BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF

SHOW CAUSE NOTICE ISSUED TO
UTILITY SOTRES COPORATION OF PAKISTAN (PVT.) LIMITED
ON COMPLAINT FILED BY
M/S DIGITAL RESEARCH LABS (PVT.) LIMITED

(F. NO: 81/DRL/C&TA/CCP/2016)

Date(s) of hearing:	19-01-2017, 27-01-2017 21-02-2017, 02-03-2017 06-03-2017, 13-03-2017 25-04-2017
Commission:	Ms. Vadiyya Khalil **Chairperson** Mr. Ikram Ul Haque Qureshi **Member**

Present on behalf of:

M/s. Digital Research Labs (Pvt.) Limited	Syed Ahmad Hassan Shah, ASC Mr. Badar Iqbal Chaudhary, Advocate Hasan Kaunain & Nafees (HKN) Mr. Hashir Jan, CEO Mr. Isphandyar Tajammal Awan, Director (Legal) Mian Wajid Ali, Project Officer
M/s Utility Stores Corporation of Pakistan (Pvt.) Limited	Mr. Tariq Hassan, ASC Mr. Bulent Sohail, Advocate Ms. Zarmeeneh Rahim, Advocate Hassan & Hassan (H&H) Mr. Shakeel Ahmed, GM (IT) Mr. Hussain Masood, C.O.O Mr. Mahmood-ur-Rehman, CFO
Pakistan Software Export Board (G) Limited	Mr. Shaukat Ali, Director Technical/CTO

THE ORDER

1. This order disposes of the proceedings initiated under Section 30 of the Competition Act, 2010 (hereinafter the '**Act**') *vide* Show Cause Notice No. 57/2016 dated 29th December 2016 (the '**SCN**') issued by the Competition Commission of Pakistan (hereinafter the '**Commission**') to M/s Utility Stores Corporation of Pakistan (Private) Limited.

FACTUAL BACKGROUND

A. PARTIES TO THE PROCEEDINGS:

2. M/s Utility Stores Corporation of Pakistan (Private) Limited (hereinafter the '**USC**' or '**Respondent**') is a state owned corporation established in 1971 by taking over 20 retail outlets from the Staff Welfare Organization. Since, 1971 the Respondent is engaged in the business of operating the retail chain stores providing basic commodities to the general public at lower rates then the open market and other vendors. Currently, the Respondent is operating around 6000 stores throughout Pakistan and is *prima facie* the largest retail chain operator in Pakistan.[1] In addition to its normal operations, the Respondent also undertakes special roles from time to time such as food security / provision during crisis i.e. during natural disasters, sale through subsidized packages i.e. sale of sugar and flour in shortage, Government relief packages such as Ramadan packages etc.

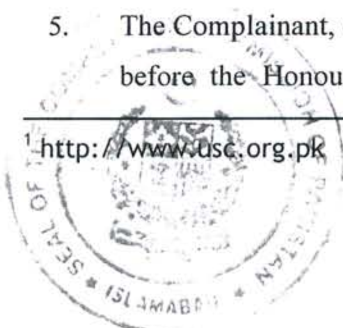
3. M/s Digital Research Labs (Pvt.) Ltd. (hereinafter the '**DRL**' or '**Complainant**') is engaged in providing a variety of IT solutions ranging from *HoneycombERP®*, E-Office, office automation & document management system, thin client networks, hardware interfacing & control systems, biometric solutions and barcode programs interfaced with general-purpose business and professional database solutions.

B. COMPLAINT, ENQUIRY, SHOW CAUSE NOTICES, REPLIES:

4. The Respondent floated an advertisement on 19th May 2016 in the daily 'Jung' newspaper whereby a Request for Proposal (hereinafter the '**RFP**') was issued for the purchase/procurement of Enterprise Resource Planning (hereinafter the '**ERP**') software and related hardware implementation services. The RFP is '**Appendix-I**' to this Order.

5. The Complainant, on 26th June 2016 challenged the RFP through Writ Petition No. 2654/2016 before the Honourable Islamabad High Court, Islamabad. The Complainant also filed a

[1] http://www.usc.org.pk



Complaint against the Respondent with the Commission on 10th August 2016 (hereinafter the '**Complaint**'), whereby the RFP was impugned on the grounds that through certain clauses in the RFP unfair terms and conditions have been imposed, thereby excluding, discriminating and restricting fair participation of local vendors, including the Complainant, in the bidding process.

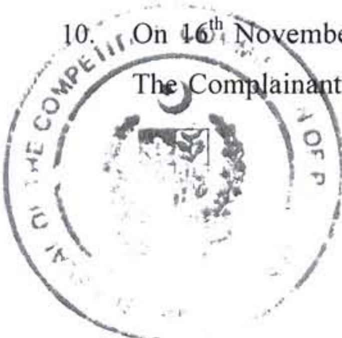
6. It was alleged in the Complaint that clause 4.2 and clause 5.1 of the RFP which set out "*Pre-Qualification Mandatory Requirement*" and "*Product Evaluation Criteria*", respectively (hereinafter, the '**impugned Clauses**') are aimed at excluding the due and fair participation of local ERP solution providers including the Complainant. The Complainant further alleged that the RFP is tailor-made so as to select only a specific international vendor, which, directly or indirectly, excludes local vendors, (including the Complainant), from the market. The Complainant also submitted that it had already highlighted its concerns in the pre-bid meeting held by the Respondent on 31st May 2016 and also before the Ministry of Industries and Production, where-after the Respondent did make certain changes in the RFP, but the same remains inconsequential.

7. The Complainant also alleged that the RFP utterly disregards paragraphs 3.4.7 and 4.5 of Pakistan IT Policy and Action Plan (the '**IT Policy**') and the purchase/procurement in question is being conducted in breach of the PPRA (the Public Procurement Regulatory Authority) Rules 2004; as it neither aims at securing the most efficient and economical solution for the value of public money nor is it based on any intelligible criteria, which thus eliminates free and fair competition in the industry.

8. It was also alleged that the said project *i.e.* procurement of ERP software and related IT equipment by the Respondent had been floated before in 2010 and 2013 with minor modifications. On both occasions, around 20 vendors (both local and foreign) had participated in the bidding process and both times, the Complainant was declared as the finalist. However, both tenders were annulled due to insufficient funds and for other reasons which remain obscure.

9. The Commission on 11th August, 2016 initiated an enquiry under Section 37(2) of the Act by appointing the Enquiry Committee to investigate the matter for possible violations of the Act, and to submit a report to the Commission.

10. On 16th November 2016, the Writ Petition filed by the Complainant was fixed for hearing. The Complainant's counsel submitted before the Honourable Islamabad High Court that the



Commission had taken cognizance of the Complaint regarding the subject matter, upon which, the Honourable Islamabad High Court observed that:

> *"Since an independent forum competent under the law is going to inquire into the matter, I am not inclined to adjudicate upon this matter. In the event, the rights of the petitioner are transgressed during the pendency of the matter before the Competition Commission of Pakistan; the petitioner is at liberty to avail his constitutional remedies".*

11. Meanwhile, the Enquiry Committee after analyzing all the material available on the record completed the Enquiry by producing Enquiry Report dated 16th December 2016 (hereinafter referred to as the "**Enquiry Report**"). The Enquiry Report concluded as follows:

    a) *USC is an undertaking in terms of Section 2 (1) (q) of the Act.*

    b) *the relevant market is the market for ERP retail based solutions including all software and hardware requirements in Pakistan.*

    c) *USC is a dominant player in the retail chain store market and that it is prima facie dominant in the relevant market being the largest procurer of ERP retail based solution in Pakistan including POS and all integrated hardware.*

    d) *It appears that Clauses 8 and 9 of 4.2 Selection criteria-Pre-qualification (mandatory clauses) are unfair and restrict competition in the relevant market by foreclosing entry by other players and are therefore, a prima facie violation of Section 3(3) (a) and (g) read with Section 3(2) of the Act which constitutes a violation of Section 3(1) of the Act.*

    e) *It appears that USC has designed the mandatory pre-qualification criteria focusing on cloud services which form only a small part of the overall tender/project a majority of which deals with ERP/Retail management system. The focus on experience in managing cloud services excludes a majority of local as well as foreign vendors from participating in the tender. Therefore, it appears prima facie that Clauses 5, 6 and 16 of 4.2 Selection criteria-Pre-qualification (mandatory clauses) are unfair and restrict competition in the relevant market by foreclosing entry by other players and are therefore, a prima facie violation of Section 3(3)(a) and (g) read with*

Section 3(2) of the Act which constitutes a violation of Section 3(1) of the Act.

f) It appears that Clauses 1 and 2 of the Solution/Product Evaluation Criteria place local vendors at a competitive disadvantage as compared to international vendors and are a prima facie violation of Section 3(3)(e)read with Section 3(2) of the Act which constitutes a violation of Section 3(1) of the Act.

12. On the above said findings and in light of public interest, it was recommended by the Enquiry Committee that proceedings under Section 30 of the Act against the Respondent be initiated. The Commission after considering the findings and recommendations of the Enquiry Committee, initiated proceedings under Section 30 of the Act against the Respondent by issuing the SCN, which in its relevant parts is reproduced herein below:

> *"4. **Whereas**, an enquiry was initiated under the provisions of Section 37(2) of the Act to determine whether the undertaking was in violation of any provision of the Act; and*
>
> *5. **Whereas**, the enquiry was completed vide report dated 16th December 2016 (the 'Enquiry Report'), a copy of which is appended herewith as Annex-I and which may be read along with this show cause notice; and*
>
> *6. **Whereas**, in terms of the Enquiry Report in general and paragraphs 14-23 in particular, the relevant product market is the market for ERP related based solution including all software and hardware requirements in Pakistan; and*
>
> *7. **Whereas**, in terms of the Enquiry Report in general and paragraphs 25-30 in particular based on the number of stores it can be concluded that the Undertaking, with a network of more than 5000 stores and with 1000 stores being initially automated, is a dominant player in the retail chain store market and that it is also prima facie dominant in the relevant market being the largest procurer of ERP retail based solutions including all software and hardware requirements in Pakistan; and*

> *8.* ***Whereas***, *in terms of the Enquiry Report in general and paragraphs 56-58 in particular it appears prima facie that Clauses 8 and 9 of 4.2 Selection Criteria Pre-Qualification (mandatory clause) are unfair and restrictive in the relevant market by foreclosing entry of other players and are therefore, a prima facie, violation of Section 3(1) read with Section 3(2) and Section 3(a) & (g) of the Act; and*
>
> *9.* ***Whereas***, *in terms of the Enquiry Report in general and paragraphs 69-73 in particular, it appears that Clauses 1 and 3 of the Solution/Product Evaluation Criteria places local vendors at a competitive disadvantage as compared to international vendors and are a prima facie violation of Section 3(1) read with Section 3(2) and Section 3(3)(e) of the Act;"*

13. On 02nd February 2017, the Respondent submitted its reply / comments to the SCN, which are summarized as follows:

    i. The Respondent is not engaged in any anti-competitive practice or abuse of dominance in any market relevant to this case.

    ii. The Respondent, while referring to Article 10A, 18, 23 and 25 of the Constitution of the Islamic Republic of Pakistan 1973 (the "**Constitution**") submitted that it has the right to acquire, hold and dispose of property as its fundamental right.

    iii. The Enquiry Report is a detailed and determinative indictment of the Respondent without giving it the opportunity of being heard in contravention of Section 33 of the Act.

    iv. The Respondent is not an undertaking in terms Section 2(1)(q) of the Act and is not in any way engaged in the production, supply, distribution of goods or services for the purposes of Section 3(1), 3(2) and 3(3) (a), (g) and (e) of the Act. Furthermore, the Commission has wrongfully taken cognizance of the Complaint under Section 37(2) of the Act. Further, the Complainant is also neither an undertaking nor a registered association of consumers for the purposes of the Act.

    v. The Complainant had neither participated in the bidding process nor has it submitted its technical or financial bid/proposal to the Complainant. Thus, it has no legal or other interest in the Respondent's purchase/procurement in question. Therefore, the allegations that the mandatory qualification criteria laid down in the RFP are unfair,

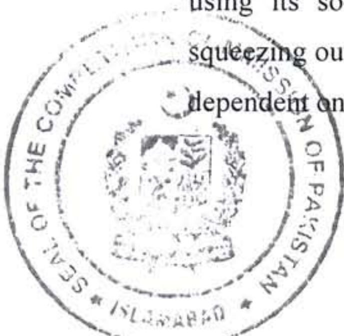
discriminatory and exclusionary in effect are denied as they are based on the technical, operational and functional requirements of the Respondent.

vi. The RFP is for procurement of ERP software, hardware, and implementation services on a turnkey basis. The RFP pertains to "*invitation of bids from reputable IT firms to implement a cloud based automated and integrated system for Enterprise Resource Management Planning alongwith an on-premises Retail Management System, which can simplify, standardize, and automate business process of different departments of USC along with Point of Sale system*". However, the Respondent is the consumer for ERP solutions and its Board of Directors has made a considered business judgement in the best interests of the organization to implement internationally accredited and technologically efficient ERP software and related IT equipment with minimal cost. It has THE unfettered right to acquire any property pursuant Article 23 of the Constitution.

vii. The Enquiry Report has selectively relied upon the RFP in determining the relevant market as "the market for ERP retail based solutions inclusive of all hardware and software requirements in Pakistan". In fact, the Respondent has specifically sought an ERP Cloud solution and on-premises Retail Management System and both products should be automated and integrated with the cloud.

viii. The Respondent's dominance in the market as a vendor and seeking ERP products as a consumer are two different areas. The Respondent's dominance cannot be equated with its ability to enter into the ERP retail market as a first-time entrant. Therefore, any assertions of its 'buyer power' fall by the sides of the road as the Respondent's ability to act independently of its competitors is non-existent.

ix. Furthermore, the Enquiry Report has in itself come to the conclusion that over 90% of grocery sales in Pakistan take place through a traditional business model *i.e. kiryana* stores, alongside the retail chain market catering to a selected urban niche. The Respondent's dominance cannot be asserted by the number of stores owned and operated by it. The dominance cannot be computed based on the Respondent's number of stores when in fact traditional models comprise of 90% of the sales. The counsel contended that the Enquiry Report has failed to demonstrate that the Respondent is using its so-called dominance to either obtain better procurement conditions by squeezing out suppliers, or to negotiate for better discounts, or that any ERP supplier is dependent on the dominance of the Respondent.



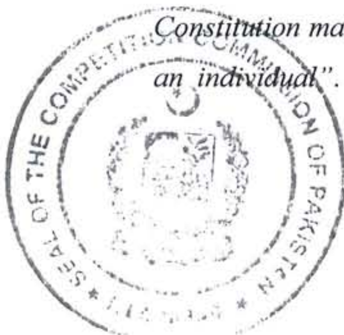
x. Clauses 4.2(8) and (9) of the RFP are neither unfair nor restrictive of competition as the term Tier-1 is commonly understood to mean the best in quality of services. As a matter of fact, the Commission itself has employed Tier-1/Gold/Silver terminology to select IT equipment suppliers. Such classification is based on an intelligible differentia which is not discriminatory. Moreover, nowhere has it been demonstrated by the Enquiry Report exactly how the Respondent's standards amount to "unfair trading conditions" or to "boycotting or excluding any other undertaking from the production, distribution or sale of any goods or provision of any service" or "refusal to deal". The conditions only apply to ERP cloud solution providers, which in Pakistan comprises of dozens of local companies who have a partnership with international cloud service providers. The RFP is only illustrative of the criteria requested by the Respondent and the highest marks are to be awarded to a solution which is critically relevant for it.

14. On 20th February 2017, the Complainant submitted its comments to the reply filed by the Respondent, which for ease of reference are summarized as follows:

i. The Respondent in its reply has not answered or provided any plausible explanation on how the mandatory criteria laid down in the impugned Clauses of the RFP are not in contravention of the Act. Rather, the Respondent had raised technical objections as to the validity of the Enquiry Report, the Complaint, and application of the Act. The RFP titled "*Procurement of Enterprise Resource Planning (ERP) Software and Implementation Services*" encompasses provisions of '*goods and services*' by way of competition among suppliers.

ii. The Respondent in its reply failed to address the fundamental questions raised in the Complaint that the RFP contains qualification/disqualification criteria, which is not only, unfair, discriminatory or exclusionary, but is also tantamount to refusal to deal and contains express entry barriers to local suppliers, including the Complainant, which had not only participated in two bids held previously but was also declared as the finalist. It may be appreciated that under the RFP, the Complainant is only seeking a fair chance of competition.

iii. Relying on *Dossani Travels (Private) Limited Vs. Travel Shop (Private) Limited* [PLD 2014 SC 1], it was submitted that "*by qualifying the right to do business and trade, the Constitution makers wanted to create a balance between societal needs and the right of an individual*". The Act is a manifestation of these very qualifications/ restrictions,



which the law deems mandatory in order to protect the citizens by fostering free and fair competition or level playing field. Accordingly, the Respondent is obligated to follow the principles of free competition, and in the instant case, it is the Complainant, whose rights under Article 18 of the Constitution are being restricted by the criteria laid down in the RFP.

iv. The SCN does not aim at hindering the Respondent from acquiring any property. However, the right to acquire property under Article 23 is subject to certain restrictions in public interest and other provisions of the Constitution. Furthermore, the Respondent's objection under Article 25 of the Constitution is fallacious at best because it is the Complainant, which, in fact, is seeking the right to equal treatment under the Act.

v. The Enquiry Report and the SCN are not in violation of Article 10A of the Constitution and the Respondent's objections in this regard have stemmed from a misreading of the law. The current proceedings are in compliance with Section 30 of the Act read with Regulation 26 of the Competition (General Enforcement) Regulations 2007, which encompasses the principle of due process as is envisaged under Article 10A of the Constitution. The SCN is meant to afford the Respondent, the opportunity of being heard, which fulfills the legal standard of due process and fair conduct of proceeding before the Commission.

vi. During the course of the enquiry, the Respondent was engaged by the Enquiry Committee, but it failed to provide any facts specific to the case or provide reasons to substantiate the fact that no breach of the Act had occurred. In any event, there is no bar on the Respondent to explain its case in the instant proceedings as paragraph 80 of the Enquiry Report merely recommended initiating proceedings under Section 30 of the Act after having established a *prima facie* violation of the Act. However, instead of availing the opportunity to contest the matter fairly and placing on record evidence and material in support of its contentions, the Respondent had rather preferred to sidetrack the issue by raising collateral and technical defenses in its response to the SCN.

vii. Regarding the Respondent's contention that it is a consumer for the solution/ software being procured, it was submitted that the Respondent is not a consumer, but a procurer and purchaser. A consumer or a procurer is to be differentiated in the sense that the former obtains goods or services for personal consumption while the latter obtains goods or services for onward distribution/supply/functioning, which clearly refers to the

Respondent procuring of goods for its business purposes and functioning as an organization, so it squarely falls within the definition of undertaking provided in the Act.

viii. Regarding the Respondent's objection that Complainant has not participated in the bidding process and thus has no standing to file the Complaint, it was submitted that it is also a matter of record that the Complainant had not only participated in the earlier bids held twice *i.e.* in 2010 and 2013 for procurement of the ERP solution but was also declared as the finalist. However, the process was maliciously scrapped by the Respondent on these occasions to circumvent the Complainant's obtaining of the tender. Secondly, in the instant procurement, the Complainant has been barred from participation by virtue of the non-competitive or restrictive clauses contained in mandatory qualification criteria of the RFP. In every possible eventuality, the mandatory qualification criteria operate to eliminate competitors and fair participation in the bid on account of selective and tailor-made qualifications, which local industry participants do not possess except those to whom, perhaps, the RFP is designed to benefit.

ix. The Respondent has admitted that it is engaged in the retail supply and distribution of household goods and is, therefore, an undertaking for all intents and purposes of the Act. In this regard reliance was placed on the Commission's Order in the matter of Pakistan Automobile Manufacturers Authorized Dealers Association (2013) and argued that the Commission has espoused the stance taken by Court of Justice of the European Union in *Hofner and Elser v Macrotron GmbH [Case C-41/90]*, wherein it was held that:

> *"In the context of competition law [...] the concept of an undertaking encompasses every entity engaged in the economic activity regardless of the legal status of the entity and the way in which it is financed".*

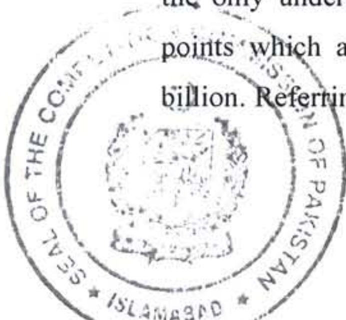
x. In regard to the Respondent's contention that the Complainant is not an undertaking in terms of Section 2(1)(q) of the Act, it was submitted that it is a corporate entity operating in the business of production, supply and distribution of innovative software solutions in IT technology and provisions of associated services. Therefore, the Complainant is an undertaking under section (2)(1)(q) of the Act.

xi. On the relevant geographic market, it was submitted that since the instant proceedings involve a national level tender; the relevant geographic market extends to the whole of Pakistan. As far as the product market is concerned, under the Act a product market should be so defined to "*comprise of all the products or services which are regarded as interchangeable or substitutable*" from the demand-side perspective which in the matter at hand are the *suppliers* of the ERP software and related IT equipment and services.

xii. On substitution, reliance was placed on the judgement of the European Court of Justice in the ***United Brand v Commission of the European Communities (1978) Case 27/76***, and stated that degree of substitutability is to be "*evaluated having regard to all the features of the products involved and all the factors which influence consumer choice*". Based on this, it was submitted that the Enquiry Report has rightly assessed that as per functional requirements of the ERP, "*some of the functions are geared specifically to retail solutions*" and that include "*hardware requirements which include items to be used at retail store level*". Accordingly, the product being unique in its features and functions, there is no substitute, keeping both demand-side and supply-side in perspective. Therefore, the relevant product market has justifiably narrowed down to the "*ERP retail based solutions including all software and hardware requirements*".

xiii. Referring to paragraph 26 of the Enquiry Report, it was stated that "*in procurement markets, a company's power to supply cannot only be limited to competitors, but also by buyer power. A powerful buyer has the ability to favour one or certain suppliers over the others. If one supplier has better procurement conditions than other suppliers, he can use these to strengthen his position in the market by squeezing out other competitors*". The purpose of instant procurement of ERP solution by the Respondent is not for personal consumption, but onward supply/distribution and functioning at approximately 6,000 stores under its control and management. Therefore, even in the relevant market as identified by the Respondent, it is involved in the control of procurement of goods or services and has sufficient power to distort competition.

xiv. While countering whether the Respondent has a dominant position in the relevant market, it was submitted that the Respondent holds a dominant position in the '*retail chain market*' as well as in the '*relevant market*' defined in the Enquiry Report. A factual analysis of the retail chain market in Pakistan suggests that the Respondent is the only undertaking which holds a dominant position based on a number of sales points which are approximately 6,000 with an annual turnover exceeding PKR 60 billion. Referring to paragraph 1 of Respondent's reply to the SCN, the Respondent has



admitted that it is "*the operator of one of the largest network of chain stores in the world*". Furthermore, the Respondent's closest competitor within retail chain market is Canteen Stores Department (CSD) operating around 110 stores, which is less than 2% in comparison to the Respondent. Therefore, the Respondent has significant buyer power which becomes even acute in a product as limited and specific as ERP Retail Solutions.

xv. The Respondent has the ability to impose, directly or indirectly, competitive constraints on the undertakings engaged in ERP retail solution markets, by erecting entry barriers on the suppliers to win a tender of this magnitude ever sought and granted in Pakistan and the investment regime it would build as a result of grant of this tender. All unequivocally establish that the market power of the Respondent in the relevant market of ERP retail based solutions including all software and hardware requirements in Pakistan. The number of stores operated by the Respondent indicates its dominance within retail chain market and the consequent procurer power it enjoys in the procurement market of all products associated with the retail chain, including the ERP software. The quantum of sales, in this case, is of no pertinence.

xvi. The pre-qualification mandatory criteria laid down in clause 4.2 of the revised RFP are reflective of the Respondent's arbitrariness or favoritism and excessive inclination towards a particular vendor. Hence, the Commission needs to take into account the possibility of collusive design/dealing and possible violations of Section 4 of the Act. The use of the term 'Tier-1 ERP' for software classification is neither a standard market practice nor is it an accurate determinant of the quality of the software. 'Tier-1 ERP' classification is used by a select few publications, which might be good to the extent of the researcher's knowledge and the breadth of research undertaken. The use of this classification is so limited that even the publications referenced by the Respondent in the impugned Clauses of the RFP *i.e.* Gartner and IDC, do not employ it. Therefore, it is the highly discriminatory criterion, as it neglects important factors such as the size of the project and the type of business, among other things.

xvii. The qualification criterion of 'CMMI Level-III' is excessively narrow and serves to limit the competition to an untenable level at the cost of all other vendors. The insignificance of applying such qualifying criteria becomes even more apparent when the effect of clause 4.2 (15), which imposed an internationally accepted accreditation criteria of ISO 9001, ISO 27001 or IEEE certification upon the vendors are read together.

xviii. On the issue of alleged abuse of dominant position, it was submitted that the Enquiry Report in paragraphs 32-55 had correctly analysed clauses 4.2(8) and 4.2(9) of the RFP and how they are in contravention of Section 3(3)(a), and 3(3)(g) read with Section 3(2) and 3(1) of the Act.

C. INTERIM ORDER AND HEARINGS BEFORE THE COMMISSION:

15. On 29th December 2016, the Complainant submitted an application, whereby it requested the Commission to make an interim order under Section 32 of the Act (the '**IO application**'). The Complainant mainly submitted that it has a *prima facie* case and keeping in view unresponsiveness of the Respondent, the Commission may grant an interim order restraining the Respondent from awarding the bid till the final order of the Commission. The Complainant also submitted that if award process continues, it will not only cause harm to its business interest but will also cause serious and irreparable damage to the public interest. Therefore, such directions may be issued to the Respondent, which ensures and satisfies the Commission that it will not proceed with the procurement during the pendency of the proceedings before the Commission.

16. On the first date of hearing before the Commission i.e. 19th January 2017, the Respondent's counsel filed their power of attorney and sought an extension to file a reply to the SCN. The request was acceded to and the Respondent was given time to file written reply to the SCN until 02nd February 2017. The counsel also sought an extension to file a written reply to the IO application until 27th January 2017, which also was granted by the Bench.

17. On 27th January 2017, both parties appeared before the Bench and argued in favour and against the grant of the relief prayed under the IO Application. The Respondent's counsel submitted that the Complainant has not submitted its response to the RFP, it is not part of the ERP procurement process; thereby its argument pertaining to serious or irreparable damage is not sustainable, be it, for personal and/or in the public interest. In rebuttal, the Complainant's counsel submitted that they could not submit the RFP because of the restrictive, unfair and discriminatory criteria laid down therein.

18. The Bench having heard the arguments at length and considering the likelihood of serious damage caused to public interest, found it imperative to issue an interim order under Section 32 of the Act to prevent the award of the contract in question till the conclusion of the proceedings and final order of the Commission.

19. As a result, the Bench vide its Order dated 27th January 2017 directed the Respondent that it may continue to carry out its internal bidding process and tenders received thus far; however, it shall not proceed with the award of procurement contract till the conclusion of the proceedings and final order of the Commission.

20. Subsequent to the above, detailed hearings were conducted on 21st February 2017, 02nd March 2017, 06th March 2017 and 13th March 2017. During the hearing held on 13th March 2017, the Commission was of the view that it will be in the interest of all the parties to consult with Pakistan Software Export Board (Guarantee) Limited (hereinafter the '**PSEB**') on the RFP in and the mandatory criteria laid down therein. Accordingly, PSEB appointed its Director Technical to attend the hearing and to submit its comments in writing. On 21st March 2017, PSEB submitted its comments which, for ease of reference are summarized as follows:

i. PSEB understands that the Respondent has the right to define its own terms, conditions, and specifications in line with its strategic and operational requirements. Nevertheless, being a public sector organization, domestic IT industry should be provided a due and fair opportunity to propose an ERP solution, if, they meet the given specification and technical criteria. PSEB is of the opinion that domestic IT industry is well capable now to provide ERP solutions of various capacities. On general examination of the RFP provided by the Commission, PSEB observe that the pre-qualification (mandatory) clause 4.2(8) that demands Tier-1 ERP solution is not a standard term. Referring to paragraph 32 of the Enquiry Report and web search, PSEB commented that the term 'Tier-1 ERP' appears to be a product of a select group of vendors comprising SAP, Oracle, and Microsoft Business Solutions. This limits the competition among the solutions of SAP, Oracle and Microsoft and their Gold/Tier-1 partners.

ii. The pre-qualification (mandatory) clause 4.2 of the RFP also requires CMMI Level-III certification for local vendors to participate. As PSEB record, only five companies are CMMI Level-III certified in Pakistan to-date, which is listed below:

a. Business Analytics	CMMI LEVEL-III
b. Info Tech	CMMI LEVEL-III
c. iEngineering	CMMI LEVEL-III
d. NetSol Technologies	CMMI LEVEL-III
e. Systems (Pvt.) Ltd.	CMMI LEVEL-III

iii. Only three out of five, are providing enterprise level ERP solution, in the presence of a detailed and high-level product/ solution evaluation criteria given under clause 5.1 of the RFP. This condition limits the due participation and fair competition from top local IT companies in the bidding process, despite there being a number of IT companies providing enterprise level ERP solution to domestic as well as international clients. Some of them are listed below:

a. Abacus Consulting Technology (Pvt.) Ltd.
b. Inbox Business Technologies
c. Info Tech (Pvt.) Ltd.
d. Systems (Pvt.) Ltd.
e. Techlogix Pakistan (Pvt.) Ltd.
f. LMKT (Pvt.) Ltd.
g. Techaccess Pakistan (Pvt.) Ltd.

iv. PSEB observe that the clause 4.2(15) states that "*Vendor should be ISO 9001 or ISO 27001 or CMMI or IEEE certified. Having any one certification will be accepted*". This apparently nullifies the conditions of CMMI Level-III certification requirement; therefore, clarification is required on the two contrary clauses in the RFP.

21. The Commission, after having reviewed PSEB's comments on technical specifications prescribed in the mandatory criteria of the RFP, *vide* its letter dated 29th March 2017, deemed it appropriate to seek PSEB's further comments on the financial thresholds prescribed therein. The Commission required the list of local vendors that have:

i. experience in deployment of ERP solutions/retail solution in Pakistan over PKR 75 million;

ii. an annual turnover of PKR 500 or equivalent in past consecutive three (03) years; and

iii. successfully completed 05 retail projects.

22. In response, PSEB shared details of four companies which claimed to meet the given criteria. These are:

a. InfoTech (Pvt.) Ltd.
b. Inbox Business Technologies (Pvt.) Ltd.
c. Ora Tech Systems (Pvt.) Ltd.

d. Excellence Delivered ExD (Pvt.) Ltd.

23. PSEB commented that if the opportunity is re-advertised using the available media, other IT companies with experience and expertise in ERP solutions are likely to submit their proposals. The Commission shared PSEB's observations with the Respondent and the Complainant for their comments. On 03rd April 2017, the Respondent filed its reply to PSEB's comments, which are summarized as follows:

i. Referring section 53(2) of Act, it was objected that PSEB neither has the power nor the authority or mandate to render any opinion on aspects of the competition law under the Act, in particular, on whether the RFP constitutes a violation of the Act. PSEB is not in a position to opine whether the RFP offers a level playing field between Pakistani and international ERP providers, as PSEB's *scope* is limited to promote Pakistani IT industry and boost revenues of the Pakistan IT industry by 2020.

ii. The RFP does not restrict the participation of the local vendors in the bidding process. All companies that submitted their bid in response to the RFP were local companies. Therefore, PSEB's remarks "*But being a public sector organization, domestic IT industry should also be provided a due and fair opportunity to propose an ERP solution [...]*" is a slanted accusation, misconceived and contrary to the facts.

iii. "*Tier-1*" is a standard term extensively used in public sector ERP procurement. The term denotes the high level of ERP functionalities that are specific to large scale enterprises. The Respondent has more than 10,000 employees, have revenues in billions and require integration across a wide geography. In fact, the Commission and PSEB themselves are also beneficiaries of the use of "*Tier-1*" in respect of "data node operations" and services. The term does not refer to a select group of ERP providers. Had that been the intent, the Respondent would have named those ERP solution providers. Hence, what has not been stated in the RFP cannot be imputed by inference or read in as the presumption of fact.

iv. Referring to the decision of Oracle/PeopleSoft, what is meant by the term high function/tier-1 ERP software, the Respondent's counsel cited that:

> *"(59) The market investigation has shown that, within complex EAS solutions, delineation according to EAS "pillars" or group of functionalities is necessary. The segmentation would, in particular, single-out "high-function" solutions in the field of FMS [financial*

management system] and of HR [human resource], as opposed to other specific pillars (or group of functionalities) such as CRM, SCM, or PM."

v. Apart from the fact that each pillar, *i.e.* HR, FMS, SCM, CRM is intrinsically linked to specific business function and therefore is barely substitutable from both a demand and (to a lesser extent) supply-side viewpoint, FMS and HR solution are the administrative and financial backbone of an entire organization and represent the key application software in an undertaking (their back-office functions), regardless of the industry sector in which the company may be active.

vi. Relying on the above, the term "*Tier-1*" used in the RFP denotes to the high-functionality of ERP software required for its own business and operational needs. Therefore, the term "*Tier-1*" solution does not *ipso facto* mean a select group of international players as any Pakistan company having the requisite capability and maturity in software development can also provide such software in Pakistan. The entire thrust of the Respondent's RFP was to invite proposals for solutions from the widest possible array of ERP solutions providers. In this regard again Respondent has relied upon the ***Oracle/PeopleSoft,*** the relevant part relied upon by the Respondent, for ease of reference is reproduced herein below:

"(60) For these two groups of functionalities (HR & FMS) customers having a high level of functional needs (such as large organizations with complex functional need) require software and accompanying services with performance characteristics of a particularly high standard. The FMS and HR software solutions concerned by this transaction are those that can be integrated into suites of integrated functions and are usually accompanied by a high level of service and support. These solutions normally exhibit the specific characteristics of complexity and performance that specify high standard requirements and are therefore typically purchased and used by large customers having complex needs (hereinafter these EAS are also referred to as "high-function" solutions or software).

(61) In reply to the Commission's statement of objects, Oracle submitted that the Commission used vague concepts such as large enterprise with complex functional needs (LCE) and "high-function

HR and FMS solutions" which are not defined, except for "circular" references, nor do they have a recognized meaning in the industry.

(62) In this respect, at the outset, it has to be stated that the investigation allowed a progressively refined understanding of the market. Within HR and FMS software – product pricing, characteristics and intended use make it possible to distinguish -from antitrust perspective – software having high standard of performance, suitable for organizations having particularly high standard of performance suitable for organizations having the highest functional requirement, from simpler software performing at a lower rate of throughput and suitable for less complex, or simpler organization.

This software has the capability of executing a wide array of business processes at a superior level of performance has been in the Commission's statement of objection as "high-function". This high-function software has certain characteristics in terms of, inter alia, scalability, re-configurability, sophistication, pricing of the software and reliability, quality and brand recognition of the vendor. In the industry, this software is referred to in different ways, using various terminologies ("upstream software", "tier-one software", "enterprise software"). The sale process of this high-function or enterprise software is lengthy and involves extensive sharing of information between candidate vendors and the customer.

(63). The low-rate performing kind of software is known also as mid-market software. The mid-market software is a product with different characteristics and a set of pre-packaged functions."

vii. With regard to the requirement of CMMI level-III, PSEB's observations are denied by the Respondent. Two (InfoTech and Systems Limited) out of five CMMI level-III certified companies submitted their proposals and bids to the Respondent. Moreover out of seven ERP providers named by PSEB, four of them have already participated in the Respondent's bid proceedings. CMMI level-III is an average/middling standard. All that it means is that the vendor's software development and implementation process is well-defined and can be trusted by the consumers. These are the bare minimum standard that a consumer of the Respondent's size would expect from a prospective ERP solution

provider. Therefore, the claim that CMMI level-III condition limits due and fair participation does not hold true on the facts.

viii. With regard to financial thresholds, the Respondent's project requirement costs are over PKR 500 million or USD 5 million. It is, therefore, critical for ERP providers to meet certain minimum thresholds (i.e. CMMI level-III and PSEB eligibility in respect thereof) to assure quality performance and implementation of the ERP solutions. The Respondent cannot afford to risk the project with ERP providers who do not need meet these bare minimum standards.

24. Subsequent to the above another hearing was held on 25th April 2017, wherein the parties were again heard at length. During the Commission's hearings, both Complainant and the Respondent, through their duly authorized representatives, argued on the similar lines to their written submissions, other than providing additional documents by way of response/rebuttals to submissions made by each party.

DELIBEARATION AND ANALYSIS

25. After hearing the parties at length and perusing the record, the following issues are identified, for deliberation of the Commission, which are as follows:

(A). *Whether the parties to the proceedings in the instant matter are undertaking(s) in terms of clause (q) of subsection (1) of Section 2 of the Act?*

(B). *What is the relevant market for the purposes of the instant matter?*

(C). *Whether or not the Respondent holds a dominant position in terms of clause (e) of subsection (1) of Section 2 of the Act within the relevant market?*

(D). *In the event Respondent is found to have a dominant position in the relevant market, did the Respondent engage itself in abuse of its dominant position by introducing unfair, discriminatory or exclusionary bidding criteria in the RFP and therefore prevent, restrict, reduce or distort competition in terms of clauses (a), (e) and (g) of subsection (3) of Section 3 read with subsection (1) & (2) of Section 3 of the Act?*

A. UNDERTAKING:

26. The Respondent has raised an objection that it is not an '*undertaking*' in terms of clause (q) of subsection (1) of Section 2 of the Act; rather the Respondent is a "consumer" of ERP software

and related hardware and software solutions. Since, the object of the Act is to protect the interest of the consumers and not competitors; therefore, the Respondent objected that it does not fall within the definition of an "undertaking"; as the Act is not applicable to its purchasing or procurement activities in question.

27. It seems that the Respondent has mainly objected to its status as an undertaking under the Act regarding the nature of conduct under question. Given the foregoing, in order to address this particular issue, we deem it appropriate to refer to the definition of the term 'undertaking' under the provisions of Act, which for ease of reference is reproduced herein below:

> *"any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association of undertakings".*

28. While interpreting the definition of an 'undertaking' we are guided by the judgment of the August Supreme Court reported as ***Zahid Iqbal vs. Hafiz Muhammad Adnan and others, 2016 SCMR 430***, wherein while interpreting the provisions of section 27 of the Punjab Local Government Act, 2013, it was held that *"Courts donot legislate but interpret the statutes according to their ordinary and plain meaning and donot import and or supply words or provisions from any other law, no matter how laudable and desirable it may it may appeal to be*". We are also guided by the a judgment of the ***Indian Supreme Court reported as London Rubber Co. Ltd., vs. Durex Products Limited, AIR 1963 SC 1881***, wherein it was observed that *"the duty of the Court is to give full effect to the language used by the Legislature. It has also no power either to give the language a wider or narrower meaning than the literal one, unless the other provisions of the Act compel it to give such other meaning."* With the foregoing in view, we now proceed with interpreting the definition of 'undertaking' under clause (q) of subsection (1) of Section 2 of the Act, in the subsequent paragraphs.

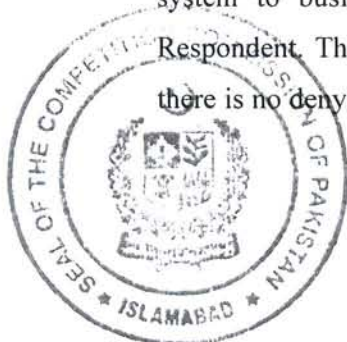
29. A bare perusal of the definition of an 'undertaking' leaves no doubt that it is divided in two parts. The first part of the definition takes within its folds the types of entities that can possibly exist i.e. an individual, a company, a firm, an association of undertakings, governmental entities, sector-regulators, a body corporate established under the Provincials or the Federal laws of Pakistan, a cooperative society and any other entity regardless of its legal status and the way in which it is financed. Whereas the second part focuses on the nature of activity which is performed by them be it directly or indirectly i.e. *production, supply,*

distribution of goods or provision or control of services. The most important part of the second limb of the definition is that the legislature within its wisdom by using the words '***in any way***' (emphasis added), has made it clear that there is no condition on the legal entity to engage in commercial or economic activity to fall within the purview of 'undertaking' for the purposes of the Act. If any legal entity or natural person is engaged **in any way** in the production, supply, distribution of goods or provision or control of services, the said undertaking would fall within the purview of the term 'undertaking'.

30. Having determined the scope of the definition of the term 'undertaking', we are of the considered view that the Respondent is a public sector organization operating and managing a retail chain of around 6,000 stores across Pakistan. The company is primarily engaged in the bulk purchasing and retail sales of household items targeting the lower strata of society as noted above. Hence, the Respondent clearly falls within the purview of the term 'undertaking' and hence is an undertaking in terms of clause (q) of subsection (2) of Section 1 of Section 2 of the Act.

31. As far as the stance of the Respondent *vis-à-vis* the procurement of ERP as a consumer is concerned, we are of the considered view that this argument lends no support to the Respondent as far its status as an undertaking is concerned. As noted above, there is no denying to the fact that the Respondent is primarily engaged in bulk purchasing and retail sales of household items targeting lower strata of the society, which is sufficient to determine that the Respondent is an undertaking. However, this particular aspect i.e. whether the Respondent is a consumer *vis-à-vis* procurement of ERP solutions only becomes relevant, when the Commission determines that the Respondent holds a dominant position in the relevant market. In that case, the same shall be dealt with while determining the possible violation of Section 3 of the Act.

32. Though the Respondent has raised an objection that the Complainant is not an undertaking, however, in support of its contentions the Respondent has not made any noteworthy submissions or placed any documents on the record. Despite the foregoing, the Commission will analyse whether the Complainant is an undertaking or not. In line with the scope of the term 'undertaking' as discussed in preceding paragraphs, the Complainant is engaged in providing a variety of information technology (IT) based software, including ERP solution namely, HoneycombERP for the purposes of automation and documentation of management system to businesses and professional undertakings, which fact is not denied by the Respondent. Therefore, being engaged in the provision of IT related products and services, there is no denying to the fact that the Complainant is an undertaking in terms of clause (q) of



subsection (1) of Section 2 of the Act. Accordingly, the objection of the Respondent in this regard is turned down.

B. RELEVANT MARKET:

33. In terms of clause (k) of subsection (1) of Section (2) of the Act, the 'relevant market' is defined as follows:

> *"relevant market" means the market which shall be determined by the Commission with reference to a product market and a geographic market and a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products' characteristics, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those areas;"*

34. From a perusal of the above definition of the 'relevant market', there is no doubt that the relevant market has two components (i) the relevant product market and (ii) the relevant geographic market. While taking into account the above and the facts at hand the Enquiry Report has defined the 'relevant market' in the following terms:

> *"20. It is noted that some of the ERP functional requirements are generic such as financial, payroll, human resource; however, other requirements are geared specifically to retail solutions i.e. purchasing, inventory, on premise retail management system.*
>
> *21. In addition there are certain hardware requirements which include items to be used at the retail stores level. These include POS with LED display (1550 quantity), bar code scanners (1700 quantity), thermal printer (1550 quantity), bar code printers (1140 quantity), UPS (1065 quantity), Switch racks, networking, wiring, civil works etc. (1,000), cash drawers (1550 quantity), internet connectivity (1200 quantity), LaserJet printer (50 quantity), servers (as per requirement), desktop (290 quantity).*

22. Therefore based on the findings of paragraphs 14-21 above, we conclude that the relevant product market is the market for ERP retail based solutions including all software and hardware requirements."

35. With reference to the geographic component of the relevant market, the Enquiry Report concluded that:

    "The tender is a national level tender limited to the territory of Pakistan therefore the relevant geographic market is the whole of Pakistan"

36. Summing up the above, the relevant market as defined by the Enquiry Report is the market for ERP retail based solutions including all software and hardware requirements in Pakistan. The Respondent has objected before the Commission that the relevant market as defined by the Enquiry Report is not an appropriate one and while determining the relevant market, the Enquiry Report has failed to appreciate that ERP software is a universal solution used to streamline all business processes of any organization irrespective of the nature of business or organization concerned. The Respondent further contended that software and hardware are not substitutable products. Similarly, an ERP system cannot be substituted with RMS and PoS systems.

37. In support of the above submissions, the Respondent placed reliance on clause 2.1. of the RFP, which provides that "*the overall goal of this project is to devise an automated system for enterprise resource planning on the Cloud. An ERP system along with Retail Management System... ERP cloud system should enable the workforce to collaborate, analyse and work on the move to accelerate performance...ERP system should be available on the cloud -Software as a Service (SaaS) and managed by OEM of ERP application provider*". In a nutshell, the entire thrust of the Respondent's objection is that ERP is a generic product common to all businesses and solutions cannot be substituted with RMS/point of sale systems, etc. During the arguments, the Respondent has placed reliance on the European Commission's Order in ***Oracle/PeopleSoft***[2].

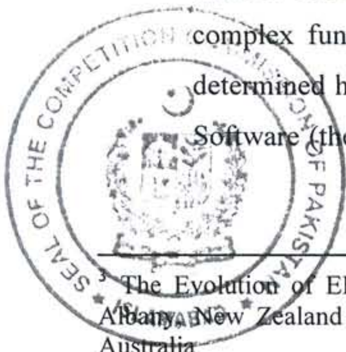
38. We deem it appropriate to address this issue while considering the demand and supply-side interchangeability and substitutability perspectives of the ERP software and related IT system with special focus on the characteristics and intended uses, for the purposes of defining the relevant market. Therefore, before proceeding further it is imperative to understand the term

[2] Case M. 3216, Oracle/PeopleSoft, 26.10.2004

'*Enterprises Resource Planning Systems*' or ERP, and its characteristics in order to carry out the interchangeability and substitutability analysis.

39. ERP or enterprise resource planning systems or enterprise systems are software systems for business management, encompassing modules supporting functional areas such as planning, manufacturing, sales, marketing, distribution, accounting, financial, human resource management, project management, inventory management, service and maintenance, transportation and e-business.[3] American Production and Inventory Control Society[4] has defined ERP systems as "a method for the effective planning and controlling of all the resources needed to take, make, ship and account for customer orders in a manufacturing, distribution or service company." From the foregoing definitions, we are of the considered view that ERP is built to collect and organize data from various levels of an organization and connect business activities across departments. A structured approach to ERP can help a company standardize and automate its business processes and improve the efficiency of operations. In addition to saving time and money, an integrated approach to managing business processes ensures that everyone is working with the same data and watching the same key performance indicators.

40. Since, the Commission has not dealt with any case earlier, wherein ERP was treated as a product; therefore, we seek guidance from the European Commission's decisions in this regard, in order to understand the functionality and substitutability of the ERP in order to determine the relevant market, while carrying out the interchangeability and substitutability analysis. In ***Oracle / PeopleSoft.,***[5] the European Commission while analysing the merger between Oracle and PeopleSoft., concluded that separate markets existed for financial management systems (FMS) and human resources (HR), which are both part of a wider market for enterprise resource planning (ERP). In addition, the Commission concluded that, within the financial management systems (FMS) and human resources (HR) markets, distinct markets existed for "*high-function*" solutions typically purchased by large organisations with complex functional needs. In ***SAP/Business Objects***[6] although separate markets were not determined however, the European Commission observed that, within Enterprise Application Software (the '**EAS**'), a separate market for business analytics (BA) may exist. Similarly, in



[3] The Evolution of ERP Systems: A Historical Perspective by Mohammad A. Rashid Massey University–Albany, New Zealand Liaquat Hossain Syracuse University, USA Jon David Patrick University of Sydney, Australia

[4] APICS (2001). American Production and Inventory Control Society (APICS), http://www.apics.org.

[5] Case M.3216, Oracle / PeopleSoft, dated 26 October 2004, paragraph 57, 13

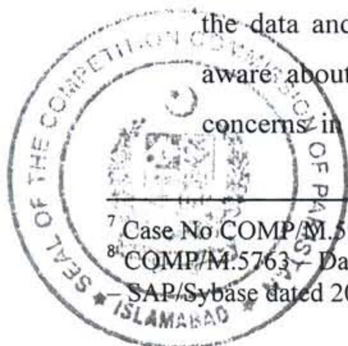
[6] Case M.4944, SAP / Business Objects, dated 27 November 2007, paragraphs 13, 16

SAP / Sybase[7] the Commission also left open whether EAS could be divided into separate markets by industry, mainly for the reason that the merger transaction under review did not pose any competition concern. However, in the instant matter, we are cognizant of the view that there is an allegation of abuse of dominant position on the Respondent, with special reference to the type of ERP demanded from the vendors through the RFP. Therefore, we now have to see whether a distinction can be made *inter se* industry specific ERP solutions or not.

41. The Respondent while referring to clause 2.1. of the RFP i.e. "*the overall goal of this project is to devise an automated system for enterprise resource planning on the Cloud. An ERP system* ***along with Retail Management System****... ERP cloud system should enable the workforce to collaborate, analyse and work on the move to accelerate performance...ERP system should be available on the cloud -Software as a Service (SaaS) and managed by OEM of ERP application provider*", has maintained that ERP is a generic product common to all businesses and solutions cannot be substituted with RMS/point of sale systems, etc.

42. In this regard, and taking guidance from the above quoted decisions of the European Commission, and while keeping in mind the peculiar facts of the instant matter, we are of the view that *separate and distinguishable product markets exist for ERP solutions in different sectors such as healthcare, hospitality, airlines, telecom, energy, and retail, owing to the specific functionality required by each organization*[8]*; as the KPI to be performed by each industry are not identical and hence there is a need to customize the ERP solutions so that they can perform the functions based on the specific industry*.

43. We are of the considered view that specific product characteristic, intended usage and possible pricing structure of on-cloud ERP software and related IT systems limit the field of possible substitutes or interchangeable solutions, which the supplier can offer. As noted above, the functional attributes of an ERP Software (on-premises or on-cloud) may also be the considerations which need to the taken into account; however, as noted above, this is also as per the requirements of the particular procurer. To choose between on-premises or on-cloud, the particular procurer may have reservations about the location of the data, and its security. While having an on-premises system, the procurer is assured about the location of the data and can ensure its security, whereas, in on-cloud system the procurer/user is not aware about the location of the actual data warehouse and it may raise certain security concerns in certain sectors such as aviation, defence and governmental records. With the

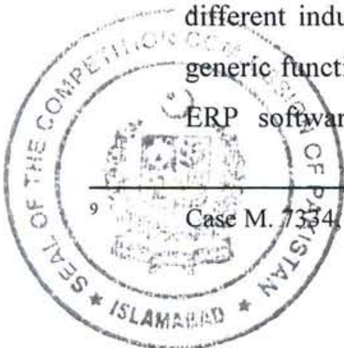


[7] Case No COMP/M.5904 – SAP/ Sybase, dated 20 July 2010
[8] COMP/M.5763 – Dassault Systemes/IBM DS PLM Software Business dated 29 March 2010; COMP/M.5904 – SAP/Sybase dated 20 July 2010 and COMP/M.4608 Siemens/UGS dated 27 April 2007, paragraph 11

foregoing in view, on-premises and on-cloud ERP systems are not viable substitutes of each other, keeping product characteristic/functionality and pricing perspectives, *albeit* the intended usage of the two systems could be deemed as generally the same with a possibility of substitution both from users and organization's perspective. The ERP procurer, including in the retail sector, will generally acquire the system as a pre-integrated solution, hence they would generally float a composite tender. A pre-integrated system combines, *inter alia*, servers, hardware, external storage system, networking equipment, virtualization, and other hardware and software applications- customized, optimized and packaged or bundled according to the particulars and complexity of the concerned industry and the organization, which in the matter at hand is a network of large scale retail chain stores spread across the country. This view finds further credence from the fact that the Respondent has invariabily referred to a "**retail based**" (emphasis added) and **pre-integrated and customised COT off the shelf ERP solution** (emphasis added) in the pre-qualification mandatory clauses of the RFP as well as in its submissions before the Commission.

44. Furthermore, those ERP Solutions once customized according to the needs and KPI of a particular procurer might not be substitutable once customized, integrated and implemented in an organization. In ***Oracle/Micro***[9], for instance, the European Commission observed that Micro is engaged in the business of developing and distributing hardware and software for the retail and hospitality industry only. ERP systems are adapted to the needs of customers and industries. These industry specific solutions are sometimes referred to as "verticals", to contrast them to "horizontals" (software) - which can be used across industries. Of particular relevance is the observation that, the European Commission has also noted that Oracle mainly offers ERP specifically designed to retail comprising retail establishments such as clothing and supermarkets.

45. In this regard, while, ERP solutions generally share certain core characteristics for all types of industries as the solution provider originally develops standard software for a variety of customers, it, however, appears that the industry or the business model of each organization and their consequent unique requirement with reference to their peculiar functions necessitates customization and integration of the ERP software as well as RMS/PoS solutions. The differences between the ERP and RMS bundles might not only exist among businesses in different industries, but also among businesses active in the same sector, in spite of some generic functions, which may remain the same across organizations. The sourcing method of ERP software and complementary solutions/equipment might remain the same across



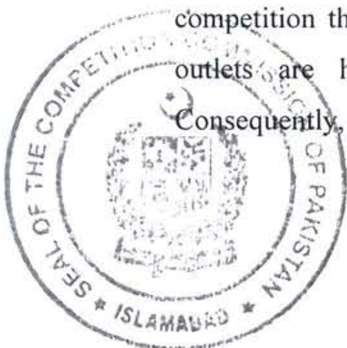
9 Case M. 7334, Oracle/Micros, 29.08.2014 , para 2,6,7

industries; however, the ultimate product and its integration shall differ according to the requirements of an organization.

46. It is on record that the Respondent is essentially seeking to procure a pre-integrated/bundled infrastructure *i.e.* ERP and related RMS/PoS and hardware in order to meet its retail specific needs, instead of purchasing a software with generic functionality. Had the Respondent's intentions been to acquire generic functioning software, the same would have been spelt out in the RFP. On the contrary, the Respondent has argued that ERP software is a universal application and can be substituted across industries and across the business. Unfortunately, this proposition is neither attracted on the supply-side nor is applicable on the demand-side perspective of the market. It is clear that once a product i.e. the ERP Solution is customized for a particular procurer, its cannot be supplied to any other procurer by the supplier, unless the same is not customized according to the need and requirements of the procurer. For instance, ERP software procured and customised for retail chain market would not constitute a viable substitute for ERP software integrated and customised for the airline, hospitality, education, or manufacturing sector and even within the retail chain market, where the retail organization is performing the functions of peculiar nature i.e. single branding etc. Furthermore, the Commission observes that hardware and software might not be substitutable or interchangeable products; however, both are highly complementary products and are used in conjunction with each other on an IT system to do a useful and necessary job.

47. Based on the above, the Commission is of the considered opinion that any segmentation of ERP software and RMS/PoS system including hardware requirement in the instant case is of no relevance. Needless to reiterate, the RFP floated by the Respondent requires the entire solution in one pre-integrated package or bundled form in one-shot (initially as a lot of 1,000 stores). Therefore, from the demand-side perspective, the Commission finds that the Respondent's ERP software and related RMS/PoS equipment are highly unlikely to be substitutable for other markets and businesses.

48. Taking into account the factors to determine relevant market(s) in terms of clause (k) of subsection (1) of Section 2 of the Act, the Relevant Product Market for the purposes of the instant matter is the procurement of ERP Solutions for large scale retails outlets. Furthermore, the Respondent is operating across Pakistan and has also requested for the ERP solutions to be implemented in its outlets across Pakistan. It needs no emphasis that the conditions of competition throughout Pakistan with reference to the ERP Solutions for large scale retail outlets are homogeneous; therefore, the Relevant Geographic Market is Pakistan. Consequently, the relevant market, for the purposes of the instant matter is determined to be



the market for procurement of customized ERP Solutions for large scale retail outlets in Pakistan.

C. DOMINANT POSITION:

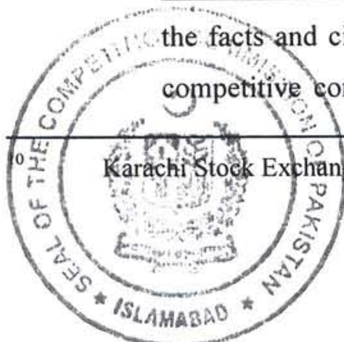
49. Having determined the relevant market, in the instant matter, we may now determine whether the Respondent is a dominant undertaking in the relevant market identified in the instant matter i.e. the market for procurement of customized ERP Solutions for large scale retail outlets in Pakistan. The term 'dominant position' is defined in the Act in clause (e) of subsection (1) of Section 2 of the Act, which for ease of reference is reproduced herein below:

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

50. From a bare perusal of the above definition it is clear that the definition, is divided into two parts i.e. the first part of the provision relates to the deeming clause where a dominant position of an undertaking can only be deemed to exist if upon analysis of pertinent factors it is found that an undertaking can behave independently of its competitors, consumers and suppliers etc., to an appreciable extent. The second part of the provision provides that if an undertaking's share of the relevant market exceeds 40%, it shall be presumed to have a 'dominant position'.

51. In its previous orders[10], the Commission has held that the concept of a "dominant position" provided in Section 2(1)(e) of the Act, envisages (i) a presumption of fact, and (ii) a presumption of law:

    i. "Presumption of fact" refers to the "deeming clause" incorporated in Section 2(1)(e) of the Act which prescribes that the "dominant position" of an undertaking shall be considered to exist if the circumstances of the case imply that the *undertaking has the ability to behave, to an appreciable extent, independent of competitors, customers, consumers, and suppliers, in the relevant market*. This requires an in-depth analysis of the facts and circumstances as to whether or not an undertaking is subject to effective competitive constraints or to the market forces in the relevant market. The European



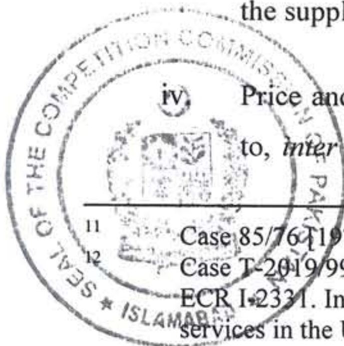
[10] Karachi Stock Exchange Guarantee Limited [2009], JJVL & LPGAP Order [2009]

Court of Justice in ***Hoffmann-La Roche v Commission***[11] has explained the undertaking's "*ability to behave independently*" as:

> "...<u>a position of economic strength</u> enjoyed by an undertaking which enables it <u>to prevent effective competition</u> being maintained on the relevant market <u>by affording it the power</u> to behave to an appreciable extent independently of its competitors, its customers, and ultimately of its consumers..."

ii. If the facts and circumstances suggest that an undertaking has the ability to behave (irrespective of where that ability emanates from) to an appreciable extent independently of its competitors, customers, consumers, or suppliers, it would be safe to assume that the undertaking has a sufficient degree of market power to either adversely affect competition or distort competitive dynamics of the relevant market.

iii. Furthermore, there are no thresholds to determine an "*appreciable extent*". In case of linear markets *i.e.* markets characterized by typical supply chain flow involving manufacturers/suppliers, distributors/wholesalers, retailers, and consumers; demand/supply substitution analysis in the light of assessment of dominance is linked with customers/consumers' ability to switch to substitutable goods or services by virtue of price, intended use, and products' characteristics. Here, it is relevant to refer to the argument of the Respondent that it is a consumer *vis-à-vis* the procurement of ERP solutions, as the same is addressed in the subsequent paragraphs. In case of the procurement market, however, the analysis of dominant position takes into account the ability of the suppliers to switch to substitutes in order to offer goods or services because a dominant buyer can distort the market not only by price factor but also by non-price strategic behaviour both in the relevant market in which it is mainly active as well as adjacent markets. In the context of a buyer's market, we are guided by the Judgment of the Court of First Instance of the European Union in ***British Airways plc v Commission***[12], wherein it was confirmed that a dominant position may exist not only in the supplier market but also in the buyer market.



iv. Price and non-price behaviour of a dominant undertaking or its market power is linked to, *inter alia,* its ability to raise or lower prices above or below the competitive level;

---

[11] Case 85/76 [1979] ECR 461, [38]

[12] Case T-219/99 [2003] ECR II-5917 upheld by the ECJ in Case C-95/04P BA v Commission [2007] ECR I-2331. In this case British Airways was found to be in a dominant position as a purchaser as of services in the UK from travel agents.

impose unfair trading conditions; indulge in price discrimination; predatory pricing; apply dissimilar conditions to equivalent transactions; tie-ins, boycotting, and refusal to deal or supply. The test also requires examination of the market dynamics in view of the market structure, and competitive constraints inside and outside the market which in a buyer's power analysis includes a supplier's ability to switch and offer competing products, entry, exit and expansion barriers, investment, technological innovation, and fixed/sunk costs.

v. In light of above, the Commission needs to capture subtleties of the interactions between and among the market players in question because the *caveat* to "*an appreciable extent*" suggests that the "*ability to behave independently*" need not be absolute. That is to say, it need not to be a pure monopoly or a pure monopsony to make an undertaking dominant rather it is a matter of "*degree*" of market power held by one or more undertakings in the relevant market. Section 2(1)(e) of Act specifically mentions an undertaking's "***ability to behave independently of its [...] supplier***". Hence, we are of the considered view that an assessment of dominant position not only takes into account the dominance of a manufacturer, distributor or retailer /suppliers but it also caters for a situation of buyers who are able to assail their dominant position or market power to create distortion in the buyer's market. Hence, the Act treats seller's ability and its effects analogous to that of buyer power. As noted above, antitrust/competition distortions can broadly be price related or non-price related or a mix of both. Thus, in the procurement market, competition distortions generated by the dominant buyer, in particular, the public buyer can have a significant impact on free and fair competition in the market and the overall economy.

vi. "Presumption of law" provides that if an undertaking's market share exceeds 40%, it shall be presumed to have a "dominant position". In ***Hoffman-La Roche v Commission***[13] the European Court of Justice has observed that there is a strong presumption which links market shares to market power in the following words:

> *"...the existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative but among these factors are a highly important one is the existence of very large market share...."*

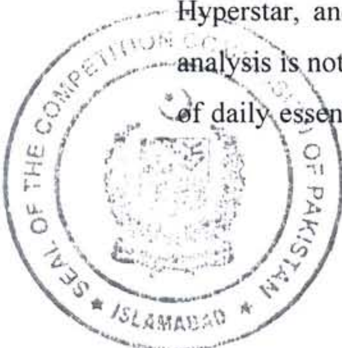
[13] Case 85/76 Hoffman La-Roche & Co AG v Commission [1979] ECR 461, [39] and [41]

"...very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position."

vii. Under the Act, where an undertaking has a market share of 40% or above, it shall be presumed to have a "dominant position" in the relevant market. However, it is noted that market shares below the presumption of 40% does not grant safe harbour to an undertaking. Likewise, a market share above the presumption of 40% is not in itself condemned unless there is a finding of abuse. The market share of 40% may be used as an initial screening device for market situations where there are competition concerns and not as a definitive test for determining dominance in the circumstance. Therefore, like seller power, buyer power does not flow solely from lesser or greater market share than the threshold of 40% stipulated in the Act. Nevertheless, the greater the market share, the greater the likelihood that an undertaking can set its prices or other terms and conditions of sale and purchase with limited constraints from competitors, customers, suppliers, and end-consumers.

52. While analysing the facts available on the record, it is observed that the in the instant case the abuse of dominance in the "procurement market" is alleged, wherein the Respondent is acting as a "dominant buyer" or procurer and the affected market is the market for "procurement of ERP software and related IT equipment for large scale retail stores" vis-à-vis the suppliers' ability to offer or switch to substitutable products. In the procurement market, if one supplier has better procurement conditions than the rest, a dominant procurer can also use its power to strengthen and squeeze out competing suppliers. According to the Enquiry Report, owing to its size, resources and certain economic benefits and competitive advantages i.e. in the form of state subsidies available to the Respondent and its outreach which are rarely available to any hypothetical competitor i.e. retail network in Pakistan; the Respondent has significant market power which enables it to favour one or more suppliers over the others.

53. It is on record that the Respondent has a retail network of around 6,000 stores with annual revenue of approximately PKR sixty (60) billion (in 2014-15) which makes it the single largest retail network dealing in household items targeting the lower strata of consumers across the country. The Respondent also avails direct or indirect State subsidies on a regular basis. In the retail sector, the Enquiry Report has suggested that over 90% of grocery and daily essentials are sold *via* traditional *kiryana* stores and other retail chains *such as* Metro, Hyperstar, and Punjab cash & carry, CSD, etc., serve a small urban *niche*, however, this analysis is not apt for the instant case as the matter is not with reference to the sale and supply of daily essentials rather the relevant market in the instant matter is the procurement of ERP



Solutions for the large scale retail outlets. As we are aware, *kiryana* stores do not procure ERP solutions for the purposes of maintaining or running their retail operations, rather the same is carried out through manual working owing to the financial constraints faced by them. Even otherwise, the RFP floated by the Respondent is a one of its kind tender based on the number of stores operated by it. The Respondent has a network of around 6,000 stores out of which 1,000 stores are initially being automated. The Respondent is a dominant retailer in the large scale retail chain market, which also makes it a dominant buyer in the relevant market with an ability to operate independently of market forces and is capable of affecting the relevant market and its competitive dynamics in favour of one supplier over others. The next closest retail chain is operated by CSD with around 120 stores in the entire country. The comparison of numbers makes it clear that the Respondent is a dominant player in the relevant market. Post-implementation of the project in question i.e. ERP software and IT equipment in around 6,000 stores, the Respondent would be the largest entity in the market in question when the number of PoS terminals integrated with ERP software is taken into account both quantitatively and qualitatively.

54. The Commission's view is strengthened by the Respondent's submission where it has repeatedly contended that it is not an ordinary chain of stores because it is mandated to serve the lower strata of society by providing them with daily essentials at cheaper prices than in the market. Hence, Hyper-star, Metro Cash & Carry, CSD and other retail chain are not comparable with the Respondent. Furthermore, it has been submitted that it is the only retail chain, which is mandated to provide daily essentials at a subsidized rate during the month of Ramadan and other crisis-like situations. In addition, the Commission observes that a determination of the Respondent's dominance or market power based on its assets, turnover (sale), volume (quantity), number of competitors, suppliers, or customers would not be a correct metric in the instant situation because of pricing and business model and the product category sold at Respondent's stores, which undoubtedly affords it an exclusive competitive differentiation, not found in the case of other local/ international retail chain stores, including individual *kiryana* stores in the market. Each of these facts has its merits and limitations and the Commission is of the considered opinion that none of them might be appropriate in relation to the case at hand because the relevant market is to be viewed from the procurement scenario and not the retail sale of goods or services.

55. It follows from the above, that the Commission has not taken into account the number of the stores for determining the dominant position in the instant matter, rather the Commission has taken into account the number of chain stores which translates into a number of point of sale

and IT systems to be purchased and installed at the Respondent's stores. For instance, 1,000 stores could mean a minimum requirement of 1,000 PoS systems integrated with the ERP software, albeit many large stores may need more than one PoS system. Hence, both from the relative and absolute perspective the market in question is the market for procurement of ERP software and related IT system for large scale retail chain stores in Pakistan.

56. Furthermore, the Respondent has consistently held its market position with around a network of 6,000 retail stores across the country. Therefore, the Respondent enjoys a dominant position in the retail chain market as well as in the relevant market. In the instant case, the Respondent has decided to automate its entire chain, albeit 1,000 stores in the first lot (and eventually up to 6,000 stores). It is the largest procurer of ERP software and related IT equipment in the large scale retail sector in Pakistan; therefore, it has the ability to influence the supply market of the said solution. By virtue of its dominance in the retail chain market, Respondent, directly or indirectly, has dominance in the relevant market i.e. market of procurement of ERP software and related IT equipment. Even if it is admitted that 90% of grocery items are sold through the traditional *kiryana* stores, the Commission considers that such stores are not direct competitors of the Respondent's retail network and also because the market in question is not the sale of grocery but the procurement of ERP software and related equipment.

57. It has also been argued by the Respondent that the exercise of buyer power must result in lowering of prices in the supplier's market. The Commission considers it as a one-sided appreciation of the concept of buyer power. As noted above, competition harms can manifest in price or non-price distortions. By virtue of the terms and conditions imposed on the participants in the affected market, non-price distortion may also result in exploitative, discriminatory and exclusionary abuses in violation of Section 3 of the Act. Therefore, the Commission is of the considered view that the market power enjoyed by the Respondent enables it to act independently of its suppliers in the instant scenario and it is possible for the Respondent to favour one or certain suppliers over the others by imposing unfair, discriminatory or exclusionary conditions.

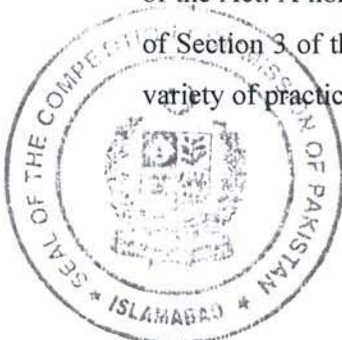
58. Lastly, the Commission notes that although dominant position or market power is generally linked to the elasticity of supply and demand analysis, however, since every case is highly facts specific; dominance or market power can also be inferred from the mere conduct of the undertaking concerned. Now given the dynamics of ERP software and related IT equipment market, and in view of the prevailing competitive conditions in the market, especially high switching costs [in a timely manner] in supply of on-cloud solution *vis-à-vis* actual/potential

suppliers in the relevant market, and the Respondent's country-wide presence, size and fragmented hypothetical competitors i.e. *kiryana* stores, the Commission is of the considered opinion that the Respondent has significant market power and the ability to independently behave to an appreciable extent of the suppliers in the relevant market. Also, it has the ability to, *inter alia*, impose unfair, discriminatory and exclusionary procurement and delivery terms, and hence distort fair competition or foreclose the market for the incumbent as well as new entrants. Furthermore, the Commission is of the considered opinion that the life cycle of a well-designed and well-implemented ERP software and related IT equipment system in any organization, including the Respondent, is deemed to be perpetual or for a substantial period of time. In the instant case, the resulting procurement contracts would have effect *ad infinitum*. Therefore, as long as the procurement contract is valid, no other vendor of ERP software and related IT equipment would be bidding for the same project and most probably could not even supply other value added services (VAS) required by the Respondent. Consequently, the supplier to whom the contract in question is awarded, would, in effect, successfully exclude other suppliers from the relevant market. And, the Respondent will continue to have a dominant position in the relevant market by virtue of its number of stores in its network over a sustained period of time without any need to take into account the market reaction of the suppliers of ERP software and related IT equipment. Therefore, in all circumstances, the Respondent has a dominant position to leverage its buyer power in the relevant market to actual or potential suppliers' detriment.

D. ABUSE OF DOMINANT POSITION:

59. At the very outset, there is no cavil to the proposition that the provisions of the Act are applicable on both public and private undertakings regardless of their legal status, source of financing and corporate form. The Act does not distinguish between the conduct of public bodies carrying out regulatory functions, administrative duties or public organizations involved in commercial and economic activities in Pakistan or any part of it. In the preceding paragraph it has been determined that the Respondent is an undertaking in terms of the clause (k) of subsection (1) of Section 2 of the Act.

60. However, it is pertinent to highlight that under the Act, it's not the dominant position which is prohibited rather it's the abuse thereof which is prohibited by the legislature under Section 3 of the Act. A non-exhaustive and illustrative list of practices is provided under subsection (3) of Section 3 of the Act, which might constitute "abuse" of a dominant position. Thus, a wide variety of practices may be abusive if carried out by an undertaking in a dominant position.



61. Before proceeding to examine the alleged abusive conduct of the Respondent, the Commission notes the following provisions of the Act, relevant to the conduct in question:

> *"3. Abuse of dominant position.—(1) No person shall abuse dominant position.*
> *(2) An abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restrict, reduce, or distort competition in the relevant market.*
> *(3) The expression "practices" referred to in subsection 2 shall include, but not limited to—*
> *(a) limiting production, sales and unreasonable increase in price or unfair trading conditions;*
> ....
> *(e) applying dissimilar conditions to equivalent transaction on other parties, placing them at competitive disadvantage;*
> ...
> *(g)boycotting or excluding any other undertaking from the production, distribution, or sale of goods or the provisions of any services."*

62. Before moving further, it is pertinent to clarify that the dominant position of an undertaking is not illegal or otherwise prohibited under the Act. An undertaking may gain or have any degree of market power or to use it within the parameters of the Act. Furthermore, the term "abuse" has no statutory definition. Referring to the ECJ decision in ***Hoffman-La Roche v Commission***,[14] the Commission, in its ***KSE Order*** of 2009, has adopted the concept of "abuse" as follows:

> *"an objective concept relating to the behaviour of undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of transactions of commercial operators, has the effect of hindering the maintenance of the degree of the competition still existing in the market or growth of that competition."*

[14] Case 85/76 Hoffman-La Roche v Commission [1979] ECR 461 [91]

63. It follows from the above that for an "abuse" to exist "intent" is not required, nevertheless in certain cases evidence on "intent" might be considered relevant. Furthermore, an "abuse" need not necessarily consist in conduct which has the effect of preventing, restricting, reducing or distorting actual or potential competition altogether. It would suffice for it to have "*the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of it*". In relatively recent judgments, for instance, in ***Michelin Vs. Commission (Michelin II)***[15] and ***British Airways Vs. Commission***,[16] the Court of First Instance (CFI) of the European Union has set out the threshold for demonstrating such effects relatively low. Thus in the latter case, it has been held that:

> "*...[f]or the purposes of establishing an infringement of Article 82 (now, Article 102)*[17] *EC, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that abusive conduct of undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect.*"

64. In furtherance to the above, it has been observed that:

> "*...[t]he fact that the result sought is not achieved is not enough to avoid the practice being characterised as an abuse of dominant position*[18]"

65. Moreover, the European Court of Justice in ***Michelin Vs. Commission [1983] ECR 346*** has held that a dominant undertaking bears a "*special responsibility not to allow its conduct to impair genuine undistorted competition on the [common] market*". Whilst examining and summarising the established principles of law on abuse of dominant position decided by the European Court of Justice, the Competition Appellate Tribunal of the United Kingdom has stated in ***Genzyme Limited Vs. Office of Fair Trading***[19] that:

> "*Cases such as Commercial Solvents, Télémarketing and Tetra Pak-II demonstrate that it may well be an abuse for an undertaking which is dominant in one market to act without objective justification in a way*

15 T-203/01 Michelin v Commission (Judgement of 30 September 2003)
16 T-219/99 British Airways v Commission (Judgement of 17 December 2003)
17 Section 3 of the Competition Act 2010 is *pari materia* to the provisions of Article 102 of the Treaty of Functioning of the European Union.
18 Para 239, supra 14
19 1016/1/1/03 Genzyme Limited

which tends to <u>monopolise a downstream, neighboring or associated market</u>. ....

As the OFT points out at paragraphs 296 and 304 of the decision, the abuses found in the case law essentially involve <u>a company which is dominant in one market extending its monopoly into a separate or related market to the exclusion of competitors who would otherwise be able to compete in that separate market</u>. <u>If the elimination of competition in the related market is not the result of competition on the merits, then an abuse may be found</u>."

66. In view of the above, analogy is drawn to the application of Section 3(3)(a) of the Act, which refers to "*limiting production, sale and unreasonable increase in price or other unfair trading conditions*" and Section 3(3)(e), which refers to "*applying dissimilar conditions to equivalent transactions with other parties, placing them at a competitive disadvantage*" is not limited to manufacturers, distributors or sellers of goods or services, but also equally applicable to (public) buyers or purchasers/procurers of goods or services in the markets in which they mainly operate and also in the adjacent or separate markets. The same is true of Section 3(3)(g) of the Act, which refers to "*boycotting or excluding any other undertaking from the production, distribution or sale of any goods or the provisions of any service*".

67. A conjunctive reading of the concepts of "undertaking" "dominant position" and "abuse" *vis-à-vis* Section 3 of the Act reinforces the Commission's view that the essence of "abuse of dominant position" is to regulate or intervene into the conduct of manufacturers, sellers, buyers and suppliers, if such conduct is abusive by object or effect or both and in any trading context. Furthermore, the Commission observes that, the economic analysis of a monopoly/seller power is analogous to that of a monopsony/buyer power, in addition to the fact that in the latter case, a dominant undertaking might be able to affect dual markets *i.e.* the one in which it is offering the goods or services and second in which it is involved in purchase or procurement of the goods or services which might be directly offered to the end-consumer or might be ancillary to such offerings.

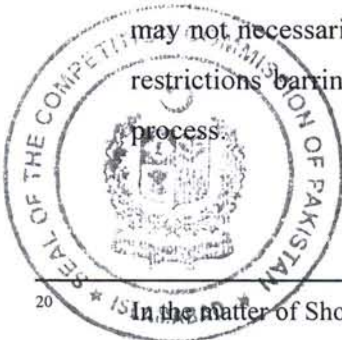
68. In the instant case, the thrust of allegations levelled by the Complainant is that the Respondent has imposed certain tendering conditions, *inter alia*, certain pre-qualification mandatory criteria in the RFP, which amounts to unfair trading/tendering conditions, discrimination and exclusionary practices as they deprive market participants of a fair opportunity to participate (*i.e.* suppliers of ERP software and related IT equipment) in the

bidding process and that the Respondent by virtue of its dominant position in the retail chain market is able to leverage its position as a powerful buyer in the relevant market, which infracted Section 3 of the Act. As per the Enquiry Report, the impugned Clause 4.2 (5), (6), (8), (9), (15) and (16) of the RFP appear to be unfair, exclusionary and restrictive of competition in terms of Section 3(3)(a), 3(3)(e) and 3(3)(g) of the Act.

69. Explaining section 3(3)(a) of the Act, the Commission in its ***Engro Vopack Terminal Order***[20] has observed that:

> *"...unreasonable increase in prices [which is to be] read in conjunction with "other unfair trading conditions" [which, in turn] include[s] taking advantage of consumers by using market power to charge grossly excessive prices or impose unjustifiably erroneous or unfair terms. It arguably applies only in cases where there are significant barriers to entry created in favour of dominant player or that cannot be overcome by investments in anticipation" (para 43).*
>
> It is also stated that
>
> *"...section 3(3)(a) of the Act...manifests behavioural economics which conceives that individuals do not necessarily behave rationally. Manufacturers or services providers [or procurers] may manipulate [the market and] customers through shrouded practices. Customers may be faced with complex [pricing] strategies ending up in undesired deals e.g. low upfront fee coupled with expensive follow-on services which warrant interventionist course of action by competition agencies..."*

70. In case of public procurement, unfair trading or tendering conditions may manifest, *inter alia*, in the form of participation restrictions or high participation costs in terms of technical specifications and/or financial thresholds, imposing discriminatory conditions or framing tender conditions, which are unfair or exclusionary in nature. To reiterate, such distortions may not necessarily involve a price based competition restriction but also non-price oriented restrictions barring market participants to have a fair chance of participating in the bidding process.



[20] In the matter of Show Cause Notice issued to Engro Vopak Terminal Limited (2011)

(i). Pre-qualification criteria regarding the standing of suppliers i.e. Tier I under Clause 4.2. (8) and 5.1. of the RFP:

71. In the instant case, the impugned Clause 4.2 (8) of the RFP requires that bidders offering the solution should fall in the "*Tier-I*" category of ERP solutions and available as "*SaaS, Software as a Service*". Furthermore, such solution should be "*referenceable through leading research companies like Gartner, IDC, etc.*" The Enquiry Report has determined that the term "*Tier-1*" is not a standard industry term, however, it might be used to denote a few global vendors of ERP software and IT equipment, which includes Oracle, SAP, and Microsoft Dynamics. The Enquiry Report has highlighted the fact that different research organizations use different methodologies in order to classify vendors into "*Tier-I*", "*Tier-II*" solution providers and so on. Even the European Commission in its merger decision of ***<u>Oracle/PeopleSoft</u>*** (also relied upon by the Respondent) has suggested that *"...within complex [ERP] solutions, a delineation according to [ERP] "pillars" or group of functionalities is necessary...the high function software has certain characteristics in terms of, inter alia, scalability, re-configurability, sophistication, pricing of the software and reliability, quality and <u>brand recognition of the vendor</u>. In the industry, this software is referred to in different ways; using various terminologies ("upstream software", "tier-one software", "enterprise software")...The low-rate performing software is known also as mid-market software...."*[21]. Based on this, the Respondent has argued that the use of the term "*Tier-I*" in the RFP denotes the high functionality of the ERP software required by it. According to the Respondent, there are dozens of IT companies in Pakistan who meet the criteria laid down by it in the RFP. In support of its contention, it has produced a list of 101 such local vendors. The Complainant on the other hand has contradicted the same and has averred that if the same was true then the Commission may consider asking the Respondent as to how many vendors have participated in the bidding process. In response to the Commission's querry, the Respondent produced a list of only 3 out 101 vendors, who have participated in the bidding process, which suggests that the Respondent's contentions do not seem sound, reasonable or in accordance with the facts relied upon by it.

72. Having reviewed the material available on the record, we deem it appropriate to conduct an objective assessment of the impugned Clauses of 4.2 and 5.1 of the RFP, which enumerate mandatory pre-qualification selection criteria and scoring methodology to qualify in the bidding process. We note that "*Tier-I*" is not a standard industry term and it cannot be classified as a technical standard or technical specification to denote an ERP software and related IT equipment in the relevant market. However, when read in the entire context i.e.

[21] Case M. 3216, Oracle /PeopleSoft, 26.10.2004, paras 59, 62, and 63

"*Tier-I category of ERP solution and available as SaaS, Software as a Service*" in conjunction with "*referenceable through leading research companies like Gartner, IDC, etc.,*" it becomes clear that directly or indirectly, the '*Tier-I category*' refers to certain global brand(s) only. Therefore, the clause has the effect of restricting or artificially narrowing down participation of local and even a range of foreign vendors in the bidding process. The impugned clause 4.2(8) is likely to favour a certain group of vendors of ERP software and related IT equipment. Therefore, the Commission finds that the use of the term "*Tier-1*" in conjunction with "*ERP solution available as Software as Service*" and "*referenceable through Gartner, IDC, etc.*", constitute unfair, discriminatory as well as exclusionary trading/tendering conditions, barring a number of actual or potential local vendors to participate in the bidding process in violation of subsection 3(3)(a), 3(3)(e) and 3(3)(g) read with subsection 3(2) and of section 3 of the Act.

(ii). Prequalification criteria: enlistment of local vendors as CMMI Level III or above coupled with the condition to have a partner of Gold/Tier-I level for last three years under Clause 4.2. (8) and 4.2. (9) of the RFP:

73. In addition to "*Tier-1*", the impugned Clause 4.2.(8) of the RFP stipulate that "*for local companies having a presence in Pakistan only, vendor must be listed as CMMI level-III or above*". Furthermore, the impugned Clause 4.2.(9) of the RFP requires "*for authorized partners documentary evidence of Gold/Tier-1 or equivalent level of partnership with proposed technology solution in Pakistan for last three (03) years...*". Review of the material available on record reveals that as per the Enquiry Report, there are only two software vendors listed as CMMI level-III on the website of CMMI Institute. Whereas, PSEB has identified five local vendors certified as CMMI level-III. Out of the five, only two to three companies are providing ERP solutions. PSEB has also named at least seven local IT companies which are providing enterprise level ERP to domestic as well as international clients. Accordingly, the requirement of CMMI level-III certification, in addition to the "*Tier-1*" requirement further filters out and restricts competition to two or three local vendors who have a partnership with the aforementioned global players i.e. Oracle, SAP and Microsoft Dynamics.

(iii). Certification requirement under Clause 4.2. (15) of the RFP i.e. ISO 9001 or ISO 27001 or CMMI or IEEE certified:

74. In addition to the requirement of CMMI level-III, the impugned Clause 4.2(15) of the RFP stipulates that "*vendor should be ISO 9001 or ISO 27001 or CMMI or IEEE certified. Having any one certification will be accepted*". After a thorough research on ISO and IEEE standards

and certifications, the Enquiry Report has concluded that both are globally recognized standard, however, if a vendor has one of the certification why would the Respondent further requires them holding CMMI level-III certification. Also, PSEB has noted that this clause apparently nullifies the condition of CMMI level-III certification. Further, both the Enquiry Report and PSEB have suggested that clarification is needed on two contrary clauses of the RFP. In response, while referring to PSEB's website, the Respondent submitted that CMMI is globally regarded as the most authentic quality standard for the software industry. It has been developed by the Software Engineering Institute (SEI) of Carnegie Mellon University (CMU) to improve software development process. Since its establishment in 1987, the model has gained popularity throughout the world and it has become the *de facto* standard for software process improvement and software capability evaluation.

75. In view of the foregoing, the Respondent submitted that it has used the CMMI level-III because it has been highly recommended by PSEB. Referring to PSEB's criteria for selection of companies for CMMI, the Respondent has contended that PSEB has itself prescribed certain eligibility criteria in order to receive its funding for CMMI level-III certification which include (i) minimum 1-year registration with PSEB, (ii) ISO 9001:20000 or ISO 27001 certification, (iii) not blacklisted, (iv) at least 2-year in IT business, (v) minimum of 10 employees, (vi) annual export over the last 2-years over USD 200,000 and equivalent domestic revenue, (vii) must have a minimum number of projects. Furthermore, there are five levels of CMMI, and CMMI level-III is average / middling standard which stipulates that vendor's software development and implementation is well-defined and trusted by the consumers. According to the Respondent, these are the bare minimum standards that it expects from a prospective ERP solution provider to assure quality, compliance, and implementation of the system.

76. With reference to the impugned Clause 4.2(15), the Respondent submitted that PSEB's own eligibility criteria in respect of CMMI funding application stipulates that the applicant company must have ISO 9001 or ISO 27001 certification in order to become eligible for PSEB's assistance on CMMI level-II which, in turn, is a prerequisite for PSEB's assistance on CMMI level-III certification.

77. According to the website of CMMI Institute, CMMI is a world-class performance improvement model for organizations that want to achieve high-performance operations...CMMI Institute model helps to identify and improve the key capabilities that elevate organization's performance, quality and profitability. CMMI offers four models [*i.e. CMMI for Development, CMMI for Acquisition, CMMI for Services, and People CMMI*] that

can be customised to fit your needs for a different environment. With respect to CMMI maturity model, it states that "*CMMI maturity levels provide a rigorous benchmark/rating method that enables one to compare one's organization capability to its competitor, its industry, and itself over time, CMMI provides five levels of maturity that demonstrate a visible path for improvement.*" CMMI Institute defines five maturity levels[22], which are reproduced hereunder:

> ***"Maturity Level 5 - Optimizing***
> ***Stable and flexible.*** *The organization is focussed on continuous improvement and is built to pivot and respond to opportunity and change. The organization's stability provides a platform for agility and innovation.*
>
> ***Maturity Level 4 – Qualitatively Managed***
> ***Measured and Controlled.*** *The organization is data driven with quantitative performance improvement objectives that are predictable and align to meet the needs of internal and external stakeholders.*
>
> ***Maturity Level 3 – Defined***
> ***Proactive, rather than reactive.*** *Organization-wide standards provide guidance across projects, programs, and portfolio.*
>
> ***Maturity Level 2 – Managed***
> ***Managed on project level.*** *Projects are planned, performed and measured, and controlled.*
>
> ***Maturity Level 1 – Initial***
> ***Unpredictable and reactive.*** *Work gets completed but is often delayed and over budget."*

78. In light of findings of the Enquiry Report along with contentions raised by the Respondent and the Complainant, the Commission finds that given the size and nature of the project in question the requirement of CMMI level-III for local companies which are only present in Pakistan appears to be reasonable. However, the criterion of ISO, IEEE, or CMMI laid down in the impugned Clause 4.2(15) negates the criterion laid down in the impugned Clause 4.2.(8). At best, the two clauses create information asymmetry and imbalance between the local vendors who are included on competing to offer ERP software and related IT equipment. This, in turn, results in unfair conditions set forth in the tendering document i.e. RFP and restriction or exclusion of competing supplier(s) of ERP software and related IT

[22] Source: http://cmmiinstitute.com/capability-maturity-model-integration, retrieved on 01.06.2017

equipment in violation of subsection 3(3)(a), 3(3)(e) and 3(3)(g) read with subsection 3(2) and of section of the Act.

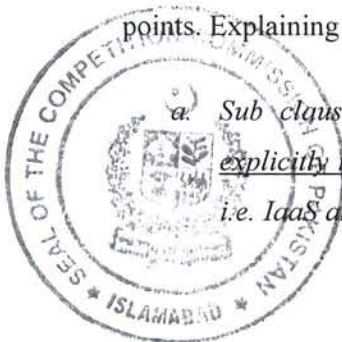
*(iv). **Tender evaluation criteria under Clause 5.1. in RFP:***

79. With regard to 'Tender Evaluation' clauses contained in 5.1 of the RFP, the Commission finds that the determination of the Enquiry Report is most relevant and appropriate. In the impugned Clause 5.1(1) of the RFP, the Respondent has given an evaluation criteria explicitly stating that the ERP solution should be pre-integrated on cloud offered and managed by a single principal who is directly covering updates, upgrades and future enhancement of the proposed solution. In reference to the cloud based ERP solution, the RFP invariably refers to SaaS, Service as a Solution, including in the clause 4.2 discussed above. However, while allocating marks or scores, the RFP mentions different cloud solutions as viable alternates bearing the following marks:

    i. IaaS (Infrastructure as a Service) 10 marks
    ii. PaaS (Platform as a Service) 20 marks
    iii. SaaS (Software as a Service) 30 marks

80. Furthermore, the impugned Clause 5.1(2) of the RFP grants 5 points (total 30 points) to each reference of ERP cloud in the region offered for Software as a Service (SaaS). Keeping in view the evaluation criteria, higher marks are awarded to cloud based experience and SaaS solution. Even if the mandatory pre-qualification clause 4.2. allows for a possibility of joint venture or partnership between local and global firms, the evaluation criteria clearly gives precedence to the large global vendors providing SaaS based ERP software. Therefore, in essence, the evaluation criteria imposed an unfair tendering condition, which favours global vendors *vis-à-vis* the local vendors including the Complainant.

81. In this regard, the Respondent has submitted that total points for "*solution/product evaluation criteria*" are 300 points with 210 being the minimum qualifying points. Out of the total of 300, 120 points are allocated to cloud ERP software; 150 points are allocated to RMS solution i.e. 50-50 weightage, and 30 points for technical staff of OEM. Sub clauses (1) and (2) of 5.1. of the RFP require cloud based ERP experience *i.e.* a total of 60 out of 300 or 20% of the total points. Explaining the evaluation criteria, the Respondent further submitted that in the RFP:



a. Sub clause (1) of 5.1 allocated full 30 marks to SaaS solution that is <u>explicitly required by USC and lesser points to other cloud based solutions</u> i.e. IaaS and PaaS.

b. *Sub clause (2) of clause 5.1 allocates 30 points for reference to local and global offering (not deployment) of SaaS based cloud solution. Each reference carries 5 points irrespective of location.*

c. *Sub clauses (5), (6) and (16) of clause 4.2 require documentary evidence of only cloud based deployment of ERP in Pakistan or abroad in the form of purchase order or contract.*

d. *Sub clauses (3) and (5) of clause 4.2 relate to ERP solutions in Pakistan whether or not they are cloud based.*

e. *Sub clause (3) of clause 5.1 allocates 30 points to implement ERP solution in Pakistan as quoted by vendor irrespective of the on-cloud deployment.*

f. *Sub clause (5) of clause 5.1 allocates 30 points to implement ERP solution in public sector in Pakistan (either out of the box or add-ons). And this relates to ERP solution only and not to cloud based ERP solution.*

g. *Sub clauses (4), (6) and (8) of clause 5.1 pertain to RMS solution and constitute 50% of the total points.*

82. Summarizing the evaluation criteria under the RFP the Respondent submitted that out of the total 300 points:

i. 60 points (20%) are allocated to cloud experience;
ii. 60 points (20%) are allocated to implementation of other ERP solutions in the public sector whether or not on-cloud in Pakistan or aboard
iii. 150 points (50%) points pertain to RMS solution
iv. 30 points (10%) to technical staff of OEM in Pakistan.

83. It has been argued on behalf of the Respondent that weightage in product solution and technical evaluation criteria are evenly distributed between ERP and RMS solutions specific to the project objectives of the Respondent, which only gives veracity to stance on ERP and RMS being distinct products.

84. As mentioned above, the Commission finds that the Respondent has stressed and explicitly stated that it requires cloud based SaaS ERP solution hence the technical evaluation criteria allocates lesser marks to other cloud based ERP solutions *i.e.* IaaS and PaaS. Secondly, marks between ERP solution and RMS solutions have been distributed evenly.

85. Based on the facts and material available on the record, the Commission hereby finds that the Respondent is clearly indicating purchasing/procuring cloud-based ERP software and related IT equipment which is available as SaaS, given the efficiency of such solution and its low upfront cost, although this model requires subscription on a recurring basis for its entire life span of the solution. If the Respondent is determined to purchase/procure cloud-based ERP SaaS software, then why has it included and allocated marks to other solutions and non-cloud implementation models, drawing distinction between offering and implementation. Further, regarding the distinction made in public and private sector deployment, we are unable to understand the logic behind such distinction and the Respondent has failed to point out any plausible justification in this regard. In IT systems, the functionality of the system ought to be the requirement irrespective of its deployment in the public or private sector. With the foregoing in view, the Commission finds the technical evaluation criteria laid down in clause 5.1. of the RFP to be partly unfair and exclusionary and in violation of subsection 3(3)(a), 3(3)(e) and 3(3)(g) read with subsection 3(2) and Section 3(1) of the Act.

86. Moreover, the Commission notes another defense put forth by the Respondent, where it has argued that it is entering into this market for the first time and hence it cannot be held liable for any abuse under Section 3 of the Act. The Commission finds this argument to be baseless because this stance is maintainable only when an undertaking is competing for the market in terms of entry or expansion and offering goods or services. However, in the instant matter the Respondent is specifically acting as a procuring agency, which post-procurement would not be operating as a provider of such solutions in any of the markets in which such solution may be installed and implemented. Post-procurement, the Respondent will be in a vertical relationship with the manufacturer/supplier of such solution, which cannot grant it with a position of a competitor in the relevant market.

87. In conclusion, the pre-qualification mandatory criteria laid down in clause 4.2 and clause 5.1. of the RFP are unwarranted and unreasonable, discriminatory and exclusionary in effect and also appear to favour particular bidder(s) in defiance of the provisions of Section 3 of the Act. It is evident from the list of companies who have submitted their bid in response to the RFP that; (i) Systems Limited in Joint Venture with TechAccess Private Limited has proposed solution as Microsoft Enterprises Resource Planning (ERP) software and Microsoft Retail Point of Sale (POS) software; (ii) InforTech Private Limited in joint venture partner with LumenSoft Technologies Private Limited has proposed solution: Oracle Enterprise Resource Planning (ERP) and LumenSoft Candela Retail Point of Sale (POS) software; and (iii) Inbox

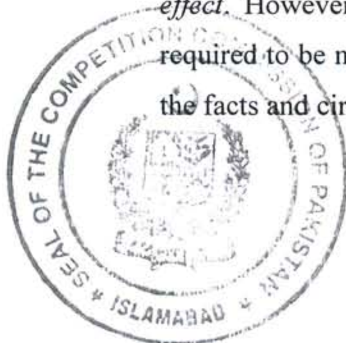
Business Technologies Private Limited has proposed solution: Oracle Enterprise Resource Planning (ERP) software and Oracle Retail Point of Sale (POS) Software.

88. Furthermore, the above suggests that none of the companies are providing or are able to provide ERP software and related IT equipment on their own, but they are possibly acting as System Integrators (SI) from a supply-side perspective. This further strengthens the Commission's view that the clauses relating to technical specification, financial thresholds or turnover of the prospective bidders and the evaluation criteria are unfair and restrictive of competition in the relevant market. While the Commission is cognizant of the authority of a procuring agency to insert pre-conditions or notification for tenderers to ensure that the contractor has the capacity and resources to successfully execute the project, however, the pre-qualification mandatory criteria laid down in the RFP, thoroughly examined above warrants the Commission to impose appropriate remedies to ensure a level playing field for the participants on the supply-side of the market. Furthermore, the Commission is of the considered opinion that in procurement markets, if every procuring agency or public organization were to stipulate such technical, financial and performance thresholds and certification history as a mandatory condition in its pre-qualifying criteria, no existing or new market player would be able to forge any grounds in the relevant market at both a national and international level. Therefore, such conditions cannot be allowed for the purposes of fair competition and growth of competition in the market.

REMEDIES/ORDER

89. After examining all the facts and material available on the record, we hereby hold that clause 4.2. and clause 5.1 of the RFP leave the actual and/or potential bidders with uncertainty owing to which an insufficient number of bidders have been able to make meaningful bids, and consequently competition in the relevant market is constrained to an appreciable extent in the market of suppliers of ERP software and related IT equipment in Pakistan in violation of Section 3 of the Act. Therefore, the RFP is declared illegal and hereby annulled.

90. The provisions of clause (a) of subsection (1) of Section 31 of the Act, provides that *the Commission may in the case an abuse of dominant position, require the undertaking to take such actions specified in the order as may be necessary to restore competition and not to repeat the prohibition specified in Chapter II or to engage in any other practices with similar effect.* However, the Commission is cognizant of the fact that whenever any direction is required to be made in view of the foregoing, the same must be issued while keeping in view the facts and circumstances of each case.



91. In view of the above, the Commission is abreast with the universal principle of public sector purchase/procurement of goods or services i.e. to secure "*best value*" for "*public money*". Given the magnitude of purchase/procurement of the ERP solution and related IT equipment in question, on both sides of the market i.e. supply-side and demand-side, it can impact the market structure and competitive dynamics of the relevant market. Therefore, it is critical to ensure transparency, integrity, and a level playing field in the bidding process in order to maximize societal benefits and enhance economic efficiency as well as the competitiveness in the overall market. One of the means of achieving these goals is by encouraging and promoting healthy competition amongst the potential bidders by eliminating information asymmetries, irregularities, and other corrupt irregularities. The cardinal principle of public procurement is to procure the goods or services of a specified quality, at the most competitive prices and, in a fair, just and transparent manner.

92. In the preceding paragraphs, the Commission has duly noted that the technical specifications and the evaluation criteria laid down by the Respondent in the clause 4.2. and clause 5.1. of the RFP are arbitrary, unreasonable, unfair, discriminatory and exclusionary in effect and restrict fair opportunity of participation within the competitive bidding process. In this context, the Commission finds it pertinent to refer to the Public Procurement law of Pakistan as well as the Directive 2014/24/EU of European Parliament and of the Council dated 26th February 2014 on public procurement, which provides the following key principles to be adhered to by the procuring agencies while drawing technical specification(s) and evaluation criteria of a bid:

   i. The technical specification drawn up by public purchasers needs to allow public procurement to be open to competition as well as to achieve objectives of sustainability. To this end, it should be possible to submit tenders that are reflective of the diversity of technical solutions standards and technical specifications in the market place, including those drawn up on the basis of performance criteria linked to the life cycle and the sustainability of the works, supplies, and services.

   ii. Consequently, the technical specification should be drafted in such a way which avoids artificially narrowing down competition through requirements on a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by the economic operators.

iii. Drawing up the technical specifications in terms of functions and performance requirement generally, allows the objective to be achieved in the best way possible. Functional and performance related requirements are also appropriate means of favouring innovation in public procurement and should be used as widely as possible.

iv. It follows from the above that technical specification in a bidding document should be based on relevant characteristics and/or performance requirement. References to brand names or similar classification should be avoided. If it is necessary to quote a brand name etc., to clarify an otherwise incomplete specification the words "*or equivalent*" should be added after such reference. The specification must permit the acceptance of an offer of goods or services by the bidder which have similar characteristics and is able to provide performance at least substantially equivalent as specified.

v. With regard to evaluation criteria, the aforementioned Directive provides that "*...it should be set out explicitly that the most economically advantageous tender should be assessed on the basis of the best price-quality ratio, which should always include a price or cost element. It should equally be clarified that such assessment of the most economically advantageous tender could also be carried out on the basis of either price or cost effectiveness only...to ensure compliance with the principle of equal treatment in the award of contracts*". Meaning thereby, the procuring agencies must ensure transparent evaluation criteria or scoring methodology.

93. With reference to the Procurement Laws in Pakistan, the Commission notes that Rule 10 of the Public Procurement Regulatory Authority Rules, 2004 (the '**PPRA Rules**') also mandates that "*specification shall allow the widest possible competition and shall not favour any single contractor or supplier nor put others at a disadvantage. The specification shall be generic and shall not include references to brand names, model numbers, catalog number or similar classification. However, if the procuring agency convinced that use of a reference to a brand name or a catalog number is essential for completing an otherwise incomplete specification, such use or reference shall always be qualified with the words "or equivalent*". Where reference is made to an international or national standard, tenders based on equivalent arrangements ought to be considered by the procuring agency. It should be the responsibility of the economic operator to prove equivalence with the requested label.

94. In view of the above, the Commission directs the Respondent to be mindful of the above broad guidelines/directions while drafting future tenders, be it in the instant matter or

otherwise, in order to provide a level playing field and not to hamper the competition in the relevant market. The Respondent is reprimanded and is hereby directed to refrain from following, adopting, implementing or carrying out any activity, which constitutes a violation of the Act.

95. In terms of section 38 of the Act, the Commission is empowered to impose such financial penalties upon the contravening party(s), as deems fit in the circumstances which may be up to 75 million or 10 % of the annual turnover of undertakings concerned. However, in this regard, it is noted that on 27 January 2017, the Commission had passed an interim order which restrained the Respondent from awarding the contract until the final order of the Commission. Therefore, in view of the compliance oriented approach of the Respondent and the fact that the contract has not been awarded, the Commission is of the considered view not to impose any financial penalty on the Respondent in this instance.

96. Nonetheless, the Respondent is directed to submit a compliance report in terms of paragraph 92 to 94 *supra* with the Registrar of the Commission within forty-five (45) days from the date of issuance of this order. After compliance with the order to the satisfaction of the Commission, the Respondent may only then re-advertise the RFP and proceed with the bidding process afresh all while ensuring a fair opportunity for prospective bidders to participate in the bidding process as per this order.

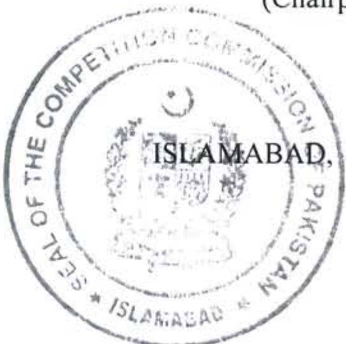
97. In the event, the Respondent fails to comply with the directions given above within the time period specified and continues contravening the Act in any manner, it shall be held liable under Section 38 of the Act which may result in the imposition of financial penalties that may extend to PKR 25,000,000/- (Rupees twenty-five million) and an additional penalty of PKR 5,00,000/- (Rupees five hundred thousand) per day, from the date of passing of this order.

98. In terms of the above, the SCN is hereby disposed of.

99. Ordered accordingly.

Vadiyya S. Khalil
(Chairperson)

Ikram Ul Haque Qureshi
(Member)



ISLAMABAD, 15th DECEMBER, 2017