



**BEFORE THE  
COMPETITION COMMISSION OF PAKISTAN  
IN THE MATTER OF  
IMPLEMENTATION AGREEMENT ENTERED INTO BETWEEN  
PORT QASIM AUTHORITY  
&  
M/S ENGRO VOPAK TERMINAL LIMITED  
(File No. 6/LP/CMTA/CCP/2010)  
&  
(File No. 2/(192)/AGR/Exm/Reg/CCP/2010)**

Dates of hearing: 21<sup>st</sup> July 2010  
November 4, 2010

Present: Ms. Rahat Kaunain Hassan  
**Chairperson**

Dr. Joseph Wilson  
**Member**

Ms. Vadiyya S. Khalil  
**Member**

On behalf of:

Port Qasim Authority: Mr. Munawar Ali Isani, Legal Advisor,  
Mr. Arbab Ali Shaikh, Director (PSP)  
Mr. Anwaar Mahtab Zaidi, Manager (PSP)

M/s. Engro Vopak Terminal Limited: Sheikh Imranul Haque, CEO  
Mr. Andaleeb Alavi, GM Legal &  
Company Secretary

Lotte Pakistan Ltd: Ms. Amber Darr  
Mr. Ali Amir  
Mr. Osman Karim Khan

## ORDER

1. Through this order the Competition Commission of Pakistan (the “**Commission**”) shall dispose off the proceedings initiated under Section 30 of the Competition Act, 2010 (the “**Act**”) vide Show Cause Notice No.23/2010 dated July 06, 2010 (**SCN**) against Port Qasim Authority (**PQA**) and M/s Engro Vopak Terminal Limited (**EVTL**) for entering into a prohibited agreement and also the Exemption Application (File No. 2/(192)/AGR/Exm/Reg/CCP/2010) filed by PQA under Section 5 of the Act during the course of subject proceedings.
2. The primary issues in this case are whether the exclusive rights granted to EVTL through a concessionary agreement entered into by and between PQA and EVTL to handle and store all liquid chemicals and gaseous liquid chemicals (except for LPG) entering the Port Qasim area (PQ area) domain/area, have an object or effect to prevent, restrict and distort competition within the relevant market, thereby violating Section 4(1) read with sub-section (2) (a) & (d) of Section 4 of the Act; and whether the request for exemption for the said concession agreement can be granted in terms of Section 5 read with Section 9 of the Act.
3. At the outset we would like to place on record that while the proceedings were initiated under the Competition Ordinance, 2010, the competition law now stands transitioned and enacted as the Competition Act, 2010 (the “**Act**”). By virtue of Section 62 of the Act any thing done including actions taken, proceedings initiated, powers assumed by the Commission or exercised by its officers on or after October 2007 (when the Competition Ordinance was first promulgated) shall be deemed to have been validly done, made, issued, taken, initiated, conferred, assumed and exercised and provisions of the Act shall have and shall be deemed to always have had effect accordingly.

## UNDERTAKINGS

4. PQA is a port regulatory authority established under Port Qasim Authority Act, 1973 for making all arrangements for the planning, development and management of Muhammad Bin Qasim Port at Phitti Creek and is an undertaking as defined in clause (p) of sub-section (1) of Section 2 of the Act.
5. EVTL is a joint venture between Engro Chemicals Pakistan Limited and Royal Vopak of the Netherlands engaged, *inter alia*, in handling and storage of chemicals at Port Qasim and is an undertaking as defined in clause (p) of sub-section (1) of Section 2 of the Act.

## BACKGROUND

6. The Commission on its own took notice of an Implementation Agreement (the “**Implementation Agreement**”) executed on February 18, 1996 by and between PQA and EVTL (then known as Engro Paktank Terminal Limited or EPTL) for setting up of integrated liquid chemical terminal and storage farm at South Western Zone of Port Qasim. The Implementation Agreement grants EVTL an exclusive right for thirty (30) years, extendible to another thirty (30) years, to handle and store all liquid chemicals and gaseous liquid chemicals (except for LPG) entering the PQA area.
7. The concessionary rights granted to EVTL pursuant to the Implementation Agreement to exclusively handle and store liquid chemicals entering PQ area appeared to have the object of creating entry barrier and restrict the choice of customers/users and competition *inter se* the chemical terminal and storage farm operators.
8. In view of the exclusive rights and other provisions restrictive of competition stemming from the Implementation Agreement, PQA and EVTL both were issued SCNs on July 06, 2010 by the Commission directing to submit a written reply within fourteen days, and to appear

before the Commission on July 21, 2010 to avail the opportunity of being heard. SCN was issued, *inter alia*, in terms of following:

*Whereas, the Implementation Agreement grants EVTL the exclusive concessionary right to handle and store all liquid chemicals and gaseous liquid chemicals (except for LPG) entering the PQA area. The exclusive concessionary rights granted by PQA to EVTL are for a period of 30 years; extendible to another 30 years. Under the Implementation Agreement EVTL has the right to exploit the constructed terminal and receive charges from the users of such facility. The tariff arrangement under the Implementation Agreement authorizes EVTL to receive for its account all handling and storage charges for cargo using the facility without any provision of criteria therein;*

*Whereas, the relevant market comprises of product market and geographic market in terms of section 2(1) (k) of the Ordinance. The relevant product market for the purposes of this Show Cause Notice is a market for the supply of storage services for liquid chemicals entering a port. Such storage services are provided through a purpose built storage terminal and a chemical jetty constructed to handle specific kinds of chemicals. Determination of relevant geographic market is based on the important factors of supply-side substitutability and demand-side substitutability. Port Qasim Authority area has a few number of terminals for chemical storage. However, the Implementation Agreement limits the storage services only with the EVTL to the exclusion of all other terminals within the PQA area. The EVTL is a specialized chemical terminal and storage farm that has been set up at PQA to handle highly toxic, explosive and corrosive chemicals. The EVTL in its letter dated 22 May 2010 claims that a chemical terminal like the one it has with superior facilities and emphasis on safety, health and environment did not exist in the existing general facilities at PQA nor at the chemical terminals at Karachi Port Trust. Customers of the EVTL have final preference for EVTL's chemical storage terminal and are dependent on its facility for having made huge investments in setting up their manufacturing plants in the vicinity of PQA to avail the services of EVTL; hence, the geographic market is the PQA area. Accordingly the relevant market is the terminal for providing storage services for liquid chemicals in the PQA area;*

*Whereas, the Implementation Agreement, in general and clauses 3.1 and 3.26, in particular grant EVTL an exclusive right as chemical terminal operator and thereby prevents competition with other terminal operators for particular traffic within Port Qasim Authority area for 30 years which is extendible for another 30 years. Such arrangement between EVTL and PQA, prima facie, has the object of creating entry barrier and restricts the competition in the relevant market;*

*Whereas, pursuant to the Implementation Agreement, the customers and users of such facility are, prima facie, left with no option but to use the storage facility offered by the EVTL notwithstanding that terminals for storage of chemicals were already operating at the time of grant of such exclusive rights. Hence it, prima facie, restricts the choice of customers/users from choosing a chemical terminal operator/supplier offering competitive trading terms and conditions and also appears to*

*restrict competition inter se the chemical terminal operators in the relevant market;*

*Whereas, after the promulgation of the Ordinance and establishment of the Commission on 2<sup>nd</sup> October 2007, the Commission issued a General Order published in the Official Gazette vide SRO 51(I)/2008 dated 15-01-08 informing and requiring all the undertakings to seek exemption within (90) days from the issuance of the General Order, in respect of all the Agreements falling within the ambit of Section 4 of the Ordinance which were entered into with or without intimation to the defunct Monopoly Control Authority (a competition authority subsisting at the time of promulgation of the Ordinance). Thereafter, reminders to comply with the said General Order were also published in all the leading newspapers, failing which would attract a penalty under section 38 of the Ordinance;*

*Whereas, PQA was requested vide letter dated 5 January 2010 to submit for exemption Implementation Agreements (s) executed by PQA with other companies pertaining to concessionary rights granted for terminal facilities/services etc. However, till to-date the Commission has not received any application for grant of exemption for any such Implementation Agreement executed by PQA;*

*Whereas, in view of foregoing, it appears to the Commission that the PQA and EVTL have entered into an Implementation Agreement prohibited under the Ordinance which has the object or effect of preventing, restricting or reducing or distorting competition within the relevant market as aforesaid and it, prima facie, constitutes violation of section 4(1) and 4(2) & (d) of the Ordinance.*

9. Subsequent to the issuance of the SCN, Lotte Pakistan PPTA Limited (**Lotte Pakistan**) through its counsel ABS & Co. requested the Commission on August 06, 2010 to initiate action against EVTL and PQA for entering into the Implementation Agreement which is prohibited under the Act and for persisting with such Implementation Agreement without seeking an exemption from the Commission and also for abusing its dominant position by charging an exorbitant price for its storage facilities and services.
10. The Commission informed Lotte Pakistan vide its letter dated August 11, 2010 that an action has already been initiated by the Commission against EVTL and PQA in respect of their Implementation Agreement for, *prima facie*, violation of Section 4 of the Act. However, they can avail the opportunity to join the proceedings before the Commission as an intervener having sufficient interest in the outcome of the proceedings.

11. The parties (PQA and EVTL) were directed to respond to SCN and were afforded with an opportunity of hearing to explain as to why the Commission should not proceed against the parties for the, *prima facie*, violation of Section 4 of the Act. On July 14, 2010 the Commission received a letter from PQA requesting to suspend the hearing of the SCN. This was premised on the fact that PQA maintained that it was in the process of applying for block exemption of concession/BOT agreements with terminal operators and the impugned Implementation Agreement is also included in these agreements. PQA raised a concern that if SCN proceedings are not held in abeyance, it will seriously prejudice PQA's proposed block exemption application. The Commission did not accede to the request to suspend the SCN proceedings, however, assured PQA vide its letter dated July 16, 2010 that no prejudice will be caused to the proceedings on the application for exemption if the proceedings in SCN are continued.
12. PQA through another letter dated July 20, 2010 requested the Commission to consolidate hearing of SCN with PQA's proposed block exemption application. This request was declined by the Commission vide its letter dated July 20, 2010 for the reasons; proceedings in SCN are under Section 30 while exemption reviewed under Section 5 of the Act are two independent proceedings, further no application for exemption had yet been formally filed and only a pay order of Rs.250,000 had been provided and, therefore, block exemption application cannot be treated as pending before the Commission.
13. Hearing in the matter was conducted on July 21, 2010. M/s Lotte Pakistan PTA Limited ("**Lotte Pakistan**"), a consumer/customer of terminal and storage facilities of EVTL, also appeared in the hearing as an observer. PQA's officials appeared before the Bench without submitting a written reply to SCN. Bench directed PQA's representatives to file their written submissions at the earliest after the hearing. On the other hand, EVTL's written reply was received on the day of hearing. Representatives of both PQA and EVTL made representation of their

case and were heard by the Bench at length. Written submissions made by the EVTL are summarized below:

- a. *Storage services need not necessarily only be provided through purpose built terminal and jetty. Chemicals can be offloaded on most jetties and storage tanks can be constructed. However, obviously purpose built terminals provide better quality services and a much higher level of safety.*
- b. *There exists a general marginal wharf at PQA at which chemicals can be and are being unloaded, however it lacks many of the safety and other features of the Respondent's terminal which is why the GOP and PQA desired a purpose built terminal to be built.*
- c. *The Implementation Agreement recognises the right of (then) existing storage facilities to continue operating for storage purposes, however their owners were required to use the Respondent's jetty instead of PQA's own marginal wharf.*
- d. *It is further submitted that to restrict the geographic market to the PQA area is taking a very narrow view and not correct. Just a few miles on the same coast is the Karachi Port Trust which already has jetties to unload chemicals. Storage facilities can also be built and are already available in KPT and if the users find EVTL expensive they can offload at KPT and the incremental cost of transport is an almost irrelevant figure. In fact an associated company of EVTL decided to use KPT for its exports. Gwadur port is also available further on the same port.*
- e. *It however must be appreciated that it was not the case that operators were lining up to invest in PQA or Pakistan and the sponsors and the Respondent have invested huge amount of money (USD 115 million upto now) without any government guarantees for off take as some other terminals have. There are however no restrictions for operators to invest in storage at KPT or in Gwadur and it is therefore, submitted that competition in the relevant market is available.*
- f. *It is incorrect that terminals for storage of chemicals were already operating at the time of Implementation Agreement and that their users were left with no option but to use storage facilities offered by Respondent. What was existing were storage facilities and not jetties and in-fact those companies have been specifically identified and listed in the Implementation Agreement. However, all such companies have to use now the Respondent's jetty though they are not doing so.*
- g. *The issuance of SRO 51(i)/2008 was in the knowledge of the Respondent, as were the reminders.*
- h. *The chemical terminal was constructed by the Respondent at great cost and a total amount of US\$ 115M has been invested in*

*the terminal to-date. The Respondent did not apply for exemption for the following reasons:*

- I. The competition law at the relevant time was the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 (“MRTP”). The MRTP did not by itself substantive sections (3-6) restrict the arrangements sought to be entered into by PQA through the Implementation Agreement, including the exclusivity granted.*
- II. In any case Section 25 of the MRTP provided that it shall not apply to (a) undertakings owned by the Central Government or (b) an undertaking owned by a body corporate established by the Government by law or whose chief executive is appointed by or with the approval of the Central Government or (c) to anything done by any undertaking in pursuance of any order of the Central Government. Therefore, even if the MRTP had restricted or required exemption for the Implementation Agreement due to provisions of Section 25, the Implementation Agreement was outside the purview of the MRTP as PQA is clearly a Central Government owned and controlled body whose Chief Executive is appointed by the Central Government. Section 6 of the General Clauses Act 1897 also clearly supports the continued validity of the Implementation Agreement.*
- III. Section 4 of the Ordinance provides that “No undertaking ..... shall enter into any Implementation Agreement.....”. The Ordinance can only require an exemption for Implementation Agreement signed after its promulgation. The words “shall not enter into” clearly indicate a prospective approach which shall not apply to Implementation Agreements entered into prior to the promulgation of the Ordinance.*
- IV. Section 5 of the Ordinance by no stretch of imagination requires exemption of an Implementation Agreement before the passage of law that specifically enacts such prohibition. As such reliance on Section 5 for the purpose of SRO No. 51(i)/2008 is incorrect. The legislative intent is manifest in Section 59 of the Ordinance whereby the law is to apply prospectively. SRO 51(i)/2008 itself recognises that Section 59 of the Ordinance does not specifically provide for the saving of the Implementation Agreements envisaged under Section 4 of the Ordinance which might have been entered into ..... prior to and subsisting at the time of the promulgation of the Ordinance, in contravention of the said Section 4.*
- V. For the CCP to take action in terms of the SCN, specific language needed to be included in Section 59 with respect to requiring exemptions under Implementation Agreements executed before the promulgation of the Ordinance. This*



*can not be achieved by an SRO therefore, the SRO 51(i)/2008 is not valid.*

VI. *There are many other areas where exclusivity is granted e.g. patent rights. These are clearly, in a sense, anti-competitive, but are accepted to encourage innovation and investment. PQA has powers under the PQA Act to develop ports, so acting under this statutory authority they should not be treated differently from e.g. patents.*

14. After the hearing, a detailed reply was filed by PQA on July 29, 2010.

Submissions made by PQA are summarized as below:

- a. *PQA & EVTL's Implementation Agreements has the following two aspects:*
  - i. *PQA & EVTL's Implementation Agreement has the following two aspects: Sea Terminal/Wharf operations in which Karachi Port Trust is the competitor of PQA and in respect of liquid chemical cargo of EVTL. These sea terminal/wharf operations under the said Implementation Agreement are not in the Show Cause Notice the "product market" within the meaning of Section 2 (k) of the Ordinance. PQA & EVTL's sea terminal/wharf operations as such are not the material points for the Commission's determination in these proceedings; and*
  - ii. *Handling and storage of liquid chemicals in Port Qasim the supply of which services has been defined in para 6 of the Show Cause Notice as the "product market" within the meaning of Section 2 (k) of the Ordinance.*
- b. *The matter needs to be determined in its correct legal and factual perspective relating to : Relevant Market; Product Market; and Geographic Market. SCN is based on misreading of the Implementation Agreement, states the discriminated affectees of PQA & EVTL's Implementation Agreement are "a few number of terminals for chemicals storage". It is categorically stated with exception of PQA's marginal wharf there are no other sea terminal/wharves which have capability/equipment/facility to handle or store liquid chemical cargo in Port Qasim.*
- c. *EVTL's liquid chemical handling and storage business in Port Qasim area acquired by efficiency and in investing in advance facilities is oriented to public demands at a price which public regards reasonable. Conducting business on the basis of efficiency does not constitute anti-competitive under the Competition Ordinance.*
- d. *The undertakings which had liquid chemical handling storage facilities prior to the PQA & EVTL's Implementation Agreement are permitted under the Implementation Agreement to continue using their liquid chemical and storage facilities. The difference with these undertakings relate to the fact that under the Implementation Agreement these undertakings were to use EVTL's terminal instead of PQA's marginal wharf. These undertakings have obtained an interim order and the matter is sub-judice in the Sindh High Court,*

*Karachi. The Commission advisably should leave the matter to the court.*

- e. An exporter/importer of liquid chemicals by sea has the option of using either facilities of KPT's at Karachi Port or EVTL's at Port Qasim. There is as such substitutability from the exporter/importer's point of view.*
- f. Storage facilities are integrant of the process of loading and unloading of ships at EVTL's sea terminal/wharf. The liquid chemical storage activity integrated with loading/unloading of ships is separate business of EVTL. The EVTL's liquid chemicals handling and storage becomes "product market" within the meaning of the SCN from the point and time such storage is extraneous to the loading/unloading of ships at EVTL's sea terminal/wharf. This factual and legal dichotomy needs to be maintained between EVTL's liquid chemicals handling and storage.*
- g. The exporter/ importers of liquid chemicals by sea for handling and storage extraneous to loading and unloading of the ships have options to use EVTL's handling storage facility at Port Qsim or KPT's liquid chemical storage facility or other liquid chemical storage facilities in other Karachi area like Landhi and Korangi. Geographic market as defined in the SCN is not wide enough in terms of competition. SCN has materially failed to give root effect to the uniform/identical conditions of competition in Port Qasim, Karachi Port and remaining Karachi in respect of the business of liquid chemicals handling storage services. Tempa electric Company Vs. Nashville Coal Company 365 US 320 at page 589.*
- h. During hearing Chief Executive Officer of EVTL stated that storage capacity in Karachi Port is 100,000 tons whereas EVTL's in Port Qasim is 55,000 tons which comes to 55% of KPT's. The remaining Karachi liquid chemical storage figures would even further drastically reduce EVTL's market share.*
- i. It is not every restraint of competition that works as an injury to the public. It is only undue restraint of competition that has an effect and is deemed unlawful. There is no allegation in SCN that Implementation Agreement has caused any public harm. Further, in the absence of this concession Implementation Agreement there would not have been any technically advanced liquid chemical terminal and storage facility for public. Nordentfelt Vs. Maxim Nordenfelt Guns and Ammunition Co. Ltd. (1894) AC 535, Petrofina (Great Britain) Limited Vs. Martin (1966) Ch. 146, 149.*
- j. From the options available to customers in terms of ports and the relevant market, it is evident EVTL does not have the power to control prices/relevant market or exclude competition. The mere presence of exclusive area clause in the Implementation Agreement is not per se anti-competitive. The term competition imports existence of competitors which in the circumstances of the case are EVTL, KPT and parties in liquid chemical storage business in whole of Karachi.*

- k. The Competition Ordinance, 2010 does not have any provision giving it retrospective effect before or from 18-02-1996 the date of execution of PQA & EVTL's Implementation Agreement. PLD 1970 Peshawar 37.*
- l. The Implementation Agreement enjoys legal sanctity under Section 25 of the repealed Monopolies & Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 read with Section 6(c) of the General Clauses Act, 1987.*

15. Lotte Pakistan filed a formal request to intervention on August 17, 2010 through its legal counsel ABS & Co. under Regulation 27 of the Competition Commission (General Enforcement) Regulations, 2007 and then filed an amended application for intervention on October 15, 2010. The request for intervention was allowed by the Commission and submissions made by Lotte Pakistan as an intervener are summarized as under:

- a. On April 04, 1996 ICI entered into an Implementation Agreement with EPTL for Reception, Storage and Delivery of Paraxylene and Acetic Acid (the Storage Implementation Agreement). The Storage Implementation Agreement was to remain valid for a period of 15 years from the start date. Throughout the term of the Storage Implementation Agreement EPTL was to provide to ICI services related to a berth at the jetty, storage of products in tanks and delivering them to loading point. In consideration of which ICI agreed to pay US\$9,200,000 per year as fixed charges only, in addition to which ICI also agreed to pay to EPTL a variable cost depending upon the quantum of Paraxylene and Acetic Acid stored by EPTL on its behalf.*
- b. As the term of the Storage Implementation Agreement is drawing to a close, a few months ago negotiations were started with EPTL for renewal. Lotte Pakistan PTA Limited's stance was that EVTL should lower the price of services for the reasons; Lotte Pakistan PTA is likely to pay to EVTL an aggregate amount of US\$170,000 till the expiry of the Storage Implementation Agreement which is more than the cost incurred in setting up EVTL facility. Secondly, the price charged by EVTL is significantly higher in comparison with cost of such services elsewhere in Asia. EVTL however, remained inflexible and provided a proposal which is still excessively high.*

- c. *It is evident that EVTL has contravened the express provisions of Section 4 of the Ordinance in terms of following:*
- i. *Clause 3.1 of the Implementation Agreement confers on EVTL an exclusive concession right in respect of Integrated Liquid Chemical Terminal and Storage Farm and thereby restricts other parties from setting up such terminals, hence restrict competition in the market.*
  - ii. *Also Clause 3.1 grants exclusive right to handle and store all liquid chemicals entering PQ area thereby restricting not only other parties from handling or storing such chemicals but also forcing potential consumers to deal with EVTL.*
  - iii. *Prior to Implementation Agreement there existed storage facilities at PQA for companies' own use. The Implementation Agreement recognized such facilities and allowed these companies to continue their operations. Once EVTL had set up its facilities, PQA asked these companies to shut down and transfer their operations to EVTL's facilities. These companies refused as EVTL was demanding far excess price than cost these companies were incurring operating their own facilities. These companies approached court and got a stay order.*
  - iv. *Clause 3.3. of the Implementation Agreement obliges every customer to use storage farm along with jetty. This clause clearly violates Section 4 of the Ordinance.*

16. A second hearing in the matter was conducted on November 04, 2010. Representatives of EVTL reiterated their stance that the Act does not have retrospective intent and therefore, is not applicable on the Implementation Agreement. The Implementation Agreement was signed at a time when Monopolies and Restrictive Trade Practices (Prevention and Control) Ordinance, 1970 (the "MRTPO") was effective. Under Section 25 of the MRTPO any act done by the Central Government shall not come under the purview of MRTPO. The Implementation Agreement entered into by PQA with EVTL under Port Qasim Authority Act was clearly an act done by the Central Government. MRTPO has been repealed by the Act under its Section 61. This repeal does not have effect on anything done or any right accrued under the repealed enactment as provided under Section 6 of General Clauses Act 1897. To support their contention representatives of EVTL quoted several cases. Representatives of EVTL further submitted that Sections 4 and 5 of the

Act are prospective in nature and shall apply only to those agreement that are signed after promulgation of the relevant law. Had they have retrospective effect, Section 61 of the Act should have envisaged such legislative intent which is not the case here.

17. PQA' officials raised objection that substitutes to EVTL's facilities are available at another port and area of Karachi. They also highlighted lack of finances and inability of government to provide such infrastructure that has been possible through investment of EVTL in PQ area. Public interest was also emphasized that EVTL's technically advanced liquid chemical terminal and storage facility will serve.
18. After hearing Lotte Pakistan filed a rebuttal on December 08, 2010 to the arguments made by EVTL and PQA in the hearing which is summarized as under:

*Rebuttal to EVTL's Arguments*

- a. *Lotte Pakistan vehemently rejects EVTL's suggestion that s substitute for EVTL's facilities is available at Karachi Port or at Port Qasim. It is Lotte Pakistan's contention that currently in Pakistan there is no facility that can provide similar services.*
- b. *Karachi Port historically evolved as an oil and dry cargo port and to this day prioritizes oil products. Consequently, the storage tanks available at Karachi Port are not suitable for storing chemicals such as Paraxylene and Acetic Acid.*
- c. *Specifications for storage tanks vary in accordance with the substance proposed to be stored in them e.g. flash point and corrosive properties of liquid substance. Paraxylene and Acetic Acid imported by Lotte Pakistan require design specific tanks which are not available presently at Karachi Port.*
- d. *Unlike Port Qasim where allocation of land was made during master planning for chemical industry, Karachi Port is not purpose built for chemical industry. Also unlike Port Qasim which provides best inland handling economies for up-country transport Karachi Port has no such advantage. It is for that reason that ICI invested US\$ 490,000,000 in setting up its plant in the vicinity of Port Qasim.*
- e. *It is submitted that EVTL is able to take unfair position by charging exorbitant prices because of its exclusivity granted under the Implementation Agreement. This stance not only translates into higher cost for Lotte Pakistan but also results in higher prices for the end user.*

- f. *Transport of Paraxylene and Acetic Acid would pose a serious environmental risk as both chemicals are highly flammable. There will be an increased risk of an environmental disaster and collateral damage at the port if the chemical products are stored in a facility that is not purpose built.*
- g. *Transporting these chemicals from Karachi Port to Lotte Pakistan's plant would cause a serious security threat. Moving these hazardous materials on a daily basis will not only expose the population but also create a national security challenge in case the materials fall into the hands of miscreants.*
- h. *Also, hauling Paraxylene and Acetic Acid from Karachi Port to the plant will not only mean additional unnecessary consumption of one million litres of diesel fuel per annum but will also result in additional transportation insurance cost and will add to the cost of manufacturing PTA products making it unattractive for downstream market.*
- i. *There also does not exist any substitute facility at Port Qasim for storage of chemical liquids. Currently other facilities at PQ are offering following services:*
- *Iron Ore and Coal Berth*
  - *Multipurpose Terminal*
  - *Qasim International Container Terminal*
  - *Fotco Oil Terminal*
  - *Liquid Cargo Terminal*
  - *Grain and Fertilizer Terminal*
- j. *Lotte Pakistan rejects EVTL's claim that the Implementation Agreement is not an exclusive arrangement and that similar facilities constructed at Port Qasim prior to the execution of the Implementation Agreement have been allowed to continue to date.*
- k. *It is evident from the text of the Implementation Agreement that it is an exclusive Implementation Agreement. Clause 3.1 confers exclusive rights on EVTL to operate chemical terminal and storage farm at PQ. Clause 3.2 provides that only EVTL can handle liquid chemicals entering PQ area. Clause 3.3 requires jetty and storage farm to be considered as an integrated facility.*
- l. *There is no doubt that these above mentioned clauses serve to prevent and restrict competition in construction and operating facilities required by Lotte Pakistan and other businesses having interest in handling and storage of liquid chemicals.*
- m. *It is important to note that prior to the execution of the Implementation Agreement certain chemical storage facilities were operating at PQ. Although the Implementation Agreement recognised these facilities but specifically barred new construction. Once EVTL facility was operational PQA requested these companies to shut down their facilities and transfer*

*their operations to EVTL. These companies refused, as the price EVTL was demanding was much more than their own cost of operating. When PQA persisted these companies approached the courts and got a stay order.*

- n. *The exclusivity contained in the Implementation Agreement is for a period of 30 years which is extendible to another 30 years which cause further stagnation of development at Port Qasim for another 30 years. Moreover, this in effect allows EVTL to perpetuate its dominance in the chemical storage market and continue dictating its terms on which it provides these services. Therefore, EVTL's contention that the Implementation Agreement is not an exclusive Implementation Agreement is rejected.*

*EVTL had argued that since the Commission had come into force after the Implementation Agreement, EVTL had acquired vested rights and could not be deprived of these rights under the Act expressly stated that it had retrospective effect. We have examined each of the cases relied upon by EVTL to support their claim. None of these apply to the facts of the present matter.*

- o. *The commission has addressed this issue in its earlier orders in the matter of Pakistan Banking Association and All Pakistan Cement Manufacturers Association and its members.*

*Rebuttal to PQA's Arguments*

- p. *PQA's arguments before the Commission relate to its exemption application under Section 5 of the Act. Lotte Pakistan opposes this application and contends that PQA is not entitled to the exemption it is seeking. In order to succeed in its application, PQA is required to meet the criteria provided in Section 9 of the Act.*
- q. *After enforcement of the Competition law in the country, EVTL and PQA were duty bound to seek exemption for the Implementation Agreement. Further, the Implementation Agreement itself provides in its Clause 19.1 that "this Implementation Agreement shall not constitute a violation of any statute, judgment, order, decree or regulation....." Clause 19.2 also provides that "PQA and EPTL agree that if amendments, modifications or revisions to this Implementation Agreement may become necessary or desirable to satisfy the requirements for the implementation of the project, PQA and EPTL shall promptly consult and take all action necessary....."*
- r. *In the event however if the Commission decides that it was not incumbent upon PQA and EVTL to revise the Implementation Agreement in order to bring it in line with the Act, it must not condone the delay on the part of PQA to delay in filing exemption application, particularly in the light of general Order (SRO 51(i)/2008) issued by the Commission.*

- s. *PQA in any event not entitled to an exemption in respect of the Implementation Agreement as any benefit that the Implementation Agreement may have conferred on the public by allowing investment in comparison to the disadvantages caused by the discriminatory and un-competitive treatment of EVTL by PQA which has in turn allowed EVTL to charge prices which are much higher compared to the regional tariffs. Consequently, high costs due to unavailability or high cost of raw material will eventually cause all stakeholders in the industry to suffer.*

## **ISSUES**

19. In view of the given facts, the following issues need to be addressed :

- a) What is the relevant market?
- b) Whether the Implementation Agreement entered into between PQA and EVTL before the promulgation of the Act falls within the purview of Section 4 of the Act and qualifies exemption under Section 5 of the Act?
- c) Whether the request for exemption for the Implementation Agreement can be granted in terms of Section 5 &9 of the Act?

## **ANALYSIS**

### **Issue I: Relevant Market**

20. PQA and EVTL's major objection is that the relevant geographic market cannot be confined to PQ area alone. There are two other ports of Karachi Port Trust and Gwadur on the same coast- that also provide the substitutable facilities. The Karachi Port Trust already has jetties to unload chemicals and storage facilities can also be built and are already available there.
21. Representatives of PQA contended that the exporter/ importers of liquid chemicals by sea for handling and storage extraneous to loading and unloading of the ships have options to use EVTL's handling storage facility at Port Qasim or KPT's liquid chemical storage facility or other liquid chemical storage facilities in other Karachi areas like Landhi and Korangi. It was further emphasized that the SCN has materially failed to give root effect to the uniform/identical conditions of competition in Port



Qasim, Karachi Port and remaining Karachi in respect of the business of liquid chemicals handling storage services.

22. PQA's representative relied upon a US judgment in the case of *Tempa electric Company Vs. Nashville Coal Company* 365 US 320 at page 589. In this case petitioner produced and sold electric energy in the vicinity of Tampa, Florida. It entered into a contract with respondents to purchase all the coal required for its power generating plants for 20 years. After two years of entering into contract the respondents advised petitioner that the contract was illegal under the antitrust laws, would therefore not be performed, and no coal would be delivered.
23. In the *Supra* case, the Supreme Court held that the relevant market is not restricted to Florida but it is the area in which respondents and 700 other suppliers effectively compete with each other to produce and market the coal. Petitioner's maximum requirements did not amount to more than 1% of the total amount of coal in the relevant market. Even though the contract is an exclusive dealing arrangement, it does not violate S 3 of the Clayton Act unless it forecloses competition in a substantial share of the line of commerce affected.
24. EVTL took a stance that a few miles away at Karachi Port Trust (KPT), jetties are available to unload chemicals. Storage facilities can be built and are already there allowing Lotte Pakistan the option to shift their businesses to KPT if they so desire. Lotte Pakistan has already got the quotes from Al Rahim Tank Terminal (Pvt.) Limited situated at KPT that is lower than EVTL proposed rates for renewal of the Storage Agreement.
25. Section 2(1)(k) of the Act defines the relevant market comprising of product and geographic dimensions and is reproduced below for ease of reference:

*Relevant Market" means the market which shall be determined by the Commission with reference to a product market and a geographic market and product market comprises all those products or services which are regarded as interchangeable or substitutes by the consumer 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 conditions of competition are appreciably different in those areas.*

26. According to definition provided in the Act, determination of the relevant market depends on the availability of substitutable services for customers i.e. whether there is a cross-elasticity of demand between EVTL's handling and storage facilities and other facilities. This interchangeability is gauged by how different from one another are the offered products or services in character or use, how far customers will go to substitute one for another. For inter-changeability only those substitute products or services will be considered which are substantially fungible. Similarly, which geographical area is to be considered depending on whether undertakings involved in supply of handling and storage services face homogenous conditions in competing with each other.
  
27. Primarily three competitive constraints are important in defining the relevant market; (i) demand substitutability,(ii) supply substitutability and (iii) potential competition. From an economic point of view the most important among all of these is the demand substitutability. If customers are in a position to switch easily to available substitute services or suppliers located elsewhere, no supplier can have a significant impact on the prevailing conditions of sale such as price. Therefore, definition of market consists in identifying the effective alternative sources of supply for the customers of the undertaking involved, both in terms of services and geographical location of suppliers. This requires that suppliers be able to switch to relevant services and market them in the short term without incurring significant additional costs. For customers it is equally important to assess switching costs for diverting its order to other supplier or area in terms of impact of transport costs and restrictions depending on the nature of the relevant services.

28. To sum up the discussion of the relevant market encompasses the competitors who effectively compete with the undertaking and are capable of constraining the undertaking's behaviour. European Commission's *Notice on the Definition of the Relevant Market for the purposes of Community Competition Law*<sup>1</sup> also explains the concept of relevant market in the similar manner as follows:

*The objective of defining a market in both its product and geographic dimensions is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure.*

29. Question to be determined before this Bench is who are the competitors of EVTL? And is there any substitutable facilities available for handling and storage of liquid chemicals which can give effective competition to EVTL for its similar facilities? For this purpose, we will consider other ports along with PQ area.
30. **Facilities:** Chemical liquids like different types of paraffin, acids, plasticizers, alcohols, alkalis, aromatics etc. are specific types of liquid chemicals which are used as raw materials by Petrochemical industry in Pakistan. These chemicals are highly volatile liquids and can vaporize to form an ignitable mixture in the air and have other corrosive properties. These liquid chemicals are off loaded at a port through a jetty to handle these chemicals. Once off loaded they are then stored in purpose built storage farm. Port Qasim has substantial allocation of land in its master plan for chemical industry. So it will not be wrong to say that unlike other ports Port Qasim was developed to serve specific purposes including to cater chemical industry in Pakistan. None of the other ports at Karachi Port Trust and Gwadur except PQ have specialized facilities to handle and store chemicals illustrated above .
31. **Exclusivity:** The Implementation Agreement grants EVTL an exclusivity to handle and store liquid chemicals in PQ area and obliges

---

<sup>1</sup> OJ [1997] C 372/5, [1998] 4 CMLR 177

every consumer of EVTL's facilities to use jetty and storage farm as an integrated facility. Clauses 3.1 and 3.3 of the Implementation Agreement state:

*PQA also grants EPTL the exclusive right to handle and store all liquid chemicals and gaseous liquid chemicals (except for LPG) entering the PQA area.*

*The Jetty and Storage Farm would be considered as an integrated facility i.e., Customers using the Jetty will also be obliged to store the products at the storage Farm.*

Such restriction denies the option to avail any other storage facility, if any, available to customers. Customers have no choice but to use storage facility of EVTL along with its jetty to the exclusion of any other service provider/supplier in PQ area.

32. **Restricted Customer's Choice:** It is also important to note here that development plans of a port and investment/expansion plans of service providers/suppliers have serious impact on customers' business decisions dependent on that port and supplier for their imports of chemicals. They are in a way captured and restricted to a supplier which can provide them services to meet their requirements. For example, Lotte Pakistan invested to set up its PTA plant in the vicinity of the Port Qasim on the understanding that a purpose built chemical jetty and storage farm will be operated from Port Qasim which have the appropriate and required facilities to handle and store liquid chemicals. Not only this Lotte Pakistan also invested to build water and electricity grid at PQ to facilitate storage of its chemicals.
33. **Supply- substitutability:** Once having invested heavily in a plant near to Port Qasim, it is financially infeasible to switch to other facilities, if any, available at other ports. There is no such facility in existence or readily available on other ports that can be compared with EVTL. EVTL in its submissions dated February 18, 2011 filed in response to the

complaint of Lotte Pakistan<sup>2</sup>, itself has admitted that the only offer made to Lotte Pakistan by Al-Rahim Terminal at KPT is not comparable to EVTL's facilities for the following reasons:

- i. Less storage capacity
- ii. Inappropriate design code
- iii. Tanks and pipes are not insulated
- iv. Tanks are not equipped with heating coils
- v. No slop handling facility
- vi. No safety arrangements
- vii. No automation system

Hence, there is no supply substitutability available for EVTL's facility.

34. **Demand- Substitutability:** Now considering the possibility to explore other options that may be available in future. Conscious mind has to take into account if customers are in a position to switch easily to available substitute services or suppliers located elsewhere and that suppliers in other areas are able to switch to relevant services and market them in the short term without incurring significant additional costs. During the course of hearing, Lotte Pakistan gave an alternative to shift to KPT to avail handling and storage facilities. However, this option would require another investment to upgrade the existing facilities at KPT. Whether a potential supplier would be willing to invest on its existing facilities for up-gradation or it would come from potential customer is an important factor. Among other factors include serious environmental hazards if these materials are moved on daily basis and will also create national security threat in case the materials fall in the hands of miscreants. Besides transportation hassle, it will also cause huge cost when transportation of materials will consume more than one million liters of diesel per year and will also result in additional insurance premium that will eventually add to cost of downstream market manufacturers.

---

<sup>2</sup> Complaint filed by M/s Lotte Pakistan PTA Limited against Engro Vopak Terminal Limited for Abusing its Dominant Position by virtue of the Implementation Agreement. (File No. 8/Reg/Comp/Lotte Pak/CCP/10)

35. PQA and EVTL asserted that both ports i.e. PQA and KPT should be considered within the same geographical market due to their proximity and the fact that they serve the same hinterland, completely ignores the two dimensions of relevant market. Relevant product and relevant geographic area are two essential constituents for defining the relevant market. Product market comprises all those products or services which are regarded as interchangeable or substitutes by the consumer 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 as discussed in para 30 to 34 the two ports can not be termed as substitutable. It is clear that the conditions of competition are not sufficiently homogenous and Port Qasim can be distinguished from the Karachi Port in particular on account of the conditions of competition being appreciably different with respect to the product/services involved in these proceedings be it the transportation cost or non-availability of substitute facility or switching costs for both suppliers at other ports and for customers to avail a comparable facility.
36. In view of the above, we are of the considered view that EVTL terminal is the only facility that has these unique features of having the specialized jetty and storage farm to handle specific chemicals. There appears to be no close substitute facility readily available at other ports. Facilities that do not exist or will be available in future cannot be a benchmark for comparability with EVTL. Further, switching costs for both suppliers and customers and also hazards involved for transportation keeping in view particularly the frequency and volume make it a bleak option for the customers to look for other avenues. Hence, keeping in mind the factors of demand and supply side substitutability we hold that currently there is no effective competition (as relied upon by PQA on *Tempa electric Company Vs. Nashville Coal Company*) in the area of all three ports vis-à-vis the facilities required for handling and storage of liquid chemicals.

37. With respect to relevant market a concern was also raised that SCN does not define the ‘relevant market’ correctly. It was asserted that the relevant market did not comprise only of the “terminal for providing storage services for liquid chemicals in the PQA area” as stated in the last line of para-6 of SCN. It also included Jetty for handling of liquid chemicals. While the parties waived their objection in conceding that the relevant market may be read as asserted by them, we would like to refer to the relevant paragraph of SCN in question.

*Whereas, the relevant market comprises of product market and geographic market in terms of section 2(1) (k) of the Ordinance. The relevant product market for the purposes of this Show Cause Notice is a market for the supply of storage services for liquid chemicals entering a port. Such storage services are provided through a purpose built storage terminal and a chemical jetty constructed to handle specific kinds of chemicals. Determination of relevant geographic market is based on the important factors of supply-side substitutability and demand-side substitutability. Port Qasim Authority area has a few number of terminals for chemical storage. However, the Implementation Agreement limits the storage services only with the EVTL to the exclusion of all other terminals within the PQA area. The EVTL is a specialized chemical terminal and storage farm that has been set up at PQA to handle highly toxic, explosive and corrosive chemicals. The EVTL in its letter dated 22 May 2010 claims that a chemical terminal like the one it has with superior facilities and emphasis on safety, health and environment did not exist in the existing general facilities at PQA nor at the chemical terminals at Karachi Port Trust. Customers of the EVTL have final preference for EVTL’s chemical storage terminal and are dependent on its facility for having made huge investments in setting up their manufacturing plants in the vicinity of PQA to avail the services of EVTL; hence, the geographic market is the PQA area. Accordingly the relevant market is the terminal for providing storage services for liquid chemicals in the PQA area;*

38. Following the settled principle of interpretation and reading the document as a whole, we find that this aspect of jetty being part of the relevant market was expressly envisaged in the same paragraph. In line 2 of the above quoted paragraph it is stated that “The relevant product market for the purposes of this Show Cause Notice is a market for the supply of storage services for liquid chemicals entering a port. Such storage services are provided through a purpose built storage terminal and a chemical jetty constructed to handle specific kinds of chemicals.” As for the last two lines of the above quoted paragraph “Accordingly the relevant market is the terminal for providing storage services for liquid chemicals in the PQA area” we are of the view that since the sentence begins with the word ‘accordingly’ the proceedings contents of paragraph must be taken into account. Furthermore, the contents of the preceding Para 5 also consolidate the position that relevant market envisages in its scope facility of handling and storage in the following words:

*Whereas, the Agreement grants EVTL the exclusive concessionary right to handle and store all liquid chemicals and gaseous liquid chemicals (except for LPG) entering the PQA area.*

39. We do notice the inconsistency in the language of SCN but in our view the intent and context is quite clear. In any event the parties have clarified the position.

**Issue II: Whether the Implementation Agreement entered into between PQA and EVTL before the promulgation of the Act falls within the purview of Section 4 of the Act and requires exemption under Section 5 of the Act?**

**Applicability of the Act**

40. EVTL and PQA have raised a preliminary objection that the Act does not cover agreements that were executed before its promulgation. The competition law came into force long after the Implementation Agreement was signed between EVTL and PQA and that EVTL had acquired vested rights under the previous legislation, MRTPO which



cannot be taken away by the Act unless a specific legislative intent is manifest from any of its provision which is not the case here.

41. EVTL specifically raised the point that Section 4 is prospective in nature and not retrospective as it provides that:

*No Undertaking ..... shall enter into any agreement.....which have the object or effect of preventing, restricting or reducing competition with the relevant market unless exempted under Section 5 of this Act.*

The Act may require exemption for agreements signed after its promulgation. The words ‘shall enter into’ clearly indicate a prospective, forward looking requirement and which will not apply to agreements executed prior to the promulgation of the law.

In our considered view that the Act has not been applied retrospectively though it apply to agreements entered into prior to the Act but are still in force. Intention of the legislature is to be gathered from the language used, the object and the scheme of the Act, the nature of the rights affected and the circumstances under which the statute came into being.

42. The words used in Section 4 are a medium of expressing the intention and the object that the said Section and the Act seek to achieve. Mere reading of Section 4 helps to ascertain the real intention embodied in the Section. Use of words “shall enter into” in Section 4 render the provision mandatory to give emphasis that outcome of any proceeding in contravention would be invalid as rightly laid down in its sub section (3) that “any agreement entered into in contravention of the provision of sub section (1) shall be void”. It would be wrong to say that the words “shall enter into” suggest that Section 4 is prospective in its approach and that it is merely a forward looking provision. Rather it clearly embraces agreements executed prior to promulgation of the Act and are continuing after the promulgation of the Act.

43. The Commission in one of its earliest orders passed in the matter of *All Pakistan Cement Manufacturers Association and its Members* (2010 CLD 1586), has addressed the issue of applicability of Section 4 of the Act on the agreements executed before its promulgation. In the

aforementioned order the Commission discussed at length the scope of word 'enter' and 'enter into'. The relevant part of the order is reproduced below for ease of reference:

*At this point, it may be useful to examine the scope and ambit of the word 'enter' and the term 'enter into'. It has been held that the connotation of the word 'enter' is sufficiently wide to cover even cases where the entry is continued or retained (Kowtha Suryanarayan Rao V Bank of Hindustan Ltd (1953) 23 Comp Case 168 (Mad)). In its ordinary sense the word 'enter' has been defined as to "become a member of; enroll; come on stage" (the Penguin English Dictionary at page 246). The term 'enter into' has been defined as 'to engage in'; 'be part of'; 'take part in'; 'become a party to'; 'to participate in'; 'take an active role or interest in....."*

*It is interesting to note that when the term 'enter' is used in isolation, it may connote a relatively restrictive interpretation. However, when this is coupled with the term 'into', the scope is considerably enhanced to include situations of participation in a pre-existing event. In fact the term 'into' has been defined as 'continuing to the midst of (the Penguin English Dictionary at page 384). Accordingly, the term as is used in the said section must necessarily include the continuance of an agreement as well.*

*By concluding that the term 'enter into' excludes agreements that were in fact executed prior to the promulgation of the Ordinance, would obviously defeat the very purpose for which the Ordinance was promulgated. In the very least, the term was included to enhance the scope of the Section rather than to restrict it.*

44. From the foregoing it is clear that the Commission has already held that the word 'enter into' in Section 4 should be interpreted to include "situations of participation in a pre-existing event". Scope of Section 4 cannot be restricted by confining its application to only those agreements which were entered into after promulgation of the Act. Such limited interpretation would defeat the very purpose and scheme of the Act.
45. The Implementation Agreement which was entered into in 1996 has been in force since its inception without any interruption and is, therefore, a continuing and subsisting agreement. The very day the Act was promulgated and the Section 4 came into force, the Implementation Agreement descended into the category of 'prohibited agreements' giving rise to a cause of action under the Act. Failure of undertakings to seek exemption of the Implementation Agreement is a continuous wrong giving rise to a recurring cause of action under the Act. According to the

test laid down in Brojendra Kishore Roy V Chandra Roy<sup>3</sup> ‘there is a continuing wrong’ when the wrongful act complained of produces a state of affairs every moment a continuance of which is new tort. There appears to be a good authority for the proposition that in the case of ‘trespass’ there is a fresh injury and a fresh cause of action at every moment during the period during which the trespass continues. The Commission in its Cement case (mentioned in the above paragraph) has also given findings on the applicability of the Act on continuing and subsisting agreements.

*(n) with respect to the argument, with regard to the retrospective operation of the Ordinance, it may be stated that in our view there is no dispute with respect to the retrospectivity of the law itself; instead, the question at issue is the applicability of the Ordinance to the case at hand.*

*Since the Agreement was executed in 2003, no doubt exists in stating that it was executed at the time when the 1970 Ordinance was in force. However, in our considered view, if subsequent to the promulgation of the Ordinance, the Undertaking continues the breach in any way, as in the present case it is detailed above, the breach shall be one that is continuing and subsisting, renewed on every single day, a continuing cause of action. Hence the question of retrospectivity application does not arise.*

*In examining whether the Undertaking has continued the breach after the promulgation of the Ordinance, the dates of execution or expiration of the Agreement are not at issue. In fact, if the effects of the undertaking between the Member Understandings can still be felt, even for one day after the promulgation of the Ordinance, it may be presumed that the Agreement has continued, and the provisions of the Ordinance may therefore be invoked.*

*In this regard, the observation made by Supreme Court of Pakistan in Khan Asfandyar Wali V Federation of Pakistan reported at PLD 2001 SC 607 at page 903, is relevant, wherein retrospectivity of the National Accountability Bureau Ordinance 1999, in respect of its applicability to a default committed prior to the promulgation of the Ordinance was examined and the Honourable Court held as under:--*

*“The mere fact that at the time of entering into an Agreement no punishment was prescribed for default in payment of loan or bank dues, as the case may be, cannot possibly mean that the duty of the defaulter to re-pay the loan/dues also expired. The duty still remains. It continues till the loan/dues also re-paid as required under the Agreement. Therefore, non-payment of loan/dues in terms of the Agreement within the contemplation of section 5(r) is a continuing breach of duty or*

---

<sup>3</sup> 31 1C242 (1916) 20 CWN 481

*obligation, which itself is continuing if duty to re-pay the loan/dues as aforesaid continues from day to day and the non-performance of that duty/default from that point of view must be held to be a continuing default in the repayment of loan. Therefore, if it is continuing, there is a fresh starting point of limitation every day as the wrong continues. Viewed from this angle, there is no limitation and no question of retrospectivity involved as long as the duty remains un-discharged.”*

*Therefore, viewing the situation in light of the above, the nature of the breach under any section of the Ordinance, and in this case particularly under Section 4 of the Ordinance, is not the breach which is committed once and for all. It is a continuous breach. Thus, on every occasion the breach occurs and recurs, it constitutes an act or omission, which continues and is therefore a fresh act.*

*Notwithstanding the above, it is relevant to consider whether Section 4 of the Ordinance is caught by clause (1) of Article 12 of the Constitution. Since discussion on Article 12 in the above context falls within the fourth category of constitutional issues i.e. “that the subject matter is outside the field in which particular court is competent to act.” Stated in Akhtar Ali case and subsequently approved in Pir Sabir Shah.*

*Article 12 of the Constitution states as follows:*

*12. Protection against retrospective punishment:-*

*No law shall authorize the punishment of a person:-*

*For an act or omission that was not punishable by law at the time of the act or omission; or*

*For an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed.”*

*The said Article does not deprive the legislature of its power to give retrospective effect to an enactment, which the legislature is competent to act. In Khan Asfandyar Wali (at page 904) case Article 12 was stated to provide as follows:*

*“It merely provides that no law shall authorize the punishment of a person for an act or omission or for an offence by a penalty greater than, or of a kind different from the penalty prescribed by law for that offence at the time the offence was committed.*

46. Seen in this perspective, the Agreement, although it may have constituted breach of certain provisions of the MRTPO 1970 is also a breach committed after the promulgation of the Ordinance, whereby the offence of ‘Prohibited Agreements’ was created. As stated the Agreement continued, is in nature of a continuing wrong, which was converted into an offence prospectively i.e. in a case where such breach

continued even after the promulgation of the Ordinance and not retrospectively. EVTL claims that vested rights accrued to it under MRTPO cannot be taken away by new legislation i.e. the Act. Even though to divulge into this discussion is extraneous to our determination of applicability of the Act on a subsisting agreement, we would like to clarify here that merely a right to take advantage of the provisions of a statute is not a vested right. A vested right is a right which accrues to a party as an absolute right.

47. The superior courts in Pakistan have observed that vested right is a right which is complete and not dependent on any contingency and its enjoyment has become the property of the person concerned (Ref. 1992 S C M R 2430 Federation of Pakistan vs Mirza Muhammad Irfan Bail and 4 others). Further more in 2002 S C M R 312 Zaman Cement Company (Pvt.) Ltd. vs Central Board of Revenue and others, it was observed by the Supreme Court that:

*“There is no cavil with the proposition that "vested rights cannot be taken away save by express words and necessary intendment. No doubt that the Legislature, is also competent to amend, vary or repeal the same but the right conferred through statute can only be taken away by legislative enactment and not by an executive authority through notification in exercise of the rule-making power or the power to amend, vary or rescind an earlier order/notification in the purported exercise of powers conferred under section 21 of the General Clauses Act.”*

48. EVTL claims that the Implementation Agreement is exempted under Section 25 of MRTPO. In our view, such exemption from the application of law (i.e. MRTPO) did not confer a vested right. The Implementation Agreement itself provides in its Clause 19.1 that “this Implementation Agreement shall not constitute a violation of any statute, judgment, order, decree or regulation.....” The Implementation Agreement is a continuing and subsisting agreement subject to the law prevailing during its operation/existence. Any change in law, therefore, makes it subservient to the existing law as even envisaged under the Implementation Agreement.

49. The requirement to seek exemption under Section 5 read with the criteria to grant exemption as laid down under Section 9 is on different footing. The argument that the government is a party to the concession must not and does not excuse/or exempt the concessionaire from the purview of the Act. We would refer to the case of Annor Textile Mills Limited Vs. Federation of Pakistan (PLD 1994 SC 568), where the Supreme Court held that:

*... Merely because a particular party is burdened with certain liability in consequences of the operation of law, does not mean that that any of his rights has been illegally infringed.*

50. We have also gone through the following case laws quoted by EVTL to support their assertion that rights accrued to EVTL before the enforcement of the Act cannot be deprived under the Act. The thrust of these cases is given below for ease of reference:

*Fazal Din & Sons (pvt) Limited Vs. Federal Board of Revenue Islamabad 2009 SCMR 973*

*Petitioner paid taxes in accordance with the assessment orders, however, subsequently the Income Tax department amended its assessment orders and required the assessee to pay more tax since year 2005. Court held that "a right was created in favour of the petitioner and a subsequent amendment in the original scheme cannot be given retrospective effect by a subsequent act of the department to destroy the said right.....the right conferred through statute can only be taken away by legislative enactment and not by executive authority through notification."*

*Al Samerz Enterprise V. Federation of Pakistan 1986 SCMR 1917*

*Importer on the faith of exemption of custom duty available on import of goods entered into a contract to import goods. However, Government withdrew the exemption before goods were actually imported. Court held that "retrospective operation cannot be given to executive orders so as to destroy contractual rights and obligations already accrued."*

*Dr. Syed Sharaf Ali Shah V. Province of Sindh 2009 SCMR 249*

*Petitioners were government servants and notices were issued to them to vacate residential flats allotted to them earlier. The Court held that "certain rights were created in favour of petitioners through allotment orders issued by government and such rights, even if in nature of privileges, could not be taken away by subsequent executive actions."*

51. None of the cases relied upon by the respondent are applicable to this case. They refer to a principle of law which is applicable to past and closed transaction where rights accrued to parties were taken away by executive orders. It is a settled principle of law that executive orders are prospective in nature and cannot deny the rights bestowed upon parties through an enactment. Section 6 of the General Clauses Act, 1897 clearly states that an executive order cannot be retrospective.
52. Section 4 is a substantive provision of the Act which embraces prospective and agreements concluded before the promulgation of the Act. Even the question of retrospectivity of the Act does not arise here for the simple reason that the Implementation Agreement itself is subsisting and continuing in nature and it was in operation when the competition law in the form of “Competition Ordinance, 2007” was enforced in the country. **Importantly, subsection (4) of Section 5 expressly empowers the Commission to grant exemption so as to have effect from a date earlier than that on which exemption is granted.** Section 5 in its relevant part reads as under:

*5. Individual exemption (1): The Commission may grant an exemption from Section 4 with respect to a particular practice or agreement, if a request for an exemption has been made to it by a party to the agreement or practice and the agreement is one to which section 9 applies.*

*(4) individual exemptions may be granted so as to have effect from date earlier than that on which it is granted.*

53. The above, clarifies the position that all continuing agreements which fall within the ‘prohibited agreements’ category can be exempted by the Commission subject to meeting the requirement of Section 5 read with Section 9 of the Act. It further expressly empowers the Commission to grant such exemption to have effect from the date earlier than that on which it was granted.

**The Implementation Agreement is a ‘Prohibited Agreement’ under Section 4 of the Act**

54. We now move to addressing the issue whether the Implementation Agreement falls within the purview of Section 4 of the Act. Section 4 prohibits undertakings from entering into agreements or in the case of association of undertakings from making decisions, which have the object or effect of preventing, restricting or reducing competition within the relevant market unless, exempted under Section 5. Section 4 in relevant part is reproduced here below:

*4. Prohibited Agreements.-(1) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings, shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5 of this Ordinance.*

*(2) Such agreements include, but are not limited to-*

*(a) .....imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any services;*

*(d) limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of any service.*

*(3) Any agreement entered into in contravention of the provision sub-section (1) shall be void.*

55. A concession agreement also falls in the category of ‘Prohibited Agreements’ under Section 4 of the Act where in a public-private partnership, exclusive rights are granted to a private undertaking to carry out its business/operations to the exclusion of others. The major anti-competitive concern in exclusive/concessionary agreements is that such agreements foreclose market to rival competition to impair competition. Such foreclosure might impede rival efficiencies, entry, existence or expandability, any of which can anti-competitively increase the market power of the foreclosing undertaking.



56. The Implementation Agreement between EVTL and PQA grants EVTL the exclusive right to construct and operate an integrated liquid chemical terminal and storage farm to handle and store all liquid chemicals entering Port Qasim area for thirty (30) years which may be extended to another thirty (30) years. Relevant Clauses of the Implementation Agreement are reproduced as under:

*Clause 3.1: Port Qasim Authority hereby grants to EPTL the exclusive concession right and license to design, finance, insure, construct, test, commission, complete, operate, manage and maintain the Integrated Liquid Chemical Terminal and Storage Farm at the South Western Zone of Port Qasim on Build, Operate and Transfer basis in accordance with the terms and conditions contained in this Implementation Agreement.*

*PQA also grants EPTL the exclusive right to handle and store all liquid chemicals and gaseous liquid chemicals (except for LPG) entering the PQA area.*

*Clause 3.3: The Jetty and Storage Farm would be considered as an integrated facility, i.e. Customers using the Jetty will also be obliged to store the product at the Storage Farm.*

*Clause 3.26: The BOT license and the exclusive concession rights and licenses as mentioned in Article 3.1 and the Indenture of Lease mentioned in Article 6 are granted by PQA to EPTL for 30 years from the Date of Effectiveness extendible by another 30 years.....*

57. The above mentioned clauses of the Implementation Agreement prevent and restrict competition in setting up similar terminals and storage farm and further not only handling and storing such chemicals but also forcing customers to deal with EVTL only. Such restriction creates entry barrier and limits the choice of consumers.
58. Duration of concession is 30 years which is also extendible to another 30 years. This implies that the EVTL has the right to manage and operate its facilities for a long time without intervention from any other entity private or public during the course of the Implementation Agreement in the provision of handling and storage of liquid chemicals and competition will be restricted till it enjoys the concessionary rights.
59. It is also pertinent to highlight here that exclusivity under a concession agreement sanctions an extreme market power to the concessionaire that is often prone to be abused and can have an adverse effect on economic

growth. Consumer of EVTL facility, Lotte Pakistan, which is also an intervenor in the this case has raised serious concerns that the concessionary agreement perpetuates EVTL's power to dictate its own terms and conditions on which it provides services for the reason that it does not face any competition whatsoever. This un-competitive environment may pale the investment in petrochemical industry and also raise in cost of raw material will cause the stakeholders to suffer. The Commission has taken action on the complaint filed by Lotte Pakistan against EVTL for abusing the said power. Proceedings in the matter are pending, outcome of which may determine a new shape of the concessionary rights granted to EVTL.

60. From the clauses mentioned above it is clear that the Implementation Agreement has competition concerns. However, the assertion by Lotte Pakistan that Clause 3.3. of the Implementation Agreement obliges every customer to use storage farm along with jetty violates Section 4 of the Ordinance, has not been addressed in the inquiry report or the SCN and hence is not being commented on this order.
61. All the undertakings were duly informed after the promulgation of the Competition Ordinance, 2007 and establishment of the Commission on 2<sup>nd</sup> October 2007 vide a General Order published in the Official Gazette (SRO 51(I)/2008 dated 15-01-08) to seek exemption within (90) days from the issuance of the General Order, in respect of all the agreements falling within the ambit of Section 4 of the Competition Ordinance, 2007 which were entered into with or without intimation to the defunct Monopoly Control Authority ( a competition authority subsisting at the time of promulgation of the Competition Ordinance, 2007). Thereafter, reminders to comply with the said General Order were also published in all the leading newspapers, failing which would attract a penalty under section 38 of the Competition Ordinance, 2007. However, neither EVTL nor PQA approached the Commission to avail the opportunity to seek exemption for the impugned Implementation Agreement.

62. Having addressed the objection raised by EVTL and PQA, we are of the view that the Implementation Agreement impugned in the proceedings before the Commission falls within the purview of the prohibited agreement in terms of Section 4 and the parties were liable to seek exemption in terms of Section 4 read with Section 5&9 of the Act. However, the contravention of Section 4 of the Act is being determined after the commencement of the Competition Law and not from the date of signing of the Implementation Agreements, hence, question of retrospective application of law is not relevant.

**Issue III: Whether the request for exemption for the Implementation Agreement can be granted in terms of Section 5 &9 of the Act?**

63. At the out set, we would like to record our disappointment with respect to the assistance provided by the parties in processing the exemption application. EVTL has categorically denied that the Implementation Agreement required seeking exemption under Section 5 of the Act. However, PQA applied for exemption for the Implementation Agreement finally on August 05, 2010 during the course of hearing in this matter.

64. All that has been argued by PQA is that concessionary rights derived from the Implementation Agreement in-fact contribute to economic growth and social welfare. In the absence of this kind of concession there would not have been any technically advanced liquid chemical sea terminal/wharf and storage facilities for the customers/public. Exclusivity granted to EVTL falls within the exception to the restraint of competition or trade on the grounds the restriction is reasonable in reference to the interest of the parties concerned and reasonable in reference to the public.

65. The question whether the Implementation Agreement satisfies the conditions of Section 9 of the Act essentially turns into whether notwithstanding the clauses which restrict competition whether there are efficiency gains and whether its pro-competitive features outweigh its

anti-competitive features. The main aim of the Commission is to enforce competition rules to protect competition in the relevant market in order to enhance consumer welfare and to ensure efficient allocation of resources.

66. We would like to refer to Section 5 read with Section 9 of the Act which lays down the criteria on which parties may seek exemption if the agreement falls within the purview of Section 4 of the Act.

*Section 9: The Criteria for Individual and Block Exemptions:- (1) The Commission may grant individual or block exemption in respect of an agreement, which substantially contributes to—*

*(a) Improving production or distribution; or*

*(b) Promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; or*

*(c) The benefits of that clearly outweigh the adverse effect of absence or lessening of competition.*

*(2) The onus of claiming an exemption under this Act shall lie on the undertaking seeking the exemption.*

67. Agreements such as the Implementation Agreement which grant exclusive concessionary rights are often termed as ‘Concession Agreements’. Article 3.1 & 15.1 of the Implementation Agreement also refer to such concessionary rights.

68. In this regard, we would like to refer to one of the policy brief of Organization for Economic Cooperation and Development (OECD) which mentions the accepted definition of concession as “*a grant to a private firm of the right to operate a defined infrastructure service and to receive revenues deriving from it. The concessionaire takes possession of the relevant assets (but ownership usually remains with the government) and uses them to provide the relevant product or service according to the terms of the contract.*”

69. There can be various considerations and parameters while granting the concession, including specification of tariff, of investment and of levels

of service or fee to the government. The grant of concession is for a limited duration which varies between 5 to 30 years.

70. Generally, concession agreements are viewed as an important mechanism to shorten the infrastructure gap while effectively addressing technical and financial needs of large projects. Concession agreements are typically used in areas such as electricity, water, sanitation, telecommunications, roads, rail roads, ports airports, oil and gas. In developing countries where governments are confronted with tremendous financial constraints in creating new infrastructure or refurbishing the old, they increasingly rely on Public Private Partnership (**PPP**) as a tool to satisfy the needs of the public through engaging investment from private enterprise while simultaneously motivating economic growth. Primarily, the concept of 'Concession' involves the mechanism to accomplish the objective of PPP. The PPP is managed through a variety of structures including, Build Own Operate Transfer (**BOOT**), Build Own Transfer (**BOT**), Build Transfer Operate (**BTO**), Build Own Operate (**BOO**), Build Lease Transfer (**BLT**), Build Lease Operate Transfer (**BLOT**) and Build Rent Operate Transfer (**BROT**). Similarly, there are concepts where private developer takeovers existing infrastructure facility or project and restores it e.g. Rehabilitate Own Operate (**ROO**).

71. It would be useful to look to have a glimpse of the benefits that can be derived from concessions<sup>4</sup>, which are stated to include:

1. *Capital: mobilizing capital to meet investment needs without adding to sovereign debt;*
2. *Efficiency: private entities are generally more efficient than government operated enterprise. The profit motive requires economies not as necessary in government modality.*

---

<sup>4</sup> <http://www.dansonschwarz.com/international-matters/the-need-for-concession-laws-in-developing-countries.html>

3. **Political:** *achieving visible political gain through the efficient completion of the project, without any or minimal government spending yet providing the public with the benefit of the long term ownership of the project.*
  4. **Education:** *local population is trained for operation and as part of the concession, technological improvement and access thereto, upgrade and education of the indigenous population (creation new skill sets, etc.) can be structured to form a part of the agreement.*
  5. **Allocation of Risk:** *Government risk can be restricted to specifically those items accounted for in the concession agreement. The private sector is much better suited to identify and manage risk. This results in risk efficiency. In addition it is primarily, the lender groups and the investors who bear the burden of ensuring economic success.*
  6. **Optimization:** *provide contemporary management skills and optimize performance; and improve the efficiency and quality of services.*
  7. **Economics:** *Positive increase in economic and market activity which will provide overall positive impact on levels of employment and short term gains during construction process.*
72. Examining concession agreements and regulating the aspects and rights including exclusive rights granted to a concessionaire is not that simple. The OECD further in its policy brief states that “*Concession contracts are by nature “incomplete”, in that not all of the variables that affect their terms – for example, precise costs of providing a service or the amount of the service that will be demanded – can be known in advance.*”
73. Grant of concession, therefore, entails addressing issues that can be highly complex, for instance one important consideration for the concession granting authority is to ensure that there will be competition in the market post-award which requires at the designing stage of the

concession; creating a market structure favourable to competition, taking into account horizontal and vertical aspects to consider whether there are significant economies of scale and to determine the duration and length of the contract. There are certainly trade offs between parties while addressing this issue. Generally, a longer duration in concession creates incentives for the concessionaire to make investment, whereas short concessions aggravate insufficient incentives and may increase the bidder's cost. Short concessions can be granted where there is uncertainty about future marketing developments but they are likely to increase certainty in competition for subsequent concessions.

74. In view of the foregoing we do recognize that Public Private Partnership is a means to allow the public sector to benefit from the know-how, experience and financial strength of private undertakings. Concessions- a particular form of Public Private Partnership- is granted for the provision of infrastructure services and the operations of public assets. International interest in Public Private Partnership is attributable generally to three main drivers:

**a. Investment in infrastructure**

Economic growth is highly dependent on the development and enhancement of infrastructure. Therefore, for many governments this is seen as the most pressing area for private sector involvement because it relieves the public budget as an expenditure on investment and maintenance is done by a private undertaking.

**b. Greater efficiency in the use of resources**

Many activities, even those traditionally undertaken by the public sector, can be undertaken more cost effectively with the application of private sector management disciplines and competencies. Therefore, it would be right to say that concessions are granted to put an end to an inefficient market structure characterized by public monopolies and state failure.

**c. Generating commercial value from public sector assets**

Significant resources are invested in the development of assets that are often used for a narrow range of applications within public sector. Engaging private sector expertise to exploit these assets in a wider range of applications leads to the realization of substantial incremental value for the public sector. As market players driven by profit objectives, private undertakings are considered to be more experienced in realizing cost efficiencies, improving services and innovating.

75. To sum up our discussion on efficiency grounds of a concession agreement that granting an exclusive right to a private undertaking to supply a specified market shortens the infrastructure gap while effectively addressing technical and financial needs of large projects. Such Public Private partnerships are justified on the basis of economies of scope and scale and benefits in the form of reduction in cost due to acquired synergies that are passed on to the consumers.
76. However, while certain advantages do exist and can be harnessed, public private partnership should not be regarded as representing a miracle cure nor indeed a quick fix to infrastructure and service development. Public Private Partnership should be regarded as an option amongst a range of possible tools to be applied only where the situation and project characteristics permit it and where clear advantage and benefits can be demonstrated.
77. In this case before us, it seems PQA in granting exclusivity to EVTL overlooked the fact that it was developing the facility to primarily serve Lotte Pakistan's (formerly ICI) requirements. While EVTL proved to be an efficient operator; it carried out huge investments, generated revenue and employment, catered for superior services and there is no doubt that all of these, contribute to enhancing economic activity in some way or the other. However, we find that the scrutiny for public interest was not addressed and it seems PQA's only goal was to bring in a party that has



the financial muscle and technical ability to contribute in developing the Port.

78. We also have this apprehension that PQA has awarded all its major terminal on the basis of 30 years BOT and keeping in view the implications of the Implementation Agreement, it may set a tendency for exploitative and exclusionary practices by concessionaires. Therefore, we consider, it imperative that necessary checks and balances be incorporated in design, award and implementation of such agreements granting concessionary rights to minimize the impact of absence in competition created as a result.

#### **Primary Competition concerns over a Concessionary Rights**

79. As we have already shown our concern that Public Private Partnerships should not be the only method to deliver project financing and realization. They should be used as an alternative and effective method to benefit from private sector efficiencies, promote private initiatives and competition. However, transferring provision of goods and services to a concessionaire does not always result in efficient and competitive markets. Markets which are not competitive require regulatory intervention to ensure that tariffs, Revenues or profits stay closer to what would otherwise available in a competitive market, and controlling market entry or exit.. Competition issues need to be taken into account at the various stages of a concession, including its design, the award process and its execution, as well as in the regulatory framework for the markets concerned.
80. Although the competition authority may be able to intervene *ex post* on the basis of provisions prohibiting the abuse of a dominant position, it may be more appropriate to address a concessionaire's significant market power through sector-specific regulation which applies *ex ante*. It calls due diligence from public sector granting concession to assess and gauge

inherent weakness in a public private partnership and determine definitely whether indicators exist which may result in any anti-competitive behavior of concessionaire. If these indicators exist, appropriate provisions should be included in the concession agreement to address and tackle any possibility of abuse of dominance that may arise in future. Factors indicative of the extent market competitiveness include:

- a. Choice/option/substitutability available to customers largely determines the extent of competition in port sector. Market power of concessionaire or its capability to charge unfair price would be limited if other ports could provide an attractive alternative and keep competitive pressure on the concessionaire. The availability of competitive options is based not just on the existence of a physical service alternative, but on overall transport system costs.
- b. Operational performance indicator can be used to assess the relationship between supplier with its customer. Whether the exclusivity granted may create any possibility of anti-competitive practices by bundling/tying its goods or services or discriminating customers etc. or any other monopolist practice by a concessionaire.
- c. Whether the tariff level of concessionaire is reasonable. Abnormally high tariff rates are indicate tendency to exert market power and employ unfair trading conditions. Tariff rates under consideration can be compared with: (i) historical rates of the same port, (ii) rates at other ports, and (iii) theoretical rates based on model port costs.
- d. Financial performance projection can be used to examine whether a concessionaire will be earning abnormally high profits. The assumption here is that abnormal profits may

indicate a non-competitive market setting and possibility that the concessionaire may engage in anti-competitive behavior taking advantage of dominant market power. As the economic theory also maintains that supplier possessing monopoly power tend to charge prices that exceed marginal and average cost.

81. In view of the fore-going, it is very important that an appropriate structure of an agreement conferring concessionary rights is adopted to address the inherent weaknesses in a concession and shortcomings of the market place. Public sector must transform its role from service provider to manager/ monitor of private contractor. Public benefit will enhance from Public Private Partnership to a large degree only on effective designing, structuring and monitoring of a concession agreement.
82. In this regard we would like to refer to the judgments passed by the European Court of Justice (ECJ) wherein the Court has made it categorically clear that a concessionaire is granted exclusive rights contrary to competition principles of the Treaty on Functioning of the European Union (TFEU) only to the extent to which they are necessary to enable it to perform its particular tasks assigned in general economic interest.

*The wording of Article 90(2) itself shows that exemptions to the Treaty rules are permitted provided that they are necessary for performance of the particular tasks assigned to an undertaking entrusted with the operation of a service of general economic interest.<sup>5</sup>*

*In allowing derogations to be made from the general rules of the Treaty in certain circumstances, Article 90(2) seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and the preservation of the unity of the Common Market.<sup>6</sup>*

---

<sup>5</sup> Commission of the European Communities V. Netherlands (C-157/94)

<sup>6</sup> *Id*, Case C-202/88, France v. E.C. Commission

83. These particular tasks assigned in general economic interest which a concession granting authority endeavors to attain are made possible by means of entrusting the concessionaire with certain obligations or imposing constraints. It is very important that such obligations or constraints are embodied in the legislation under which a concession is granted or reflected in the design of concession agreement in the absence of any such legislation.

*The Member States' interest being so defined, they cannot be precluded, when defining the services of general economic interest which they entrust to certain undertakings, from taking account of objectives pertaining to their national policy or from endeavouring to attain them by means of obligations and constraints which they impose on such undertakings.<sup>7</sup>*

*It is true that for an undertaking to be regarded as entrusted with the operation of a service of general economic interest within the meaning of Article 90(2) of the Treaty, it must have been so entrusted by an act of public authority<sup>8</sup>.*

*However, that does not mean that a legislative measure or regulation is required. The Court has already recognized that an undertaking may be entrusted with the operation of services of general economic interest through the grant of a concession governed by public law. (see Almelo) That is so a fortiori where such concessions have been granted in order to give effect to the obligations imposed on undertakings which, by statute, have been entrusted with the operation of a service of general economic interest.<sup>9</sup>*

84. In *Almelo and Others vs. Energiebedrijf Ijsselmij*(C-393/92) the ECJ accepted that an undertaking entrusted with electricity distribution shall supply uninterrupted electricity throughout the territory in respect of which the concession is granted to all consumers, whether local distributors or end users, in sufficient quantities to meet demand at any given time, at uniform tariffs and on terms which may not vary save in accordance with objective criteria applicable to all customers, is a task of general economic interest within the meaning of Article 90(2) of TFEU.

---

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, Case 127/73, *BRT v. SABAM and NV Fonior* and Case 66/86, *Ahmed Saeed Flugreisen and Others v. Zentrale zur Bekämpfung Unlauteren Wettbewerbs*.

<sup>9</sup> *Id.*

85. Similarly, the European Commission, in its Decision 91/50 (IV/32.732-Ijsselcentrale and Others) has already recognized that an undertaking entrusted with the main task of ensuring the reliable and efficient operation of the national electricity supply at costs which are as low as possible and in a socially responsible manner provides services of general economic interest within the meaning of the Article 90(2) of TFEU.
86. In the case of European Commission V Netherlands (C-157/94) the Commission contended that the concession granted does not take into account the public service obligations and the constraint of environmental protection and regional policy cannot form part of the particular tasks entrusted to concessionaire since those constraints apply more or less generally to all economic operators. French Government in response submitted that the concessionaire has been entrusted in compliance with various public service obligations which include “: the obligation to supply all customers, in the case of EDF throughout the national territory and, in the case of GDF, in the areas served; ensuring continuity of supply; endeavouring to provide the most competitive tariffs and the lowest costs for the community; and observing equal treatment between customers.” The French government further took the view that “those provisions of the terms and conditions, although not excluding tariff increases, are clearly designed, first, to establish a link between the sale price and the cost price and, second, to call upon the concessionaire to minimise its cost price by adjusting to technical and economic circumstances.”
87. We have examined the Implementation Agreement and also are aware of the scenario of alleged abuse of dominance by EVTL put up before us through a formal complaint filed by a customer of EVTL, Lotte Pakistan, which shall be disposed off by the Commission pursuant to proceedings in Show Cause Notice No. 3/2011 dated March 25, 2011. We are of the view that PQA has failed to carry out due diligence under the

Implementation Agreement in the light of indicators elaborated above to address any potential abuse of dominance by EVTL.

88. Perhaps, lack of such consideration may have given rise to this controversy of distortion of competition by EVTL alleged by Lotte Pakistan. We are of the considered view that if appropriate measures are not taken to address the issues that have cropped up in this case, we will be faced with the similar propositions under various concession agreements, in future.
89. In view of the foregoing, we are of the considered opinion that PQA has failed to determine the competition indicators and short comings of the market and also to entrust EVTL with certain obligations or impose constraints to prevent any abuse of dominance or to achieve the desired general economic interest.
90. While the object of the agreement may lead to promoting technical and economic progress and its benefits may out weigh the adverse effects of absence or lessening of competition, the above mentioned anticompetitive clauses need to be regulated with certain conditions. In our considered view PQA has failed to take into account and to address the following important factors while granting the concession:
  - a. Tariff setting/ tariff filing/ rate of return threshold
    - i). A balanced and precise mechanism for determination of tariffs should be specified for the entire concession period since this would be of fundamental importance in estimating the revenue streams of the project and induce the concessionaire to operate at efficient possible costs and align revenues with costs allowing it to earn only normal profits. In other words structured tariff setting would avoid possibility of overcharging from customers and prevent concessionaire from engaging in any exploitative practice for having market power. The proposal submitted by

EVTL to PQA addresses tariff calculation but PQA has no power to review it under the Implementation Agreement. However in PQA's acceptance of EVTL's bid (Letter of Intent issued) it is mentioned that the tariff will be firmed up at the financial close stage which shall be intimated to PQA but there is no document brought on the record related to that stage.

ii) Periodic review of tariff to allow concessionaire to align its revenue with the cost and also to minimize the instances where customers pay more when they should be receiving the benefit of a depreciated asset.

iii) Following details pertaining to tariff:

- Component wise and total reference tariff for the entire agreement term needs to separately specify fixed and variable components of tariff for shared facilities, dedicated facilities and jetty usage.
- Constituents of each components of tariff e.g. insurance cost, fuel cost, O&M cost, debt repayment, interest cost, return on equity etc.
- Basis of computation of all above mentioned constituents of tariff.
- Indexations applicable to the reference tariff e.g. currency rates, inflation rates, interest rates, fuel prices. This should be separately specified for each constituent of tariff.
- Formulae according to which and frequency with which indexations will apply.
- Sources of all variables input to the indexation formulae.
- Key assumptions (both technical and financial).  
Technical assumptions may include but not limited to:
  - projected throughput usage
  - minimum throughout usage
  - handling capacity
  - mechanical characteristics of the equipment

- port conditions
- outages
- maintenance schedules
- Financial assumptions may include to address:
  - capital structure (debt equity ratio)
  - exchange rates
  - taxes
  - debt repayments
  - interest payments
  - equity redemption
  - working capital requirements
  - project cost including EPC cost
  - project development cost
  - legal and consultancy cost
  - pre operating costs
  - taxes and duties
  - financing charges
  - basis of computation of rate of return (IRR) on equity
- Treatment of cost overruns in tariff determination.
- Billing format, content, timing and payment terms etc.

b. Compliance with Competition Principles

Explicitly obligating concessionaire to comply with the competition principles and not to engage in any of the practices amounting to excessive pricing or imposing unfair trading conditions, price discrimination or applying dissimilar conditions, tie-ins or making conclusion of contract subject to acceptance of supplementary obligations which have no connection with the subject of the contract and refusal to deal etc.

c. Monitoring of Concession Agreement

Awareness of a concessionaire to its obligations that it has for holding dominant position by embodying competition principle will not serve the purpose without an effective monitoring of implementation/execution of a concession agreement. In order to ensure adequate monitoring of the concession agreement and prevent abuse by the concessionaire during the term of the concession, generally concession agreements should provide for the following reporting mechanisms:



a) Independent Auditor:

An independent auditor is provided to undertake the auditing of the accounts of the concessionaire in order to certify the revenue generated by the project and various expenses being incurred by the concessionaire.

b) Reporting Requirements:

The concessionaire is imposed with the obligation to maintain specified project accounts and submit regular reports to the regulator on various aspects of the project;

c) Project Implementation Committee:

In some projects, depending on its particular nature and scope, the concession agreement may provide for the constitution of a committee comprising of members from regulator, federal government and concessionaire that would meet at regular interval to review the various aspects of the project and issue that may have arisen and brought to its specific attention.

91. The Commission, therefore, hereby directs PQA to undertake review of the Implementation Agreement and to incorporate therein effective provisions addressing the above stated concerns. After taking all the facts and circumstances into account we are of the considered view that only conditional exemption can be granted with respect to Implementation Agreement. While we are granting exemption we hereby direct PQA to take immediate action to review the Implementation Agreement and incorporate therein effective provisions in terms of the above stated concerns.

92. We note that 30 years is a maximum time length of an agreement allowed to a concessionaire. We have not interfered with this aspect and are not inclined to do so generally in cases, where agreements have been entered into prior to the competition law coming in force. To quote Lord Goff “*we are there to oil the wheels of commerce and not to put a spanner in the works*”. However, under no legal system maintaining commercial certainty and ensuring contractual sanctity is absolute. Therefore, even in such cases, although, as an exception; restricting or reducing the length may be warranted where adverse effects of lessening of competition outweigh any benefits resulting from the grant of concessionary rights and/or there would be a clear violation established under the law in the past impacting competition in the relevant market.

### **Remedy**

- a. PQA is given 3 months from the date of issuance of this order to report to the Commission regarding the measures/steps taken to comply with the above direction.
- b. In the next three months, the proposed provisions incorporating the concerns highlighted above shall be placed before the Commission for clearance.
- c. Thereafter, the Commission in not more than 3 months from the date of receipt of the proposed provision at ‘b’ above shall review and give its findings whether the proposed provisions would duly meet the conditions of exemption.
- d. The parties shall be bound to incorporate and implement those provisions in the Implementation Agreement no later than 3 months from the date of issuance of findings given by the Commission at ‘c’ above.

- e. Failure to comply with the above conditions shall constitute breach of condition having the effect of cancellation of the exemption in terms of subsection (3) of Section 6 of the Act.
- f. In the event of failure to comply with any of the directions above, PQA and EVTL shall be liable to pay a penalty of Rs.1 Million for each day after the first such violation.
- g. PQA is further directed to initiate and expedite exemption process with respect to all terminals that enjoy exclusive concessionary rights. It has stated on record that it will be filing a block exemption application which till to date has not been received by the Commission. While exemption proceedings with respect to all such agreements will be examined on a case to case basis, it is likely that most may have similar competition concerns. In this regard, valid concern was raised by EVTL whether other terminals enjoying exclusive concessionary rights have been issued any notices under the Act. Therefore, in this regard, the Cartel and Trade Abuse department of the Commission is hereby directed to proceed and take necessary action in accordance with law.
- h. Furthermore, in view of the findings of this Order it is established that the Implementation Agreement is in contravention of Section 4 of the Act and falls within the purview of the 'prohibited agreements' which required exemption under Section 5 read with the Section 9 of the Act. Although the concessionaire EVTL was obliged to seek exemption under the Implementation Agreement it is PQA which has approached the Commission as the applicant for seeking exemption under Section 5 of the Act. The Commission, therefore, is taking a lenient view by not imposing any penalty on PQA for violation and appreciating

this fact intends to encourage compliance by such concession granting authorities. Nonetheless, we must state that under the Act all parties to transaction are obligated to seek exemption if such transaction falls under the ‘prohibited agreements’ category.

- i. As for EVTL’s conduct, notwithstanding: i) its contractual obligation, ii) the General Order issued by the Commission and published in the Official Gazette vide SRO 51(I)/2008 dated 15-01-2008 which required all undertakings to seek exemption within 90 days from the date of issuance of General Order, iii) issuance of SCN, iv) the Commission’s view on this point of law through its orders (that all such prohibited agreements that are continuing but were entered into prior to promulgation/enactment of law fall within the purview of Section 4 of the Act), and v) failure to avail the opportunity to file or join hands with PQA during the course of subject proceedings indicates nothing more than a deliberate denial on the part of EVTL and certainly makes EVTL liable to penalty.
  
- j. In determining quantum of penalty, it is important to refer to the Implementation Agreement, wherein, Article 4 of the Implementation Agreement places the obligation on EVTL to make all applications for any further consents required from the appropriate relevant authorities. “Consents” as per Article 1, Clause (1.6) of the Implementation Agreement means undertakings, all approvals, consents, authorizations, notifications, concessions, exemptions, acknowledgements, agreements, permits, decisions or other matters required from GOP or other relevant authority. The term ‘Relevant Authority’ under the same Article has been defined to include Government of Pakistan, or any department, authority instrumentality or agency of GOP. Thus, there is neither any ambiguity under law

or under the Implementation Agreement nor any conciliatory factor which could entitle EVTL to any lenient treatment meted out to PQA. We are therefore, imposing a penalty in the sum of Rs.10 Million on EVTL to be deposited, within a period of fifteen days of issuance of this order.

- k. In the event of default in payment of penalty imposed on EVTL at 'j' above EVTL shall become liable to pay Rs.100,000 per day. This imposition of penalty is in addition to the penalty that EVTL shall become liable to pay in the event of failure to ensure compliance with the directions of the Commission given under this Order.

93. We consider it relevant to add that looking at the accounts for the year 2009 EVTL has earned PKR 917 million in the year 2009, with half of its capacity utilization i.e. handling 1,062 kilo tons of volume. While there is 21% increase in volume, in the year 2009 as compared to the preceding year 2008, the profit increased by over 78%. While companies are free to make profits, having a glimpse of this case, it becomes imperative to recognize, the need for regulating concessionary agreements/rights, which extend over a long period from 5 to 30 years. This is to ensure that while technical or economic progress is made and must be encouraged it shall also allow consumers fair share of the resulting benefit and protect consumers from any anticompetitive behavior.

(RAHAT KAUNAIN HASSAN) (DR. JOSEPH WILSON) (VADIYYA S. KHALIL)

CHAIRPERSON

MEMBER

MEMBER

**Islamabad, the June 29<sup>th</sup>, 2011**