



BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF
SHOW CAUSE NOTICES ISSUED TO PAKISTAN AUTOMOBILE
MANUFACTURERS AUTHORIZED DEALERS ASSOCIATION (PAMADA)
& ITS MEMBER UNDERTAKINGS

(FILE NO.1/101/PAMADA/C&TA/CCP/2013)

Dates of Hearing: 2 December 2014
27 January 2015
3 March 2015
12 March 2015

Adjudicating Members: Ms. Vadiyya Khalil
Chairperson

Mr. Mueen Batlay
Member

Dr. Shahzad Ansar
Member

Mr. Ikram Ul Haque Qureshi
Member

Present for Respondents:

M/s Pakistan Automobile Manufacturers
Authorized Dealers Association; and
M/s Toyota Eastern Motors
M/s Toyota University Motors
M/s Toyota Central Motors
M/s Toyota Defence Motors
M/s Toyota Society Motors
M/s Toyota Southern Motors

Mr. Aamir Khalil, Advocate
Ms. Anam, Advocate
Mars Consultants Int'l

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M/s Toyota Western Motors
M/s Toyota Hyderabad Motors
M/s Toyota Faisalabad Motors
M/s Toyota Capital Motors
M/s Toyota Sahara Motors
M/s Toyota Township Motors
M/s Toyota Multan Motors
M/s Honda Defence Motors
M/s Honda Point
M/s Honda Shahrah-e-Faisal Motors

M/s Honda South

M/s Honda Drive Inn

M/s Toyota Walton Motors

M/s Polad Motors; and
M/s Mandviwala Motors

M/s Carachi Motors
M/s Danish Motors
M/s I.G. Motors
M/s Khair Agency
M/s Khalil Motors
M/s Macca Motors
M/s Nadeem International
M/s Naseer Autos
M/s Plaza Motors
M/s Riaz Motors
M/s SNA Motors
M/s Suzuki Defence
M/s Suzuki Margalla Motors
M/s Suzuki Mehran Motors
M/s Suzuki Motorways
M/s Suzuki South
M/s Suzuki Western Motors
M/s Zeeshan Autos and
M/s Suzuki Tharparkar Motors

Mr. Hassan Ali Raza, Advocate
Mr. Umer Shahid, Advocate
Orr Dignam & Co.


Mr. Mustafa Munir, Advocate
Ms. Maleeka Ali Bokhari, Advocate
Mr. Shahrukh Ifikhar, Advocate
RIAA LAW

Mr. Mian Mansoor, Advocate
Pakistan Law Associates

Mr. Hassan Mandviwala, Advocate
Mr. Naveed UI Haq, Advocate
Mandviwala and Zafar,
Legal Consultants and Advocates

Mr. Mansoor Ali Ghanghro, Advocate
Akhund Forbes, Advocates &
Corporate Counselors



Attorney at Law


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ORDER

1. This order shall dispose of the proceedings initiated pursuant to Show Cause Notice numbers 26/2014 to 69/2014, dated 16 October 2014 (the "SCNs"), issued to the Pakistan Automobile Manufacturers Authorized Dealers Association ("PAMADA") and its member undertakings, for *prima facie* violations under Section 4 of the Competition Act, 2010 (the "Act"). SCNs were issued to the following undertakings: (hereinafter individually referred to as "**Member Undertaking Numbers 2 to 44**", and collectively as "**Respondents**" or "**Member Undertakings**").

- | | |
|---|---------------------------------|
| 1. M/s Pakistan Automobile Manufacturers Authorized Dealers Association | 2. M/s Honda Defense Motors |
| 3. M/s Honda Drive Inn | 4. M/s Honda Shahrah-e-Faisal |
| 5. M/s Honda SITE | 6. M/s Honda South |
| 7. M/s Hyundai Sherwani Motors | 8. M/s Prime Defense Motors |
| 9. M/s Carachi Motors | 10. M/s Danish Motors |
| 11. M/s I.G. Motors | 12. M/s Khair Agency |
| 13. M/s Khalil Motors | 14. M/s Macca Motors |
| 15. M/s Mandviwala Motors | 16. M/s Nadeem International |
| 17. M/s Naseer Autos | 18. M/s Plaza Motors |
| 19. M/s Polad & Company | 20. M/s Riaz Motors |
| 21. M/s SNA Motors | 22. M/s Suzuki Defense |
| 23. M/s Suzuki Margalla Motors | 24. M/s Suzuki Mehran Motors |
| 25. M/s Suzuki Motorways | 26. M/s Suzuki South |
| 27. M/s Suzuki Western Motors | 28. M/s Toyota Central Motors |
| 29. M/s Toyota Defense Motors | 30. M/s Toyota Eastern Motors |
| 31. M/s Toyota Society Motors | 32. M/s Toyota Southern |
| 33. M/s Toyota University Motors | 34. M/s Toyota Western |
| 35. M/s Zeeshan Autos | 36. M/s Toyota Hyderabad Motors |
| 37. M/s Suzuki Tharparkar Motors | 38. M/s Honda Point |
| 39. M/s Toyota Sahara Motors | 40. M/s Toyota Township Motors |
| 41. M/s Toyota Walton Motors | 42. M/s Toyota Capital Motors |
| 43. M/s Toyota Faisalabad | 44. M/s Toyota Multan Motors |

2. The matter concerns alleged collusive decision making by PAMADA and the implementation thereof by Member Undertakings in violation of Section 4(1) of the Act read with Section 4(2) thereof.



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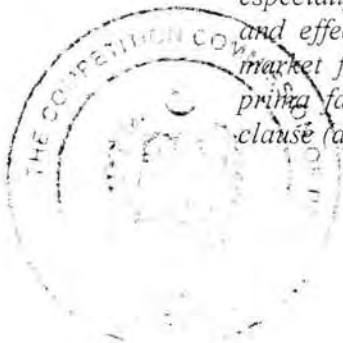
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FACTUAL BACKGROUND

3. PAMADA is an unregistered association of authorized dealers of automobile manufacturers having forty-four members across Pakistan. Its members include dealers of all major automobile manufacturers, and it is the primary association of authorized dealers of automobile manufacturers. It is important to clarify that while the Member Undertakings represent dealers of auto manufacturers all across Pakistan, not all authorized automobile dealers are members of PAMADA.
4. On 4 June 2013, the Competition Commission of Pakistan (the “**Commission**”) received a letter informing it of a decision taken by PAMADA to increase the prices of body repairs and paint jobs undertaken by its members. The Commission, taking notice of possible violations of the provisions of Section 4 of the Act initiated an enquiry on 13 December 2013, under Section 37 (1) of the Act.
5. During the course of the enquiry, the Commission, under Section 34 of the Act, authorized an inspection of the premises under the use of PAMADA located at 3 Shahrah-e-Faisal, Karachi (the “**Premises**”), consequent to which the Premises were inspected on 7 May 2014, and documents relevant to the enquiry were impounded.
6. The documents impounded during the inspection of the Premises were included in an enquiry report, along with other findings of the Commission. The enquiry report dated 1 October 2014, (the “**Enquiry Report**”) completed the Commission’s investigation into the matter and found PAMADA and its Member Undertakings to potentially be in violation of Section 4 of the Act. SCNs were therefore issued to PAMADA, as well as to the Member Undertakings individually. The contents of both being similar, the relevant portion of the SCN issued to PAMADA is reproduced below:

“WHEREAS, in terms of paragraphs 42 to 45 of the Enquiry Report, it appears that PAMADA has taken decisions regarding the rates of automotive body repairs and paint job services offered by its members, especially for insurance companies, which appears to have the object and effect of preventing, restricting or reducing competition in the market for automobile body repairs and paint jobs in Pakistan, in prima facie contravention of subsection (1) of Section 4 read with clause (a) of subsection (2) of Section 4 of the Act; and



WHEREAS, in terms of paragraph 46 of the Enquiry Report, it appears that PAMADA has taken decisions relating to fixing the prices of genuine spare parts supplied by automobile manufacturers by strictly prohibiting its members to offer discounts, which appears to have the object and effect of preventing, restricting or reducing competition in the market for automobile spare parts, in prima facie contravention of subsection (1) of Section 4 read with clause (a) of subsection (2) of Section 4 of the Act; and

WHEREAS, in terms of paragraph 47 of the Enquiry Report, it appears that PAMADA has taken decisions relating to the division of market and allocation of quota with respect to new automobile sales, which appears to have the object and effect of preventing, restricting or reducing competition in the market for new automobiles, in prima facie contravention of subsection (1) of Section 4 read with clauses (b) & (c) of subsection (2) of Section 4 of the Act; and

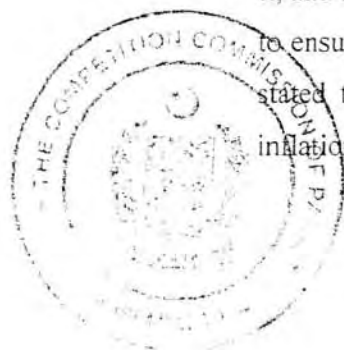
WHEREAS, in terms of paragraphs 48 of the Enquiry Report, it appears that PAMADA has taken decisions relating to restrict the movement of human resources between automobile dealers, which appears to have the object and effect of preventing, restricting or reducing competition in the market for employment of experienced sales and technical staff at authorized dealers, in prima facie contravention subsection (1) of Section 4 read with clauses (a), (b) & (c) of subsection (2) of Section 4 of the Act;”

SUBMISSIONS

7. Subsequently, written replies were filed by the Respondents and hearings in the matter were held on 2 December 2014, 27 January 2015, 3 March 2015 and 12 March 2015. Submissions were made by counsels for the Respondents who reiterated arguments provided in their written replies. The combined submissions as organised with reference to the contentions raised in the SCNs are as follows:

A. *‘the decision making of the rates of automotive body repairs and paint job services offered by it, especially for insurance companies, and appears to have implemented the same as well’*

- (i) PAMADA denied that there were any ill intentions behind the actions taken by it, and submitted that the circular of 12 March 2013, issued by PAMADA, was to ensure ‘uniformity’, ‘transparency’ and to ‘curb the threat of corruption’. It stated that the same is backed by rational analysis and reflects a standard inflationary increase. During the hearing on 12 March 2015, counsel for



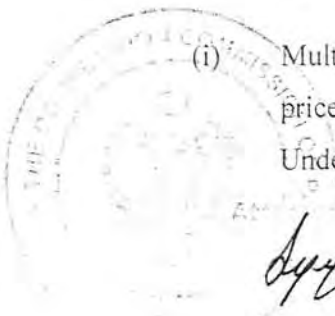
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Affidavit of the Respondent Copy

PAMADA also specified that the circular dated 12 March 2013 shows how the rates 'fixed in 2009' were still being implemented. They further submitted that the new rates, as prescribed in the circular dated 12 March 2013 were never implemented in a strict sense but were 'subject to confirmation' from insurance companies. PAMADA also submitted that the increase in rates was a reflection of the inflation in the country.

- (ii) Multiple Member Undertakings, along with PAMADA, have denied the charge and attached sales invoices for body repair and paint jobs with independently fixed rates as evidence. Member Undertaking No.5 submitted that it could not have a fixed formula regarding repair and paint work since too many factors needed to be considered to be able to arrive at the same. It has also provided its considerations for setting of an estimate for an insurance company and stated that its method for said calculation is standardized for both general public and insurance companies. It stated that car-claims from across the country were being accepted, and copies of negotiated job estimates had been appended to illustrate this point.
- (iii) Member Undertaking No.6 specifically denied all allegations as to fixing prices of body repairs and paint job services, and emphasized that none of the impounded documents related or show its involvement in any decision, or implementation of the same. It also stated that it determined rates of repair independently and attached invoices to corroborate the same.
- (iv) Member Undertaking No.41 meanwhile denied membership of PAMADA altogether and any association therewith, and similarly denied the charge without any further explanation.

B. *decision making regarding the fixing of prices of genuine spare parts supplied by the Undertaking by strictly prohibiting all the Members of PAMADA to offer discounts;*

- (i) Multiple Member Undertakings, as well as PAMADA submitted that the prices of spare parts are fixed by manufacturers and not by the Member Undertakings. The Member Undertakings also submitted that they had placed



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evidence to demonstrate that discounts had been offered by individual dealers. Meanwhile, Member Undertaking Nos. 7 and 41 denied the charge without further explanation.

C. *decision making regarding the division of market and allocation of quota with respect to new automobile sales;*

- (i) Multiple authorized dealers of Toyota addressed this allegation with the argument that M/s Indus Motors Company ('IMC') allocates the quota to authorized dealers on the basis of their past record.
- (ii) PAMADA submitted that quotas are allocated by the manufacturing companies, while business entities have their 'own forecasting, keeping in view their respective volume in detail'. PAMADA also submitted that 'division of market has nothing to do with customers', who remain for example, free to purchase automobiles from any geographical area of their choice.
- (iii) Member Undertaking No.3 submitted that the charge with regards to market allocation pertained only to dealers of IMC, and that the former was neither aware of, nor consulted, with regards to the policies in question. It further submitted that the same had had no bearing on the dealership's policies. Member Undertaking Nos.7 and 41 denied the charge without any further explanation.

D. *decision making to restrict the movement of human resources between automobile dealers;*

- (i) Member Undertaking No.3 submitted that the PAMADA recommendation with regards to employment is not in breach of any provisions of the Act, and is akin to a reference from a previous employee. It further submitted that it was not involved in discussions with regards to the movement of employees between dealerships. Member Undertaking Nos.7 and 41 denied the charge without any further explanation.



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8. The common legal contentions raised by a multitude of the Member Undertakings are as follows:

A. Definition of 'association of undertakings' and whether PAMADA falls under the ambit of Section 2 (1) (q) of the Act;

The first and foremost issue that the Respondents have collectively raised is that of the informal nature of PAMADA. It is referred to by multiple Member Undertakings as a 'toothless', 'welfare' association, without any legal standing or formal constitution, that operates as a forum to allow automobile dealerships to take up industry-specific issues at the governmental level.

B. Formalities: legal personality, and procedural legitimacy of PAMADA decisions;

The question of formalities was raised by the Member Undertakings with respect to two different issues:

i. '*membership*' of the association, and how it is constituted;

It has been contended that PAMADA has no formal concept of membership, or decision-making process, and neither does it hold any legal authority to effectuate decisions on behalf of its members. The Respondents insist therefore that PAMADA does not fall under the ambit of Section 2 (1) (q) of the Act.

ii. validity of representations made by PAMADA before the Commission.

During the course of the last two hearings in the matter, several Member Undertakings raised the contention that counsel for PAMADA had not validly been appointed, since all the Members had not individually agreed to the appointment. They alleged that the submissions made by said counsel could therefore not be held to be representative of the Member Undertakings.



C. Definition of 'relevant market' for the purposes of the Enquiry and Order :

Some of the Member Undertakings have raised the issue that the demarcations of 'relevant market', as provided in the Enquiry Report, are incorrect and should have been made along the lines of particular brands of automobile manufacturers. This argument has been stressed by multiple Respondents with especial regard to the relevant market for genuine spare parts.

9. Apart from the legal issues identified above, we will also deliberate upon the following violations by PAMADA and its Member Undertakings, as alleged in the SCNs and the Enquiry Report:

- A. The fixing of the rates of automobile body repairs and paint job services;
- B. the fixing of prices of genuine spare parts supplied by automobile manufacturers;
- C. the division of market and allocation of quota with respect to new automobile sales; and
- D. the restriction of movement of human resources between automobile dealerships.

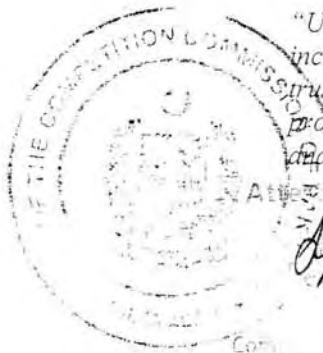
DELIBERATION AND ANALYSIS

10. We shall proceed to first address the legal objections.

A. Definition of 'association of undertakings';

11. To address the argument that PAMADA is not an 'association of undertakings' under the Act, the relevant portion of the definition as provided under Section 2 (1) (q) is reproduced herein below:

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



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12. For the purposes of this discussion, it is useful to return to the original interpretation of the term ‘*undertaking*’ as provided by the European Court of Justice (‘**ECJ**’) in its landmark judgment in **Hofner and Elser v Macrotron GmbH**¹, wherein it was held that

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

For entities to fall under the ambit of this definition therefore, they must be in performance of an ‘*economic activity*’. Economic activity under the jurisprudence of the European Union (‘**EU**’) has been broadly defined as any activity consisting of offering goods and services on a given market.² All Member Undertakings are authorized dealers of automobiles, and clearly therefore ‘*undertakings*’ for the purposes of the Act.

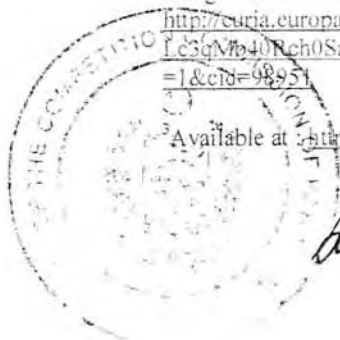
13. PAMADA has been described as an ‘*association of undertakings*’ by the Enquiry Report. The term ‘*association of undertakings*’ has been included in the definition of ‘*undertakings*’ under Section 2 (1) (q) of the Act. It has also previously been defined by the Commission through multiple orders. In the Appellate Order in the matter of **the Institute of Chartered Accountants of Pakistan**³ (hereinafter the ‘**ICAP Order**’) for example, it was stated that in the absence of a legal definition of the term ‘*association*’, it is the ordinary dictionary meaning of the word that is referred to. It further provided that an ordinary meaning of association includes ‘a gathering of people for a common purpose’. The form and purpose of such a gathering is not relevant for the purposes of the Act.

¹ Available at : <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61990CJ0041>

² Judgement in the case **AmbulanzGlöckner v LandkreisSüdwestpfalz**, available at:

<http://euria.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30dde02c180f4e594cb6a96fd3d13ede9a28.c34Kaxi1c36N7040Nch0SaxuPbx50?text=&docid=46789&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=98951>

³ Available at : [http://www.cc.gov.pk/images/Downloads/ICAP%20Final%20Order%20\(11-3-09\).pdf](http://www.cc.gov.pk/images/Downloads/ICAP%20Final%20Order%20(11-3-09).pdf)



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14. On the basis of the evidence available, the Commission finds PAMADA to fall clearly under the *de jure* definition of ‘*association of undertakings*’. Regarding the existence of a *de facto* organization, the policy of the Commission has been to take a holistic approach and to take both direct and circumstantial evidence into consideration during its evaluative process. In this particular case, the direct evidence is such as to point unequivocally towards a gathering of people for a common purpose.
15. Annex B-1 of the Enquiry Report, for example, is a list of the members of PAMADA impounded from the Premises. Annex C-5 of the Enquiry Report is a circular for the ‘74th Monthly Meeting’ of the association, which demonstrates clearly that there is a regular gathering of people i.e. Member Undertakings. Annex C-7 of the Enquiry Report shows the Minutes of Meeting of a meeting of the association, with an attendance sheet signed by participants.
16. The association’s own submissions in this regard are also of relevance here. PAMADA has, in its written reply, submitted that

“[PAMADA] is a welfare association of different automobile dealers [...] the ultimate aim of PAMADA is to raise voices of the collective legitimate grievances, problems, grave concerns of all its authorized dealers for taking up such like issues with the Government/ Semi Government/Attached Departments/ Organizations [...] the sole purpose of PAMADA is to provide platform to its authorized dealers/affiliates [Emphasis supplied]”

17. Evidently, PAMADA has by its own admission, all the components of a trade organization. The function of raising collective concerns, for example, is one usually performed by associations, trade organizations and similar. We must note also that whatever objections they may have with regards to the functions of PAMADA, not a single member has denied that a gathering exists. There remains no doubt in our minds therefore, that PAMADA is an ‘*association of undertakings*’ for the purposes of the Act.



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B. Formalities: legal personality and procedural legitimacy of PAMADA decisions;

18. A second contention, born of the first one, is related to Member Undertakings arguing that PAMADA is not an incorporated entity, with the requisite legal personality to 'sue and be sued'. They have further elaborated upon this argument by specifying that there is no formal procedure behind membership and furthermore, no formal decision-making process. Lastly, it was argued that representations made by PAMADA before the Commission should not be held to be validly made, as the individual Member Undertakings were not signatories to the executed Power of Attorney that was submitted.
19. With regards to the first limb of this contention, we must reiterate as stated above: an association whether constituted either formally or informally falls under the ambit of the Act. Proceedings before the Commission are not equivalent to civil litigation, and therefore not akin to a party being 'sued'. For the broader purposes of its mandate, the Commission is not concerned with the legal formalities of an organization, or association thereof, but rather its *de facto* nature and the *de facto* actions being carried out by it.
20. The question of formal '*membership*' for the purposes of violations under the Act is irrelevant. The Act refers to association of undertakings, which as per our understanding is a gathering of undertakings for a common purpose whether it is structured as a society, alliance, forum or similar. So as long as undertakings group together for common purpose, they are for all practical purposes members of an association. The Member Undertakings, by their own admission, concede that PAMADA is a platform which allows its members to raise collective concerns, as previously explained in Section A. They are therefore, members of the association.
21. With regards to the second limb, and in light of the discussion above, we must specify here that the Commission is concerned with valid representation only, and not with the technicalities of form. For a representation to be validly made therefore, the Commission must reasonably have found it to be so made, upon a rational inspection of the evidence available.



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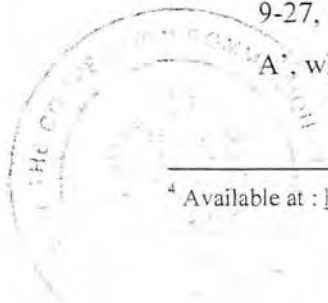
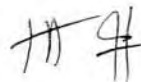
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22. We begin therefore with the Power of Attorney submitted by the counsel on behalf of PAMADA. The same has been signed by the President of PAMADA, and is also embossed with the stamp of the association. The presumption, as analogous to settled law, is in favour of PAMADA's counsel. The burden of proof to rebut this presumption therefore, lies with the party alleging misrepresentation. The same conclusion has also previously been reached by the Commission in its order **In The Matter Of Complaint Filed By M/S. DHL Pakistan (Pvt.) Ltd, (the 'DHL Order')**⁴.
23. We find it pertinent here to emphasize the timeline of the entire proceedings. The Enquiry Report in the matter was published on 1 October 2014. The SCNs to the Member Undertakings were issued on 16 October 2014. The Respondents were then accorded ample time to submit written replies, before the first hearing being held on 2 December 2014. The second hearing was held on 27 January 2015. It is during the third hearing, dated 3 March 2015, that the legitimacy of PAMADA's representations was first questioned, and then re-questioned in the hearing held on 12 March 2015.
24. The delay in response from the Member Undertakings is relevant in that it illustrates their acceptance of the status quo. Furthermore, we are of the view that from the evidence available, the authority of the President of PAMADA to act on behalf of the association has remained unchallenged up until the date of the third hearing. This is demonstrated through the fact that the Member Undertakings have attended meetings called upon by the same authority, as shown in Annex C-5 of the Enquiry Report. Most significantly, it is the fact that the Member Undertakings have themselves deemed PAMADA a welfare organization that works on the collective behalf of the dealerships that allows us to see how the Member Undertakings consider the President to be a validly authorized representative of the association. Member Undertaking Nos. 9-27, 35 and 37 have in their written replies attached a PAMADA circular as 'Annex-A', which further demonstrates the point being made.

⁴ Available at : http://www.ec.gov.pk/images/Downloads/dhl_pakistan.pdf



25. Finally, while we are cognizant of the requirements prescribed by law with regards to representation of an incorporated company, which remains the most oft-cited example by the Member Undertakings, we are of the view that company law is not transposable with the Act on this matter. The aims and purposes of the Act remain entirely different, and require therefore a different manner of dealing with technicalities.

26. In light of the above, we are of the view that the legal maxim denoting that '*no injury is done to the willing*' is of application here, as the Member Undertakings, having both actively and passively accepted the authority of the President to act on behalf of PAMADA cannot now contest it and claim misrepresentation.

C. Definition of '*relevant market*' for the purposes of the Enquiry and Order :

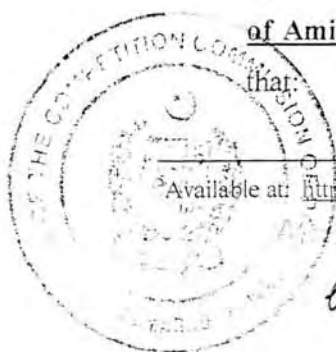
27. The third legal issue under deliberation is that of the definition of '*relevant market*' for the purposes of interpretation of Section 4 (1) and (2) of the Act. To begin with, the definition of '*relevant market*' as provided under Section 2 (1) (k) of the Act is reproduced below:

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

28. The Commission has previously addressed similar concerns in previous orders, wherein it has held that for the purposes of Section 4 of the Act, the definition of relevant market is not a precondition to establish a violation. This discussion has most recently and succinctly been prescribed in the Commission's **Order In The Matter of Amin Brothers Engineering et al.**⁵ (the '**PESCO Order**'), wherein it was held

that:

Available at: http://www.cc.gov.pk/images/Downloads/draft_order_pesco_13_may_2011.pdf



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[...] 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 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 [...]. This principle must be kept in mind while reading Section 4(1). Thus it is not mandatory on the Commission to define a relevant market in cases of collusion, nor does the wording of Section 4 mandates it.

29. The PESCO Order also placed reliance on an appellate order by the Commission in the matter of Appeals Filed By Pakistan Banks Association And Others (the 'Banks Appellate Order')⁶ wherein it was stated that:

"[...] we, [...] are of the view, that if the agreement has the object of preventing, restricting or reducing competition, there is no need to assess its anticompetitive effects, for which ordinarily relevant market is defined."

30. Since the principle behind the identification of the relevant markets has already been explained above, we will constrain our individual explanation to a singular relevant market.
31. We are agreed with the Respondents that the spare parts of a Toyota automobile may not be utilized in a Honda automobile. We may even go a step further and clarify that, for example, even a Toyota oil filter may vary for different Toyota cars. The distinctions, if we were inclined to make them, could continue ad nauseam. For the exercise to not be one in futility, the Enquiry Report has limited its specification to the overall market for genuine spare parts, as a market in which Member Undertakings operate and compete. In a similar discussion before the ECJ, the European Commission in the case NV Nederlandsche Banden Industrie Michelin vs.

⁶Available at: <http://www.cc.gov.pk/images/Downloads/Final%20PBA%20Order%2010.06.09.pdf>

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Commission of the European Communities ⁷, ('Michelin Case'), defended its definition of relevant market by pointing out that with a technically homogenous product it is not possible to distinguish different markets depending upon the dimensions, size or specific type of products. The same principle is of application here.

32. In light of the discussion above, the Commission is of the view that the Enquiry Report is correct in its demarcations of '*relevant market*' for the purposes of an alleged violation under Section 4 of the Act.
33. Having dealt with the legal contentions, we will proceed now to a discussion of the violations. The discussions below will be two-pronged, dealing first with the role of PAMADA, and then of the Member Undertakings in their individual capacities.
34. Since the violations alleged in the SCN are in the ambit of Section (4) of the Act, we shall first provide a brief background of the section and its interpretation. Section 4 (1) prohibits undertakings from entering into agreements, or in the case of association of undertakings, from making decisions which have the object or effect of preventing, restricting or reducing competition within the relevant market. The relevant part is reproduced here below:

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

(2)...

(3) Any agreement entered into in contravention of the provision subsection (1) shall be void."

Available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61981CJ0322>



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35. A violation of Section 4 of the Act may occur through either of two methods, i.e. through (i) an agreement of undertakings or their associations, or (ii) a decision of an association of undertakings. The term 'agreement' is defined under Section 2 (1) (b) of the Act as 'any arrangement, understanding or practice, whether or not it is in writing or intended to be legally enforceable'. This definition has been further elaborated upon in the order by the Commission **In the matter of Show Cause Notice dated 24th December 2007 for Violation of Section 4. ('Banks Order')**⁸ wherein it was provided that it is the ordinary dictionary meanings of the words 'arrangement', 'understanding' and 'practice' which are used, thus making the definition of the term 'agreement' a very broad one. The same order also provides that a '*decision of an association of undertakings reflects an understanding between its members*'. As above, it is the ordinary dictionary meaning of the word 'decision' that is used by the Commission.
36. Perhaps the most important consideration in a matter brought under Section 4 of the Act is that of intention and effect. The Banks Order has discussed the history and development of both and succinctly provided that:

"The term 'object' in section 4 does not refer to the subjective intention of the parties but to the objective meaning and purpose of the agreement. The words object or effect do not have a cumulative impact and are to be read as importing distinct meanings. Under the Competition Law regime adopted by the Ordinance, certain agreements are deemed to have the 'object' of restricting competition without having to establish their effects".

37. What the order is referring to above is in practice the *per se* doctrine which in the realm of competition law stipulates that certain anti-competitive practices are so egregious as to be deemed illegal outright. This is to say that they are illegal '*without elaborate inquiry as to the precise harm they have caused or the business excuse for their use*'.⁹ The doctrine has been developed extensively through case-law from both the USA and the EU. Furthermore, their applicability to Pakistan has already been demonstrated through the various orders passed by the Commission since 2008. Price fixing, market allocation and bid rigging are the forms of collusion that have

⁸ Available at : http://www.cc.gov.pk/images/Downloads/Order_of_Banks.pdf

⁹ *Northern Pacific R. Co. v. United States*, 356 U.S. 1 at 5 (1958).

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commonly been agreed to warrant treatment under the *per se* doctrine in most jurisdictions.

38. Conversely, in cases of violations which do not fall in the list given above, the concept of '*appreciable effect*' comes into play. The effects test requires an examination of the economic conditions prevailing in the relevant market and effects of the agreement on competition in the said market.¹⁰

PAMADA'S ACTIONS

39. We proceed now to a seriatim discussion of each alleged violation by PAMADA.
- A. **Decision-making of the rates of automotive body repairs and paint job services offered, in particular to insurance companies;**
40. The Enquiry Report, after examination of the impounded documents, came to the conclusion that the evidence on record points to a discussion between Member Undertakings, and multiple decisions for fixing rates of services by PAMADA, in *prima facie* violation of Section 4 (1) read with Section 4 (2) (a) of the Act. The relevant portion of Section 4 (2) of the Act is reproduced below:

"2. Such agreements include but are not limited to –
(a) fixing the purchase or selling price of or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any service."

41. Our concern here is with a horizontal arrangement, i.e. one between actual or potential rivals at the time the agreement was made. The elimination of rivalry is a competition concern, and has been held to be one of the most pernicious forms of collusion, thus falling in the ambit of the *per se* rule described above. We will proceed now towards considering the evidence on record against PAMADA, as attached with the Enquiry Report. Extracts from the impounded documents are reproduced below.

¹⁰ Available at: http://www.ec.gov.pk/images/Downloads/Order_of_Banks.pdf



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42. The first instance of a violation of Section 4 (1) read with Section 4(2) (a) of the Act by PAMADA is indicated in Annex C-8 of the Enquiry Report. The annex is a letter dated 1 December 2010 from the President of PAMADA to PICIC Insurance Limited, informing the latter about the decision of PAMADA regarding the revision in rates of body repairs and paint jobs and requesting dissemination to surveyors. The letter is followed by a table showing the revised rates. The relevant portion is reproduced below:

"[...]With reference to the subject above, please be informed that the Executive Committee of PAMADA has decided to revise the existing rates of body repair and painting charges with effect from January 01, 2011. Revised rates are given in Annexure- A.

[...]We will appreciate if the revised rates, are conveyed to the Surveyors and your Branch Managers to ensure smooth disposal of our bills."

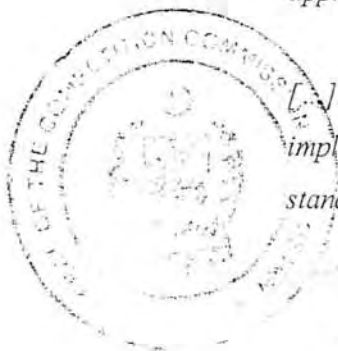
The letter has further been copied to 'All PAMADA Members'.

43. Supporting evidence regarding the decision indicated in Annex C-8 of the Enquiry Report is found in Annexes C-7 and C-6 of the Enquiry Report. Annex C-7 shows the Minutes of Meeting dated 20 December 2010, of a Service Managers' Meeting, regarding the implementation of revised rates for body and paint jobs. The minutes are followed by the names and details of the participating Member Undertakings. The relevant portion is reproduced below:

"[...]As per the decided schedule Service Managers meeting of PAMADA dealers was held on December 18, 2010, at Toyota Central motors to establish understanding and to ensure the implementation of "Revised Rates for Body and Paint Jobs" which will be effective from January 01, 2011[...]

[...]Service Managers also emphasized that a proper check and balance regarding the implementation of new rates should be arranged and they appreciated the idea of above referred monitoring committee [...]

[...]The meeting was ended with full harmony and agreement to implement the new rates and it was decided that all PAMADA dealers will stand together in the coming days".



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44. Annex C-6 of the Enquiry Report is PAMADA circular No. 10320, dated 24 December 2010, titled **'CIRCULAR-MONITORING COMMITTEE FOR PAMADA POLICIES IMPLEMENTATION'** and signed by Mr. Salim Godil, President PAMADA. The relevant portion is reproduced below:

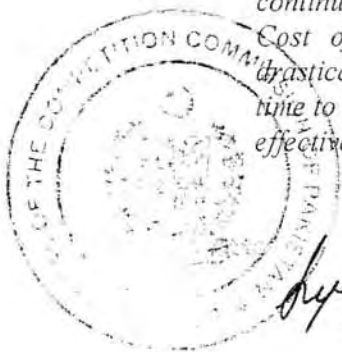
"With reference to the subject above, this is to inform all PAMADA members that PAMADA management has formed the following committee for monitoring/implementation of PAMADA policies [...]"

[...]We hope that all members will help PAMADA for the successful, satisfactory and peaceful implementation of PAMADA Policies [...]"

45. Annexes C-8, C-7 and C-6 of the Enquiry Report all constitute evidence of a decision taken by PAMADA to fix the rates of body repair and painting charges, made in 2010 and effective from 2011. Annex C-8 has provided the rates in writing along with the letter to an insurance company, while Annex-C-7 shows the actual involvement of the participants. Annex C-6 further demonstrates how PAMADA has a mechanism in place to ensure implementation of collusive practices. The Commission considers this a clear violation of Section 4 (1) read with Section 4 (2) (a) of the Act by PAMADA. No submissions have been made by Respondent No.1 with regards to these annexes.
46. The second instance of a violation by PAMADA is shown through Annex C-3 of the Enquiry Report. The annex shows PAMADA circular no.10435/2013, dated 12 March 2013, titled **'REVISION OF RATES OF BODY REPAIR & PAINT JOBS'** addressed to *'all Insurance Companies'* notifying them of the collective decision taken by PAMADA to increase rates of body repair and paint jobs with effect from 15 March 2013. The circular is followed by various tables explaining the rationale for the increase. The relevant portion is as follows:

"PAMADA had revised in consultation with all authorized dealers for the uniformity of body repair and paint jobs in 2009 which the surveyors continue to approve.

Cost of material, electricity, gas, labor and other essentials have drastically increased in the last few years and continue to increase from time to time... This increase has compelled us to revise our rates which are effective March 15, 2013."



Salim Godil

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The same is also signed by the President of PAMADA and has been copied to 'All PAMADA Members'.

47. The decision in Annex C-3 is further evidenced by Annexes C-1, C-2 and C-4 of the Enquiry Report. Annex C-1 is an email chain between Member Undertaking Nos.1 and 32 dated 7 February 2014. Attached with one of the emails is a draft letter entitled 'CAR BODY COLLISION REPAIRS TARIFF REVISION' sent on behalf of the President of PAMADA, in which a decision to boycott EFU Insurance is made due to their refusal to accept revised paint job rates of PAMADA. The relevant portion of the draft letter is reproduced below:

"[...]7. In the light of above increasing trend in the cost of performing body repair it is decided to adjust our job rates on reasonable grounds accordingly to make the business viable.

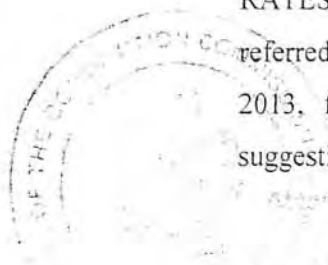
8. The current increase in our rates has been accepted by cash paid customers and insurance companies except M/s EFU Insurance Company Limited.

9. We have exercised our best efforts to convince EFU management to accept the logical change but unfortunately we could not get favorable reply.

10. It is therefore unanimously decided that to suspend undertaking insurance jobs from EFU Insurance Company Limited with immediate effect, who are not willing to accept our bonafide request till such time the new rates are acceptable by them[...]"

The same is addressed to 'All Toyota Dealer's Principals'.

48. Annex C-2 of the Enquiry Report is an email chain, with the first email dated 13 March 2013, from Member Undertaking No.28, addressed to Member Undertaking Nos. 10, 42,12 and 17, amongst others, with the subject , 'PAMADA REVISION OF RATES OF BODY REPAIR & PAINT JOBS'. Enclosed in this email is the circular referred to in Annex-C-3 above. The second email in the chain is dated 14 March 2013, from Member Undertaking No.17 to the President of PAMADA, with suggestions as to amendments in the circular. The relevant portion is as follows:



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"[...] we suggest you to kindly add percentage of premium in 2009 and 2013.

As in 2009 corolla was almost 1200,000 and now it is 1800,000. simultaneous the insurance premium also increased but labor charges paid by insurance did not increased.

In this connection please arrange Service Manager Meeting on this issue so that the same could be expedite in true spirit [...]"

49. Annex C-4 of the Enquiry Report is an email dated 1 April 2013 from Member Undertaking No.36, addressed to PAMADA and certain other Undertakings. The relevant portion is reproduced below:

"...With reference to your e-mail regarding subject matter, we are not getting positive response from surveyor company. They are not accepting PAMADA revised rates, further we have also emailed and send letters to all insurance companies to revise rates as per PAMADA request but we have not been replied by any insurance companies.

We request you to help us and make a action plan in getting revised rates..."

50. Annex C-3 provides incontrovertible evidence of continuing cartelization by PAMADA. It shows another decision by PAMADA to fix rates of body repair and painting services, now in 2013. Annexes C-1, C-2 and C-4 of the Enquiry Report further demonstrate how PAMADA serves as a forum for its members to discuss pricing strategies and enforcement mechanisms of the same.

51. It is also pertinent to mention here the submissions made by PAMADA itself. In its written reply to the SCN, PAMADA has in paragraph 6 of its preliminary objections , and again in paragraphs 6 and 7 of the para wise reply stated that

"[...] PAMADA in consultation with all authorized dealers/affiliates for the sake of bringing uniformity and ensuring transparency from bottom to top issued a circular of proposed Revision of Rates of Body Repair[...] [Emphasis supplied]."



52. PAMADA's counsel during the hearing before the Commission on 12 March 2015, also categorically stated that the circular dated 12 March 2013 was made with the intention to revise the rates 'fixed in 2009', to account for inflation since then. He further stated that the association 'took the decision for cogent reasons', which has previously also been stipulated in its written reply to the SCN. PAMADA had formerly submitted that the revision in rates was based on the inflationary increase in material costs, that such increases are annually accounted for, even by the government, and finally that the decision was never implemented in a strict sense.

53. With respect to the above, we feel it necessary to clarify in the most certain terms, that it is not the fact of a price increase that poses a competitive concern, but rather the collective determination and fixation of prices. Inflation may unquestionably be accounted for by individual dealerships, but an association of the same must not take a decision to do so. Commercial decision making by an association for or on behalf of its members, for any reason, remains prohibited under the Act. The implementation of such a decision is not a consideration in the making out of a violation under Section 4 (1) read with Section 4 (2) (a) of the Act, as explained in paragraphs 37 and 41 above. In light of the documentary evidence as well as the submissions made, there is no doubt that two instances of collusive decision making by PAMADA with respect to fixing the price of body repairs and paint jobs, one in 2010 and one in 2013, in violation of Section 4(1) read with Section 4(2)(a) of the Act can be identified.

B. The fixing of prices of genuine spare parts supplied by automobile manufacturers and further prohibiting members from offering discounts;

54. Since the legal background has already been provided for price-fixing, we will continue therefore by directly looking at the evidence available on file to determine whether PAMADA is being used as a forum to fix prices of genuine automobile spare parts by refusing discounts on the listed prices.

55. Annex C-10 of the Enquiry Report, reproduced below, is a letter from the President of PAMADA, to all the Toyota dealerships regarding its decision to implement similar rates of genuine parts at all Toyota dealerships:

The bottom of the page contains several handwritten signatures and stamps. On the left, there is a circular stamp with some illegible text. In the center, there is a signature that appears to be 'M.A.' with a large flourish. To the right, there are two more signatures: one above the word 'Attesté' and another below it. The word 'Attesté' is written in a small, simple font. There is also a signature that looks like 'H. J.' at the top right. At the bottom right, there is a signature that looks like 'S. J.' and the word 'Composé' written below it.

"...With reference to the subject above, all Toyota Dealers are advised that as per PAMADA policy, supplies of Toyota/ Daihatsu parts to all insurance companies including Adamjee Insurance Company Limited, EFU Insurance Company Limited and TPL Tracker Limited will be made on IMC issued parts price list without any discount.

In this regard you are requested to please strictly follow the above policy and do not provide any kind of discount over IMC approved parts price list. Kindly furnish your "written confirmation" that the above policy will be strictly followed by you at your earliest.' [Emphasis supplied]"

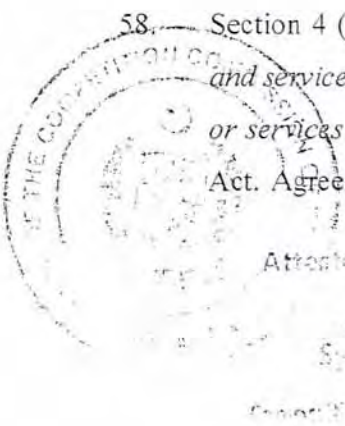
56. As discussed above, an agreement to fix prices is a *per se* violation of competition laws. We find that PAMADA's own explanation for the pricing mechanism is so useful as to be reproduced below for reference:

"[...]Over and above, this is also to pinpoint here that normally Toyota Indus Motors (Automobile Manufacturers) gives 15% margin/profit in the spare parts of periodical maintenance, 18% profit in spare parts of general repair and 20% margin/ profit in Body Parts to all its authorized dealers. Now, all the authorized dealers have to bear their allied expenses like transportation cost, salaries of staff deputed at the sale of spare parts etc. etc.[...]"

57. To note here is that the authorized dealers are accorded profit margins by the manufacturer so as to allow them to set their own rates. PAMADA's decision to prohibit discounts is in direct contradiction with this policy while also being an anti-competitive practice. Interestingly, a similar view was also expressed by the counsel for PAMADA during the hearing dated 12 March 2015, who stipulated that the giving of discounts is 'the prerogative of every businessman'. The inability of a dealership to offer discounts would in effect curtail its capability to set the rates of the spare parts, and the Commission therefore finds that the above constitutes a decision by PAMADA to fix prices in the market for genuine spare parts.

C. Decision making regarding the division of market and allocation of quota with respect to new automobile sales

58. Section 4 (2) (b) of the Act provides that "*dividing or sharing of markets for goods and services, whether by territories, by volume of sales or purchases, by type of goods or services sold or by any other means*" is prohibited in terms of Section 4(1) of the Act. Agreements or decisions which involve the assignment to particular entities of



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particular customers or markets have the effect of eliminating competition and constitute restraints, either vertical or horizontal.

59. Evidence suggesting market allocation by PAMADA was also attached with the Enquiry Report, and relevant extracts are reproduced here for discussion. Annex C-11 of the Enquiry Report contains the minutes of a Toyota dealers meeting contained in an email dated 31 August 2013, in which the allocations of new automobiles are divided amongst the dealers on the basis of geography. The minutes discuss the rationale and mechanism behind the market division in detail. Relevant portions are reproduced below:

"[...]It was discussed and agreed that by offering discounts of few thousands out of commissions, we do not convert Honda customers into Toyota customers and increase the Toyota market share against Honda or used imported vehicles but are fighting among ourselves and are merely snatching the Toyota market share from our brother dealers and not from competition.[...]It was also discussed and agreed that mostly the discounting trend is triggered because of influx of vehicles from other regions [...]With these objectives in mind, it was agreed that three regional committees shall be formed [...]These committees shall coordinate with dealerships in their respective regions and shall jointly discuss and revise forecasts of the dealership to bring them closer to the actual market potential in their respective regions. Regional total achieved number shall be then discussed in the joint dealer committee meeting, consisting of all eight members of the three committees. If the numbers are in line with the total market potential of the country then they shall be accepted otherwise the joint dealership committee shall make adjustments. The final figures shall be discussed with IMC and when both parties shall agree on numbers, the same shall be intimated to all dealerships.[...]

Southern Committee: 35% i.e. 700 units shall be divided among all southern region dealers.

Central Committee: 40% i.e. 800 units shall be divided among all central region dealers.

Northern Committee: 25% i.e. 500 units shall be divided among all northern region dealers."

60. Annex C-12 of the Enquiry Report is a letter from the Managing Director of Member Undertaking No. 28 dated 7 June 2010 to the General Manager of IMC in which a protest is registered against Member Undertaking No. 32 for poaching a corporate client.

61. From the evidence available, the role of PAMADA cannot be made out. Annex C-11 shows a discussion and decision by Toyota dealerships only, outside the PAMADA framework, while Annex C-12 indicates a dispute between two Member Undertakings without a discernable nexus to PAMADA. The Commission therefore does not find PAMADA in violation of Section 4(1) of the Act on this matter.

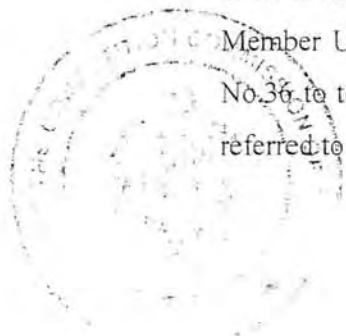
D. The restriction of movement of human resources between Member Undertakings;

62. As concerns the market for employment of experienced sales and technical staff at authorized dealers, a curtailing of the same is effectively a restriction on the free movement of skilled human resources which constitutes an anti-competitive practice, falling under Section 4 (1) read with Section 4(2) (a) of the Act.

63. With regards to this violation, Annex C-13 of the Enquiry Report provides the primary evidence. The annex is PAMADA circular no. 10347/2011, dated 11 June 2011, issued by the President of PAMADA, and stipulates in clear terms that members of PAMADA should not hire former employees of other member unless a 'No Objection Certificate', ('NOC') has been given them by the previous employer. The relevant portion is reproduced below:

"[...]In this regard and as per earlier instructions, all members of PAMADA are informed that at the time of hiring new employees, please make sure that the candidate is not one, who had been working with other PAMADA Member. If the candidate is an ex-employee of any other PAMADA member, please do not hire such candidate until unless the ex employer furnishes No Objection Certificate (N.O.C) [...]"

64. The implementation of this circular is evidenced through Annexes C-15 and C-16 of the Enquiry Report, which further help illustrate the gravity of the violation. Annex C-16 is an email dated 28 January 2010 from the CEO of Member Undertaking No.36 to the President of PAMADA informing him of compliance with the circular. Annex C-15 is an email dated 3 February 2010 the President of PAMADA to the CEO of Member Undertaking No.32 informing him of the decision of Member Undertaking No.36 to terminate an employee who was hired in violation of PAMADA policy, as referred to above.



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65. Annex C-14 of the Enquiry Report shows PAMADA's history with the violation, as it is an email dated 9 March 2009 by the President of PAMADA to the CEO Member Undertaking No.32 regarding the hiring of an employee in violation of PAMADA policy, and states as follows:

"[...]Kindly refer PAMADA Circular dated March 27, 2007 regarding hiring of employees, wherein it was informed that no PAMADA Member can hire any previous employee of other PAMADA member until unless the previous employer issues No Objection Certificate (NOC) to their ex-employee [...]"

66. This annex shows that the circular in question was in existence as long ago as 2007, and is not a reactionary protective mechanism as alleged by PAMADA in its submissions. The Respondents were even asked to provide instances of fraudulent conduct by employees but none were submitted.
67. The documentary evidence available points towards one instance of a decision given by PAMADA with regards to collectively controlling movement of human resources within the industry. We find that the decision indicated in Annex C-13 of the Enquiry Report constitutes a violation of Section 4 (1) read with Section 4 (2) (a) of the Act, as it is the imposition of a restrictive trading condition with regards to the provision of services. The restriction hampers competition between members, as experienced sales and technical staff cannot freely move around, which is critically important for bringing effective competition in the relevant market.
68. In summation of the discussion above, we find PAMADA to have been in violation of Section 4 (1) read with Section 4 (2)(a) of the Act in three relevant markets. This includes two instances of decisions regarding the fixing of prices in the market for body repair and paint jobs, a decision to fix the prices of genuine Toyota spare parts and finally, a decision to restrict the provision of services by restricting the movement of human resources.

MEMBER UNDERTAKINGS' ACTIONS

69. We will proceed now to discuss the actions of the Member Undertakings in an individual capacity. As discussed above, the provisions of Section 4 (1) and (2) of the



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Act remain applicable to individual undertakings, with the exception that for an undertaking to be considered in violation, there must be evidence of agreement between multiple undertakings. "Agreement" has been defined in Section 2(1)(b) of the Act, which reads as follows:

"agreement includes any arrangement, understanding or practices, whether or not it is in writing or intended to be legally enforceable"

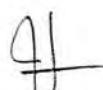
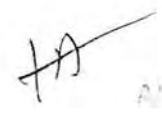
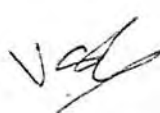
70. Regarding the interpretation of the same, the Banks Order has provided that:

"a decision of an association of undertakings reflects an understanding between its members and when such a decision is acted upon by a member bank it constitutes an 'agreement' between association and the member". [Emphasis supplied]"

71. For a violation to be made out therefore, an undertaking must have implemented the decision of the association in question. We will now address the alleged violations by the Member Undertakings in each relevant market.

A. Decision-making of the rates of automotive body repairs and paint job services offered, in particular to insurance companies;

72. Annex C-1 of the Enquiry Report, as stated above, shows email correspondence between Member Undertaking Nos. 28 and 32 regarding the boycotting of M/s. EFU Insurance Company Limited to coerce it into accepting the rates of car body collision repairs set by the Association. Annex C-2 of the Enquiry Report further shows an email from Member Undertaking No. 17 suggesting that a premium be added to the rates already given by PAMADA. Annex C-4 of the Enquiry Report shows an email from Member Undertaking No. 36 to numerous Member Undertakings with a complaint that insurance companies were not being responsive to the rates issued by PAMADA in its circular, and requested help in achieving the same. Annex C-6 shows that Member Undertaking Nos. 3, 9, 17, 22, 23, 28 and 34 formed the 'Monitoring Committee' for the implementation of PAMADA policies. Annex C-7 of the Enquiry Report shows the Minutes of Meeting wherein the rates of body repair and paint jobs are discussed by the Member Undertakings. The list of participants attached with the Minutes contains signatures of representatives from 35 undertakings. Annex C-9 of



the Enquiry Report shows email correspondence between Member Undertaking Nos. 5, 9, 19 and 28 relating to a discussion of a standardized agreement with M/s. IGI Insurance.

73. While it is apparent that sporadic instances of questionable conduct do exist, we are of the view that the Undertakings have managed to demonstrate their non-compliance with PAMADA decisions through the documentary evidence submitted. No individual violations are therefore made out at this stage with respect to the Member Undertakings in the market for automobile body repairs and paint jobs.

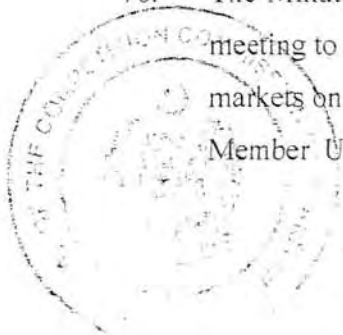
B. The fixing of prices of genuine spare parts supplied by automobile manufacturers and further prohibiting members from offering discounts;

74. The decision of the association as shown in Annex C-10 of the Enquiry Report is the only evidence available on file with regards to the alleged violation in the market for genuine spare parts. As above, the Member Undertakings have submitted documentary evidence to support the absence of implementation, and no violation is therefore made out.

C. Decision making regarding the division of market and allocation of quota with respect to new automobile sales;

75. Annex C-11 of the Enquiry Report shows the Minutes of Meeting between the dealers of IMC, held in Lahore on 24 August 2013. Since IMC is the licensed manufacturer of Toyota automobiles in Pakistan, the corresponding attendees from the Member Undertakings who have been issued SCNs may be understood to be Member Undertaking Nos. 28-36, and 39-44. However, the Minutes also state that Member Undertaking No. 41 declined to join the meeting.

76. The Minutes indicate that Toyota dealers from all over Pakistan participated in the meeting to discuss discounting trends among the dealerships as well as the division of markets on a geographical basis. They further illustrate the mechanism devised by the Member Undertakings to ensure compliance and also show that an annual fee of



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Rupees Twenty-Five Thousand (PKR 25,000) was fixed to be paid to the 'regional committees' for expenses incurred.

77. Annex C-12 of the Enquiry Report shows Member Undertaking No. 28 making a complaint regarding Member Undertaking No.32 to IMC with regards to a 'PRA violation', whereby Member Undertaking No.32 is being accused of having poached a client belonging to Member Undertaking No.28.
78. While the behaviour of the Toyota automotive dealers as evidenced above is suspect, there is no cogent evidence to suggest that Member Undertakings have agreed to divide the market amongst themselves. The actions listed above do not pertain to PAMADA's forum and hence do not fall within the context of the SCNs issued to Member Undertakings. As such the violation alleged in the SCNs is not made out.


D. The restriction of movement of human resources between Member Undertakings;

79. Annexes C-14, C-15 and C-16 of the Enquiry Report show emails from PAMADA to different Member Undertakings with regards to violations of a PAMADA policy relating to hiring of employees. The annexes also show an isolated instance of compliance by Member Undertakings. Given the isolated nature of compliance, no violations by Member Undertakings are made out in this relevant market in light of the SCNs issued. Member Undertakings are, however, warned that in future instances of similar behaviour will however be liable to severe penalty.

REMEDY AND PENALTY

80. In case of a violation of Section 4 of the Act, the Commission is empowered to impose a fine under Section 38 of the Act and to issue a cease and desist order under Section 31. In case of multiple contraventions, as in the instant case, the penalty will be reflective of the same.

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81. Collusion and cartelization, as mentioned multiple times previously, are one of the most egregious forms of anti-competitive behaviour. They corrupt the market as well the individual participants themselves, while remaining *'a paradox at the heart of economic relations: the desire of competitors not to compete'*.¹¹ In view of the settled pattern of collusion demonstrated by PAMADA, as well as four instances of distinct violations in three relevant markets, the Commission hereby:

- a. directs PAMADA to cease its collusive practices;
- b. imposes, on PAMADA, a penalty of:
 - i. Pakistani Rupees Fifty Million (PKR 50,000,000) for a violation in the market for body repairs and paint jobs in 2010;
 - ii. Pakistani Rupees Fifty Million (PKR 50,000,000) for a violation in the market for body repairs and paint jobs in 2013;
 - iii. Pakistani Rupees Twenty Five Million (PKR 25,000,000) for a violation in the market for genuine spare parts; and
 - iv. Pakistani Rupees Fifteen Million (PKR 15,000,000) for a violation in the market for human resources.

PAMADA is therefore liable to pay a total sum of Pakistani Rupees One Hundred Forty Million (PKR 140,000,000). SCN No.26 is hereby disposed of.

82. With regards to the Member Undertakings, we have made out no violations in any of the relevant markets. SCN Nos. 27 to 32 and 34 to 69 are therefore hereby disposed of without penalty. SCN No. 33 was issued to M/s. Prime Defense Motors which is no longer in business. The SCN to it is, therefore, disposed of as such.

83. We reiterate here that the Commission remains vigilant against all forms of collusion and cartelization that may take place in any market, including the automobile sector. These anti-competitive activities affect not just the market players but the general public as well. Whenever the Commission becomes aware of any such anti-competitive activity it will spare no effort to take the violators to task.

¹¹ Regulating Cartels in Europe, Harding C and Joshua J, pg 16, ed 2010.



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Javed
Secretary
Competition Commission of Pakistan

84. Finally, we find it important to stipulate here that associations of undertakings have the ability to effect advantageous changes for their members at the policy level. These associations are at liberty to take decisions regarding industry related and policy matters at the governmental level, such as PAMADA itself has also been in the practice of doing. Undertakings must remember, however, that working together is always to be considered a precarious line to walk. Where any commercially sensitive information is being exchanged, undertakings are already in the realm of anti-competitive behaviour, which is being more strictly scrutinized and penalized the world over.

85. The recent decision of the ECJ in the matter of Dole Food Company, Inc. Vs. European Commission¹², sheds further light on such practices. The Court stated that:

"[...] an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object."

86. The decision sets a precedent for information exchange to be an infringement by object and serves as a cautionary tale for all undertakings involved in any such practices. We find it pertinent to point out the scope of this decision to emphasize the demanding approach preferred by other jurisdictions, one which we are inclined to agree with. The Court has further elucidated and provided that:

"a concerted practice may have an anticompetitive object even though there is no direct connection between that practice and consumer prices. Indeed, it is not possible on the basis of the wording of Article 81(1) EC to conclude that only concerted practices which have a direct effect on the prices paid by end users are prohibited."

87. To conclude therefore, we must stress repeatedly the importance of undertakings and associations remaining vigilant as to the threat of potential collusion and other anti-competitive practices. This view has previously been summarized by the Commission



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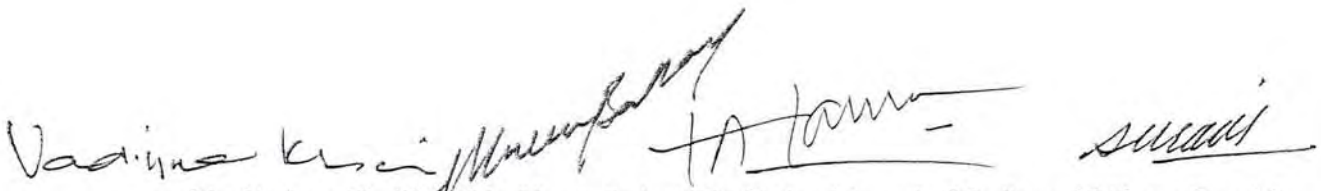
¹² Case C-286/13, P. Dole Food Company, Inc. vs. European Commission (19th March 2015), available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=163028&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=545899>

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in its Order in the matter of Show Cause Notice Issued to M/s. Pakistan Poultry Association. (the 'Poultry Order')¹³ wherein it was stated that:

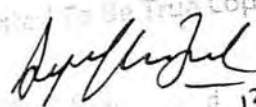
"We believe that trade associations can play an important role in the development of the sector they represent. The Commission has already observed in its ICAP final order that the most important aim of association is to develop consensus amongst its members regarding public policies that affect the sector. Associations also engage in activities that increase awareness of standards and technologies in the industry. At other times, associations may also serve as a platform to share useful information about the sector such as historical pricing data. Such activities are beneficial since they promote competition and competitiveness. However, associations must also be extremely careful about what sort of activities may violate competition law. Discussion, deliberation and decisions regarding purely business concerns like current and future pricing, production and marketing are anti-competitive and should be avoided at all costs by the associations. Associations have a responsibility to ensure that their forum is not used a platform for collusive activities. The rule of thumb is not to allow discussion, deliberations or sharing of sensitive commercial information that may allow members, who are competitors, to co-ordinate business policy. Ensuring that every, or even one, member has a profitable business is not the job of an association."

88. Ordered accordingly.


(Ms. Vadiyya Khalil) (Mr. Mueen Batlay) (Dr. Shahzad Ansar) (Mr. Ikram Ul Haque Qureshi)
Chairperson *Member* *Member* *Member*



ISLAMABAD THE 10th APRIL 2015

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¹³ Available at : http://www.cc.gov.pk/images/Downloads/ppa_order_16_august_2010.pdf