



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

IN THE MATTER OF

**PAKISTAN STEEL MILL
(File No. 3/DIR (M&TA)/PSM/CCP/09)**

Dates of Hearing	29 May 2009 16 June 2009 23 July 2009 7 October 2009
Present for the Commission	Mr. Khalid Aziz Mirza, Chairman Ms. Rahat Kaunain Hassan, Member Dr. Joseph Wilson, Member
Present for Pakistan Steel Mill	Mr. Iftikhar Ahmed Javed (GM Marketing) Mr. Mazhar Jafri (Advocate)
Present for Frontier Foundry (Pvt.) Ltd.	Mr. Nauman Wazir (CEO) Mr. Zarak Khattak (Director)

ORDER

1. At issue in this case is whether Pakistan Steel Mills (hereinafter “PSM”) abused its dominant position by excluding a number of downstream undertakings from the sale of particular types of steel billets for the period of November 2008 to January 2009, in violation Section 3(3)(g) of the Competition Ordinance, 2007 (hereinafter the “Ordinance”).

48. Factual Background

2. PSM was incorporated on 2 July 1968 under the Companies Act of 1913. PSM deals “in the production of flat steel products including, billets, slabs, hot rolled coils, cold rolled coils, galvanized sheets/coils/formed sections and corrugated sheets.”¹ PSM has a production capacity of 1.1 million tons of steel which can be expanded up to 3.0 million tons per annum and is the only blast furnace in Pakistan.² PSM is a body corporate in the business of producing and supplying steel products and is therefore an “undertaking” as defined under Section 2(1)(p) of the Ordinance.

3. The Commission took *suo moto* notice of a news items appearing in the media on 12-14 February 2009 relating to the shortage in the supply of steel billets by PSM to all but one downstream buyer, the Abbas Group.

¹ Pakistan Steel Mill website: http://www.paksteel.com.pk/organ_about_us.html

² A detailed description of blast furnace steel mills can be found at <http://www.steel.org/AM/Template.cfm?Section=Articles3&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=25317>

4. According to the minutes³ of its January 27, 2009 Executive Committee meeting, the Vice-Chairman of the Pakistan Steel Re-rolling Mills Association (hereinafter “PSRMA”) informed the Committee about the “gross malpractice of Steel Billets by the management of Pakistan Steel Mills; He informed about the supply of billets to only few units of Karachi totally ignoring the Lahore Sector. It was decided to bring into the notice of Ministry of Production this unfair distribution with the request to direct the Management of Pakistan Steel to stop such ugly discrimination in distribution of Steel Billet allowing the whole steel sector of re-rolling mills to have their own share.”
5. Months earlier, according to media reports, PSRMA wrote to the Chairman of PSM on 14 June 2008 on the matter of “gross mal-distribution of billets that were responsible for causing widespread resentment.”⁴ Some points made by PSMRA in the letter were:
- a) No justified criteria are being observed in distribution policy of PSM;
 - b) Some mills are favoured on large scale, while others are starving for raw material; and
 - c) Mills which are closed are being showered with daily allocation while other deserving units are ignored daily. Such discriminatory policies are deplorable.
6. The issue was also later brought to the Commission’s attention by Frontier Foundry (Pvt.) Ltd. (hereinafter “FFPL”), which filed a complaint on 18 February 2009. The contents of the Complaint, are summarised as follows:

³ Minutes provided by PSRMA and part of the Record.

⁴ “Fresh evidence of massive billets scam in PSM,” The News, 14 February 2009

- a) PSM is the only blast furnace in Pakistan and a national economic strategic asset. PSM produces wire-rod billets. Wire-rod billets are the raw material used by wire-rod re-rolling mills to produce wire-rod. Wire-rod is a necessary ingredient required in the manufacture of nails, welding rods, barbed-wire, nets, fan-nets and thin steel wires. No other source in Pakistan is capable of producing the quality of low carbon steel billets that PSM manufactures. This technology provides a competitive advantage in manufacturing products, and, as such has given PSM a dominant position in the local steel market. Most domestic buyers of steel products prefer to deal with PSM for their raw material and finished goods.
- b) There are 6 to 10 wire-rod re-rolling mills in Pakistan. PSM is supposed to distribute wire-rod billets amongst all the re-rolling mills in a transparent and non-discriminatory manner.
- c) The appointment of a new Chairman of PSM in May 2008 resulted in the allocation of SAE 1008 and SAE 1010 billets to one particular group, the Abbas Group increasing, while the allocation of other re-rolling mills decreased.
- d) Price of billets were reduced on 26 November 2008⁵ and billets of grades SAE 1008 and SAE 1010 were exclusively being allocated to the Abbas Group. The exclusive arrangement of wire-rod of Abbas Group led to the increase of wire-rod price from Rs. 51,000 per ton to Rs. 61,000 per ton, which would adversely affect consumers, rendering the finished product more expensive to buyers.
- e) Information pertaining to the sale of billets and other material was widely and transparently disseminated in 2008 as PSM was making all relevant allocation information, also called “notices of readiness” (NORs) available on its website. However, PSM arbitrarily stopped putting this information on its website in November 2008, and resumed in February 2009, in violation of its 2004 MOU with Transparency International Pakistan.
- f) On January 6, 2009, while the NORs were still not visible on the website and thus it was impossible to verify the status of NORs and their dispatch, FFPL wrote to the PSM Chairman stating that “[w]e are one of the very few clients who have been purchasing billets from your prestigious organization round the year; even when the PSM price was not deemed feasible by others, we continued to lift our NORs. We in the recent past have seen a decrease in the number of NORs being issued to us

⁵ Various items substantiating this price reduction appeared in local media on 27 November 2008.

for reasons unknown and unasked. We are currently desirous of purchasing SAE-1008/1010 Billets ... Kindly issue requisite NORs keeping in view our past record and relationship with your organization.” None of the requested billets were supplied to FFPL until after the Commission intervened

7. Pursuant to section 37(2) of the Ordinance, the Commission appointed an inquiry officer on 20 February 2009, who finalized the Inquiry Report in the matter on 10 April 2009. The Inquiry Report concluded that the allegations by the PSRMA and FFPL were supported by the facts. On the recommendation of the Inquiry Report, a Show Cause Notice was issued to PSM on 29 April 2009. The relevant portions of the Show Cause are reproduced below for reference:

WHEREAS, in terms of enquiry report, based on the Undertaking’s allocation data relating to notice of readiness (NOR) available on its website, the allocation of the Product to one entity i.e. ‘Abbas Group’ from October 2008 onwards has seen a manifold increase and the Undertaking has discontinued the supply of the Product to other consumers/buyers, despite their agreeing to meet any requirement imposed by the Undertaking thereby subjecting them to exclusionary conduct;

NOW THEREFORE, the Undertaking is called upon to show cause and file its reply within fourteen days of the receipt of this show cause notice and to appear and place before the Commission, facts and materials in support of its contentions and avail the opportunity of being heard through an authorized representative.

II. Submissions by PSM

8. PSM’s replied to the Show Cause Notice through its counsel on 27 May 2009. The submissions are summarized below:
 - a) Allocation of billets to the complainant was made without any prejudice and the material was never in short supply, therefore, FFPL’s claim is irrelevant. PSM claims that since it produced almost 1/3rd of its capacity, allocations to FFPL were also reduced accordingly.
 - b) The Abbas Group has not been accorded any extraordinary preference over others. During the period under reference cash starved PSM badly needed liquidity not only to run the Mill but to retire documents due for payment with the banks. Various customers including Abbas Group came to the rescue and obtained delivery

orders in advance which eased the cash flow of PSM. PSM also said that FFPL had written on 23 October 2008 to issuance to NORs to them until their field maintenance was completed. However, supplies of materials were resumed to them upon completion of this maintenance.

- c) Responding to a fact in the inquiry report that 60,000 tons of billets were sold below cost, resulting in an estimated loss of PKR 2 Billion, PSM said that price of its products are fixed through a “vibrant efficient mechanism” and reviewed on a weekly basis by a high level management committee. The review is based on a data comprising comparison of latest international prices of identical products obtained through internet, other sources, e.g. Metal Bulletin etc., research reports of the local market and through daily monitoring of the local markets.

9. PSM went further and gave the calculation in support of its claim that it is not dominant in the relevant market:

Total production/consumption of long products in the country is around 4.0 million tons per year. The requirement is met from the following sources:

- a) PSM total production capacity of long products0.660 Million tons per year
- b) Re-rollers/Re-melters/Ship breakers/Billet Importers3.330 Million tons per year.
- c) Actual production of billets at PSM during the year 2008-09 (up to 30th April, 09) 0.220 Million tons per year.
- d) From the above, the share of PSM in normal conditions (at optimum level). 17%
- e) Actual production of billets during the year 2008-09 (up to April 09) due to low production.....6%
- f) Composition of total steel billet produced during July, 2008 to April, 2009 by Pakistan Steel is as follows:-

• SR 24/SR 30	1,63,045
• GR 60 / 706	26,380
• SAE/1010/1008.....	38,481
• High Carbon WR Series.....	3,955
- g) From the above detail, it is transpired that of the 6 % production of billets of total long products, the percentage of SAE 1008/1010 is approximately 0.96 % of the total production of long products. This percentage of material cannot be termed as a monopolized item. Therefore, it may be appreciated that PSM does not hold dominant position in the relevant market as defined in Section 2(e) and 2(k).⁶

⁶ PSM, 27 July 2009, page 8.

10. PSM further contended that there were other sources of billets available and other products that can be considered as close substitutes to billets – e.g., SR24 and cobble plate. PSM also said that the ship-breaking industry provides raw material for the manufacture of wire rods.

III. Analysis

11. Refusal to deal by a dominant player may amount to abuse of dominant position under certain circumstances, and thus violate section 3 of the Ordinance. Section in relevant part is reproduced here below:

3. **Abuse of dominant position.**-(1) No Person shall abuse dominant position.
- (2) An abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent restrict, reduce or distort competition in the relevant market.
 - (3) The expression “practices” referred to in sub-section (2) shall include, but are not limited to—
 - (h) refusing to deal.

12. Therefore, we need to determine the following:

- a) What is the relevant market?
- b) Does PSM have a dominant position in that relevant market?
- c) In the event that PSM is found to have a dominant position in the relevant market in which the abuse is alleged, did PSM engage in an abusive practice by “refusing to deal” and therefore prevent, restrict, reduce or distort competition?

A. Relevant Market

13. Before invoking application of Section 3, it is essential to determine, in cases which do not merit *per se* condemnation, whether the undertaking

concerned has dominant position or not in the “relevant market,” which in turn necessitates defining the relevant market first. Section 2(1)(k) of the Ordinance lays the criteria for determining “relevant market” 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 all those products or services which are regarded as interchangeable or substitutable by the consumer by reason of the products’ characteristics, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring geographic areas because, in particular, the conditions of competition are appreciably different in those areas;

Relevant Product Market

14. The relevant product in this case is a specific type of steel product known as low carbon steel billets having international classification of grades SAE 1008 and SAE 1010⁷ and come in varying length, width, and breadth. These billets are generally produced in blast furnaces that have the ability to produce low carbon steel from iron ore and air. This product has a carbon content of 0.1 percent or lower, which gives the steel malleability and ductility enabling it to be shaped into wire rods which are then used to make end products such as screws, nails, buckles, fan covers and welding rods. SAE 1008 would have a carbon content of 0.08 percent, while SAE 1010 has a carbon content of 0.1 percent. Because both SAE 1008 and

⁷ The American Iron and Steel Institute (AISI) together with Society of Automotive Engineers (SAE) have established a four-digit (with additional letter prefixes) designation system for steel billets:

SAE 1XXX

First digit 1 indicates carbon steel (2-9 are used for alloy steels);

Second digit indicates modification of the steel.

0 - Plain carbon, non-modified

1 - Resulfurized

2 - Resulfurized and rephosphorized

5 - Non-resulfurized, Mn over 1.0%

Last two digits indicate carbon concentration in 0.01%. Thus, SAE 1030 means non modified carbon steel, containing 0.30% of carbon. Source:

http://www.substech.com/dokuwiki/doku.php?id=carbon_steels#low_carbon_steels_c_0.25

SAE 1010 have a carbon content of 0.1 percent or less, they would qualify as low-carbon steel billets.

15. Other products that come close to SAE 1008 and SAE 1010 are high carbon steel billets with a content of more than 0.1 percent carbon. This high carbon steel is brittle compared to low carbon steel meaning that any product produced from it would be of extremely inferior quality and easily breakable. This would make it unfeasible for producing nails, screws and buckles *etc.*, which depend on the tensile strength and finished look of the steel.

16. It would thus appear that this product is not substitutable unless the quality of downstream products be downgraded. Any variation in the metallic composition or carbon content of the billet makes it unusable for the downstream products.

17. PSM has emphasized that SR24 and cobble plate can be considered close substitutes of billets. PSM also said that the ship-breaking industry provides raw material for wire rods. Both FFPL and PRSMA have disputed this fact - material from ships can only make coils of 20 kg, whereas billets can make coils of 100 kg, which is the major requirement for downstream industry.

18. Additionally, we can determine by looking at the definition of 'cobble plate', that cobble plate is not an adequate substitute for SAE 1008 and SAE 1010 billets. In terms of steel manufacturing, cobble plate means

plate that “occurs when a bar of hot steel fails at any stage of the rolling process to proceed in its normal course through the mill.”⁸ In other words, cobble plate is the result of a malfunction at a steel mill and is referred to in the industry to describe the lowest form (and usually the cheapest) of hot rolled steel plate or bar. It is steel that did not make it through all of the plate finishing processes that would yield a traditional plate or bar. Reasons can vary from not meeting thickness, width, length tolerances to not having the exact chemical composition that it set out to have.⁹ Thus, like ship scrap, cobble plate is fundamentally distinct from SAE 1080 and SAE 1010 which are, by definition precise in their chemical composition: SAE 1080 has 0.08 percent carbon, and SAE 1010 consists of 0.1 percent carbon, which gives the product greater flexibility and durability. Moreover, cobble plate is not likely to fit the precise size requirements that are required by re-rolling mills such as those of the Complainant, further undermining the claim that cobble plate and SAE 1080 and SAE 1010 are substitutable products.

19. Therefore, contrary to PSM’s assertion, and as per the assertion of Complainant but not rebutted by PSM, the relevant product market is composed of low carbon steel billets of grade SAE 1008 and SAE 1010 which are the key raw material for the manufacture of quality wire rods that only 6 to 10 re-rolling mills in Pakistan have the capacity for, including the Complainant among others.

Relevant Geographic Market

⁸ *Transactions*, National Safety Council, Association of Iron and Steel Engineers, Vol 10, University of Michigan (1921).

⁹ Available at: <http://www.eng-tips.com/viewthread.cfm?qid=239348&page=1> (February 22, 2010).

20. As PSM is the sole provider of SAE 1008 and 1010 billets in Pakistan, and has the capacity to supply all over the country, the relevant geographic market is the entire country of Pakistan. Now that we have determined that the geographic area of the State of Pakistan comprises the relevant market, we must assess whether the relevant market extends to goods imported into Pakistan that could conceivably be substituted with or be interchangeable with the like imported good, or whether it only applies to those SAE 1008 and SAE 1010 billets produced by PSM.

21. To do so, we must review the tariff structure imposed on the import of steel billets or those ingredients that comprise steel billets. The Table¹⁰ below sets out the tariff structure for related imports that could be substitutes:

Tariff Structure for Wire Rod-Related Products for Import into Pakistan	
Product	Applied Import Duty
Imported Scrap or Iron Ore	0.0 %
Imported Steel Billets	5.0 %
Imported Finished Wire-Rods	10% to 20.0 %

Source: Pakistan Customs Tariff 2008-09

22. The product that comprises the relevant market are SAE 1008 and SAE 1010 billets, which have a precisely measured and low-carbon content. Thus scrap or iron ore which would have varying levels of carbon content would not be a substitutable product, but if they were, they would require the added cost of melting the scrap and render them more expensive than domestically produced billets. Imported steel billets that would be equivalent to PSM's SAE 1008 and 1010 billets are applied with a tariff of

¹⁰ Pakistan Customs Tariff 2008-09, available at: <http://www.fbr.gov.pk/newcu/TARIFF/2008/ch1-97.pdf>

5.0% import duty. A 5% import duty would mean that such products would be more costly than the domestically produced like product. Slapped with a duty of between 10% and 20%, the imported finished product of wire-rods would be even more expensive and not a 'substitutable product'.

23. If one also includes the clearing shipping and wharfage charges and extra time required for delivery, imports are considerably less viable than lifting the corresponding domestic product, and therefore could not be credibly included in the relevant geographic or product market.

B. Dominant Position

24. Before an abuse of dominance can be established the dominance of an undertaking must be determined. Section 2(1)(e) of the Ordinance defines a dominant position as follows:

“dominant position” of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have ability to behave in 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;”

25. PSM, in its written submissions, states that “share of PSM products especially the product under reference is only 0.96% which by no means can be termed as a monopolized product...it may be noted that PSM does not enjoy dominant position in the 'relevant market'...”¹¹

¹¹ PSM's reply to the show cause notice, 27 May 2009, page 7.

26. We do not agree with the calculations put forward by PSM. While the billets of grade SAE 1008 and SAE 1010 may constitute 0.96 of the total consumption of long products (500 Million) in Pakistan, the market share of PSM of these grades amount to 100% as there is no other factory in Pakistan capable of producing these grades of billets and imports are not included in the relevant market.

27. Since the market share of PSM in the relevant market is 100%, PSM would have “the ability to behave to an appreciable extent independently of competitors, customers and consumers and suppliers” as required per the Ordinance. Given that dominance shall be presumed under the Ordinance when market share within the relevant market exceeds 40%, the presumption of dominance is satisfied. In fact, it is precisely PSM’s complete dominance in the low-carbon steel billet market that enables the alleged abuse that transpired, and could have permitted PSM to refuse to supply certain of its customers and not others.

C. Refusal to Deal

Background

28. The term “refusal to deal” (or “refusal to supply”)¹² is used to describe a situation in which one undertaking refuses to sell to another undertaking, is willing to sell only at a price that is considered “too high”, or is willing

¹² While in the United States, anti-trust law uses the term of art ‘refusal to deal’, in the European Union the term of art used is ‘refusal to supply’. Pakistan’s Competition Ordinance has adopted the American term.

to sell only under conditions that are deemed unacceptable,¹³ thereby qualifying as an abuse of an undertaking's dominant position.

29. A 'refusal to deal' could occur either in vertical relation, where an undertaking refuses to supply a customer, or it could occur in horizontal relation, where an undertaking refuses to deal with, or supply its product to, its competitors. A refusal to deal may be unilateral or concerted. In the instant case, the refusal to deal occurred in vertical relation and involved the unilateral refusal of PSM to supply the downstream purchaser of SAE-1008 and SAE 1010 steel billets. Additionally, the refusal to deal here was undertaken unilaterally by PSM, and did not involve any concerted action between dominant suppliers. PSM was the only supplier of the refused product.

30. A refusal to deal either is applied to pre-existing customers or new customers of a supplier. There is pertinent jurisprudence developed in both the United States and the European Union cases involving terminating a pre-existing business relationship with customer (see *Commercial Solvents*,¹⁴ *Télémarketing*,¹⁵ and *Aspen*¹⁶), because a termination of a pre-existing business relationship implicates the legal and equitable notions of fairness including 'reliance' or 'estoppel'.

¹³ "Refusals to Deal", an OECD Policy Roundtable document, page 9, (2007). DAF/COMP (2007)46. Available online at <http://www.oecd.org/dataoecd/44/35/43644518.pdf>

¹⁴ Joined Cases 6/73 and 7/73, *Commercial Solvents*, [1974] E.C.R. 223.

¹⁵ Case 311/84, *Télémarketing*, [1985] E.C.R. 3261.

¹⁶ 472 U.S. 585 (1985).

31. A refusal to deal, may take place, *inter alia*, when a dominant firm supplies “less than the full amount requested, supplies irregularly or with long delays, or by offering to supply only at a different or variable level of quality.”¹⁷ This latter is termed as “constructive refusal to deal.”

Analysis

32. In any given jurisdiction, a number of elements ought to be satisfied before a refusal to deal will be found to constitute a violation of competition law. A comprehensive study conducted by the OECD found that across many countries, some, if not all of the following conditions were typically included to make a finding of refusal to deal:¹⁸

1. The refusing firm must have a dominant position in the market of the product or service it is refusing;
2. The product or service that is being refused must be an objectively indispensable input, with no actual or potential substitutes;
3. The refusing firm must not be willing to sell or supply at terms and conditions that would be considered appropriate or reasonable, part of the industry standard, or in the ordinary conduct of business;

¹⁷ “Refusals to Deal”, [page 28](#).

¹⁸ Ibid, page 12. Countries surveyed by the OECD included Belgium, Canada, the Czech Republic, the EC, Finland, France, Germany, Hungary, Ireland, Japan, South Korea, Mexico, Switzerland, Taiwan, Turkey, the UK, and the US.

4. Such denial of service must have a material impact on competition in a related market, to the detriment of customers;
5. The denial of dealing, supply or service must be without objective commercial justification; and
6. It is necessary that a remedy may be crafted that ensures that the relevant product is provided on an ongoing basis, at appropriate terms and conditions.

33. In EU case law, in 1998, *Oscar Bronner v. Mediaprint*¹⁹ the European Court of Justice (hereinafter “ECJ”) set a higher bar for liability than cases before it did, which formed the antecedents to the more recent EU policy papers and Guidelines they have published more recently, and from which this Order seeks guidance. In that case, Bronner published a regional Austrian newspaper and wanted access to the home distribution system of a larger national newspaper publisher. The larger firm, which had a dominant share of the daily newspaper market, refused Bronner’s request. The ECJ held that, to be unlawful, the refusal to deal had to i) relate to a product or service that is indispensable to the business of the firm requesting access, there being no actual or potential substitute; ii) eliminate all competition from the firm requesting access; and iii) be incapable of objective justification. All of the foregoing elements are sufficiently included in the more extensive list above of the six conditions, which we

¹⁹ Case C-7/97.

shall use as it is more comprehensive in undertaking our refusal to deal analysis:

(1)

34. *The refusing firm must have a dominant position in the market of the product or service it is refusing.* We have discussed at length above in the Section B on dominant, and adequately so, the first element necessary for finding a refusal to deal competition violation, and have found in the affirmative. We have found unequivocally that PSM has a dominant position in the market for low-carbon steel billets as the sole producer of such billets in Pakistan.

(2)

35. *The product or service that is being refused must be an objectively indispensable input, with no actual or potential substitutes.* We also discussed part of the second element when we defined the relevant market: that the product is not substitutable. In defining the relevant product market, we determined that low-carbon steel billets such as SAE 1008 and SAE 1010 were what constituted the relevant market and could not be substituted by steel billets made from rejected steel called ‘cobble plate’.

36. However, we need to consider more thoughtfully, whether low carbon SAE 1008 and SAE 1010 are ‘objectively’ a necessary input for customers to be able to compete effectively on the market. In its guidance on the application of Article 82 of the EC Treaty to abusive exclusion conduct by

dominant undertakings, the European Commission wrote with respect to objectively necessary inputs that

“[t]his does not mean that, without the refused input, no competitor could ever enter or survive on the downstream market. Rather, an input is indispensable where there is no actual or potential substitute on which competitors in the downstream market could rely so as to counter – at least in the long-term – the negative consequences of the refusal. In this regard, the Commission will normally make an assessment of whether competitors could effectively duplicate the input produced by the dominant undertaking in the foreseeable future.²⁰

37. In a natural monopoly like PSM, an input like low-carbon SAE billets is likely to be almost impossible to replicate for any of the downstream purchasers like FFPL because of the enormous economies of scale required for a blast furnace. Nor it is likely for a rival to PSM to appear in the foreseeable future. Thus, it can be safely concluded that there is no actual or potential substitute for SAE 1008 and 1010 low-carbon steel billets, although the product is objectively a necessary input for the manufacture of high-quality wire rods.

(3)

38. *The refusing firm must not be willing to sell or supply at terms and conditions that would be considered appropriate or reasonable, part of the industry standard, or in the ordinary conduct of business.* In order to satisfy the third element, it must be the case that the ‘refuser’ must have been unwilling to supply in accordance with reasonable, appropriate,

²⁰ “Communication from the Commission – Guidance on the Commissions’ enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings”, *Official Journal of the European Union*, 2009/C 45/7, (24 February 2009) at 19.

industry-standard relevant terms and conditions. In the instant case, between the period of November 2008 to February 2009, PSM refused to supply the Complainant any SAE low carbon billets.

39. In refusal to deal cases, there are two kinds of refusals: “disruptions to previous supply, and refusals to supply a good or service which the dominant company has not previously supplied to other (*de novo* refusals to supply).”²¹ The fact is that while the Complainant was willing to alter the terms and pay a premium of Rs. 2,500 per metric ton of low carbon steel to be able to receive the supply of the product, PSM failed to supply in accordance with the terms and conditions it was previously supplying at, and disrupted its previous supply. Thus, the third element of a refusal to deal is also found present, since it is clear that PSM was not willing to supply as it previously had, or in a reasonable or appropriate manner.

(4)

40. *Such denial of service must have a material impact on competition in a related market, to the detriment of customers.* In refusal to deal cases, the fourth element that needs to be evaluated in this case is the impact of the refusal in the downstream market, in other words, the negative effect such refusal is likely to have on competition. In *Commercial Solvents*,²² Zoja, a pharmaceutical manufacturer was dependant on a particular raw material, ethambutol, the dominant supplier of which was Commercial Solvents. When Commercial Solvents refused to continue supplying ethambutol to

²¹ Communication from the Commission, foot note at pg19.

²² [1974] 1 CMLR 309, para 25

purchasers downstream including Zoja, the European Commission found it to be a case of refusal to deal. The European Court of Justice upheld the decision of the EU Commission and stated that:

“it is in fact possible to distinguish the market in raw material necessary for the manufacture of a product from the market on which the product is sold. An abuse of a dominant position on the market in raw materials may thus have effects restricting competition in the market on which the derivatives of the raw material are sold and these effects must be taken into account in considering the effects of an infringement, even if the market for the derivative does not constitute a self-contained market.”²³

41. The general principal that can be derived from Commercial Solvents is that if the refusal by a dominant undertaking has the effect of negatively impacting, preventing, restricting, or distorting competition in the downstream market, then it satisfies the fourth element in making an abuse of dominance claim. The case before us, wherein PSM has refused to supply low carbon billets to regular customers, has to be seen in the same context.

42. Competition in the downstream market has been affected due to the fact that PSM has been allocating most (if not all) billets of category SAE 1008 and SAE 1010 to one particular entity known as the Abbas Group.

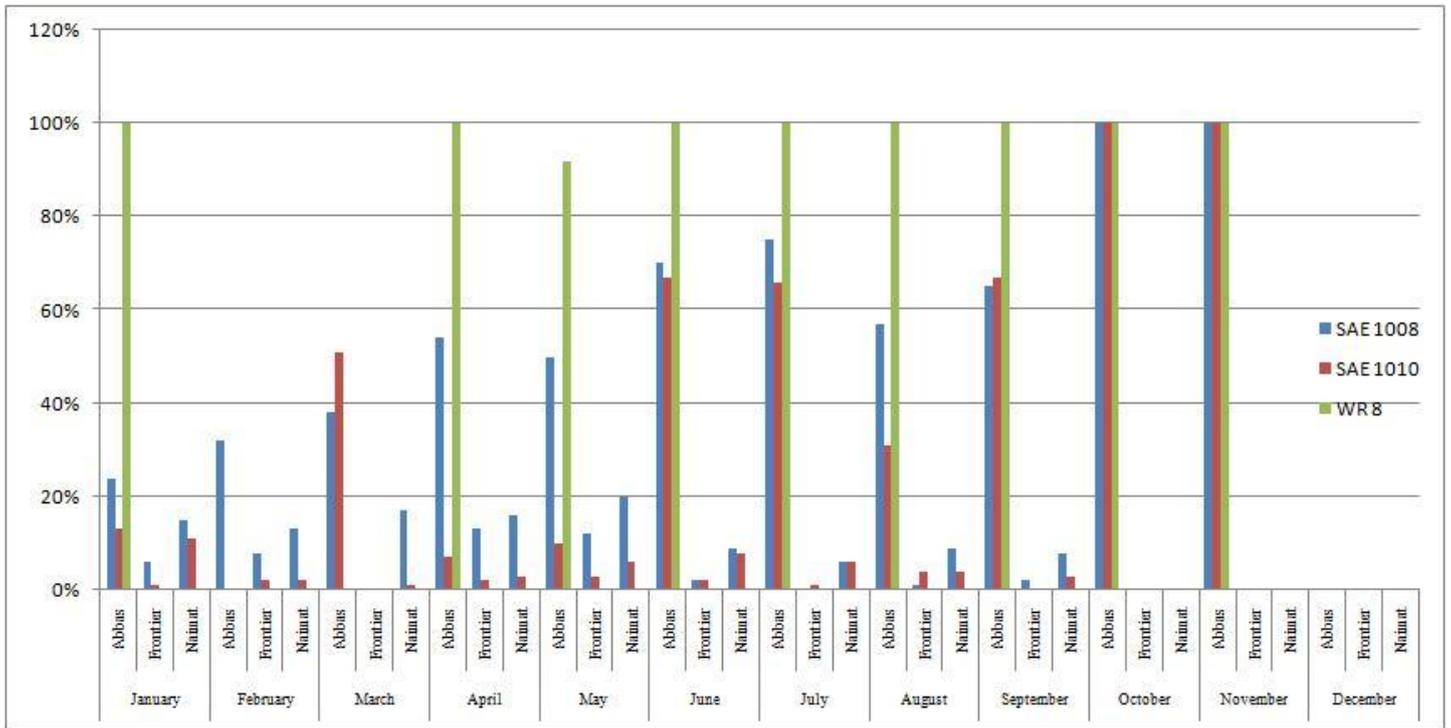
43. When PSM’s allocation data for 2008, taken from their website, is examined closely, the following distribution pattern was noted:

- i. **SAE 1008 Billets.** In the first half of 2008, allocations to the Abbas Group were higher than those to other undertakings, but there is a considerable spike in the

²³ ²³ [1974] 1 CMLR 309, para 22.

allocation from June 2008 onwards, to the extent that in October and November 2008, all billets of this category were allocated to them.

- ii. **SAE 1010 Billets.** A similar pattern of these billets can be noted *i.e.*, a sharp increase in allocation to Abbas Group from June 2008 onwards reaching 100% in



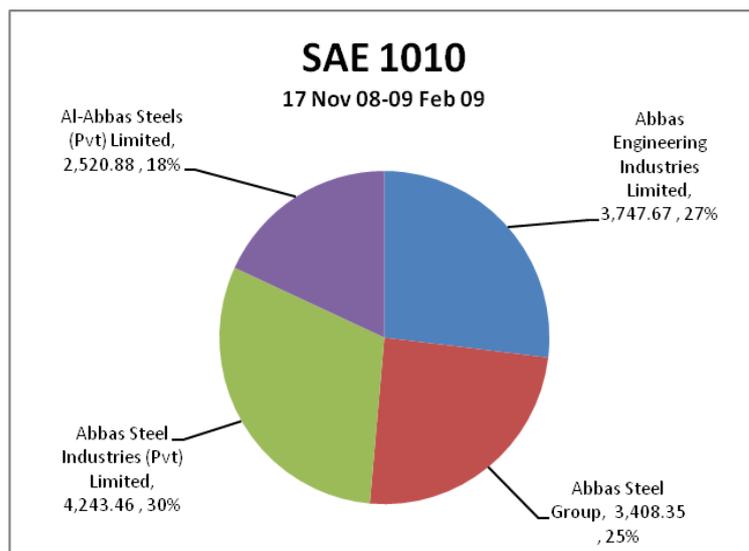
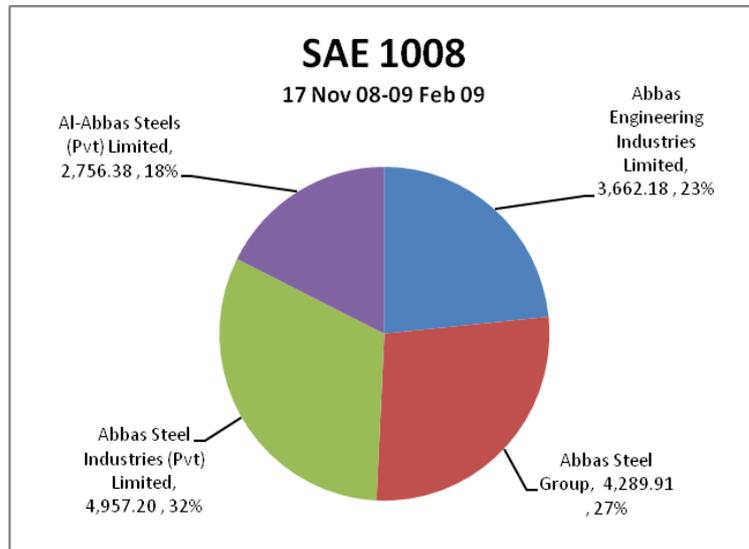
October and November 2008.

44. Notice of Readiness (NOR) data for the period between 17 November 2008 and 10 February 2009 was not placed on PSM’s website. However, the data was made available during the course of the hearing.²⁴ Analysis of the data shows that:

- i. **SAE 1008 Billets.** All allocation were made to the Abbas Group

²⁴ PSM’s letter to the Commission, 13 July 2009.

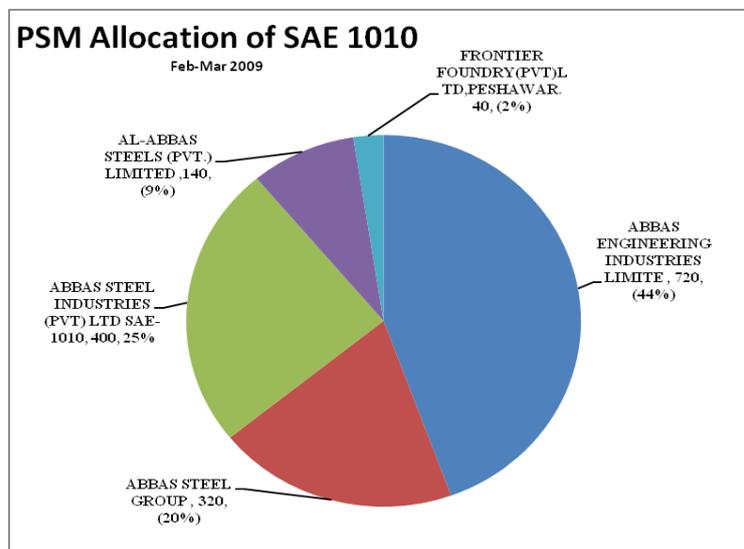
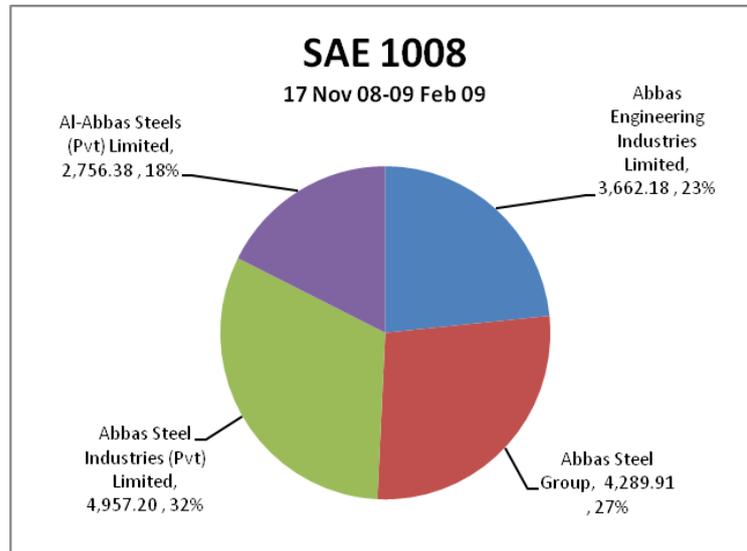
ii. **SAE 1010 Billets.** All allocations, similarly, were made to the Abbas Group.



45. NORs were placed on the PSM website from February 2009 onwards and those for the period February-March 2009 were also analysed for patterns of allocation:

i. **SAE 1008 Billets.** 97% of the billets of this category produced by PSM were allocated to the Abbas Group; 3% to the complainant, Frontier Foundry.

- ii. **SAE 1010 Billets.** 98% of the billets of this category produced by PSM were allocated to the Abbas Group; 2% to the complainant, Frontier Foundry.



46. There is sufficient evidence that PSM allocated SAE 1008 & SAE 1010 billets only to Abbas Group and refused to deal with all other purchasers of SAE 1008 & SAE 1010 billets, despite its own admission that it was

holding considerable raw material and finished goods.²⁵ By doing so, PSM negatively affected competition, prevented and distorted competition in the downstream sectors and therefore “therefore risks eliminating all competition” in the market.

(5)

47. *The denial of dealing, supply or service must be without objective commercial justification.* PSM has attempted to put forth several types of justifications for its conduct. First, in its written reply, PSM stated that the reason it had taken its NORs off its web site during the alleged period of abuse and refusal to supply to any undertaking other than the Abbas Group, was because global demand for steel had plummeted, lower-priced steel was being imported into Pakistan, and it did not want importers to know the names of PSM’s customers. However, that could be rebutted by the fact that most of the entities that would import such products would be the many re-rolling mills who are PSM customers, and therefore importers would already have knowledge of those customers.

48. During the course of the hearings, PSM has tried to defend its action during the course of the hearings. One explanation behind erratic supplies to consumers was that these consumers did not have a regular “lifting” trend *i.e.*, they did not collect raw materials allocated to them within the time period causing PSM to hold excess inventory. FFPL, for example, did not collect the billets allocated to them in the last quarter of 2008 and hence, this was a reason why allocations to them have been reduced since then.

²⁵ Paras 10 and 13 of PSM’s letter to Transparency International Pakistan dated 31 March 2009, available online at <http://www.transparency.org.pk/pm/psm.htm>

49. However, FFPL stated that, taking advantage of the high domestic prices of billets vis-à-vis those in the international market, it had begun the process of field maintenance of machinery to gear up for increased production. FFPL provided documentary evidence that this fact had been communicated to PSM but in spite of this, PSM had allocated billets to them which they could not utilize during the period of maintenance. When PSM dropped prices in November 2008 to make their products competitive with international prices, FFPL's request for billets was not fulfilled. On January 6th 2009, while the NORs were still not visible on the website and thus it was impossible to verify the status of NORs and their dispatch, in another letter FFPL wrote to the PSM Chairman reminding him of the previous record and relationship between the two undertakings and requesting the purchase of SAE-1008/1010 Billets. FFPL received no response from PSM to that letter. Despite FFPL's offer to pay more than the going rate for billets in February – also documented in a letter²⁶ – PSM yet again did not provide the requested billets.

50. That PSM in the past has found it in its business and economic interest to supply a product to one or more customers shows that it, at certain points in time, considered it efficient to engage in such supply relationships. Undoubtedly PSM's customers were likely to have made investments based on these supply relationships and that continuing these relationships was something that they had come to expect and legitimately rely upon.

²⁶ Letter dated February 24, 2009 is part of the Record, from CEO FFPL to Federal Secretary, Ministry of Industries and Production also copied to Chairman PSM on the subject of "Closure of Pakistan's Largest Re-Rolling Mill Due to Non-Availability of Billets".

51. In *BPB Industries and British Gypsum v. Commission*,²⁷ British Gypsum, which was dominant in the plasterboard market promised priority delivery of plaster to plasterboard customers who remained loyal customers and did not buy plasterboard from importers. The European Commission found it to be a case refusal to deal, even though British Gypsum was not in the plaster market, just as PSM does not compete in the market in which it has refused to deal with certain customers (i.e., the market for wire rods manufactured from low carbon steel billets). With respect to a product which was not amply produced, the Commission said:

Whilst it is open to an undertaking in a dominant position, in times of shortage, to lay down criteria for according priority in meeting orders those criteria must be objective and must not be discriminatory in any way. This is not the case where the criterion adopted is based on a distinction between, on the one hand, customers who marketed goods imported and produced by certain of its competitors, and on the other, 'loyal' customers who obtained their supplies from the dominant firm. The fact that such an abuse is committed over a limited period and that only minor delays in delivery are imposed on certain customers by comparison with the 'loyal' customers is irrelevant.

52. PSM failed to allocate and distribute the SAE low carbon steel billets in an objective and non-discriminatory way. Furthermore, they failed to objectively justify why they refused to supply FFPL, leaving us to conclude that their conduct was arbitrary and without justification, and constituted an abuse of their dominant position in the low-carbon steel market by refusing to deal with FFPL, in violation of Section 3 of the Ordinance.

²⁷ C-310/93 P, *BPB*, Case T-65/89, [1993] ECR II-389.

53. Additionally, we also note PSRMA's assertion that previously, "PSM's policy has been to number Delivery Orders and to give delivery in number order. This system had the merit of being fair and transparent." However, during the period under question October 2008 – February 2009, PSM has also not been willing to sell billets at the terms and conditions it has established with buyers in the agreements that it signed with them. In fact, this has been the common theme of the Complaint by FFPL as well as what has been noted in the media. In addition, the PRSMA submitted that:

We have noted instances (too numerous to mention) where customers have waited over 60 and 70 days to get their materials. They have written letters directly to PSM sales department requesting expediting of material but to little effect. Verbally when their truckers go to collect the materials they are told that first the deliveries of one particular group will be satisfied and then the traders and then the other customers. This is even being told to some of our members today who are waiting for deliveries.²⁸

This sort of constructive refusal is no different than a straightforward and outright refusal for all practical purposes.

54. In August 2009, the Chairman of the PSM was removed and a new one appointed. We note that FFPL adopted a conciliatory tone with the new Chairman, as can be noted from FFPL's letter of 22 August 2009 wherein it states that "after this major change in the management of PSM, we are willing to withdraw our case if proper transparent method in allocation of billets and bench marking of price as per international price is resorted to."

(6)

²⁸ PRSMA letter to the Commission, 23 July 2009.

55. *It is necessary that a remedy may be crafted that ensures that the relevant product is provided on an ongoing basis, at appropriate terms and conditions.* The sixth, and final, element of a refusal to deal action to be found is predicated on the assumption that a remedy may be crafted that ensures that the relevant product is provided on an ongoing basis, on appropriate terms and conditions. In the interest of all the customers of PSM, because it is a state-owned enterprise, and because the new PSM management has requested that the Commission issue Guidelines on how to allocate and distribute products without violating the Ordinance, we would urge PSM to maintain *status quo ante* in order to make available the average annual demand by each of its customers on reasonable commercial terms by publishing NORs on its web site.

56. Given that the negative effects and restriction of competition on the downstream market of PSM's refusal to deal have already been discussed and established in Section V(5) above, we confirm that PSM prevented, restricted and distorted competition in the downstream market for low-carbon steel billets. In this regard it may be relevant to refer to Professor Whish's book *Competition Law (Sixth Edition)* which corroborates that in the text the term 'restriction' is taken to include the prevention and distortion of competition."²⁹

²⁹ Whish, Richard, *Competition Law (Sixth Edition)*, (2008), at 113.

IV. Finding

57. In light of the discussion above and to ensure competition in the market we hold as follows:

58. PSM abused its dominant position in the low-carbon steel market by refusing to deal with customers like FFPL in violation of Section 3(3)(g) of the Ordinance.

59. While determining the amount of penalty to be imposed, we feel it is apposite to mention that whereas there is no binding or exhaustive list of criteria that must be taken into account while imposing penalty in every case this Commission has always been mindful of the stated Policy Objectives of the Fining Guidelines:

- To deter undertakings from engaging in anti-competitive practices.
- To reflect the seriousness of the infringement.

60. Also relevant are factors such as duration of the infringement, its seriousness and any other mitigating and/or aggravating factors. It is no secret that whereas cartelization is generally considered the most egregious violation of competition law, abuse of dominant position can have equally deleterious effects on competition and the consumers. It is pertinent to point out that although the duration of the infringement was not very long, it did continue till the Commission intervened in the matter. Therefore, the corrective conduct appears to be a result of proceedings initiated by the Commission rather than independent efforts by PSM. We have also taken into account not only the specific circumstances but also the general context of the infringement. In this regard, it is particularly relevant that this infringement was born out of the conduct of a state-owned enterprise,

indeed a state-owned monopoly in the relevant market, which was fully aware of the extent of the economic dependence on it of undertakings operating in the downstream market. It is our considered view, that in a country like Pakistan state-owned enterprises must take extra care to ensure that competition is not distorted because of their actions or, indeed, omissions. Barriers to entry for competitors to PSM are extremely high, and there are no plans in the foreseeable future for the establishment of comparable or competing steel mill in the country. Therefore, it behooves an undertaking in PSM's dominant position to take whatever steps necessary to promote fairness, transparency, and a reliable process in allocation of its coveted products. Every dominant undertaking has a special obligation to avoid engaging in a monopolistic or exclusionary manner, but particularly those that are entrusted by the state to produce those goods that would otherwise need to be imported.

61. Also notable is the fact that this infringement would not have occurred without the active participation of the senior management of PSM. Without prejudice to the aforesaid, we acknowledge that the conduct of PSM has been co-operative since the change of its management in August, 2009 and that has also been a relevant factor taken into consideration.

62. A balance needs to be struck between imposing a fine reflecting the infringement, its character and effect as well as the progressively co-operative conduct of the undertaking. This Commission has, in the past, held that competition law is at a nascent stage in Pakistan and therefore in many cases a measure of restraint has been exercised while imposing the penalty.

63. In light of the above and under the circumstances, it is our considered view that Rs. 25 million would be an appropriate penalty to be imposed on PSM in this case.

64. We have refrained from imposing a higher penalty which ordinarily would have been appropriate considering the gravity of the offence and instead imposed a relatively moderate fine, taking into account the fact that the abuse occurred for a period of three (3) months, pertained only to SAE 1080 and SAE 1010 billets which comprise a very small portion of the annual production at PSM, and that all the abuse occurred under the leadership of the then-Chairman who has since been removed.

65. However, we caution the current and future leadership at PSM from engaging in anti-competitive conduct of any kind in the future. We would like to take this opportunity to reprimand PSM for abusing its dominant position; Any future infringement of the Ordinance would be viewed most adversely by the Commission and justify the imposition of a far higher penalty.

Khalid Aziz Mirza
Chairman

Rahat Kaunain Hassan
Member (Legal)

Dr. Joseph Wilson
Member (M&TA)

Islamabad March 22, 2010