

**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

IN THE MATTER OF

SHOW CAUSE NOTICE ISSUED TO PAKISTAN SHIP'S AGENTS ASSOCIATION

(FILE NO. 08/APPMA/CMTA/CCP/10/1709)

Date of hearing: March 25, 2011

Present: Mr. Abdul Ghaffar
Member

Dr. Joseph Wilson
Member

Mr. Mueen Batlay
Member

On behalf of:

Pakistan Ship's Agents Association: Mr. Mohammed A. Rajpar
Chairman, Pakistan Ship's Agents Association

Mr. Amir Ali Jamal
Secretary, Pakistan Ship's Agents Association

Mr. Abdur Rahman
Advocate, High Court

ORDER

1. In March 2010, the Competition Commission of Pakistan (the ‘Commission’) was alerted to possible violation of sub-section (1) of Section 4 read with clause (a) of sub-section (2) of the Competition Act, 2010 (the ‘Act’). It took appropriate action and subsequently under Section 30 of the Act issued show cause notice no 02 of 2011 dated 14 February 2011 to Pakistan Ship Agents Association (hereinafter ‘PSAA’). The Commission has heard PSAA and considered its submissions to decide whether PSAA had fixed prices for ancillary services provided by its members, the ship agents, in violation of sub-section (1) of Section 4 read with clause (a) of sub-section (2) of the Act. It concludes in the affirmative.

I. BACKGROUND

A. UNDERTAKING

2. PSAA is the sole licensed trade association for shipping agents comprising of approximately 70 members handling vessels calling at Pakistani Ports. PSAA was originally formed in 1976 under Trade Organisations Ordinance 1961, and it presently operates under License No. 114 granted on 4 November 2008 by the Ministry of Commerce under Trade Organizations Ordinance, 2007, and its place of business is Karachi. PSAA qualifies as an undertaking as defined in Section 2 (1) (q) of the Act.

B. FACTS

3. The Commission received information from Pakistan Paper Merchant’s Association (hereinafter ‘PPMA’) through its letters dated 9 March 2010 and 12 May 2010 that indicated that PSAA may be involved in collusive practices regarding determination of ancillary charges pertaining to shipping services imposed by various ship agents.
4. PPMA alleged that PSAA may have a role in setting charges for ancillary shipping services (such as charges for export documentation, port of discharge release, security and other inter-modal facilitation) provided by its members, the Commission wrote to PSAA on 29 June 2010, asking about PSAA’s role in determining the charges of services offered by the ship’s agents. The PSAA informed the Commission on 6 July 2010 that PSAA did not determine ancillary charges, but recommended a range to serve as guidance for its members.
5. The Commission appointed Ms. Shaista Bano, Director and Mr. Syed Umair Javed, Deputy Director (collectively the ‘Enquiry Officers’) under Section 33 of the Act to initiate an enquiry, and also authorized them under Section 34 of the Act to conduct a search and inspection of PSAA’s premises located in Karachi to obtain further information. The Enquiry Officers searched the premises of PSAA on 7 January 2011, and reported to the Commission on 1 February 2011 that there was *prima facie* evidence of violation of Section 4 of the Act by PSAA and its

members. The Enquiry Report recommended that the Commission proceed against PSAA under Section 30 of the Act.

6. The Enquiry Report established that the relevant product market for this investigation is the market for ancillary services provided by shipping agents. The geographic market consists of the seaports of Pakistan. The relevant market in this case is hence the market for ancillary services provided by ship's agents at the seaports of Pakistan.
7. The Enquiry Report relied on emails circulated within the PSAA, emails and letters from the PSAA to its members and vice versa, minutes of meetings to discuss issues faced by the trade, clearing agents and ship's agents, minutes of PSAA Managing Committee and Executive Committee meetings, letters between PSAA members, letters from PSAA to its members, and letters from Pakistan International Freight Forwarding Association ('PIFFA') and PSAA to the Ministry of Commerce. These communications established PSAA's role in developing and negotiating the range of charges for ancillary services offered by its members, and communicating this range every 2 years, evidence for which is available since 2001. The content of these documents support the *prima facie* allegations made by PPMA.
8. PSAA was issued a show cause notice on 14 February 2011 broadly stating that:
 - a. PSAA is, *prima facie*, engaged in a process of collecting information regarding ancillary charges from its members, deciding a range of recommended ancillary charges, and then circulating these to the members and stakeholders. PSAA also appears to make membership contingent upon members subscribing to this recommended range.
 - b. PSAA, *prima facie*, deliberates and decides on a range of charges for ancillary services to be followed by its members, the ship's agents, which amounts to taking a decision to fix prices of services offered in violation of sub-section (1) of Section 4 read with clause (a) of sub-section (2) of the Act.
 - c. In addition, by providing information regarding the pricing of their services to PSAA and deliberating to arrive at a generally acceptable price range, PSAA members have, *prima facie*, entered into an agreement amongst themselves and PSAA concerning price fixing, in violation of Section 4(1) read with Section 4(2) (a) of the Act.

A Hearing was held on 25 March 2011.

C. SUBMISSIONS BY PSAA

9. PSAA submitted in written reply dated 4 March 2011 through Mr. Amir Ali Jamal as under:
 - a. PSAA undertook that subject to the decision of the Commission, it would pass a resolution affirming that it wishes to ensure that a competitive market is maintained for shipping and allied services in Pakistan, that no violation of the Competition Act 2010 is committed, and that PSAA and its members will not enter into any agreements with its members, or recommend any price range for shipping and allied services.
 - b. PSAA stated that the enquiry is based upon a frivolous complaint made by the PPMA and not a *suo moto* action by the Commission; that actions alleged to have been made by PSAA are prior to the promulgation of the Competition Act, and that the recommendation of price ranges to members of PSAA was done at the behest of various departments of the government, trade organizations and individuals. PSAA claimed that all its actions were covered under the State Action doctrine.
 - c. PSAA claimed that allegations made by PPMA in its letter dated 9 March 2010 were not substantiated. PSAA further denied that it had “willfully” engaged in practices prohibited under the Act. It denied that it unilaterally attempted to set the charges for services provided by its members or that its members agreed on the charges.
 - d. PSAA held that it wishes to work in an atmosphere of a free economy, but noted that there are consistent complaints from various trade organizations regarding charges levied by ship agents.
 - e. It further held that at the initiative of various trade organizations, the government inserted sub-section (2) to Section 79 A into the Pakistan Merchant Shipping Ordinance 2001 to enable regulation of charges levied by shipping company and shipping agents, and a Shipping Rates Advisory Board was constituted. This was legally challenged by various ship agents, and the matter is *sub judice*. PSAA stated that the Ministry of Commerce under the structure of “Harmonization of Scale of Charges” has held four meetings, but the matter stands unresolved.
 - f. PSAA claimed that as an interim measure, and to reduce issues raised by trade organizations and the government, it had set a recommended range of prices for services for PSAA members to reference in the event that no threshold of recommended charges were ever set. PSAA claimed that it would prefer it if no threshold of recommended charges were ever set. It further claimed that PPMA was aware of the representations being made

by trade organizations and government, and made the complaint against PSAA with *mala fide* intent.

- g. PSAA denied that it invited its members to submit inputs regarding revision of previous recommended charges. It claimed that this was forced upon it by trade organizations and government. It put the blame of developing the entire process of surveying opinion and developing a recommended price range on trade organization and government pressure. It admitted that although the price range was not binding on its members, whenever a member tried to charge in excess, complaints were received from merchants and/or trade organizations. PSAA denied that it took any unilateral actions against its members, but only attempted to reach a consensus to bring the rates within a reasonable range as requested by government and trade organizations. It denied that it had conditioned its membership on compliance with the recommended range of charges.

10. In oral arguments made before us, PSAA added:

- a. That it held the objective of the maintenance of a competitive business environment in the highest esteem, and would like nothing better than not to be “pressured” into issuing a recommended range of charges.
- b. That the practice of the development and issuance of the range of recommended charges had resulted from pressure applied by trade organizations and government.
- c. By pointing to the change in the Pakistan Merchant Shipping Ordinance 2001 and the subsequent meetings held under the auspices of the Ministry of Commerce as evidence of the level of activity of the government concerning charges of ancillary services in shipping, and tried to make the case that its practice of circulating a range of recommended charges was an attempt to piece together a working arrangement concerning price levels, since the government had failed to reach a consensus despite much activity.
- d. That it would do whatever possible to support and ensure that a positive competitive environment prevailed in the ship agents business.

II. DISCUSSION

A. APPLICATION OF SECTION 4

- 11. The actions and business practices of PSAA and its members have allegedly violated sub-section (1) of Section 4 read with clause (a) of sub-section (2) of the Act. The relevant portion of Section 4 is reproduced below:

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

(2) Such agreements include but are not limited to –

(a) fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any service;

12. The documents found during the search of PSAA's premises that have been listed in Section 7 of this Order establish that PSAA did engage in the practice of regularly circulating a range of charges for ancillary services of ship's agents. This does amount to fixing the selling price of the provision of a service, as described in clause (a) of sub-section (2) of Section 4 of the Act.

B. DEFENSES RAISED BY PSAA

13. The first defense raised by PSAA is that since all the documentary evidence obtained by the Commission was dated before the passage of the Act on October 13, 2010, the provisions of the Act do not apply to its actions.

14. The Commission has previously dealt with a similar issue in the *Pakistan Poultry Association* case¹. The question in that case was whether the Competition Ordinance 2010 was being applied retrospectively. In order to avoid repetition, the relevant part of the judgment is reproduced below.

In order to address this issue, we deem it appropriate to give a brief history of the Ordinance. The Competition Ordinance, 2007 (the 'Ordinance 2007') was promulgated on 2 October 2007 and subsequently after imposition of emergency was protected under the Constitutional (Amendment) Order 2007, which was subsequently upheld by the Honourable Supreme Court vide its judgment in 'Tika Iqbal Muhammad Khan and others vs. General Pervez Musharaf' cited as PLD 2008 SC 178 (the 'Tika Iqbal Case'). Subsequently, the Constitutional (Amendment) Order, 2007 was declared illegal and the judgment of the Honourable Supreme Court in Tika Iqbal Case supra was overruled by the full court of the Honourable Supreme Court on 31 July 2009 in 'Sindh High Court Bar Association and another vs. Federation of 5 Pakistan and others' PLD 2009 SC 879 (the 'SC Judgment'). The Honourable Supreme Court in SC Judgment held that '...the period of four months and three months mentioned respectively in Articles 89 and 128 of the Constitution would be deemed to commence from the date of short order passed in this case on 31st July, 2009...'. Therefore, the Ordinance 2007 was to remain in force till 28 November 2009. Thereafter, Competition Ordinance, 2009 (the

¹ The complete judgment can be read at http://www.cc.gov.pk/images/Downloads/ppa_order_16_august_2010.pdf

'Ordinance 2009') was promulgated on 26 November 2009 and was given effect on and from the 2 October 2007. Ordinance 2009 lapsed after four months and was re-promulgated by the President on 18 April 2010. The legislature through insertion of Section 60 of the Ordinance validated all the actions taken, orders passed and proceedings initiated by the Commission on or after 2 October 2007.

15. In the abovementioned case, the inquiry had been started under the Competition Ordinance, 2009, which had been given effect from 2 October 2007. In the instant case, the proceedings were at the earliest started on 14 February 2011 under the Competition Act, 2010 (the 'Act'). So the question before us today is whether in these circumstances, the Act is being applied retrospectively.

16. The answer lies in Section 62 of the Act. The section is reproduced below.

Validation of actions, etc. – Anything done, actions taken, orders passed, instruments made, notifications issued, agreements made, proceedings initiated, processes or communication issued, powers conferred, assumed or exercised, by the Commission or its officers on or after the 2nd October, 2007 and before the commencement of this Act shall be deemed to have been validly done, made, issued, taken, initiated, conferred, assumed, and exercised and provisions of this Act shall have, and shall be deemed always to have had, effect accordingly.

17. The reading of Section 62, especially the underlined phrases, clearly indicates that the drafters of the Act intended that its provisions have retrospective effect from 2 October 2007 regardless of the day of commencement of the Act. Section 62 of the Act provides continuation of the competition regime started by Ordinance 2007 on 2 October 2007, thereby filling the vacuum created by the lapse of successive ordinances. As PSAA circulated its recommended range of ancillary charges in September 2008 and February 2010, and the Act has been given effect from 2 October 2007, PSAA's first defense does not hold. If PSAA's defense is accepted, then the purpose and ethos of introducing a reformed competition law in Pakistan would be negated.

18. PSAA's second defense is that trade organizations pressured it to develop a system whereby it would circulate a range of recommend charges. Trade organizations are in the business of lobbying and serving the interests of their trade. In the normal course of business, they will lobby and apply pressure to further the interests of their trade. It is the duty of all entities on the receiving end of this pressure to deal with it correctly, reasonably and to always ensure that they stay within the ambit of the law. Hence, this defense does not stand.

19. PSAA's third defense is that government pressured it to develop and practice the circulation of the recommended range of charges for shipping ancillary services.

They referred to this as “State Action”. This type of defense is known as “state compulsion” in the E.U., “regulated conduct defense” in Canada, and “grant of implied immunity” in the United States. The conditions for this defense to hold were discussed in depth in the Commission Order “In the Matter of Karachi Stock Exchange, Lahore Stock Exchange, Islamabad Stock Exchange” dated 18 March 2009.² Here, we reproduce the E.U. criteria for “state compulsion” that were quoted in the KSE Order:

In the E.U., to plead the defense of state compulsion successfully, the party claiming the defense must satisfy the following three points:

- i. That the state must have made certain conduct compulsory: mere persuasion is insufficient;
- ii. That the defense is available only where there is a legal basis for this compulsion; and
- iii. That there must be no latitude at all for individual choice as to the implementation of the governmental policy.³

20. None of these criteria are met in PSAA’s case. Hence the “state compulsion” defense does not hold.

C. MITIGATING FACTORS

21. The Government amended Pakistan Merchant Shipping Ordinance 2001 on 28 August 2002, inserting, amongst others, the following clause:

79A (2) Notwithstanding anything contained in any other law for the time being in force, the licenses to Shipping Companies, Shipping Agents and Non-vessels Operating Carriers and Cargo Consolidations shall only be issued after grant of NOC from the Shipping Rates Advisory Board constituted under sub-section (2) of section 79 or by an authority authorized by the Board.

According to a Gazette Notification dated 6 February 2001, the Shipping Rates Advisory Board (hereinafter, ‘SRAB’) amongst other duties, was empowered to undertake:

- ii) **Regulation and monitoring of rates charged by shipping companies/agents for various services** including freight provided by them for imports/exports and trade through sea.
- iii) **Suggest measures for fixation of fare rates for the services being provided by shipping companies/agents** with a view to encourage trade and remove grievances of the imports/exports and port users. (emphasis added)

Ship Agents challenged SRAB in the courts where the matter still remains unresolved. Subsequently, the Planning Commission constituted a Working Group for rationalization of freight rates on 21 April 2008. The Working Group

² <http://www.cc.gov.pk/images/Downloads/KSE%20Order%2018March.pdf>

³ In the Matter of Karachi Stock Exchange, Lahore Stock Exchange, Islamabad Stock Exchange, 18 March 2009, p 34 (see for detailed discussion).

requested the Federal Board of Revenue (hereinafter, 'FBR') to take up the matter, but upon receiving no response, requested that a meeting be held under the Secretary of Commerce. This meeting was held on 18 January 2010, in which one of the decisions stated that "FBR will examine whether it has any legal mandate to take punitive action against Ship Agents who are involved in excessive charging, delay in refund of security deposit or other mal-practices". In subsequent meetings various approaches were taken to attempt to determine how to regulate the charges of Ships Agents, but no solution could be finalized.

22. In this environment of a high level of government activity concerning the matter of regulating Ships Agents' charges, even though no determination was made and no legally binding rules were promulgated, it is understandable that government intervention may have pressurized PSAA to take some measures concerning Ships Agents charges for ancillary services.

III. REMEDY

23. We hold that PSAA has violated sub-section (1) of Section 4 of the Act. None of the defenses that PSAA has offered hold. Consequently, as PSAA has engaged in an activity that is prohibited under the Act, keeping in view the mitigating factors and PSAA's cooperative conduct and professed commitment to support the competition regime in Pakistan, the Bench requires that PSAA:
- a. Pays a nominal penalty of Rs. 1 million under Section 38 of the Act; and
 - b. Passes the resolution mentioned in Sub-section 9 (a) of this Order.
24. PSA should file a compliance report within 30 days of this Order.

(ABDUL GHAFAR)
MEMBER

(JOSEPH WILSON)
MEMBER

(MUEEN BATLAY)
MEMBER

Islamabad, June 22, 2011