



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

IN THE MATTER OF

MURREE BREWERY COMPANY LIMITED

Vs.

**SIZA Foods (Private) Limited
(File No. 03 /Sec-3/CCP/08)**

Date of hearing: 22nd December 2008

Present: Dr. Joseph Wilson
Member

Present for SIZA
Foods(Pvt) Limited /
GAM Corporation
(Pvt) Limited: Mr. Amin Mohammad Lakhani, CEO of SIZA Foods
Mr. Badaruddin F. Vellani, Advocate, of Vellani and Vellani
Mr. Jamil Mughal, General Manager, Marketing and Real
Estate Development

Present for Murree
Brewery Company
Limited: M. Abdullah Zafar, Marketing Manager

ORDER

1. Murree Brewery Company Limited (hereinafter “Complainant”) filed a complaint with the erstwhile Monopoly Control Authority (MCA) *vide* its letters dated 8th and 20th August 2007 that fast food restaurants, namely, McDonalds, Pizza Hut and Kentucky Fried Chicken (KFC) had refused to entertain its offer to sell non-alcoholic beverages, *i.e.*, Malt 79, Cindy, Lemon Malt, Original Lemonade and Big Apple, as all of them have exclusive arrangements with either with Coca-Cola or Pepsi Cola (together referred to as Cola corporations). The facts as stated in the complaint, *prima facie*, seemed to violate Section 3 read with Section 6 of the Monopolies and Restrictive Trade Practices Ordinance, 1970 (hereinafter “MRTPO”). Section 3 of the MRTPO prohibited “undue concentration of economic power, unreasonable monopoly power or unreasonably restrictive trade practices”, whilst Section 6 provided instances of practices which were deemed to be “unreasonably restrictive trade practices.”¹

2. MCA took cognizance of the matter and initiated an inquiry by contacting the franchisees of McDonalds, Pizza Hut, KFC, and Coca-Cola Beverages Pakistan Limited and Pepsi-Cola Bottlers separately.

¹ Section 7 of the Monopolies and Restrictive Trade Practices Ordinance empowered the Monopoly Control Authority to prescribe by General Order practices which shall be deemed to be unreasonably restrictive trade practices. Section 7 in relevant part reads as follows:

7. Other circumstances constituting concentration of economic power, etc:- (1) Without prejudice to the provisions of section 4, 5, and 6, the Authority may by General Order prescribe the circumstances in which and the conditions under which undue concentration of economic power or unreasonable monopoly power shall be deemed to exist and the practices which shall be deemed to be unreasonably restrictive trade practices.

Exercising powers under Section 7 of the MRTPO, MCA issued S.R.O. 840(I) /2007. Paragraph (2) of the said SRO read as follows:

(2) Unreasonable restrictive trade practice:-

Any agreement between a supplier or wholesalers and a dealer or retailer that purports to restrict, restrain or prevent the dealer or retailer, directly or indirectly, in any manner whatsoever, from dealing in or retailing similar products offered by other suppliers or wholesalers shall be deemed to unreasonable restrictive trade practice.

3. Soon after the initiation of inquiry, the Competition Ordinance was promulgated on 2nd October 2007 (hereinafter “the Ordinance”), which under Section 59(a) repealed MRTPO, and under Section 59(b) dissolved the MCA. Section 12 of the Ordinance established the Competition Commission of Pakistan (hereinafter the “Commission”). Section 59(f) of the Ordinance stipulates that:

. . . all matters and things engaged to be done by, with or for the Monopoly Control Authority before the enforcement of this Ordinance shall be deemed to have been incurred, entered into, acquired or engaged to be done by, with or for the Commission, established under this Ordinance, as the case may be;
4. After the promulgation of the Ordinance, the complaint was converted into a complaint under the Ordinance at the behest of the Complainant *vide* its letter dated 15th March 2008.
5. This Order disposes of the Show Cause Notice No. 03/2008-09 dated 24th November 2008, issued to SIZA Foods (Pvt) Limited pursuant to the inquiry initiated against it as a franchisee of McDonald’s.

I. Factual Background

A. Undertakings

6. SIZA Food (Pvt) Limited is a company incorporated under Companies Ordinance 1984, as a private company, limited by shares, having its registered office at Lakson Square Building No. 2, Sarwar Shaheed Road, Karachi; and is a franchisee of McDonald’s Corporation to operate its restaurant business in Pakistan under the name and style of McDonalds. SIZA has 100% ownership of GAM Corporation (Private) Limited, a company incorporated in Pakistan and registered at Lahore as a private company, limited by shares, having its registered office at Khyber Block, Fortress Stadium, Lahore Cantt, Lahore. GAM is also a

franchisee of McDonald's Corporation. SIZA is an undertaking as defined in Clause (p) of section 2(1) of the Ordinance.²

7. Murree Brewery Company Limited is company registered under the laws of Pakistan, having its registered office at National Park Road, Rawalpindi, and is engaged in the business of manufacturing alcoholic and non-alcoholic beverages. Murree Brewery is an undertaking as defined under section 2(1)(p) of the Ordinance.

B. Facts

8. Complainant wrote several letters (dated 22nd November 2006, 13th February 2007, 7th March 2007 and 12th July 2007) during the period of November 2006 and July 2007 to SIZA with the request to consider its non-alcoholic beverages for its fast food chain in Pakistan. However, no heed was paid by SIZA to the requests made by the Complainant, and thereafter the Complainant approached Monopoly Control Authority. An inquiry was initiated in the matter and SIZA was asked by MCA *vide* its letter dated 25th September 2007 to supply information on its various meal packages and purchase orders entered into with vendors for soft-drinks and beverages.
9. On the cessation of the MCA, the matter was taken up by the Competition Commission and SIZA was asked again in a letter dated 10th January 2008 to provide agreements entered into with each of the cola companies at local and/or international level that govern the business relationship of its food chain with cola companies in Pakistan. SIZA in its reply dated 25th February 2008 stated that there is no agreement that exists between any cola company and SIZA at the national level or with its franchisor at the international level. SIZA also reiterated

² Section 2(1)(p) of the Ordinance, "Undertaking" means any natural or legal person, governmental 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 of services and shall include an association of undertakings.

in its reply that none of local beverage supplier has ever approached it to supply its product. Relevant parts of the letter are produced as under:

We have undertaken a review of the operations of SIZA, and made further enquiries of our international companies forming part of the McDonald's Group and its arrangements, and can find no evidence to support a claim where a local beverage supplier has approached us to supply their product.

We think it is an important point to note that both SIZA, or the international companies forming part of the McDonald's group and its affiliates, are always willing to negotiate with suppliers to allow them to supply their product; and any choice in selecting a vender is made after given due consideration and on commercial terms.

Based on the enquiries made, no agreements, per se, exist. The nature of the relationship with beverage providers in Pakistan is governed by purchase orders that are made by SIZA to the relevant supplier and not by any arrangement of international companies forming part of the McDonald's group.

In relation to international agreements with local cola companies we can not find any agreement that impacts on cola company operations in Pakistan and local procurement is conducted in the manner outlined above.

10. The Commission on 22nd April 2008 sent copies of letters written by the Complainant to SIZA and required of it to provide copies of response (if any) made to the Complainant and also supply copies of purchase orders, delivery chalans, vouchers and/or other correspondence, regarding the supply of beverages, by any of the local beverage producers from the date of the commencement of its business and /or to explain its position in this regard.
11. On 9th May 2008, SIZA wrote a letter to the Complainant inviting its representatives to meet the General Manager Marketing of the former for review of Complainant's products.
12. On 10th May 2008, SIZA Foods wrote to the Commission submitting that the Complainant's letter were actually sent to McDonalds Restaurant at Fortress Stadium, Lahore Cantonment, which is operated by GAM Corporation (Private)

Limited, another franchisee of McDonald Corporation in Pakistan. The letter mentioned that a meeting with the Complainant has been proposed to discuss the matter. SIZA also sent its purchase orders of nine and a half (9½) years for beverages. Relevant portions from the letter are reproduced here under:

As regards (*sic*) the correspondence from Murree Brewery Company Limited, it appears that these letters while being addressed to SIZA Foods (Private) Limited were sent to the McDonalds Restaurant at Fortress Stadium, Lahore Cantt. which is operated by GAM Corp. (Private) Limited. As such this correspondence has only now been brought to our attention through your above-mentioned Order.

Accordingly, we have already written to Murree Brewery Company Limited requesting them to meet with us to discuss whether and to what extent products of Murree Brewery Company Limited may be considered for sale in our McDonald's Restaurants. A copy of our letter to Murree Brewery Company Limited is attached, hereto for your records. Any review of the products of Murree Brewery Company Limited that we may undertake is without prejudice, and is being undertaken on a good faith basis and there is no assurance that any of the products will be selected to be sold at and from our McDonald's Restaurants.

13. Analysis of purchase orders for beverages sent by SIZA with its letter dated 10th May 2009 revealed that requests for supply of soft-drinks were made only to the Coca-Cola Company. None of the purchase order was issued to any other beverage manufacturer.

14. In the meantime, the Commission gathered, *vide* letters dated 4th and 19th September 2008, the following information from SIZA to assess whether it enjoys the dominant position in the relevant market.³ In terms of the Show Cause, the relevant product market was defined as foreign fast food restaurants and the relevant geographic market was the whole of Pakistan.

- i. Total revenue sales of all McDonalds outlets in Pakistan

³ Section 2(1)(e) of the Ordinance defines "dominant position" as:

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

- ii. Total revenue and volume purchased from cola companies, under existing or prior agreements, or without any such agreements.
- 15. The information requested was provided by SIZA under a cover letter dated 23rd September 2008, which was reviewed by the Commission's staff. However, additional information was required and the Commission wrote a letter dated 6th October 2008, and requested the following information.
 - i. Itemized revenue sales for all products for the period 1st January 2005 to 30th September 2008.
 - ii. Itemized sale price increases for all products, including the date of such increases over the last three years.

The above information was supplied by SIZA under a cover letter dated 15th October 2008.

- 16. The analysis of the information gathered lead the inquiry officer to conclude that SIZA “enjoys a dominant position by virtue of its market share in the relevant market and also by virtue of its ability to behave independently of its competitors and consumers.”⁴
- 17. In November 2008, it was brought to the Commission's attention that SIZA had not held any meeting with the representatives of the Complainant, which SIZA invited through its letter dated 9th May 2008.
- 18. On 24th November 2008, a Show Cause Notice was issued to SIZA under Section 30 of the Ordinance alleging *prima facie* violation of Sections 3(3)(h) and 4(1) of the Ordinance and affording it an opportunity to present its case at a hearing scheduled for 22nd December 2008.
- 19. SIZA replied to the Show Cause Notice with a letter dated 11th December 2008, wherein it stated that “we wish to make it clear that SIZA Foods (Private) Limited has always and continues to always act and operate within the law and, in this

⁴ Paragraph 6 of the Show Cause Notice

instance, shall provide all co-operation necessary with the Competition Commission of Pakistan” and proposed a commitment to resolve the matter under Regulation 30 of the Competition (General Enforcement) Regulation, 2007. The proposed commitment was discussed at the hearing held on 22nd December 2008.

II. Analysis

20. The Show Cause Notice alleged *prima facie* violation of Sections 3(3)(h) and 4(1) of the Ordinance. It will be useful to reproduce the relevant sections here.

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

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

(h) refusing to deal;

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

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

21. Section 2(1)(b) of the Ordinance defines “agreement” to “include any arrangement, understanding or practice, whether or not it is in writing or intended to be legally enforceable.” In the instant case, the practice by SIZA to acquire products only from the Coca-Cola Company falls within the scope of Section 4 of the Ordinance. The practice is tantamount to exclusive dealing, which, in its simplest form, is an arrangement between a manufacturer (Coca-Cola Company

- in this case) and a buyer (SIZA in the case at hand) forbidding the buyer from purchasing the contracted good from any other seller (Complainant in this case), or requiring the buyer to take all of its needs in the contracted good from that manufacturer.
22. Exclusive dealing agreements are “vertical” restraints in that the two parties to the arrangement stand in a buyer-seller relationship. Nevertheless, the competition concerns with exclusive dealing are predominantly “horizontal” in that the exclusive dealing arrangement has an impact on the rivals of the manufacturer, as the rivals are foreclosed from having access to the buyer.⁵
23. Where the buyer happens to be the dominant player, it inevitably by virtue of its exclusive dealing arrangement with the manufacturer engages in refusal to deal with the rivals of manufacturer, and thus attracts the provisions of Section 3, as in the instant case.

III. Undertaking/Commitments

24. Having understood the concerns of the Commission, SIZA volunteered to give the following undertaking, which was accepted by this bench:

SIZA hereby undertakes that SIZA will, in addition to the products of The Coca-Cola Company sell such other beverages which, after review, are shown to conform to the global quality standards prescribed by McDonald’s to its licensees/franchisees from time to time and which are available in the quantities required and on reasonable commercial terms, and in conformity with the requirements of the relevant franchise agreement, and that the other beverages will be placed in a chiller/beverage cooler within its restaurants and at kiosks (space permitting) at a place visible to customers, but without having to make any structural changes in any of its restaurants or kiosks in order to accommodate such additional beverages.

⁵ See Areeda & Hovenkamp, *FUNDAMENTALS OF ANTITRUST LAW*, 3rd Edition, Aspen 2008 at pp. 18-5 & 18-6. [hereinafter “Areeda & Hovenkamp”].

25. SIZA also confirmed that SIZA does not deal exclusively with the products of The Coca-Cola Company and in this regard further confirmed that SIZA does not at present sell KINLEY water (which is sold and supplied by The Coca-Cola Company in Pakistan) and in fact sells Nestlé's water.
26. GAM Corporation (Private) Limited also made a commitment similar to the one made by SIZA, reproduced at paragraph 24 above, which is also accepted by this bench.
27. The undertakings/commitments offered by SIZA and GAM will allow them to offer more choices of beverages to their consumers, in addition to allowing local manufacturers of beverages market access to an international fast food restaurant, which hitherto was foreclosed by a multinational corporation. Removing artificial barriers to market entry and providing choices to consumers are integral elements for promoting competitive markets, and it is hoped that SIZA and GAM by adhering to their commitments in letter and spirit will facilitate in promoting competition in the market.
28. Following the hearing, the Complainant through its letter dated 24th January 2009 confirmed to the Commission that it had a meeting with SIZA for initiating a process for the review of its products. The relevant portions from the letter are reproduced below:

[W]e confirm that we had a meeting with the representative of SIZA Foods (private) Limited for initiating a process for the review our products, and that we are satisfied with review processes.

We of course understand and accept that in order [for] SIZA Foods to be able to sell our products from their restaurants, our products and processes would have to conform to the global quality standards prescribed by McDonald's and the terms and conditions of such supply would have to be mutually agreed between SIZA Foods and ourselves.

29. Based on the undertakings given by SIZA and GAM, and on the fact that the Complainant is satisfied that SIZA will give due consideration to its products, the

Show Cause Notice No. 03/2008-09 dated 24th November 2008 issued to SIZA Foods (Pvt) Limited is hereby stands disposed.

30. I would be remiss here if I fail to put on record and commend the co-operation extended to the Commission by SIZA Foods (Private) Limited; its President and CEO, Mr. Amin Mohammed Lakhani; and its counsel, Mr. Badaruddin F. Vellani.

(DR. JOSEPH WILSON)
Member

ISLAMABAD, THE 24TH OF APRIL, 2009.