition are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas because, in particular, the conditions of competition are appreciably different in those areas;”*

16. In Pakistan, Credit Rating Agencies (**CRAs**) are regulated by the Securities and Exchange Commission of Pakistan (the **SECP**) under the Credit Rating Companies Rules 1995, the Code of Conduct of Credit Rating Companies/Agencies 2014 and the Credit Rating Companies Regulation 2016 (the ‘**Regulations**’). Regulation 2(1)(b) of the Regulations provides that “*credit rating means a process of evaluating the creditworthiness of a person which expresses its ability or willingness to meet financial obligations in full and on time”.* In the matter at hand, the assignment pertains to the credit rating of debt instruments i.e., ‘Sukuk’ of PKR 100 billion to be issued by NJHPC.

17. PACRA is known to have rated a maximum number of entities and their credit instruments, including those engaged in the energy/ power sector in Pakistan. In relation to the Sukuk to be issued by NJHPC, the knowledge of the hydropower sector and prior experience might be an important consideration in the methodology of credit rating for all purposes, including *inter alia* debt instruments issued by these entities is essentially the same.

18. Accordingly, the ‘relevant product [or services] market’ is determined as the provisions of “*credit rating and other allied services*”. Further, it appears that the conditions for the provision of credit rating services in the entire country are uniform and homogenous



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as there are no barriers within the territory of Pakistan in terms of geographic location for the competitors, customers, and consumers. Thus the relevant geographic market consists of the whole of Pakistan.

19. With regard to a “dominant position”, Section 2(1)(e) of the Act provides:

“Dominant position” of one undertaking or several undertakings in a relevant market *shall be deemed to exist if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers* and position of an undertaking *shall be presumed to be dominant if its share of the relevant market exceeds forty percent.*”S

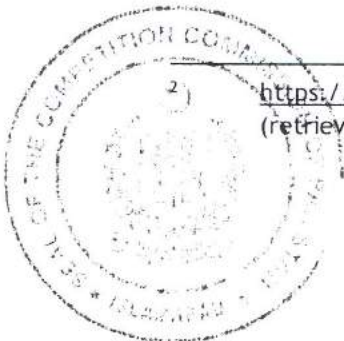
20. According to the SECP, there are two agencies, i.e., PACRA and JCR are engaged in the business of credit rating in Pakistan². Therefore, the market for credit rating in Pakistan is highly concentrated. It is a duopoly and both PACRA and JCR are providing their services in all categories of ratings such as entity rating, instrument rating, infrastructure project rating, real estate grading, corporate governance rating and financial risk assessment.

21. The Complainant has submitted that PACRA and JCR have market share of 55 percent and 45 percent respectively. Through its submissions, JCR has disputed its market share in the “relevant market”. It has argued that its market share in the “relevant market” should be assessed in the sub-segment of Sukuk or Term Finance Certificate or similar kinds of debt instruments in which it has no market share.

22. In the matters of M/s Karachi Stock Exchange (Guarantee) Limited (2009) and in M/s Jamshoro Joint Venture Limited (JJVL) & LPG Association of Pakistan (2009), the Commission has explained that the concept of “dominant position” envisaged under Section 2(1)(e) is twofold:

a. *the first relates to “presumption of fact”, wherein dominant position of an undertaking “shall be deemed to exist” if the facts of the case imply that the undertaking has the ability to behave, to an appreciable extent, independent of its competitors, customers, consumers, and suppliers. Where*

<https://www.secp.gov.pk/document/list-of-credit-rating-companies-in-pakistan/>
(retrieved on 23 January 2016)



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the facts reveal that the undertaking(s) has acted to an appreciable extent independent of its competitors, customers, consumers, and suppliers, it would be safe to assume that the undertaking(s) has dominance in the relevant market.

b. the second part relates to a 'presumption of law' which provides that where the undertaking(s) share exceeds 40 percent, it shall be presumed to have 'dominant position'.

23. The Court of Justice of the European Union in Case C-62/86 Akzo Chemie BV v Commission of the European Communities (1991) [hereinafter, Akzo Case] has explained that:

"4. In examining the possibility of dominant position of an undertaking in a particular market, the possibilities of competition must be judged in the context of market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products.

5. Save in exceptional circumstances, very large market shares are in themselves evidence of the existence of a dominant position. That is the case where there is market share of [50%]³."

24. In view of the above, the Commission is of the considered opinion that dominant position of the undertaking(s) does not solely flow from a market share that is lesser or greater than the 40 percent threshold. As noted above, the relevant market is characterized by a tight oligopoly i.e. it is a duopoly and is highly concentrated.

25. The Commission is of the considered opinion that both PACRA and JCR hold dominant position and are, therefore, in a position to behave to an appreciable extent independently of their competitors, customers, consumers and suppliers irrespective of their market share irrespective of their market share in the relevant market.

In contrast to the statutory presumption of 40% envisaged under Section 2(1)(e) of the Act, the European Commission and CJEU have used the market share of 50%, 40-45% range, less than 40% in Akzo case, United Brand case, and Virgin/British Airways case.



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26. On the issue of alleged abusive conduct by the Respondent, it is observed that the Complainant has made diverse allegations ranging from unfair, discriminatory and exclusionary conduct, including the predatory pricing to outset the Complainant from the relevant market. The Enquiry Report has synthesized the allegations into “predatory bidding” or “predatory pricing” mentioned in subsection (f) of Section 3(3) of the Act. Furthermore, the Enquiry Report has concluded that “predatory pricing” by a dominant undertaking may amount to an abuse of dominant position under certain circumstances and a contravention of Section 3 of the Act. For reference, the relevant parts of Section 3 are reproduced herein below:

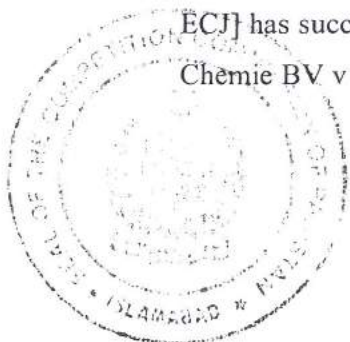
*3. Abuse of dominant position.—(1) No person shall abuse dominant position.
(2) An abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restrict, reduce or distort competition in the relevant market.
(3) The expression “practices” referred to in subsection (2) shall include, but not limited to—
(f) predatory pricing driving competitors out of a market, prevent new entry, and monopolize the market;*

27. It is pertinent to mention that Section 3 of the Act provides a non-exhaustive and illustrative list of abusive conducts. The Commission may take cognizance of other forms of abuses that are not outlined in Section 3. Having a dominant position in the relevant market is not condemned by itself.

28. The term “practices” used in Section 3 includes practice or conduct or a single time infringement as its core objective is to assess whether the conduct of a dominant undertaking in the relevant market is aimed to impair or distort competition in the relevant market.

29. The concept of predatory pricing comprises not only of “predatory prices,” but also strategies and exclusionary conduct by the dominant undertaking(s). There is no requirement that the alleged infringement of Section 3 must have been repeated until the eventual closure of the competitor from the relevant market.

30. The Court of Justice of the European Union (CJEU) [ex. European Court of Justice or ECJ] has succinctly stated the approach to assessing predatory pricing in Case 62/86 AKZO Chemie BV v Commission [1991] ECR I-3359 [hereinafter, Akzo Case] as follows:



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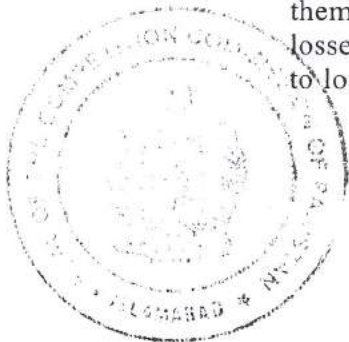
31. The Court of Justice of the European Union (CJEU) [ex. European Court of Justice or ECJ] has succinctly stated the approach to assessing predatory pricing in Case 62/86 AKZO Chemie BV v Commission [1991] ECR I-3359 [hereinafter, Akzo Case] as follows:

"71. Prices below average variable costs, that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitor so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of fixed cost (that is to say, those which remain constant regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced.

72. Moreover, prices below average total cost, that is to say, fixed costs plus variable costs must be regarded as abusive if they are determined as a part of a plan for eliminating a competitor. Such prices can derive from the market undertakings, which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them."

32. Based on the above, in Akzo Case the CJEU has essentially sanctioned two mutually exclusive tests to determine if the conduct of the undertaking(s) does amount to predation contravention:

- i). first, prices '**below average variable costs**' must always be considered abusive. The rationale behind the test is there being no conceivable economic objective, but for, simply ousting a competitor out of the market.
- ii). second, prices '**below average total costs but above average variable cost**' are only to be considered abusive if an intention to eliminate can be shown. In relation to 'predatory intention,' CJEU has linked the fact that the prices or pricing strategy is 'part of a plan for eliminating a competitor'. In Case T-83/91, Tetra Pak International SA v Commission of the European Communities (1994), wherein the accounting data showed that the company had been engaged in importing products merely to resell them below cost in the targeted areas and therefore deliberately incurring losses. The CJEU observed that to determine predatory 'intent' one needs to look into "a whole series of important and convergent factors [whether



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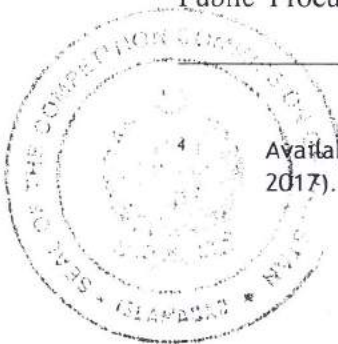
they] provide evidence of the existence of an eliminatory intent. Such intent is apparent in particular from the duration, the continuity and the scale of the sales at loss made [over a period of time].”

33. In simple terms, predatory pricing refers to a strategy or a price charged by the dominant undertaking(s) that are not market-related but below that what is to be expected of a market price.

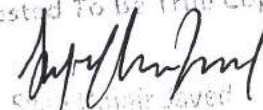
34. It has also been averred by the Complaint’s Counsel that the rating of NJHPC’s proposed Sukuk of PKR 100 billion was called for through a competitive bidding, which essentially is the case of solicited rating. The credit rating agencies do not issue any *pro bono* ratings. If they do so, it is unsolicited *i.e.*, that are not initiated at the request (and in cooperation with) the relevant issuer or rated entity. An unsolicited rating should be clearly differentiated from solicited rating, in particular, where the issuer or rated agency is seeking to rate through the award of a bid in the public sector.

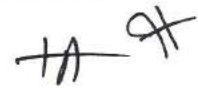
35. JCR’s schedule of rating fee⁴ prescribes that for long-term corporate debt instruments, among others, terms finance certificates, Sukuk, etc., for an instrument amounting up to PKR 01 billion, it charges a minimum of PKR 300,000. For long-term debt instrument of over PKR 15 billion, it charges PKR 3,600,000 plus 0.75 bps of the amount exceeding 15 billion. In addition, same fees are charged for both initial rating and the surveillance.

36. According to the record of bidding titled “Award of Rating Assignment to JCR-VIS Credit Rating Company Ltd. Through Bidding for the Proposed Sukuk Issued of Rs. 100 Billion by Neelum Jhelum Hydro Power Company” dated 24.05.2016; there have been two separate rounds of bidding. In the first round, both PACRA and JCR participated in the bid to procure the assignment. JCR submitted a bid of PRK 15.077 million, whereas PACRA submitted for PKR 14.95 million. The assignment was awarded to PACRA on account of it being the lowest bidder on 01.02.2016. JCR preferred to file an appeal before the NJHPC’s Grievance Redressal Committee (GRC). On 03.03.2016, GRC evaluated the appeal under the Public Procurement Rules 2004. On 08.03.2016 a joint meeting of NJHPC management,



Available at: http://www.jcrvis.com.pk/docs/rating_Fees.pdf (retrieved on 25th January 2017).

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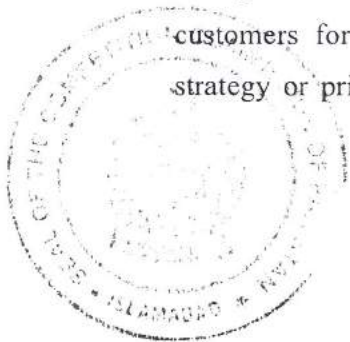

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PACRA and JCR was held to deliberate upon the GRC report. It was resolved that the rating mandate awarded to PACRA may be cancelled and fresh bidding may be carried out. To carry out afresh bidding, the detailed procedure was set out/agreed, during that meeting and incorporated in the letters dated 08.03.2016, which invited fresh bids. On 14.03.2016, as per the agreed procedure, PACRA and JCR submitted fresh bids. On 15.03.2016, bids were evaluated by the Bid Evaluation Committee and its findings report/ results were communicated to the parties. On 26.03.2016, NJHPC awarded rating mandate to JCR according to which JCR would carry out the assignment extensively for the proposed Sukuk of PKR 100 billion to be issued by NJHPC. It noted that in the second/ final round of bid, PACRA quoted PKR 7.22 million, which was approximately 51% lower than its initial bid, whereas JCR quoted PKR 1,100, which was as low as 99.99% as compared to its initial bid.

37. During the hearing, JCR's Counsel has stated that the reason for the drastic reduction of its price is because it intends to carry out the Assignment on a *pro bono* and on a national/public interest basis.

38. However, as noted above, the Complainant's Counsel has rightly pointed out, amongst others, that it is the case of a solicited credit rating. From the JCR's prescribed fee schedule and credit rating market perspective, neither does the bid of PKR 1,100 for Sukuk of PKR 100 billion appear to have a legitimate/ objective justification, nor does it directly or indirectly suggest any viable commercial sense. Therefore, it is very obvious that JCR has intentionally priced the assignment below its average variable cost, which itself suggests that there exists an exclusionary abuse in the form of anticompetitive predations in violation of subsection 3(f) read with subsections 3(1) and (2) of Section 3 of the Act.

39. From the antitrust/ competition law perspective, the Commission finds that in the credit rating market in Pakistan, debt issuers have no choice but to request rating either from PACRA or JCR in exchange for a fee. The relevant market is characterized by a high degree of concentration. Needless to reiterate, it is a duopoly and both Undertakings had been indulged in a parallel behaviour by cutting their prices in each successive round of bid, which finally has resulted into an exclusionary conduct by the Respondent. Pricing low to woo customers for a short while may not constitute abuse under the Act. However, pricing strategy or pricing below the average variable costs with no objective justifications are in



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Registrar
Competition Commission of Pakistan
Government of Pakistan
Islamabad.

themselves unequivocally predatory and abusive under the Act. Such conduct(s), if left unchecked, are likely to result in the exit of either of the competitors, resulting in anticompetitive monopolization and ultimately harm to the customers and consumers. With regard to the aim of maintaining undistorted competition, the CJEU in Case C-333/94 Tetra Pak International SA v Commission of the European Communities (1994) has 'rule[d] out waiting until such a strategy leads to the actual elimination of competitors.'

40. The Commission is of the considered opinion that the final bid submitted by the Respondent reflects a predatory pricing strategy. The Respondent has failed to provide a viable commercial sense or any objective justification in terms of efficiency gains for the same. The credit rating sought by NJHPC is essentially solicited for which it had called for a competitive bidding. The Commission finds no merit in the Respondent's argument that its quotation of PKR 1,100 is a *pro bono* and in the national interest.

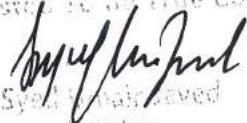
41. Structurally speaking, "predatory bidding" is similar to "predatory pricing". Section 3 of the Act outlaws the conduct of a dominant undertaking which harms the competitive structure of the markets by resorting to a strategy which has the potential of foreclosing or eliminating the competitors, or other economic partners i.e. customers or suppliers in the related markets. Such exclusionary conduct(s) ultimately weakens the competition and harm consumer welfare. If such practices are allowed on the grounds of a *pro bono* and national interest as having been put forward by JCR, the strategy may result in harm to competition with the elimination of specific undertaking, which is likely to trigger financial instability. Having said that, the Commission concludes that the Respondent has been engaged in predatory pricing in contravention of subsection 3 clause (f) read with subsection 3(1) and (2) of Section 3 of the Act.

Remedies

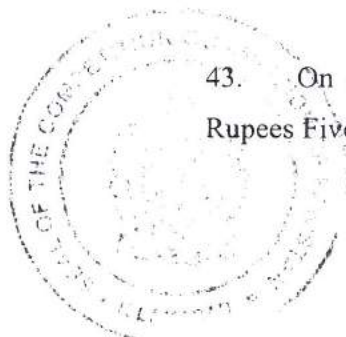
42. In light of the foregoing, the Commission finds that JCR has indulged into exclusionary conduct because of its predatory pricing strategy in violation of subsection 3(3)(f) read with subsections 3(2) and (1) of Section 3 of the Act.

43. On account of violation of the aforementioned provisions of the Act, a penalty of Rupees Five Hundred Thousand (PKR 500,000) is imposed on JCR.

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Competition Commission of Pakistan
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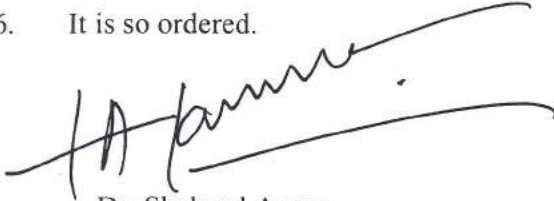
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44. The Commission hereby directs NJHPC to cancel the impugned bid forthwith and file compliance report with the office of Registrar of the Commission within fourteen (14) days of this order.

45. NJHPC may conduct a fresh bid pertaining to the credit rating for the proposed issue of Sukuk comprising of PKR 100 billion. In doing so, NJHPC shall ensure that the bid is conducted in a fair, transparent and competitive manner.

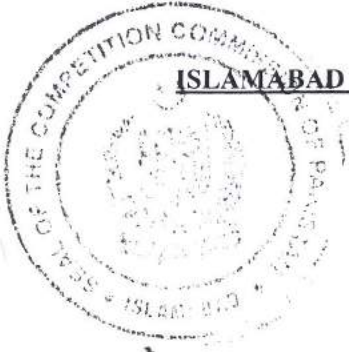
46. It is so ordered.



Dr. Shahzad Ansar
Member




Mr. Ikram Ul Haque Qureshi
Member



ISLAMABAD THE 27th JANUARY, 2017

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