BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF SHOW CAUSE NOTICES ISSUED TO

M/S. PAKISTAN CIVIL AVIATION AUTHORITY
M/S. PAKISTAN STATE OIL
M/S. SHELL PAKISTAN LIMITED
M/S. TOTAL PARCO PAKISTAN LIMITED

ON COMPLAINT FILED BY

M/S. HASCOL PETROLEUM LIMITED
FOR PRIMA FACIE VIOLATION OF SECTION 4
OF THE COMPETITION ACT, 2010

(FILE No. 146/HASCOL/ C&TA/CCP/2017)

Dates of Hearing	30th April 2019, 26th August 2020 10th November 2020
Adjudicating Members	Ms. Shaista Bano **Member** Mr. Mujtaba Ahmad Lodhi **Member**
Present:	
On behalf of:	
M/s Hascol Petroleum (Pvt.) Limited	Ms. Rahat Kaunain Hassan, *Senior Partner* at Hasan Kaunain Nafees (HKN) [Appeared on 30th April 2019] Ms. Maham Ahmed, Advocate HKN Mr. Zeeshan ul Haq, Advocate HKN Ms. Gulalay Zeb, Advocate HKN Mr. Shahzeb, Advocate HKN

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M/s Pakistan Civil Aviation Authority	Mr. Zarin Gul Durrani, *Additional Director* Mr. Usama Jameshed, Advocate Mr. Muhammad Asim Rashid, Senior Assistant Director (Legal Affairs)
M/s Pakistan State Oil Company Limited	Mr. Sultan Mazher Sher, Advocate Mr. Kashif Siddique, *General Manager* Mr. Syed Sajjad, *(Legal Affairs)*
M/s Shell Pakistan Limited	Ms. Danish Zuberi, Advocate Ms. Sana Moeen Warraich, Advocate Ms. Lalarukh Hussain, *Head of Legal & Company Secretary* Mr. Imran Hussain Qureshi, *Head of Corporate Affairs and Government Relations* Mr. Farhan Ahmed Khan, *Business Manager*
M/s Total Parco Pakistan Limited	Mr. Asim Nasim, *Partner* Orr, Dignam & Co Mr. Taha Alizai, *Partner* Orr, Dignam & Co Mr. Amin Fakir, Advocate Orr, Dignam, & Co.

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ORDER

1. This order shall dispose of the proceedings initiated pursuant to Show Cause Notice No. 08, 09, 10, and 11 of 2019 dated 08 March 2019 (hereinafter the '**SCNs**') issued to M/s Pakistan Civil Aviation Authority (hereinafter the '**Respondent No. 1**' or '**CAA**'), M/s Pakistan State Oil (hereinafter the '**Respondent No. 2**' or '**PSO**'), M/s Shell Pakistan Ltd (hereinafter '**Respondent No. 3**' or '**Shell**') and M/s Total Parco Pakistan Ltd (hereinafter '**Respondent No. 4**' or '**Total**') respectively, jointly referred to as the '**Respondents**', for *prima facie* violation of Section 4 of the Competition Act, 2010 (the '**Act**'). The SCN's were issued pursuant to the Enquiry Report dated 12 Feb 2019, initiated on the Complaint of M/s Hascol Petroleum Limited (hereinafter the '**Complainant**') alleging, inter alia, that the Respondents have entered into agreements conferring exclusivity in violation of section 4 of the Act.

FACTUAL BACKGROUND

A. Complaint, Enquiry and Show Cause Notice:

2. The Complainant alleged that the Respondents were engaged in anti-competitive activities in violation of the Act by not allowing the Complainant to operate a fueling facility at the Jinnah International Airport, Karachi ('**JIAP**'). It was further alleged that Respondent No 1 has granted exclusive rights, in respect to the use of the fueling facility, to a consortium comprising of Respondent No 2, 3 and 4 (herein after the '**Consortium**'), due to which the Consortium enjoys a favorable position at the cost of healthy competition within the industry.

3. It was further alleged that an Agreement of Sale (the '**1994 Agreement**') in regard to the operational management of the fuel hydrant system was entered into by CAA as the seller and Shell, PSO and Caltex as the purchasers, on 7th April 1994. The agreement specifically refers to the underground hydrant lines connected from the depot to the fueling bays where the aircrafts are parked. The agreement has been entered into by the referred parties for a period of 30 years and prohibits 3rd parties, besides PSO, Shell or Caltex, from engaging in the supply of fuel through the fuel hydrant system at JIAP. Prior to the construction and subsequent sale of the hydrant facility, fuel was being supplied as per the Eastern Joint Hydrant Agreement (the '**1961 Agreement**') which allowed third parties access to the system upon payment of a throughput charge, at the discretion of the majority of the original contracting participants [i.e. Burmah-Shell Oil Storage and Distribution Company of Pakistan Limited now Shell, Standard-Vaccum Oil Company Incorporated now PSO and Caltex Oil (Pakistan) Limited (Brand name Chevron) which has been acquired by Total] provided that the hydrant system at the time has adequate capacity.

4. The Enquiry Committee ('**EC**') while deliberating on the relevant market observed that the 'Airport Fuel Infrastructure' has three basic components i) Fuel supply from

refinery to fuel farms ii) Fuel storage and iii) Fuel delivery to aircraft. The fuel supply and fuel storage is an upstream activity, whereas the delivery of fuel from fuel farm to aircrafts falls within the sphere of downstream activity. In such instances, the parties may either employ the fuel hydrant system or they may opt for tankers/refuelers/bowsers as per the fuel requirements and characteristics of the particular airport involved. The relevant product market, in the instant matter, has been determined as being the supply of jet fuels to aircrafts, comprising of both upstream and downstream market activity.

5. The EC observed that the 1961 Agreement has been entered into for the ownership and management of the storage and hydrant facilities, the same has been executed with the Consortium at the behest of the Department of Civil Aviation by virtue of which the fuel farms are joint property of the contracting parties. Regarding the Hydrant fuel facility, clause F (ii) of the Agreement stipulates that it can be used by third party upon payment of throughput charges at the discretion of the majority of the original contracting participants, provided that the hydrant system at the time has adequate capacity.

6. Regarding the 1994 Agreement, it was observed that the same was entered into by Respondent No1 and the Consortium with effect from 20 May 1992 for a period of thirty years, which is set to expire on 20 May 2022. The 1994 Agreement covers the fuel hydrant system and a separate agreement has been entered into for the land upon which the Fuel hydrant system is installed. Under Clause 3 of the 1994 Agreement the Consortium enjoys exclusive right over the supply of fuel through the fuel hydrant system. It was further observed that clause F (ii) of 1961 Agreement has become redundant by virtue of the 1994 Agreement, wherein consensus has been reached upon by the parties in respect of the 'Business Right of Purchaser', wherein it is expressly stated that no other company besides the purchasers shall be permitted to supply fuel via the fuel hydrant system. The 1961 Agreement further stipulates that it will remain in force for an indefinite period of time. Thereby restricting any other competitors to enter the relevant market.

7. The EC concluded that the 1994 Agreement as well as the 1961 Agreement are, *prima facie*, prohibited in terms of Section 4(1) read with Section 4(2) (a) of the Act.

8. The Competition Commission of Pakistan (Hereinafter 'the Commission') after considering the *prima facie* findings of the Enquiry Report, deemed it appropriate to initiate proceedings under Section 30 of the Act while providing the parties an opportunity of being heard. The relevant parts of SCNs are reproduced hereunder:

WHEREAS, *in terms of the Enquiry Report in general and paragraphs 22 to 24 in particular, the relevant market appears to be a combination of the market for supply of jet fuel into the fuel farm and supply of fuel into the aircraft at JIAP Karachi; and*

*5. **WHEREAS,** in terms of the Enquiry Report in general and paragraphs 25 to 35 in particular, it appears to be the 1994 Agreement in general and Clause 3.1 in particular confers exclusive rights on PSO, Total and Shell as operators for use of the Hydrant Fuel System at JIAP Karachi, thus apparently restricting competition in the relevant. Therefore, the 1994 Agreement is, prima facie, a prohibited agreement in terms of sub-section (1) of Section 4 read with clause (a) of sub-section (2) of Section 4 of the Act; and*

*6. **WHEREAS,** in terms of the Enquiry Report in general and paragraphs 37 to 45 in particular, it appears that Clause F(ii) of the Agreement for the Ownership and Operation of Storage and Hydrant Facilities dated 28th October 1961 (the **'1961 Agreement')** having become practically redundant in the aftermath of the 1994 Agreement, the 1961 Agreement, appears to confer exclusive rights to PSO to own, control and maintain the fuel tanks for an indefinite period of time, thus apparently closing the market to other potential competitors is, prima facie, in violation of sub-section (1) of Section 4 read with clause (a) of sub-section (2) of Section 4 of the Act; and"*

B. Written Reply, Oral Representation and Hearing:

9. The Respondents, vide SCNs, were directed to file their written replies in writing within fourteen (14) days of the receipt of the notices and were provided the opportunity to be heard on 30 April 2019, 26 August 2020 and 10 November 2020. The oral and written submissions of the Respondents are summarized as under:

9.1 Pakistan Civil Aviation Authority (CAA)/ Respondent No 1

The CAA vide its letter dated 25 March 2019 submitted their written reply in respect to the SCN and took the following legal objections during hearing proceedings before the Commission;

a) That the requirement for aviation fuel at different airports including JIAP has been assessed and presently it is ascertained that there is no demand and supply gap. Regarding the provision of aviation fuel at any of the airports it was stated that the existing facilities are sufficient to cater the supply of fuel to the airlines satisfactorily and simultaneously, no alternative systems are currently being used in the local airports of Pakistan. Thus CAA is not restricting competition in this regard.

b) While referring to the 1994 Agreement, it was submitted that upon expiration of the agreement, all interested parties including the Complainant would be at liberty to engage in competitive bidding for a fuelling services tender.

c) In respect to the matter of allocation of land in favour of the Complainant, it was maintained that the Commission is not vested with the power to direct the Respondent to remedy this particular grievance of the Complainant. It remains

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the sole domain of CAA to deal with procurement services through the established legal procedures of the institution.

d) Both the agreements were executed before the promulgation of the Act and taking cognizance of such would tantamount to retrospectively deal with the issue in violation of Article 12 of the Constitution of Pakistan, 1973, which provides protection against retrospective punishment. Reliance was placed on **PLJ 2010 Lah 78 (DB).**

e) Willingness was shown to make any necessary amendments as directed by the Commission provided that the legal formalities have been dispensed with. Reference in this regard was made to NFC Employees Co-operative housing Society Ltd. (2019 CLD 164) and Oil Companies advisory Council (2019 CLD 1285).

f) The Enquiry Report was assailed as being miss-founded and inaccurate. Since, the enquiry committee was supposed to submit the final report within 30 days of their appointment. Reference in this regard was placed on Rule 4 of the Competition Commission Enquiry (Conduct of Investigation Officers) Rules, 2007, read with Rule 23(1) of the Competition Commission (General Enforcement) Regulations, 2007.

9.2 M/s Pakistan State Oil (PSO)/ Respondent No 2

PSO vide its letter dated 24th April 2019 replied to the SCN and the following legal objections were raised during the hearing proceedings;

a) It was argued that the Complaint stands primarily against CAA, as the question of allotment of land is settled at the discretion of the CAA. Since the Commission has taken cognizance under section 37(2) of the Act it cannot go beyond the allegations leveled in the complaint.

b) The fuel hydrant system has been purchased from CAA for valuable consideration at a time when the Act had not been promulgated. Being the owner of the fuel hydrant system, by virtue of a legally binding agreement, the Complainants ability to use the fuel hydrant system is subject to the discretion of the Respondent.

c) While framing opinion under section 37(2) of the Act the Commission is under an obligation to pass an Order.

d) If the Commission is of the opinion that 1994 Agreement is in violation of the Act, an exemption application can still be filed.

e) The Consortium is not only working independently of each other but its members are in competition with each other as well due to which airlines experience competitive prices. In other words, at JIAP there exists a perfect state of competition as the airlines enjoy the prerogative to choose between their suppliers.

f) The relevant market has wrongly been defined as the fuel hydrant system rather at best it can be considered as a sub-component of the market. Which may comprise of not only other hydrant systems but also refuelers etc. Jet A-1 is the relevant product market and relevant geographical market is JIAP.

g) Clause F (ii) of the 1961 Agreement has not become redundant as a consequence of the 1994 Agreement.

9.3 M/s Shell Pakistan Limited (Shell)/ Respondent No 3,

Shell replied to the SCN on 13 April 2019, wherein the following submissions were made;

a) The Shell has been advocating for open access at all airports in Pakistan as the presence of multi-players in aviation refueling sector at all airports would benefit the airlines industry, which may in turn prove beneficial to the end-consumers through lower airfares.

b) It was further alleged that, a commercial joint venture agreement for the supply of fuel at the New Islamabad International Airport has been entered into by Respondent No.1 with Pakistan State Oil and Attock Petroleum Limited, as per which the latter have been granted exclusivity in respect to the supply of Jet A1 fuel for a period of 30 years.

c) The CAA's alleged denial to the grant of land to the complainant is a matter inter se between the Complainant and CAA, therefore the same does not concern the respondent.

d) The 1961 Agreement and 1994 Agreement do not fall within the categories of typically accepted anti-competitive behavior by object such as price fixing or market sharing.

e) Under EU Competition law, more restrictive understanding regarding the per se anti-competitive agreement has emerged. In 2014, the European Court of Justice (ECJ) in its ruling in Groupement des cartes Bancaires (CB) V Europena Commission, indicated that an essential legal criteria of a by object offence is whether the coordination between undertakings reveals a sufficient degree of harm to competition.

f) The 1994 Agreement does not preclude the CAA from allotting land to Hascol and the establishment of any new fuelling service is beyond the scope of the aforementioned agreement. Therefore the matter remains solely between the CAA and the Complainant and is of no concern to the other OMCs.

9.4 M/s Total Parco Pakistan Ltd (Total) / Respondent No. 4

Total vide its letter dated 24 April 2019 replied to the SCN, and presented its arguments during hearing before the Commission, the following legal objections were raised by the Respondent.

a) The issues framed by the Commission regarding the grant of land by Civil Aviation authority with regard to 1961 Agreement is misconceived, since CAA is the sole authority to determine whether or not to grant land to any party within its jurisdiction and same issue is beyond the purview of proceedings before the Commission.

b) The 1994 Agreement does not preclude any other entity from building/using another fuel hydrant system and same has been acknowledged by the

Complainant (reference was placed on page 10 and 11 of Complaint). Hence there is no violation of competition law.

c) There is no allegation by any consumer airlines or CAA, so there is no competition related concern or issue. Furthermore, it was emphasized that as per the complaint the Complainant has made it explicitly clear that the same does not intend to use the participants' fuel hydrant system. Since the 1994 Agreement does not impose any restriction on the complainant from supplying fuel at JIAP by using its own system, it is of no concern to the instant Respondent.

d) Since the fuel farms and fuel hydrant system are owned and operated by the Consortium, the ability of any other entity to use the same is subject to the discretion of the Respondent.

e) The Complainant is not interested in either using the Respondent's fuel farms or their fuel hydrant system rather their grievance stands against CAA, which is to allow the complainant to allot a piece of land for establishing their own fuel storage facility and fuel supply through bowsers at JIAP. Hence there is no violation of any Provision of the Act.

f) When the 1994 Agreement was entered into among the Consortium the Act was not promulgated. However, the Respondent No 4 is still willing to file the relevant exemption application relating to the 1994 Agreement as it has been recognized by the Commission that granting of exclusive rights or all types of agreements giving exclusive rights are not anti-competitive.

g) With respect to the relevant market it was submitted that the enquiry committee has wrongly concluded that the relevant market is the composite of the markets for the supply of the jet fuels into the fuel farms and supply of fuel into the aircrafts at JIAP Karachi. From consumer perspective the relevant aspect is only the supply of fuel into the aircraft at JIAP Karachi.

h) Since the Commission has taken cognizance of the issue on the complaint and the grievance of the complainant is against the Respondent No 1 rather than other the remaining respondents so any deliberation on the agreements involved in the fuel supply is not relevant.

Preliminary Objections

10. Before proceeding to the merits of the case the Bench deems it appropriate to deliberate upon the preliminary objections raised by the Respondents. Taking in view the aforementioned legal objections, the preliminary objections of all the Respondents are summarised as follows;

I. Whether taking cognizance of an agreement executed before the promulgation of the Competition Ordinance 2007, or before the promulgation of Act, would tantamount to retrospectively dealing with an agreement?

II. Whether Rule 4 of the Competition Commission Enquiry (Conduct of Investigation Officers) Rules, 2007, read with Rule 23(1) of the Competition

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Commission (General Enforcement) Regulations, 2007 is relevant in the instant proceedings?

III. Whether the rights to own the facility and do business is absolute/unqualified in nature and same cannot be interfered with by the Commission?

IV. Whether the Commission is under an obligation to pass an Order to comply with the statutory obligation i.e., framing of opinion, under section 37(2) of the Act?

V. Whether the Complaint is essentially against CAA/Respondent No1 and the alleged denial of land to the complainant is a matter *inter se* between the Complainant and Respondent No 1 and since the Commission has taken cognizance under Section 37(2) of the Act, it cannot go beyond the contents of the compliant?

These are addressed as follows:

I. Whether taking cognizance of an agreement executed before the promulgation of Act would tantamount to retrospectively dealing with an agreement?

11. According to the general canons of interpretation of statutes, every statute is presumed to be prospective in nature based on the principal of *nova constitutio futuris formam imponere debet non praeteritis* which means "a new law ought to regulate what is to follow, not the past," unless it was given retrospective operation either by express or necessary implication of the legislature. To ascertain the enforcement date of the Act, the legislature has provided a commencement clause in Sub-Section (4) section 1 of the Act, which reads as "*it shall come into force at once*". The Bench in this regard is guided by the deliberation of the August Supreme Court of Pakistan in 2020 PLD 641 SC, wherein it was held that *"when an act of parliament provides that it shall come into force at once then every provision of it become enforceable from the day the Act received the assent of the President unless any provision of the Act itself suggest that it would come into force only when some authority nominated in such behalf so decides or happening of an event."*. The notification No. F.22 (30)/2009-Legis published in the Gazette of Pakistan is descriptive of the fact that the assent of the President was received on 6 October 2010. However, to avoid any confusion and misconstruction, it must also be highlighted that Section 62 of the Act provides for validation of actions clause and states that "*all the actions taken or Orders passed..... after the 2nd October 2007 and before the commencement of this Act shall deemed to have been validly done*... and provisions of the Act shall have, and shall be deemed always to have had, effect accordingly." The validation clause validates the actions of the Commission taken between 2 October 2007 and 6 October 2010 and covers any gap that may existed in the promulgation of the various competition ordinances. The foregoing wording of the legislature through Section 62 makes it clear that any instance, matter, action or conduct which distorts the state of competition in Pakistan on the 2 October 2007 or subsequent to the foregoing date shall be cognizable by the Commission. In view of the foregoing, there is no denying the fact that concluded transactions taking place prior

to the 2 October 2007 are not cognizable by the Commission, but matters which distort competition and are valid/or continue post that date fall within the regulatory prowess of the Commission. In the matter of All Pakistan Cement Manufacturer Association (APCMA) and member undertakings the Commission held that the following:

> *31(n). With respect to the argument, with regard to the retrospective operation of the Ordinance, it may be stated that in our view there is no dispute with respect to the retrospectivity of the law itself; instead, the question at issue is the applicability of the Ordinance to the case at hand. Since the Agreement was executed in 2003, no doubt exists in stating that it was executed at the time when the 1970 Ordinance was in force. However, in our considered view, if subsequent to the promulgation of the Ordinance, the Undertaking continues the breach in any way, as in the present case it is detailed above, the breach shall be one that is continuing and subsisting, renewed on every single day i.e. a continuing cause of action. Hence, the question of retroactive application does not arise.*
>
> *32. In examining whether the Undertaking has continued the breach after the promulgation of the Ordinance, the dates of execution or expiration of the Agreement are not at issue. In fact, if the effects of the understanding between the Member Undertakings can still be felt, even for one day after the promulgation of the Ordinance, it may be presumed that the Agreement has continued, and the provisions of the Ordinance may therefore be invoked."*

The date of execution of any matter or any action is of no concern during the course of proceedings for the purpose of ensuring competition under the Act, if the same matter or action has resulted in distortion of competition after the enforcement of the Act. The agreements in question are still in field and their execution remains active, hence the objection taken is of no avail.

II. Whether Rule 4 of the Competition Commission Enquiry (Conduct of Investigation Officers) Rules, 2007, read with Rule 23(1) of the Competition Commission (General Enforcement) Regulations, 2007 is relevant in the instant proceedings?

12. While the defense that the enquiry was not completed within the time frame, as provided by the Competition Commission Enquiry (Conduct of Investigation Officers) Rules, 2007, was addressed by the Bench during the course of hearing proceedings before the Commission, the council remained adamant to address the same within the Order. To address the objection it is necessary to construe the application of Competition Commission Enquiry (Conduct of Investigation Officers) Rules, 2007. The preamble of the Competition Commission Enquiry (Conduct of Investigation Officers) Rules, 2007 is reproduced verbatim herein below; *"In exercise of the Powers conferred by Section 55 read with Section sub-section (3) of section 35 of the Competition Ordinance, 2007 (LII of 2007), the Competition Commission of Pakistan,*

with approval of Federal Government, hereby makes the following rules,". Section 55 was re-promulgated, with the same spirit, in the Act as Section 57. Whereas Section 35 has remained same in array of instances. Section 57 of the Act or Section 55 of the then Competition Ordinance, 2007, refer to the Powers of the Commission to make rules. Whereas Section 35 is regarding forcible entry. Sub-section 3 of Section 35 deals with the enquiry in regard to the conduct of investigation officer during instances of forcible entry. The aforementioned preamble and perusal of Section 35 clarifies the application of the Rules, moreover, the application of the said rules can also be construed from Clause (a) and (b) of Sub Section (1) of Section 2 of the said Rules. Clause (a) reads as *"Inquiry Officer" means the officer or the Committee, as the case may be, appointed by the Commission to conduct enquiry into the conduct of investigation officer;* whereas, the Clause (b) provides the definition of the term investigation officer in the following words *"Investigation officer" means an individual authorised by the Commission to enter any place or building of an undertaking, under the Ordinance"*. The bare reading of clause (a) and (b) transpires that these rules are not made for the enquiry officer appointed for an enquiry under Section 37 of the Act, that is to say that enquiry proceedings in the instant matter was initiated by the Commission under Section 37 sub-section (2) of the Act, whereas the provisions relied upon by the Respondents relate to proceedings which are distinctly separate and of no relevance to the proceedings in the instant matter. Hence, the above referred rules have no relevance to the instant case.

III. Whether the rights to own the facility and do business is absolute and unqualified in nature and same cannot be interfered-with by the Commission?

13. The respondent's assertion that by virtue of being the owners of the fuel hydrant system facility it is within their legal rights to exercise discretion in respect of whether to allow or deny access to its competitors, leads to the legal question of whether the rights of the Consortium to use the said facility are absolute and unqualified? In the realm of jurisprudence, rights and duties are two sides of the same coin, meaning that they both go side by side. Any right of a person protected by any statute corresponds an inherent obligation i.e., to recognize the same right for others. A right is an interest which is recognized by the law of the land, however it is pertinent to note that rights are subject to regulation by the law of the land as-well. In this regard, the bench is guided by Article 4 and 5 of the Constitution of Pakistan 1973. Article 4 deals with right of an individual to be dealt with in accordance with the law, whereas Article 5 envisages the obedience to the constitution and the law as an inviolable obligation. The Bench is further guided by the Peshawar High Court observation in 2020 CLD 1232 PHC, wherein, it was held that **"***Fundamental right of freedom of trade, Business or profession under Art. 18 of the Constitution of Pakistan 1973 was not absolute right but subject to law which regulate the business trade or profession of a citizen. Such freedom could be subject to certain guidelines as may be prescribed by law and could be hedged to the extent which was lawful."* The Consortium may have a right to own the facility and do business but the same is subject to the laws of the land. While

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undertakings remain free to enter into legally binding contracts, subject to the terms and conditions as deemed appropriate by themselves, it is important to note that the agreement itself along with the conduct of the undertakings, in all instances, will be subject to the provisions of all the respective governing laws. The Commission is mandated to prohibit and rectify any instance in which the realm of freedom of trade, business or profession is being used as an avenue for the distortion of competition, irrespective of whether it is being done *intentionally, unintentionally or negligibly*. An undertakings right to own/operate a particular facility for any commercial purpose cannot be used as a pretext for imposing blockades against its competitors which in turn would consequently place them at a competitive disadvantage. Therefore, in the instant matter the Bench agrees that based on the contractual rights of the Consortium, they are indeed the rightful owners and chief-executives of the facility in question, however their agreements and their conducts remain subject to the provisions of all relative legal statutes, which includes, but is definitely not limited to, the Competition Act, 2010.

IV. Whether the Commission is under an obligation to pass an Order to comply with the statutory obligation i.e., framing of opinion, under section 37(2) of the Act?

14. The Respondent No. 2 asserted that since under Section 37(2) of the Act an opinion must be backed by prima facie evidence, the opinion in turn has to be expressed by the Commission through an "Order". Section 37(2) of the Act provides the following:

> "***37. Enquiry and studies.--(1)*** *The Commission may, on its own, and shall upon a reference made to it by the Federal Government, conduct enquiries into any matter relevant to the purposes of this Act.*
> ***(2)*** *Where the Commission receives from an undertaking or a registered association of consumers a complaint in writing of such facts 'as appear to constitute a contravention of the provisions of Chapter II, it shall, unless it is of opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by prima facie evidence, conduct an enquiry into the matter to which the complaint relates.*
> ***(3)*** *The Commission may outsource studies by hiring consultants on contract.*
> ***(4)*** *If upon the conclusion of the enquiry under subsection (1) or subsection (2), the Commission is of the opinion that the findings are such that it is necessary in the public interest so to do, it shall initiate proceedings under section 30."*

15. To address this issue, first of all, the decision in LPG Association of Pakistan vs. Federation of Pakistan, 2021 CLD 214 is of significance where the following was held:

> *" 54. ..... As per the dicta of the august Supreme Court of Pakistan we find that the CCP was not established as part of the judicial hierarchy of courts nor are its function to exercise judicial power. It is established to carry out the administrative function of the executive to ensure economic efficiency and promote consumer welfare and in doing so it discharges quasi-judicial*

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functions with the sole objective to regulate anti-competitive behaviour. Although the process followed by the CCP while hearing cases must follow due process, they are not bound by the formal laws of evidence and procedure. Furthermore, the members of the CCP are not necessarily trained in law, as they require expertise in economic, commerce, finance and industry. The CCP was established under the Act, with the intent to ensure free competition and economic efficiency, so the function of hearing and deciding issues only occurs where the prohibitions have been violated, that to with the intent to restore competition in the relevant market. Hence while exercising its functions under the Act the CCP is not a 'court' under Article 175 of the Constitution."

16. As held in the above-mentioned case, the Commission is established to carry out the administrative function of the executive to ensure economic efficiency and promote consumer welfare and in doing so it discharges quasi-judicial functions with the sole objective to regulate anti-competitive behaviour and is not a part of the judicial hierarchy of courts, nor are its function to exercise judicial power. It follows that the Commission does not have any inherent powers to pass orders. The Bench is of the view that the Commission can only pass orders under Section 28, 30, 31 and 36 of the Act, which are reproduced below for reference:

"28. Functions and powers of the Commission.--(1) *The functions and powers of the Commission shall be, ---*

(a) *to initiate proceedings (emphasis added) in accordance with the procedures of this Act and make orders in cases of contravention(emphasis added) of the provisions of the said Act;*

30. Proceedings in cases of contravention.—(1) *Where the Commission is satisfied that there has been or is likely to be, a contravention of any provision of Chapter II, it may make one or more of such orders specified in section 31 as it may deem appropriate. The Commission may also impose a penalty at rates prescribed in section 38, in all cases of contravention of the provisions of Chapter II...*

.....

(5) *Any order issued under this section shall include the reasons on which the order is based. (Emphasis added)*

31. Orders of the Commission.--*The Commission may in the case of,---*

(a) *an abuse of dominant position, require the undertaking concerned to take such actions specified in the order as may be necessary to restore competition and not to repeat the prohibitions specified in Chapter II or to engage in any other practice with similar effect; and*

(b) *prohibited agreements, annul the agreement or require the undertaking concerned to amend the agreement or related practice and not to repeat the prohibitions specified in section 4 or to enter into any other agreement or engage in any other practice with a similar object or effect; or*

(c) a deceptive marketing practice, require,---

(i) the undertaking concerned to take such actions specified in the order as may be necessary to restore the previous market conditions and not to repeat the prohibitions specified in section 10; or

(ii) confiscation, forfeiture or destruction of any goods having hazardous or harmful effect.

(d) A merger, in addition to the provisions contained in section 11,---

(i) authorize the merger, possibly setting forth the conditions to which the acquisition is subject, as prescribed in regulations;

(ii) decide that it has doubts as to the compatibility of the merger with Chapter II, thereby opening a second phase review; or

(iii) undo or prohibit the merger, but only as a conclusion of the second phase review.

36. <u>Power to call for information relating to undertaking.</u>—*Notwithstanding anything contained in any other law for the time being in force, the Commission may, by general or. special order, call upon an undertaking to furnish periodically or as and when required any information concerning the activities of the undertaking, including information relating to its organization, accounts, business, trade practices, management and connection with any other undertaking, which the Commission may consider necessary or useful for the purposes of this Act."*

17. Section 37(2) provides that the upon receiving a complaint, the Commission shall conduct an enquiry unless the Commission forms an opinion that the complaint is frivolous or vexatious or based on insufficient facts, or is not substantiated by *prima facie* evidence. There is no mention of passing of an Order under Section 37(2) where an enquiry is initiated and the Commission is of the opinion that the complaint is backed by prima facie evidence and is not frivolous or vexatious or based on insufficient facts, or is not substantiated by prima facie evidence. Whereas the word 'prima facie' is a generic word; defined nowhere in the Act, consequently the Bench will place reliance on its definition, as is widely accepted in the context of the legal realm. According to Black's Law Dictionary Prima facie means *"Sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it make later be proved to be untrue"*. The Bench is further guided by the observation of the Sindh High Court, Karachi in 2015 CLC 493, wherein it was held that the term *"'prima facie case" was existence of legal right which should appear to a prudent mind with a probability of success at the end of the day."* Based on the above, the Bench is of the view that the notion of *prima facie* evidence present within section 37(2) of the Act constitutes an evidence sufficient to give rise to a presumption of the presence of a contravention of the Act and is distinct from the evidence required to prove a contravention of the provisions of the Act. Similarly, the Act does not provide a definition for the term 'opinion'. The widely and broadly accepted definition or the dictionary meaning of the

said word is *"your feelings or thoughts about someone or something, rather than a fact"*[1].

18. Considering the aforementioned, the Bench is of the view that the opinion of the Commission under section 37(2) of the Act is a tentative estimation of the *prima facie* evidence/material cited by the complainant in the complaint, which in turn gives rise to a presumption of a contravention of chapter II of the Act and the exercise of framing of opinion is for taking cognizance to initiate enquiry rather than to conclusively decide the matter. In view of foregoing the Bench does not find any substance in the argument raised in this regard and finds that there is no obligation on the Commission to pass an Order prior to initiation of an enquiry under Section 37(2).

V. Whether the Complaint is essentially against CAA/Respondent No1 and the alleged denial of land to the complainant is a matter inter se between the Complainant and Respondent No1 and since the Commission has taken cognizance under Section 37(2) of the Act, it cannot go beyond the contents of the compliant?

19. For this common concern of Respondent No 2, 3 and 4 the Bench would like to highlight the Prayer of the Complaint as follows:

"In view of foregoing, it is humbly prayed that the Commission may, for the purpose of ensuring and restoring Competition:

a. Require CAA to allot land to Hascol measuring approximately 8,500 sq. yards at Jinnah International Airport Karachi for purpose of setting up and operating a fueler system to provide fuelling services to aircrafts, in accordance with applicable requirements and direct not to repeat and engage in such prohibited practices in any other geographical market in Pakistan;

b. Annul the agreement of sale or require the parties to amend the Agreement of sale in relation to the exclusivity practiced for over 20 years, prohibiting the same on account of being anti-competitive and in violation of Section 4;

c. Prohibit CAA, PSO, Shell and Caltex/Chevron from continuing with exclusivity conferred under the agreement of sale subject to grant of exemption by the Commission for the same in order to safeguard the third party rights and protect the harm done to competition resulting from such arrangement; and/or Any other relief as the Honourable Commission may deem fit and appropriate."

20. A plain reading of the complainant's prayers reveals that the complainants concern is not solely in regard to the allotment of land but incorporates the exclusivity enjoyed

[1] https://www.oxfordlearnersdictionaries.com/definition/american_english/opinion

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by the Consortium for a period of twenty years. However, in our considered view even if the respondent's objection is taken at face value, the argument is misplaced, considering the fact that the argument is directed towards the genesis of the Commission's jurisdiction, due to which the question of whether the Commission's jurisdiction is adversarial or non-adversarial in nature must be satisfied. The two type of systems mentioned, incorporate a wide range of variations. The adversarial system aims to ascertain the truth through open competition between the litigants, furthermore the scope of such proceedings is limited to the claims made by the litigants. Whereas in the case of the non-adversarial system the adjudicatory body is actively involved in investigating the facts adduced before it and is not limited to ***dominis litis*** (a person to whom a suit belongs). The August Supreme Court of Pakistan has deliberated upon the notions of adversarial and non-adversarial system in PLD 2011 SC 997, the relevant extract of which is reproduced as follows:

> ***"The adversarial system (or adversary system) is a legal system where two advocates represent their parties' positions before an impartial person or group of people, usually a jury or judge, who attempt to determine the truth of the case, whereas, the inquisitorial system has a judge (or a group of judges who work together) whose task is to investigate the case.***
> ***The adversarial system is a two-sided structure under which criminal trial courts operate that pits the prosecution against the defence. Justice is done when the most effective and rightful adversary is able to convince the judge or jury that his or her perspective on the case is the correct one."***
> ***"An inquisitorial system is a legal system where the court or a part of the court is actively involved in investigating the facts of the case, as opposed to an adversarial system where the role of the court is primarily that of an impartial referee between the prosecution and the defence. Inquisitorial systems are used in some countries with civil legal systems as opposed to common law systems. Also countries using common law, including the United States, may use an inquisitorial system for summary hearings in the case of misdemeanors such as minor traffic violations. In fact, the distinction between an adversarial and inquisitorial system is theoretically unrelated to the distinction between a civil legal and common law system. Some legal scholars consider the term "inquisitorial" misleading, and prefer the word "non-adversarial"."***

21. As per Section 37(4) of the Act, the legislature in all its wisdom has declared that the proceedings before the Commission are public interest proceedings. The apex Courts of Pakistan have constantly upheld that public interest proceedings are always inquisitorial in nature. Reference in this regard is placed on the above referred judgement of the Supreme Court, wherein it was has held that the proceedings under public interest are inquisitorial in nature, where an authority may engage in fact finding for the promotion of public interest. The Bench is of the view that the Commission being bestowed with the inquisitorial jurisdiction is empowered to delineate upon any

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fact referring towards alleged violation of substantive provisions of the Act, whether or not same is alleged by the Complainant. Moreover, it is important to note that the Commission is mandated to ensure healthy and free competition throughout the region, the Commission is a regulatory body which is bestowed with a mantle purposed for the adoption of a pro-active approach to bring all matters and activities distorting competition law in line with the provisions of the Act. In view of the above, the Bench is fortified with the view that the argument raised by the respondents is neither tenable on merits nor otherwise.

ANALYSIS

22. Keeping in view the findings of the Enquiry Report, SCN, submissions made in written replies and submissions made before the Commission during hearing, following issues, on merits, have emerged.

I. Whether the Relevant Market has wrongly been defined by Enquiry Committee by not taking into account the fuelling system as a substitute of Hydrant System at JIAP Karachi?

II. Whether the 1961 Agreement and 1994 Agreement are in violation of the provisions of Section 4 of Competition Act?

I. Whether the Relevant Market has wrongly been defined by Enquiry Committee by not taking into account the fueler system as a substitute of hydrant System at JIAP Karachi?

23. It is pertinent to note that the term relevant market in the context of the enquiry report, cannot be categorised as being an end in itself, rather it is a tool to outline and ascertain the boundaries of competition in which the competitors are operating. The objective of defining the relevant market is to identify both the product and areas within which businesses are competing with each other. This helps in the determination of market share (for purposes of Section 3 – Abuse of Dominance). Regarding the importance of Relevant Market in terms of contravention of section 4 of the Act, the Commission has previously addressed a similar concern in its previous Order of "*In the Matter of Amin Brothers Engineering et al.*" (the 'PESCO Order') wherein it was held:

> *"18.....the rationale behind having a relevant market when dealing with competition issues must be kept in mind. In competition law, distinction must be made between unilateral anti-competitive conduct (abuse of dominance in Section 3 cases) and multilateral anti-competitive conduct (collusion in Section 4 cases). In the first instance, the issue is to determine whether a dominant undertaking has abused its market power in a particular market. Before an abuse of dominance can be established, dominance in a particular market has to be established which, in turn,*

warrants a definition of a relevant market. Therefore in cases regarding abuse of dominance, it is an essential requirement that a relevant market is identified in order to establish dominance, and thus its abuse, if any.

19. The same is not true in cases of collusive behavior prohibited under Section 4. It is an underlying presumption that all the undertakings involved are operating in the same market, whether horizontal or vertical. Clearly, if they were not, then the need or question of collusion would not have arisen in the first place. Moreover, in cases of collusion, market power is irrelevant. What is relevant is the agreement to collude. Therefore, the identification of a relevant market in cases of collusion is merely for the purposes of reference, and is not a requirement for establishing an anti-competitive action."

24. In the instant case the Bench is of the view that the issue must be addressed in line with the merits of the case. Therefore, the Bench will revisit the enquiry's finding on the Relevant Market. The Relevant Market has been deliberated upon by the Enquiry Committee as follows:

*"**22.** This particular matter refers to the provision of aircraft refuelling services at JIAP Karachi. From discussions with the parties the Enquiry Committee was informed that at present in Pakistan there is one standard/quality of jet fuel i.e. Jet Al being used for commercial aircraft. Airport fuel infrastructure has three basic components: Fuel Supply, Fuel Storage and Fuel Delivery (Into Plane). The Fuel Supply component is delivery of fuel from the refinery to the airport which in the case of JIAP Karachi is through a dedicated pipeline. The fuel delivered from the refinery is stored in large storage tanks also known as a fuel farm. This is the upstream activity with respect to the third component i.e. pumping this fuel into the aircraft. The latter is done through two known methods, Fuel Hydrant system or tankers/refuelers/bowzers.*

***23.** JIAP Karachi has a fuel hydrant system, which is a network of pipes under the apron connected to the fuel farm. Fuel is pumped from the fuel farm through the hydrant system to refuelling pits at aircraft parking spots around the terminal and is loaded to the aircraft using hoses hooked up between the aircraft and the fuel pits (there are special trucks for this containing the connectors and control systems, delivery counters, etc.). At large international airports, aircraft can be refueled either by fuel trucks or using dedicated underground pipeline systems. According to discussions with CAA in infrequent cases (cargo or charter planes) when an aircraft is parked away from the fuel pits, tankers/refuelers/bowzers supply fuel directly to the aircraft. However, the primary mode of fuel supply for RAP is through the hydrant system.*

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24. From the foregoing it appears that the relevant product market is the supply of jet fuel to aircraft. That for the purpose of this enquiry appears to consist of two submarkets that of supply of fuel into the tank farms (upstream activity) and supply of fuel into the plane (downstream activity). With respect to determination of the geographic market in terms of Section 2(l)(k) of the Act the Enquiry Committee notes that since the conditions of competition in the matter at hand are governed by the 1961 and 1994 agreement which are only applicable for JIAP, it appears that the relevant geographic market for the purposes of this enquiry is JIAP Karachi. Therefore, the relevant market appears to be a composite of the markets for supply of jet fuel into the fuel farm and supply of fuel into the aircraft at JIAP Karachi."

25. Whether the fueling system, as proposed by the Complainant, can be used as an alternative or substitute to the Hydrant system the Enquiry committee in para 29 has highlighted as following:

***"29.** No substitutes/alternate systems are available for provision of fuelling services. According to CAA alternate systems are not feasible due to multiple reasons one of them being that the hydrant system is state of the art being used at airports worldwide and is sufficient to cater to the demand of aircrafts at RAP Karachi. Tankers/refuellers/bowzers are however, used at smaller airports such as Peshawar, Quetta, Sukkur, Multan and at RAP in infrequent cases when a charter or cargo plane is parked away from the terminal. As per CAA, use of tankers/refuellers/bowzers entails a separate protocol in terms of ramp congestion, fire safety and security and would not be feasible when a state of the art hydrant system that suffices the fuel requirement is already in place. Based on a research paper[2] on optimization of aircraft refuelling, Hydrant refuelling, is considered to be an optimal fuelling method as it increases safety, shortens the aircraft turnaround time and cuts the overall costs. However, at smaller airports, implementation of this system can lead to high investment costs. Internationally 90 percent of large airports and 67 percent of medium sized airports deploy a hydrant system.[3] The research also took a sample of airports and found that all the airports with a fuel throughput higher than 420 million liters/year had installed a hydrant system, whereas no airport below 144 million liter/year had one. This seems to imply two things: (i) Airports only find installation of a fuel hydrant system practically feasible when a certain minimum threshold of fuel uplift is being carried out, for instance in the research study no airport with fuel uplift below 144 million/liter has installed a*

[2] http://yadda.icm.edu.pl/baztech/element/bwmetal.element.baztech-0269da72-0918-4697-b410-a83b9532107e;jsessionid=777DEA2F217F704277C95962A2B5B3AE

[3] Commercial Aviation —Fueling Fundamentals, Airports Council International https://www.acina.org/sites/default/files/straub.chris-hydrant.fueling-saturday.pdf

hydrant system (ii) a fuel hydrant system would seemingly suffice the fueling requirement of an airport with fuel uplift below 420 million liter/year. As per information from CAA, fuel uplift only in the six months between January and June 2017 amounted to 152 million litres at JIAP Karachi. Assuming constant factors and extrapolating it to one year would mean fuel uplift of roughly 300 million litres at JIAP Karachi."

26. An airport authority has to take into account certain complex considerations in deciding whether to use either the hydrant system or the bowser system or both the systems simultaneously. In the instant matter the CAA is the custodian of the airports land on which the refueling system will be installed based on commercial viability safety and other important considerations, therefore the choice in regard to the type of fueling system to be adopted falls within the prerogatives of the CAA. It must be borne in mind that the size of an airport and its traffic are fundamental aspects which must be considered prior to the introduction of a refueling facility at any airport. Installing the bowser facility on top of the hydrant system, a system which is appropriately equipped to satisfy the refueling requirements of a medium sized airports such as JIAP, is not in line with the practical considerations one must satisfy before making such a decision and therefore ostensibly not feasible.

27. The Bench remains confounded in respect of how bowsers can be deemed as viable substitutes when the installed state of the art refueling system cannot exploited to its optimum threshold. Similarly, the deliberations of the enquiry committee make it clear that the present system is capable of handling the current requirements of the airport. Moreover, according to the CAA, the refuellers cannot be considered in terms of substitution as it would entail a separate protocol in terms of ramp congestion, fire safety and security.

28. The underlying rationale, as deliberated upon by the Commission in its PESCO order and in the instant matter, illustrates the concept of relevant market as a tool for due deliberations in respect of any contraventions of the Act, moreover certain characteristics of the concept have to be satisfied before a Relevant Market in any given matter can be safely concluded. In the instant matter, based on the foregoing paras, it is evident that the Relevant Market has indeed served as a tool for the Bench to proceed forward diligently in the instant matter, furthermore the Bench finds the Relevant Market incorporated with all the essential characteristics of the same. Given the foregoing, the Bench is of the considered view that Relevant Market has rightly been defined by Enquiry Committee.

H. Whether the 1961 Agreement and 1994 Agreement are in violation of the provisions of Section 4 of the Act.

The record before the Commission reveals that the 1961 Agreement was entered into by Respondent No 2, 3 and 4 among themselves for ownership and operation of fuel

tanks commonly known as fuel farms. Whereas the 1994 Agreement is between the Consortium comprising of Respondent No 2,3 and 4 (buyers) and the Civil Aviation Authority (Seller) for sale of fuel hydrant system at New Jinnah Terminal Quaid-e-Azam international Airport, Karachi.

30. The 1961 Agreement was executed on 28 October 1961 and under clause 'F' the agreement is to remain in force for an indefinite period of time. It is pertinent to mention here that 1961 Agreement is essentially a concession agreement and such agreements are common in the development of infrastructural projects under the Public-Private Partnership (PPP) models. Generally, a concession agreement refers to an agreement between a government authority and a private entity, through which the government grants certain rights to the private entity for a limited period of time for implementation of infrastructure projects. In such instances, the private parties are provided with a package which is conveniently favourable to the same. Such agreements entail a considerable amount of monetary investment and high-risks.

31. The infrastructure of Eastern Joint Hydrant System under the 1961 Agreement was constructed and developed by Respondent No 2, 3 and 4. Respondent No 1 (the CAA) has failed to provide any document regarding lease of land whereupon the Eastern Joint Hydrant System is installed. Consequently, the absence of lease agreement and presence of clause 'F' makes 1961 Agreement practically enforceable for an indefinite period of time. While, the agreement does not strictly bar any other competitor to use the Eastern Joint Hydrant System it does provide provisional exclusivity to the contracting parties, which is subject to the discretion of the same. As clause F (ii) of the agreement provides that any other competitors may use the Eastern Joint Hydrant System on the payment of throughput charges at discretion of the majority of the original participants provided that the hydrant system at the time has adequate capacity.

32. The 1994 Agreement is in regard to the fuel hydrant system, a network of pipes under the apron connected to the fuel farms. Unlike, the 1961 Agreement the 1994 Agreement is a sale agreement entered into by Respondent No1 and the Consortium of Respondent No 2, 3 and 4. Said agreement covers the hydrant fuelling system i.e. the system of underground pipes, but it does not include the land upon which the hydrant system is constructed, the land in question is governed by a separate lease agreement which has been signed for a period of 30 years starting from 20 May 1992. As per the agreement itself and the submission of Respondent No 1 the said lease is set to expire on 20 May 2022. Clause 3 of the 1994 Agreement encapsulates the Business Rights of Purchaser. In the said clause, it has been agreed that no company other than the purchasers shall be permitted to supply fuel through the Fuel Hydrant System that is to say that by virtue of the 1994 Agreement the Consortium has been granted absolute exclusivity in respect to the operational management of the fuel hydrant system.

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33. The fact that the fuel farms and fuel hydrant system, existing by virtue of agreements 1961 and 1994 respectively, form an integrated system for the process of refuelling available at JIAP which in turn constrains the bench to look at both facilities in unison for the purpose of refuelling. The fuel farms serve as the primary source for the supply of fuel as input to the fuel hydrant system for the refuelling of aircrafts. No notable substitutes of the fuel hydrant system exist at present, as the system is considered the most appropriate feasible solution based on commercial viability and other considerations expected to be taken into account by CAA as per its assigned mandate and reported assertion before the Commission.

34. Apart from the foregoing, the record further reveals that the facility and the agreements cannot be viewed disjunctively. The Respondent No 2 and 4 (PSO and TOTAL) vide their letters dated 5 June 2018 and 4 June 2018 respectively submitted that after the construction of JIAP (adjacent to Karachi Civil Airport) the 1961 Agreement regarding the hydrant System became frustrated to the extent of its independent usage of any bowser refuelling facilities provided by the Consortium prior to the construction of JIAP. Consequently the 1961 Agreement is only operational to the extent of ownership of fuel farm and the current status of fuel farmp being integrated with the fuel hydrant system at JIAP must be looked at in the context of the 1994 Agreement.

35. Section 4 of the Act prohibits and outline the Prohibited agreements as follows:

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

36. The 1961 Agreement confers exclusive rights on the Consortium for ownership, operation and maintenance of fuel farms facilities for an indefinite period of time, hence preventing other OMCs to compete for the same. Whereas the 1994 Agreement confers exclusive rights on the Consortium as operators for use of the fuel Hydrant System at JIAP Karachi, hence preventing competition for other OMC's willing to supply jet fuels to airlines at JIAP. Therefore when both the agreements are looked at in conjunction, they have the effect of excluding competitors for refuelling purposes and are therefore the exclusivity clauses therein are prohibited under section 4(2)(a) read with Section 4(1) of the Act.

37. It is pertinent to note that while the exclusivity clauses in the foregoing agreements have been determined to be in contravention of the Act, the Bench does recognise the necessity of concession agreements in terms of mega-projects of national importance, for example concession agreements for port-terminals or airport fuelling facilities, as is the case in the present matter. The Commission is of the view that exemptions under Section 5 or 8 of the Act should be applied for as soon as agreements (containing restrictive clauses) have been drafted on the promise that an executed version will also be provided to the Commission immediately upon execution of the agreement. It is pertinent to note that while the Commission allows for exemptions in respect of agreements which satisfy the criteria established by Section 9 of the Act, the regulation of such exempted agreements is of paramount importance for the diligent safeguard of public interest. That is to say that the underlying principle justifying the grant of an exemption to an agreement containing restrictive clauses is that pro-competitive effects which the agreement results in will outweigh any distortion to competition law brought about by the same and in turn the public at large will benefit. This approach is in line with the previous decisions of the Commission particularly in the matters of *Implementation Agreement entered into between Port Qasim Authority & M/s Engro Vopak Terminal Limited, 1-Link Guarantee Ltd. and Member Banks, Exemption Application of Joint Venture Agreement between M/s Metro Cash & Carry International Holding B. V. and Thal Limited, and DHA- Wateen Order.*

38. The Bench would also like to point out here that the Complainant has been unable to convince us regarding the allocation of land to it by CAA. The lease of land to any entity is a matter solely under the purview of CAA as the national aviation regulator and the Commission does not wish to step into its shoes in this regard. The Commission's sole mandate is to ensure and protect competition in the market and it will not step beyond the role assigned to it to benefit a particular competitor over another. The Complainant has failed to demonstrate how the provision of leased land at JIAP in the present circumstances would further competition in the relevant market. Further we note the Complainants previous lack of interest in competing for aviation fuel services as it did not compete for the fuel farm at the New Islamabad International Airport when the opportunity was available recently. Instead it has approached the Commission to obtain specific preferential treatment at JIAP which cannot be granted.

39. The Bench understands that establishing parallel fuel farms or fuel delivery systems (hydrant or bowsers) at airports may not be feasible commercially and it is important for business entities to aggressively compete whenever opportunities present themselves. Therefore, we are not inclined to consider the Complainants request to order CAA to provide separate land for a fuel farm or fuel distribution system.

DECISION

In view of the foregoing, we direct as follows:

a. That parties to the 1961 and 1994 Agreement shall apply to the Commission for retrospective and prospective exemption under Section 5 of the Act as per applicable regulations no later than thirty (30) days from the date of this Order, failing which the exclusivity clauses in the 1994 Agreement and the 1961 Agreement shall stand void as per Section 4(3) of the Act.

b. CAA shall ensure that upon expiry of the 1994 Agreement on 20 May, 2022, operation and management of both the fuel farm and the fuel hydrant system at JIAP, is opened for competition under a transparent, open, and inclusive process so that any market player willing to manage and operate these facilities is able to compete for it.

c. All Respondents shall file compliance reports in the matter with the Registrar to the Commission not later than ten (10) days after undertaking necessary actions required above.

41. So ordered.

(Shaista Bano)
Member

(Mujtaba Ahmad Lodhi)
Member

ISLAMABAD THE 17th MARCH 2022