



**BEFORE THE  
COMPETITION COMMISSION OF PAKISTAN**

**IN THE MATTER OF  
PAKISTAN SUGAR MILLS ASSOCIATION (PSMA)  
AND MEMBER UNDERTAKINGS  
F. NO: 366/SUGAR ENQUIRY/C&TA/CCP/2020**

Present for Commission:

Ms. Rahat Kaunain Hassan  
*Chairperson*

Ms. Shaista Bano  
*Member*

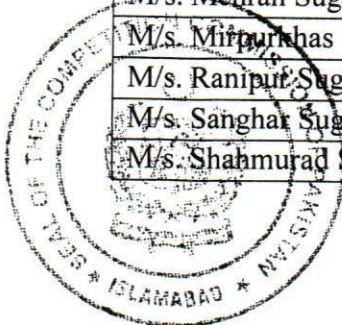
Ms. Bushra Naz Malik  
*Member*

Mr. Mujtaba Ahmad Lodhi  
*Member*

Present for:

Hearing:

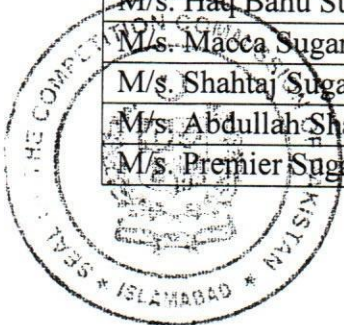
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| M/s. Pakistan Sugar Mills Association | Mr. Salman Akram Raja, ASC<br>Mr. Abuzar Salman Khan Niazi, Advocate<br>Mr. Ghulam Shabir, Advocate<br>Ms. Atira Ikram, Advocate<br>Ms. Mehrunissa Sajjad<br><i>Raja Muhammad Akram &amp; Co.</i> | 15-01-2021<br>22-02-2021<br>12-04-2021               |
| M/s. Al-Abbas Sugar Mills Ltd         | Mr. Abdul Sattar Pirzada, Advocate<br>Mr. Mamoon Nawaz Chaudhry, Advocate<br>Mr. Nasir Mahmood, Advocate<br><i>Hafeez Pirzada Law Associates</i>  | 15-01-2021<br>22-02-2021<br>12-04-2021<br>27-04-2021 |
| M/s. Al Noor Sugar Mills Ltd          |   |  |
| M/s. Army Welfare Sugar Mills Ltd     |   |  |
| M/s. Dewan Sugar Mills Ltd            |   |  |
| M/s. Digri Sugar Mills Ltd            |   |  |
| M/s. Faran Sugar Mills Ltd            |   |  |
| M/s. Habib Sugar Mills Ltd            |   |  |
| M/s. Khairpur Sugar Mills Ltd         |   |  |
| M/s. Matiari Sugar Mills Ltd          |   |  |
| M/s. Mehran Sugar Mills Ltd           |   |  |
| M/s. Mirpurkhas Sugar Mills Ltd       |   |  |
| M/s. Ranipur Sugar Mills Ltd          |   |  |
| M/s. Sanghar Sugar Mills Ltd          |   |  |
| M/s. Shahrada Sugar Mills Ltd         |   |  |



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| M/s. Sindh Abadgar's Sugar Mills Ltd |  |  |
| M/s. SGM Sugar Mills Ltd             |  |  |
| M/s. Tharparkar Sugar Mills Ltd      |  |  |

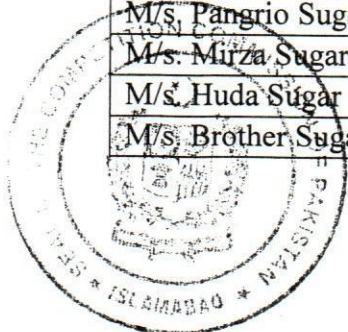
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| M/s. Al-Arabia Sugar Mills Ltd                | Mr. Sikandar Bashir Mohmand, ASC<br>Mr. Mustafa Aftab Sherpao, Advocate<br><i>Mohmand &amp; Sherpao</i>  | 11-01-2021<br>02-03-2021<br>15-04-2021                             |   |
| M/s. JK Sugar Mills Ltd                       |  |  |   |
| M/s. Adam Sugar Mills Ltd                     |  |  |   |
| M/s. Ashraf Sugar Mills Ltd                   |  |  |   |
| M/s. Chanar Sugar Mills Ltd                   |  |  |   |
| M/s. Etihad Sugar Mills Ltd                   |  |  |   |
| M/s. Fatima Sugar Mills Ltd                   |  |  |   |
| M/s. Fecto Sugar Mills Ltd                    |  |  |   |
| M/s. Hamza Sugar Mills Ltd                    |  |  |   |
| M/s. Ittefaq Sugar Mills Ltd                  |  |  |   |
| M/s. Rasool Nawaz Sugar Mills Ltd             |  |  |   |
| M/s. Kashmir Sugar Mills Ltd                  |  |  |   |
| M/s. Madina Sugar Mills Ltd                   |  |  | Barrister Khush Bakht<br>JK Sugar Mills Ltd |
| M/s. Pattoki Sugar Mills Ltd                  |  |  |   |
| M/s. Ramzan Sugar Mills Ltd                   |  |  |   |
| M/s. Tandlianwala I Sugar Mills Ltd           |  |  |   |
| M/s. Tandlianwala II Sugar Mills Ltd          |  |  |   |
| M/s. Popular Sugar Mills Ltd                  |  |  |   |
| M/s. Jahuarabad Sugar Mills Ltd<br>(Kohinoor) |  |  |   |
| M/s. Deharki Sugar Mills Ltd                  |  |  |   |
| M/s. Tandlianwala Sugar Mills Ltd<br>(Zamand) |  |  |   |
| M/s. SW Sugar Mills Ltd (Chishtia)            | Barrister Shazad A. Elahi, Partner<br>Mr. Mussadiq Islam, Senior Associate<br>Mr. Shahmeer Arshad, Associate<br><i>Cornelius, Lane &amp; Mufti</i> | 07-01-2021<br>02-03-2021<br>06-04-2021<br>09-04-2021<br>22-04-2021 |   |
| M/s. Baba Farid Sugar Mills Ltd               |  |  |   |
| M/s. Indus Sugar Mills Ltd                    |  |  |   |
| M/s. JDW-I Sugar Mills Ltd                    |  |  |   |
| M/s. JDW-II Sugar Mills Ltd                   |  |  |   |
| M/s. JDW-III Sugar Mills Ltd                  |  |  |   |
| M/s. Layyah Sugar Mills Ltd                   |  |  |   |
| M/s. Safina Sugar Mills Ltd                   |  |  |   |
| M/s. Noon Sugar Mills Ltd                     |  |  |   |
| M/s. Shekhoo Sugar Mills Ltd                  |  |  |   |
| M/s. RYK Sugar Mills Ltd                      |  |  |   |
| M/s. A-lmoiz II Sugar Mills Ltd               |  |  |   |
| M/s. Al-Moiz Industries (Unit-I)              |  |  |   |
| M/s. Haq Bahu Sugar Mills Ltd                 |  |  | Mr. Rashid Sadiq,<br>RS Corporate Advisory  |
| M/s. Macca Sugar Mills (Pvt.) Limited         |  |  |   |
| M/s. Shahtaj Sugar Mills Ltd                  |  |  |   |
| M/s. Abdullah Shah Ghazi                      |  |  |   |
| M/s. Premier Sugar Mills Ltd                  | Mr. Qausain Faisal Mufti   | 25-01-2021   |   |



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|---------------------------------|---|------------|
| M/s. Chashma I Sugar Mills Ltd  | Advocate Supreme Court  | 01-03-2021 |
| M/s. Chashma II Sugar Mills Ltd |   | 14-04-2021 |
| M/s. Hunza I Sugar Mills Ltd    | Mr. Ali Sibtain Fazli, ASC<br>Mr. Hasham Ahmad Khan Advocate<br><i>Ali Sibtain Fazli &amp; Associates</i> | 24-02-2021 |
| M/s. Hunza II Sugar Mills Ltd   |   | 04-05-2021 |

|                                    |  |  |
|------------------------------------|--|--|
| M/s. Husein Sugar Mills Ltd        | Mr. Mustafa Ali Tariq,<br>Chief Executive Officer<br>Mr. Waseem Saleem<br>Chief Operating & Finance Officer  | 01-02-2021                             |
|                                    |  | 04-03-2021                             |
| M/s. Kamalia Sugar Mills Ltd       | Barrister Iftikharuddin Riaz<br>Advocate Supreme Court<br><i>Bhindari Naqvi Riaz (BNR)</i>   | 26-05-2021                             |
| M/s. Shakarganj I Sugar Mills Ltd  | Mr. Khalid Pasha<br>General Manager Accounts   | 01-02-2021                             |
| M/s. Shakarganj II Sugar Mills Ltd |  | 04-03-2021                             |
| M/s. Kiran Sugar Mills Ltd         | Mr. Rizwan Ahmed,<br>Assistant Manager General   | 01-02-2021<br>04-03-2021               |
| M/s. Khoski Sugar Mills Ltd        | <i>OMNI GROUP</i><br>Mr. Salman Younas<br>Group Chief Operating Officer<br>Mr. Kamal Danish<br>Head of Finance & Business Groups<br>Mr. Zafar<br>Sugar Division Head | 27-01-2021                             |
| M/s. Naudero Sugar Mills Ltd       |  | 18-03-2021                             |
| M/s. New Dadu Sugar Mills Ltd      |  |  |
| M/s. Larr Sugar Mills Ltd          |  |  |
| M/s. Bawany Sugar Mills Ltd        |  |  |
| M/s. Ansari Sugar Mills Ltd        |  |  |
| M/s. Imperial Sugar Mills Ltd      | Mr. Mubashar Ashraf,<br>Company Secretary  | 21-01-2021<br>03-03-2021               |
| M/s. Abdullah Sugar Mills Ltd      | Mr. Muhammad Ahsan Khan,<br>Advocate High Court  | 21-01-2021                             |
| M/s. Haseeb Waqas Sugar Mills Ltd  |  | 03-03-2021<br>19-03-2021<br>28-04-2021 |
| M/s. Khazana Sugar Mills Ltd       | Mr. Muhammad Haroon, Legal Advisor   | 11-02-2021                             |
| M/s. Chaudhry Sugar Mills Ltd      | Mr. Ali Usman, Advocate High Court   | 21-01-2021<br>03-03-2021               |
| M/s. Sakrand Sugar Mills Ltd       | Mr. Usman Mirza, Chief Finance officer   | 20-01-2021<br>18-03-2021               |
| M/s. TMK Sugar Mills Ltd           | Mr. Mohsin Tabbani,<br>Chief Executive Officer   | 01-02-2021                             |
| M/s. Seri Sugar Mills Ltd          |  | 04-03-2021                             |
| M/s. Najma Sugar Mills Ltd         | Nemo   |  |
| M/s. Pangrio Sugar Mills Ltd       | Nemo – Published in Newspaper  |  |
| M/s. Mirza Sugar Mills Ltd         | Nemo   |  |
| M/s. Huda Sugar Mills Ltd          | Nemo – Published in Newspaper  |  |
| M/s. Brother Sugar Mills Ltd       | Nemo   |  |



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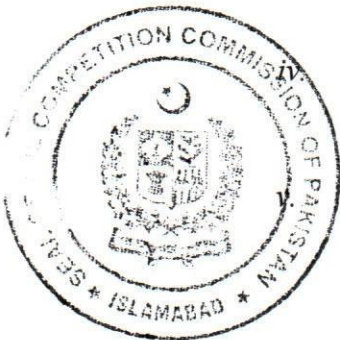
## BACKGROUND FACTS

1. This order shall dispose of proceedings arising out of Show Cause Notice No. 56/2020 to Pakistan Sugar Mills Association (the 'PSMA') and Show Cause Notices Nos. 57/2020 to 140/2020 (collectively referred to as 'SCNs') to 84 sugar mills affiliated with PSMA (hereinafter collectively referred to as the 'undertakings') for *prima facie* violation of Section 4 of the Competition Act, 2010 (hereinafter referred to as the 'Act').
2. Brief facts of the case are that the Competition Commission of Pakistan (the 'Commission') initiated an enquiry on 19 December 2019 under Section 37(1) of the Act in order to analyze "Possible anti-competitive activities in the Sugar Industry". Pursuant to that, an Enquiry Committee was constituted with approved Terms of Reference (the 'ToRs') in terms of clauses (b) and (c) of sub-section (1) of Section 28 read with Section 37 of the Act and to ascertain the state of competition in the sugar industry while taking into account various aspects which included, *inter alia*, the cost of production of sugar.
3. On 7 September 2020, the Commission was presented a working paper proposing amendments in the ToRs as new facts that had come to light pertaining to anti-competitive activities in the sugar sector, in particular, price hike, shortage of supply, collective suspension of crushing activities by sugar mills at the behest of PSMA and the non-supply to Utility Stores Corporation ('USC'). Consideration the same, the Commission resolved to add the following to the ToRs:

- i. *Whether any industry players(s) is prima facie dominant in the terms of Section 2(1)(e) of the Competition Act, 2010 ('the Act'). Assess individual as well as collective dominance as per the law.*
- ii. *Did major players in the Sugar Industry collectively decide to cease crushing of sugarcane during crushing season 2019-20, thereby affecting production of sugar in prima facie violations of Section 4 (Prohibited Agreement/Cartelization) and or 3 (Abuse of Dominant Position) of the Act.*
- iii. *Whether there has been any collective decision by sugar mills for not supplying sugar to tenders floated by Utility Stores Corporation ('USC') or any form of bid rigging in prima facie violation of Section 4(2) (e) of the Act.*

*Whether there is collusion behind recent price hike or current shortage/crisis.*

*Any other anti-competitive conduct that may be identified during the course of the investigation.*

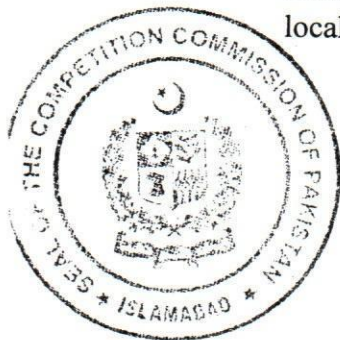


4. On 10 September 2020, the Commission authorized a team of officers of the Commission under Section 34 of the Act to 'enter and search' two premises occupied by the PSMA. On 14 September 2020, the 'enter and search' inspection was carried out at (i) Office No. 102, Mohammad Gulistan Khan House, Fazal-e-Haq Road, Blue Area, Islamabad; and (ii) Unit No. 2, Happy Homes, 38-A, Main Gulberg, Lahore. Keeping available facts in view, duly authorized officers of the Commission conducted another 'enter & search' inspection at M/s JDW Sugar Mills Limited (JDW Group's Sugar Division) on 25 September 2020.
5. During the said 'enter and search' inspections, authorized officers impounded certain evidentiary material comprising, *inter alia*, documents/files, computer & computer-stored data including smart phones. In terms of Section 53 of the Act, the Commission sought assistance from the Federal Investigation Agency ('FIA') for a digital forensic analysis, which was provided by FIA on 25 September 2020 and 07 October 2020.
6. The Enquiry Committee finalized the Enquiry Report on 21 October 2020. It found that there was absence of any individual or collective dominant position in the relevant market. Therefore, a case of abuse of dominance in terms of Section 3 of the Act was not made out. However, with regard to violation of Section 4 of the Act, the Enquiry Committee found *prima facie* evidence of collusive/collective decision behind the sugar shortage crisis and price hike. The relevant para of the Enquiry Report is reproduced herein below:

*"83. Based on the foregoing analysis, it appears that starting from 2012 to date, the conduct of PSMA and all its members vis-à-vis collective discussion on stock positions leading to a decision on the quantity to be exported is tantamount to fixing or setting/controlling supply within the relevant market this has resulted in price hike that is not based on actual/available supply and demand. Hence a prima facie violation of Section 4(1) read with Section 4(2)(c) of the Act. Furthermore, this reduction in domestic stocks/supplies leads to an increase in or maintenance at desired price level in the relevant market, as admitted by PSMA through evidence presented above, which constitutes a prima facie violation of Section 4(2)(a) of the Act by PSMA members."*

7. The Enquiry Report also found that there had existed zonal committees for coordination on local sales, stock positions and production quotas eventually leading to control of local sales. The relevant paragraph of the Enquiry Report is reproduced herein below:

*"92. From the evidence presented above, it appears that since 2017 PSMA Punjab Zone has:*



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- a. Created zonal divisions for the purposes of coordination among respective mills on local sales as the phrase 'Sales committee comprising of one member from each zone to meet periodically' indicates. Share of each zone vs total production in Punjab is mapped out which shows that the coordination in sales is based on share in production.
- b. Stock positions of each mill in each zone are mapped out on a monthly basis.
- c. Mills are also coordinating for start of crushing activity in the respective zones.

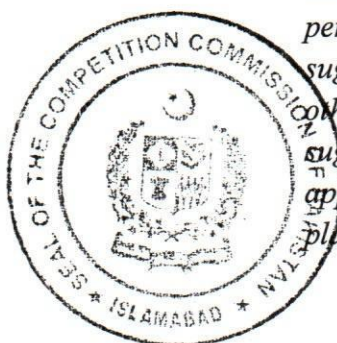
*This zonal division and coordination on sales, stock positions and production quota appears to be none other than monitoring the position with respect to each mill to control local sales and quantity to be sold which is a prima facie violation of Section 4(1) read with Section 4(2)(a) of the Act."*

8. In connection with the information exchange on stock positions, the Enquiry Report has found that:

*"111. From the foregoing and the evidence available, it appears that since 2012 onwards, the platform of PSMA is being used by its member mills in Punjab Zone to share stock information amongst themselves which is considered as sensitive commercial information and such information having a direct bearing on the current and future price of sugar thereby used to control prices and restrict and distort competition in the relevant market in prima facie violation of Section 4(1) read with Section 4(2)(a) of the Act."*

9. The Enquiry Committee also found that the decision to cease crushing in the season 2019-20 was *prima facie* the result of a collective decision on part of the sugar mills. Relevant portion of the Enquiry Report is reproduced herein below:

*"137. From the evidence above, it appears that during the crushing season 2019-20, PSMA Punjab Zone ceased to crush sugar from 30th December 2019 to 11th January 2020. As evident from the data received from the Cane Commissioner Punjab, this closure was a collective decision on part of PSMA Punjab wherein 15 mills appear to have ceased crushing on the call of the association. Evidence impounded from PSMA indicates that during this period PSMA Punjab held back to back meetings with the agenda of sugarcane procurement. The purpose of holding these meetings appears none other than to coordinate on taking decision on crushing and procurement of sugar cane as merely procurement is a commercial decision and does not appear to hold relevance for collective deliberation using the association platform. Therefore, prima facie PSMA Punjab Zone particularly the 15 units*



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*named by the Cane Commissioner Punjab, are taking a collective decision on procurement in violation of Section 4(1) read with Section 4(2)(a) of the Act."*

10. With regard to the USC tenders, the Enquiry Report found as follows:

*"118. In terms of its dealings with USC following conclusions are drawn:*

- a. For tender of 20,000 MT of sugar (closing date of which was 28th March 2019) it appears that mills of PSMA Punjab Zone took a collective decision to fix and divide the quantity of sale, among the members mills who participated in the tender, thus prima facie violating Section 4(1) read with Section 4(2)(c) of the Act.*
- b. For tender dated March 20, 2010 for 100,000 tons of sugar, it appears that vide its letters, dated 26th and 29th March 2010, to USC, PSMA and its members have taken a collective decision on dividing and sharing quantity to be supplied which is a prima facie violation of Section 4(1) read with Section 4(2)(c) of the Act."*

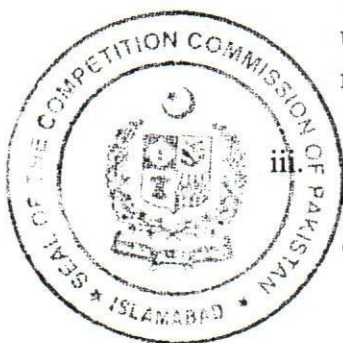
11. Based on the findings and recommendations of the Enquiry Committee, the Commission issued the SCNs to the undertakings. Availing the opportunity of hearing the undertakings made legal and factual arguments separately through different counsel. However, upon review and consideration of these arguments, the Commission considers several legal arguments similar and/or overlapping. Therefore, these are addressed in this other as 'Common Grounds'. However, factual grounds asserted by the undertakings are considered separately.

**A. COMMON GROUNDS**

12. The common legal grounds/objections are as follows:

- i. The Enquiry Report is based on mere deductions and surmises. These do not satisfy the 'standard of proof'. The undertakings maintain that the Commission should adopt the burden of proof, i.e., 'beyond reasonable doubt' instead of the 'balance of probabilities' with regard to the probative value of the evidence available on record.
- ii. The undertakings objected to the constitutional vires, the legality and the validity of the Act on the grounds of lack of Federal Legislative competence, unconstitutional powers to enter and search premises, unavailability of judicial review over actions of the Commission and violation of fundamental rights.

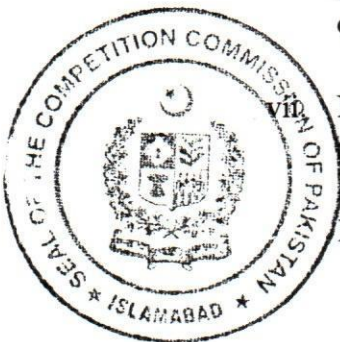
iii. As per Section 24-A General Clauses Act, 1897, discretionary powers exercised by the Commission are subject to the test of reasonableness and fairness. The enquiry procedure is claimed to be unfair as no reason or basis is adduced *qua*



reconstitution of the Enquiry Committee and amendments in ToRs after nine months of the initial constitution the Enquiry Committee. According to the undertakings, the initial ToRs were “to review state of competition in sugar industry”, whereas, amendment in TORs added peripheral matters to the scope of the Enquiry and completely changed its nature. Failure of the Enquiry Committee to mention this fact or reason in the Enquiry Report demonstrates lack of fairness, transparency and *bona fide* on the part of the Commission. Hence, violating Articles 4 and 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 (the “**Constitution**”).

- iv. Amendment in TORs, reconstitution of the Enquiry Committee and issuance of SCNs are not a result of any objective, independent and impartial decision of the Commission. Rather, the Federal Government dictated the Commission to conduct an unlawful roving enquiry. Strict deadlines from the Government caused the Commission to conclude the enquiry in a hasty and arbitrary manner. According to the undertakings, the Commission changed the Enquiry Committee and its ToRs pursuant to a letter of Advisor to Prime Minister as well as Action Matrix dated 21 May 2020 proposed by him. The said Action Matrix was held unlawful by the Sindh High Court and the Islamabad High Court, when certain sugar mills challenged it. However, the matter is still pending adjudication before the Supreme Court of Pakistan. Hence, neither initiation of the Enquiry pursuant to the letter of the Advisor to the Prime Minister is lawful nor there existed any “reasonable grounds” under Section 34 of the Act to “enter and search” the premises. Furthermore, the undertakings had not been made aware of any legality or basis for the purported enter and search inspection; therefore, the Commission is put to strict proof of the same. Hence, due process and safeguards built in the Act have not been complied with.
- v. SCNs have been issued by the Registrar instead of the competent authority and no disclosure is attached with the SCNs for delegation of power under Section 34 of the Act.
- vi. A view/opinion independent of the Enquiry Report should have been formed by the Commission and communicated before initiating proceedings under Section 30 of the Act. The findings of the Enquiry Report are based on certain evidence which the undertakings have not been confronted with, therefore, it does not only prejudice the rights available to the undertakings under the principles of natural justice, but also, nullifies the whole proceedings in the eyes of the law.

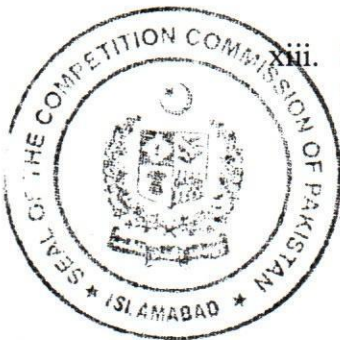
No spill-over effect has been stated in the SCNs as required by the judgment of the Lahore High Court dated 26 October 2020 in the matter of *LPG Association*. Issue of jurisdiction should have been decided at first instance. The Enquiry Report is silent as to how alleged conduct of the Respondent affected national





trade and commerce. Therefore, the undertakings are not subject to the jurisdiction of the Commission.

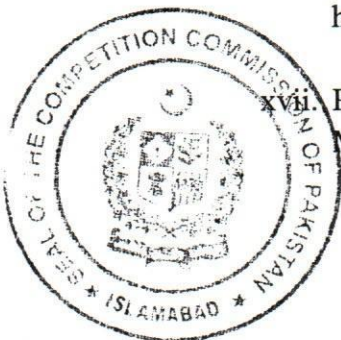
- viii. The Commission has not complied with the test provided by the Islamabad High Court in the matter of *National Feeds* (2016 CLD 1688), which concerns the availability of sufficient material before initiation of enquiry. According to the undertakings, the Commission cannot proceed on the basis of insufficient facts or when allegations are not substantiated by *prima facie* evidence. Initiation of Enquiry for an alleged contravention of the provisions of Chapter II is claimed to be an adverse action for an undertaking, which not only has undermined the repute of a commercial entities in the market, but also, entailed inconvenience and intrusive proceedings. Besides, the undertaking claimed not to have received any copy of the underlying decision of the Commission.
- ix. The undertakings have resorted to the plea of 'Government Action'. Reliance is placed on *Eastern Railroad v Noerr Motor Freight [365 US 127 (1961)]*, wherein the alleged restraint upon trade was a result of valid governmental action, as opposed to private action, hence, no violation of competition law was made out.
- x. No opportunity of proper hearing was afforded to the undertakings at Enquiry stage or before taking any adverse action. Reliance is placed on *Abdul Majeed Zafar v Governor of Punjab, 2007 SCMR 330*.
- xi. Documents and other materials impounded during the Enquiry are without lawful authorization, hence, cannot be used as evidence against the undertakings.
- xii. Relevant geographic market is incorrectly defined as "*white refined sugar in the whole of Pakistan*". Various factors such as commercial/domestic consumers, distinct cost structures and production procedures, different legal/regulatory frameworks and Government interventions are ignored. Sugar and sugarcane are provincial subjects, regulated by provincial laws and operate in different markets. Even otherwise, the Enquiry Report has defined relevant market in the context of Section 3 instead of determining it in the context of Section 4 of the Act. Whereas, it would be necessary in the light of the Honourable Lahore High Court's judgement in the case of *LPG Association* to ascertain the 'spill-over effect'.
- xiii. Data pertaining to sugar exports was unlawfully obtained by the Enquiry Committee from the Federal Board of Revenue (FBR). Information obtained, employed or utilized by the Enquiry Committee is also in violation of Section 155H of Customs Act, 1969. The Enquiry Committee was not delegated power to seek information in such manner in accordance with the Competition



Commission (Conduct of Business) Regulations, 2007. Therefore, actions of the Enquiry Committee are unlawful.

- xiv. The PSMA has a licensed mandate under the Trade Organization Ordinance, 2007 (now Trade Regulation Act, 2013), to share statistics pertaining to sugar industry and obtain any concessions, rights and privileges from the Government in the best interests of the sugar industry. Unless and until that license is set aside by a court of competent jurisdiction, the Commission would not be able to proceed in the matter. Objectives of PSMA enshrined in its Memorandum of Association (“MOA”) allow, as per the law and its licensed mandate, PSMA to collect, compile and circulate statistics pertaining to the sugar industry. The context in which the Sugar Advisory Board (“SAB”) requires the PSMA to attend its meetings and play its role is not appreciated by the Enquiry Committee.
- xv. On the basis of merely 8 month data, the Enquiry Report unfairly jumped to an incorrect conclusion that there has always been increase in price due to export. The undertakings claimed that there isn’t any direct link between export of sugar and rise in its price. The statement that ‘*export always raises prices*’ is actually linked to retail price, not to the ex-mill price. If there was increase in ex-mill prices after export then it would have proved that the undertakings had obtained benefit from export and raised prices, however, such is not the case.
- xvi. Allegation *qua* ‘*collective discussion of stock position*’; ‘*reduction in domestic stocks/supplies*’ and ‘*coordination on local sales*’ are unfounded. Data on sales, stock positions and production is already available with the Cane Commissioners and is easily accessible. Reliance is placed on the *Pharma Bureau Order and PAMADA Order* in the context that the data that is already in public domain does not constitute strategic and commercially sensitive information. The Enquiry Report erroneously treated the data so shared as ‘*Sensitive Commercial Information*’. No information is commercially sensitive which could have violated competition law. Even otherwise, the real reason for getting stock reports is to provide the same to the SAB whose function is to look at overall supply and demand situation on the basis which recommendations are made with respect to imports and exports. The role of SAB, therefore, cannot be ignored which requires the PSMA to verify data collected through the Cane Commissioners. There is no way that this information could be secret amongst the members of PSMA, neither does it have any role in determination of stock positions.

xvii. PSMA is a separate legal entity and it is responsible for its own actions. Members of PSMA cannot be held liable for any action of PSMA.



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- xviii. Section 34 of the Act does not permit seizure and search of cell phones. Purported search authorizations were limited to documents and computers and did not include mobile phones of the employees. Likewise, data retrieved from 'WhatsApp' group is not admissible.
- xix. Evidence annexed with Enquiry Report cannot be relied upon until authors or documents relied by the Enquiry Report are cross-examined.
- xx. *Actus Reus* i.e. actual entry into an agreement or making a decision is required which the Enquiry Report has failed to establish.
- xxi. There is no decision or agreement between sugar mills in the instant matter. As per the undertakings, '*decision of an association*' is distinct from '*agreement between undertakings*'. First, there would be need to prove the decision, only then, agreement between mills to implement that decision could be established. Even otherwise, there is no evidence as to the fact that the undertakings had actually acted upon or played a role in implementation of the alleged decision(s) by the PSMA. Evidence relied in the Enquiry Report is merely statements by the Chairman of PSMA and cannot be equated with a formal decision of PSMA itself which otherwise could be made only through a resolution passed by all concerned stakeholders in accordance with its Articles of Association.
- xxii. Section 4 of the Act does not encompass '*Concerted Practices*'.
- xxiii. Right of lobbying is acknowledged by the Commission and is not an offense.
- xxiv. The participation in the USC tenders of 2010 and 2019 was not anti-competitive as all applicable laws, rules, regulations and procedures had been duly followed and that the documents on record attached with the Enquiry Report were not sufficient to establish any violation of Section 4 of the Act.

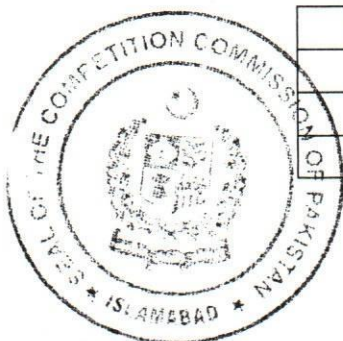
**B. GROUNDS SPECIFIC TO UNDERTAKINGS**

13. The Commission issued SCNs to 84 sugar mills which are categorised below based on counsel/authorized representatives who appeared before the Commission.

**Group 1 – Counsel for PSMA Mr. Salman Akram Raja & Mr. Abdul Sattar Pirzada Co-Counsel for PSMA as well as Counsel for 17 other Sugar Mills:**

14. First group comprises of the following:

| S. No | Name of Undertakings                  | SCN No. |
|-------|---------------------------------------|---------|
| 1.    | M/s. Pakistan Sugar Mills Association | 56      |
| 2.    | M/s. Al-Abbas Sugar Mills Ltd         | 103     |
| 3.    | M/s. Al Noor Sugar Mills Ltd          | 104     |



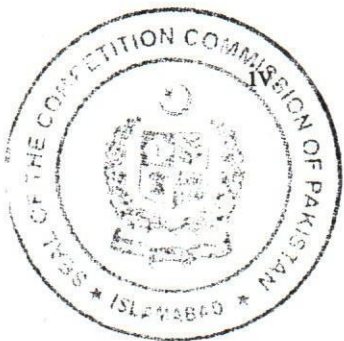
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|-----|--------------------------------------|-----|
| 4.  | M/s. Army Welfare Sugar Mills Ltd    | 106 |
| 5.  | M/s. Dewan Sugar Mills Ltd           | 108 |
| 6.  | M/s. Digri Sugar Mills Ltd           | 110 |
| 7.  | M/s. Faran Sugar Mills Ltd           | 111 |
| 8.  | M/s. Habib Sugar Mills Ltd           | 113 |
| 9.  | M/s. Khairpur Sugar Mills Ltd        | 114 |
| 10. | M/s. Matiari Sugar Mills Ltd         | 118 |
| 11. | M/s. Mehran Sugar Mills Ltd          | 119 |
| 12. | M/s. Mirpurkhas Sugar Mills Ltd      | 120 |
| 13. | M/s. Ranipur Sugar Mills Ltd         | 126 |
| 14. | M/s. Sanghar Sugar Mills Ltd         | 128 |
| 15. | M/s. Shahmurad Sugar Mills Ltd       | 130 |
| 16. | M/s. Sindh Abadgar's Sugar Mills Ltd | 131 |
| 17. | M/s. SGM Sugar Mills Ltd             | 132 |
| 18. | M/s. Tharparkar Sugar Mills Ltd      | 133 |

15. These undertakings submitted written replies to the SCNs on 17 December 2020. Subsequently, opportunity of hearing was provided on 5 different dates (3 hearings for PSMA, and 2 hearings for the other 17 undertakings). Counsels presented arguments at length. Main arguments of the undertakings included those, which have been previously reproduced in Part A above (Common Grounds), however, the gist of the arguments specific to the undertakings in this group are restated below:

- i. Market is neither oligopolistic nor monopolistic; hence, no company or group is able to control quantities or prices.
- ii. There is sharp contrast between the present case and other cases by the Commission, such as *All Pakistan Cement Manufacturers Association*, *PAMADA* and *Pharma Bureau*, which were based on 'decisions' by associations. In *PAMADA*, the association issued direct instructions to its members. In *APCMA*, there was an agreement on price fixing. In *Pharma Bureau*, meetings were held and directives were issued pursuant to the agreement.
- iii. All that the Enquiry Report has to hold the undertakings culpable is communication on stock information, whereas, the context in which stock positions in Pakistan are shared has been ignored by the Enquiry Report i.e. for meaningful participation in SAB meetings.

Sugar sector is highly regulated, therefore, allegation in the Enquiry Report that PSMA or member mills attempted to control the supply/quantity of sugar, is erroneous. Instead of being controlled by market forces, the sugar industry is highly regulated where minimum support price is fixed by the provincial



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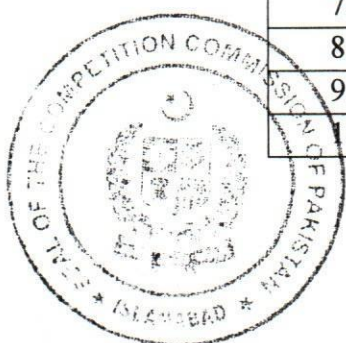
governments. Entry into the relevant market is restricted by law and export of sugar is contingent upon permission granted by the Federal Government. The role of SAB and Economic Coordination Committee (ECC) has also not been covered in the Enquiry Report. SAB determines sugar surplus subsequent to which it recommends export quantities to the Federal Government. ECC in return makes decision on sugar export which is then sent to the Federal Cabinet for approval. PSMA has been notified as a member of SAB and part of its function as its member is to monitor the stock data collected by the Cane Commissioners.

- v. Jurisprudential approach towards information sharing has shifted from *per se* to the *rule of reason*, given the potential benefits of information sharing for the industry. In the instant matter, there has been no anti-competitive intent behind sharing of information. The *Dole* test is not fully applicable in the instant matter. The undertaking relied on various American and Indian cases (discussed later).
- vi. The simplistic narration that PSMA manipulates surplus, exports and hence prices, is incorrect. Assertions of the Enquiry Report are not backed by facts.
- vii. The Enquiry Report is limited to the Punjab zone and the creation of Zonal committees. There is no evidence that these committees actually functioned or at least attempted to control local sales.
- viii. The right to lobby the Government for deregulation of prices is recognized by the Commission in its order in the matter of *Jamshoro Joint Venture & LPG Association*. The right to lobby is further recognized by the Commission in the 2010 provisional PSMA Order.

**Group 2 – Counsel Mr. Shehzad Elahi from Cornelius Lane & Mufti**

16. Second group of undertakings consists of the following 13 undertakings, who submitted their written replies to SCNs on 17 December 2020:

| Sr. No | Name of Undertakings               | SCN No. |
|--------|------------------------------------|---------|
| 1.     | M/s. SW Sugar Mills Ltd (Chishtia) | 65      |
| 2.     | M/s. Baba Farid Sugar Mills Ltd    | 61      |
| 3.     | M/s. Indus Sugar Mills Ltd         | 77      |
| 4.     | M/s. JDW-I Sugar Mills Ltd         | 80      |
| 5.     | M/s. JDW-II Sugar Mills Ltd        | 81      |
| 6.     | M/s. JDW-III Sugar Mills Ltd       | 112     |
| 7.     | M/s. Layyah Sugar Mills Ltd        | 84      |
| 8.     | M/s. Safina Sugar Mills Ltd        | 85      |
| 9.     | M/s. Noon Sugar Mills Ltd          | 88      |
| 10.    | M/s. Shekhoo Sugar Mills Ltd       | 94      |



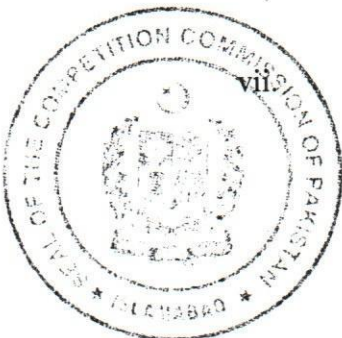
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|-----|----------------------------------|-----|
| 11. | M/s. RYK Sugar Mills Ltd         | 98  |
| 12. | M/s. Al-Moiz II Sugar Mills Ltd  | 101 |
| 13. | M/s. Al-Moiz Industries (Unit-I) | 137 |

17. Opportunity of hearing was availed by these undertakings on four occasions, when Counsel presented detailed arguments in the matter. The grounds taken were similar to those taken by PSMA. However, few arguments specific to these undertakings are reproduced herein below:

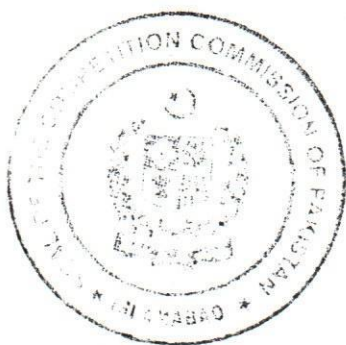
- i. Enquiry Report suffers from procedural defects such as improper exercise of discretion and lack of jurisdiction and proper authorization of the Enquiry Committee.
- ii. The Enquiry Report, which is the basis of the SCNs, is general in nature and makes no specific mention of any agreement reached by the respondents, nor does it otherwise relate specifically to the respondents. Hence, the Commission could not have been satisfied as required under Section 30 of the Act about purported contraventions at time of issuing SCNs.
- iii. Sales are made by sugar mills on an ex-mill basis, to wholesalers and final customers.
- iv. Denied the existence of coordination committees. Information was shared with PSMA directly, not through coordination committees. Information sharing is not denied, however, it is claimed to have been done for legitimate purposes. It was done on purpose keeping the circumstances of the country in view.
- v. Inference of Enquiry Report is incorrect that if individual mills shared data on stock, it had helped them to devise future strategies or that sharing of stock data had made them aware of each other's stock so they had lobbied the Federal Government to affect prices in the market. However, what benefit or competitive edge the mills had gained is not proved in the Enquiry Report. There is neither any proof in the Enquiry Report which establishes that availability of sensitive data with the mills served a sinister purpose for their advantage.
- vi. The mandate of the Enquiry Report was to check refusal to supply which was concluded very briefly in the Enquiry Report that there was no collective refusal to supply.

vii. USC has had a bad track record of payment to sugar mills which made them reluctant to participate in its tenders. The Government requested PSMA to play a positive role. PSMA is just a letterbox in this matter. However, the PSMA



does not decide capacity or quantity, rather, only convinces mills to participate in the tender.

- viii. On the allegation relating to stoppage of crushing, entire reliance of Enquiry Report is placed on a Report by the Cane Commissioner Punjab (Annex F1 to the Enquiry Report). Only a presumption can be made as to whether it is prepared by the Cane Commissioner or not since there is no documentary chain attached with it detailing how it was obtained or came in possession of the Enquiry Committee. Hence, it has no legal value. Sugar mills operate on the basis of ground realities and the fact is that crushing was ceased on account of non-availability of sugarcane, as is evident from the Enquiry Report.
- ix. SCNs against the undertakings are premature because the SCN against PSMA needs to be decided first.
- x. The respondents are not liable for actions of their employees who participated in alleged meetings of the PSMA.
- xi. Paragraph 76 of the Enquiry Report mentions/reproduces minutes of the 52<sup>nd</sup> AGM, however, these statements are not included in Annex B5 where the minutes are placed. There is a similar discrepancy with regards to proceedings of the 54<sup>th</sup> AGM placed at Annex B7.
- xii. The following cases were emphasized and relied upon by Counsel:
  - a. The Commission's *PAMADA Order* where member undertakings were found not liable for not implementing the decisions of *PAMADA*. Reliance was also placed on the excerpt of the *Pakistan Banking Association Order* regarding implementation of decisions by the association.
  - b. The *Pharma Bureau Order* and the Competition Commission of India's Order in the matter of Alleged Cartelization in Flashlights Market in India were relied upon to argue that information exchanges in the said cases were not held to be anti-competitive.
  - c. The Indian Competition Commission's sugar order where it was emphasized that the sugar sector in India is similar to Pakistan and in such a similar environment, the participation of undertakings in a meeting to purportedly impose a minimum ex-floor price and the conduct of exchanging data was not found to be anti-competitive. Moreover, in such a regulated environment it was observed by the Indian Competition Commission that cartelization was a remote possibility and that government intervention distorts competition.

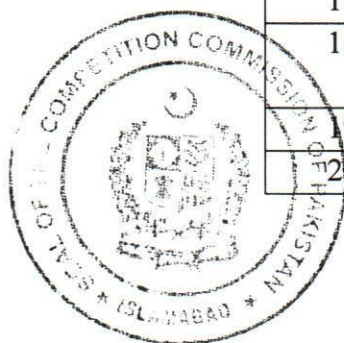


- d. The US case of *Re: Baby Food Antitrust Litigation* where information was exchanged but not found to be anti-competitive. Moreover, it was observed that information exchanges alone were insufficient to establish prohibited cartel-like behavior and merely treated as a '*plus factor*'.
- e. The EU case of *O2 (Germany) GmbH & Co* where it was emphasized that any assessment of the alleged concerted practices must be examined in their economic and legal context.
- f. The EU case of *ABB Ltd.* to support the argument that the burden of proof is on the Commission and that the presumption of innocence lies in favor of the undertakings. Counsel further cited the Honorable Islamabad High Court decision in *Muhammad Abid Farooq versus the State and another* to argue that the doctrine of presumption of innocence is enshrined in Article 10A of the Constitution.

**Group 3 – Counsel Barrister Sikandar Bashir Mohmand**

18. Third group of undertakings consists of following 21 sugar mills, who submitted their written replies on 18 December 2020:

| Sr. No | Name of Undertakings                          | SCN No. |
|--------|---|---------|
| 1.     | M/s. Al-Arabia Sugar Mills Ltd                | 58      |
| 2.     | M/s. Adam Sugar Mills Ltd                     | 59      |
| 3.     | M/s. Ashraf Sugar Mills Ltd                   | 60      |
| 4.     | M/s. Chanar Sugar Mills Ltd                   | 63      |
| 5.     | M/s. Etihad Sugar Mills Ltd                   | 66      |
| 6.     | M/s. Fatima Sugar Mills Ltd                   | 67      |
| 7.     | M/s. Fecto Sugar Mills Ltd                    | 68      |
| 8.     | M/s. Hamza Sugar Mills Ltd                    | 74      |
| 9.     | M/s. Ittefaq Sugar Mills Ltd                  | 79      |
| 10.    | M/s. Rasool Nawaz Sugar Mills Ltd             | 75      |
| 11.    | M/s. Kashmir Sugar Mills Ltd                  | 82      |
| 12.    | M/s. Madina Sugar Mills Ltd                   | 87      |
| 13.    | M/s. Pattoki Sugar Mills Ltd                  | 89      |
| 14.    | M/s. Ramzan Sugar Mills Ltd                   | 90      |
| 15.    | M/s. Tandlianwala I Sugar Mills Ltd           | 95      |
| 16.    | M/s. Tandlianwala II Sugar Mills Ltd          | 96      |
| 17.    | M/s. Popular Sugar Mills Ltd                  | 97      |
| 18.    | M/s. Jahuarabad Sugar Mills Ltd<br>(Kohinoor) | 99      |
| 19.    | M/s. JK Sugar Mills Ltd                       | 100     |
| 20.    | M/s. Deharki Sugar Mills Ltd                  | 109     |



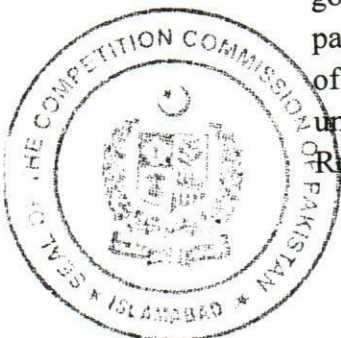
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|-----|---|-----|
| 21. | M/s. Tandlianwala Sugar Mills Ltd<br>(Zamand) | 140 |
|-----|---|-----|

19. Opportunity of hearing was availed by the undertaking on three occasions where Counsel presented detailed arguments in the matter. The grounds taken were similar to those taken by PSMA. However, few arguments specific to these undertakings are restated below:

- i. The evidence of lobbying relied in the Enquiry Report is insufficient. Speech of the Chairman PSMA is the primary proof of lobbying. However, the alleged speech was directed at the Government. Even otherwise, speeches cannot be treated as direct evidence. The undertakings have not received any email pertaining to sharing of production or sale quotas.
- ii. The Enquiry Report has not appreciated the context of the market in which sugar is exported.
- iii. Existence of any agreement is denied. Minutes of AGMs are relied as evidence by the Enquiry Report, whereas, merely sitting in or attending the AGMs is not objectionable. There exists no linkage or proof of participation on the part of undertakings in the alleged policy/decision or implementation of proposal.
- iv. JK and JDW are two separate legal entities. JK was incorporated in 2017 whereas it took part in crushing season of 2019. It cannot be held liable for making decisions since 2012.
- v. JK Sugar Mills to be assessed independently because it became a member of PSMA in 2018 so the allegations do not fully apply to it.
- vi. The allegation that mills have lobbied to their advantage is negated by the fact that decision on export is made by the Government.
- vii. The reason for stoppage of crushing was non-availability of sugarcane. Cane sellers have cartel and they decide when and how much to sell. It is cane sellers who withheld sugarcane and caused increase in its prices.
- viii. Allegation in the Enquiry Report as to bid rigging is false. It has not been denied that a competitive tender did not take place. All tenders floated by USC are governed, *inter alia*, by the PPRA rules, 2004 and all persons and entities that participate in such procedures have to abide by these rules. There is no question of bidders manipulating the bidding process. The 2010 USC tender does not fall under the purview of the Commission and cannot be a subject of the Enquiry Report as it is a matter that pre-dates the Act.



- ix. Counsel relied upon, *inter alia*, EU cases pertaining to the burden and standard of proof to be applied. He also relied upon similar cases, which were also cited by other Counsels concerning the principle that a restriction of competition made due to government intervention would not be in violation of competition law.

**Group 4 – Authorized Representative Mr. Rashid Sadig**

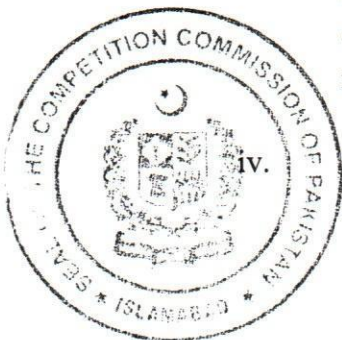
20. Fourth group comprises of the following four undertakings:

| S. No | Name of Undertaking               | SCN No. |
|-------|-----------------------------------|---------|
| 1.    | M/s. Haq Bahu Sugar Mills Ltd     | 69      |
| 2.    | M/s. Macca Sugar Mills (Pvt.) Ltd | 86      |
| 3.    | M/s. Shahtaj Sugar Mills Ltd      | 91      |
| 4.    | M/s. Abdullah Shah Ghazi          | 102     |

21. The undertakings submitted their replies on 17 December 2020 and availed the opportunity of hearing on three different occasions (eight dates were provided to the undertakings by the Commission, out of which five were adjourned on the Representative's request). During the hearing, the Representative made arguments on the same grounds as previous undertakings had made, however apart from denial of allegations against the undertakings, few of his assertions specific to the undertakings represented by him are as follows:

- i. The Commission issued generic SCNs to the undertakings for establishment of allegation, which are otherwise not established against the undertakings he has represented. Due process of law as laid down in Regulation 22 of the Competition Commission (General Enforcement) Regulations, 2007 is not followed. The allegation of Enquiry Report is adopted by the Commission in its SCNs without any examination, which has led the Commission to issue SCNs in absence of any material evidence against the undertakings.
- ii. The Commission should first decide the matter against the PSMA and other related undertakings for making any decision and the matter against the undertakings represented by him may be decided afterwards.
- iii. A request was made to the Commission to provide a copy of the opinion based on which the enquiry was initiated. However, the request has not been acceded to by the Commission on the account that the document so requested was confidential in nature and copy could not be provided. The undertakings reserved the right to get a copy of the document, which has held them culpable.

The undertakings have not been informed or made clear if any reference from the Federal Government was pending with the Commission.



- v. SCNs are missing certain factual and legal aspects. For example, the undertakings have not been informed as to what information was impounded against them during the 'enter and search' inspection. Neither were the undertakings made party to the Enquiry. The Representative relied on *Omni Bus Order* of the Securities and Exchange Commission of Pakistan (SECP), which holds that the decision of the SECP must be made independent of the Enquiry Report keeping in view facts of the case.
- vi. The Enquiry Report is unclear on the fact that how the export of sugar has impacted the prices or how the undertakings have impacted prices. The Enquiry Report is totally silent on ex-mill prices while ignoring the role of retailers and wholesale dealers.
- vii. The undertakings have not provided any sugar to USC.
- viii. As to participation in coordination committee, the undertakings asserted that the Enquiry Report has not evidenced how the meetings had any effect on competition.
- ix. As to the allegation related to stoppage of crushing, it is asserted that Haq Bahu Sugar Mill had to stop crushing only for 10 days on account of unavailability of sugarcane. Whereas, Abdullah Shah Ghazi Sugar Mill only functioned for a few days in 2019.
- x. The Enquiry Report does not take into account that prices of sugar varied across different cities of Pakistan. The undertakings have not participated or been part of the coordination committee. Merely attending PSMA AGM or coordination committee meeting is not objectionable. Even otherwise, the undertakings have not acted on any decision taken by the PSMA, hence, they cannot be held accountable.
- xi. Objection regarding the way only national/countrywide average price data is presented in the Enquiry Report, whereas, there is a price differential between cities.
- xii. Being historical in nature and already available in public domain, the information shared with PSMA is not sensitive and therefore has no effect on competition.
- xiii. As to the AGM held in 2012, discussion on sensitive information was not an agenda item of the meeting. Even otherwise, the member undertakings only listened to it but did not deliberate on it. As to the minutes of AGM held in 2014, closing remarks of the Chairman should not be taken as decision.



- xiv. Reliance on *Pharma Bureau Order* in context that the price discussion does not distort competition. If the instant matter is not dealt with in the manner similar to *Pharma Bureau*, then Article 25 of Constitution would be violated.
- xv. Reliance on *PFMA Order* and *PPA Order* in the context that the Commission issued show cause notices only to the associations involved in the referred cases instead issuing it separately to member undertakings of the associations.
- xvi. Reliance on *All India Sugar Association* case in the context that sugar was essential commodity whose price depended upon many factors and there had been no impact on the prices of sugar due to information exchange among the member mills. In the *Flash Light case*, the Competition Commission of India has held that there must be a correlation between prices and the alleged conduct.

**Group 5 – Counsel Mr. Qausain Faisal Mufti**

22. Fifth group of undertakings consists of following three undertakings represented by Mr. Qausain Faisal Mufti, who submitted written replies on 08 January 2021:

| Sr. No. | Name of Undertakings            | SCN No. |
|---------|---------------------------------|---------|
| 1.      | M/s. Chashma-I Sugar Mills Ltd  | 135     |
| 2.      | M/s. Chashma II Sugar Mills Ltd | 136     |
| 3.      | M/s. Premier Sugar Mills Ltd    | 138     |

23. The undertakings were afforded opportunity of hearing eight times. Counsel made detailed arguments only in two hearings. Primarily, the undertakings filed an application for reconstitution of the Commission's Bench on the ground that constituting a full bench in the instant proceedings has deprived the undertakings from their right of appeal under Section 41 of the Act. Furthermore, Counsel argued that there exists a conflict of interest as one member of the Bench had already been involved as enquiry officer in the sugar matter before the Commission earlier in 2009, and that one of the members on the Bench was also on the Bench of the previous order passed against PSMA. Hence, the undertakings apprehend prejudice that may be caused to the instant proceedings. In response to the application, the Commission decided to proceed with the matter on merits while holding the application to be decided later along with the final order. Therefore, application shall be decided in analysis part of the instant order. Nevertheless, the undertakings argued at length on merits including those, which are mentioned earlier in the Common Grounds. In addition to that, gist of arguments specifically related to these undertakings is summarised below:

Chashma Sugar Mills are juristic persons separate from the PSMA. There is no evidence as to the fact that Chashma had been involved in any decision making exercise.



- ii. No witness is examined by the Commission, therefore, no document with the Enquiry Report is formally proved under Article 17 of Qanun-e-Shahadat Order, 1984 (QSO).
- iii. As per Section 33 of Act, the proceedings before the Commission are of civil nature and should be treated as civil suit. The Competition Act is silent on the mode in which proceedings are to be conducted, therefore as per settled principle, the procedure laid down in the CPC is to be adopted. Having said that, witnesses are neither summoned nor documents are examined. The Registrar of the Commission ought to have been brought before the Commission as witness because he issued SCNs.
- iv. Likewise, the Act is silent on the mode in which recovery memos are supposed to be prepared, therefore, procedure laid down in Criminal Procedure Code (CrPC) and QSO should have been adopted or otherwise it would have no value in the eyes of law. Not only that, recovery memos are not provided to the undertakings. If recovery memos are taken to be confidential documents then neither the Enquiry Report could have relied upon these documents as evidence nor could public proceedings be conducted. Emphasis is made on recovery of mobiles phones and WhatsApp messages from that mobiles. Section 34 of the Act does not encompass mobile phone which could be confiscated. Since, mobile phones are forensically analyzed, therefore, the undertakings claimed it to be valueless until forensic analysts appear as witnesses or cross-examined as per provisions of QSO. Even otherwise, a document is *per se* admissible, without calling the analysts as witness, only under Section 510 of Cr.PC. In any other case, the authority would need to call and examine analysts or expert and the alleged party would be given opportunity of cross examination. Nothing is recorded in writing as to the fact that for what purpose the forensic report was obtained.
- v. The Enquiry is only to the extent of the Punjab zone. The mills represented by Counsel are situated in the territorial limits of KPK and the allegations in the Enquiry Report do not apply to them. There is no evidence on the record to implicate these three undertakings. Data retrieved during enquiry is related to the Punjab zone only. There is no allegation on the undertakings from KPK as to sharing of stock information.

There is no legal authorization available on the record on the behalf of undertakings to appoint representative for the PSMA meetings. The undertakings did not participate as juristic persons in any meeting.

It is admitted that at the time of infringement, the Chairman PSMA was part of Premier Sugar Mills. However, merely the fact that a telephone of an employee



of the undertaking has been used would not be enough to hold the undertaking culpable. The important point is what has actually come directly from the undertaking. There must be evidence as to the fact that prohibited activity was intended or occurred.

- viii. All alleged minutes of PSMA meetings do not provide inference that any collective decision was taken. Mere participation in the alleged meeting would not mean collusion or decision on part of the undertaking. There is no bar on discussing stabilization of prices.

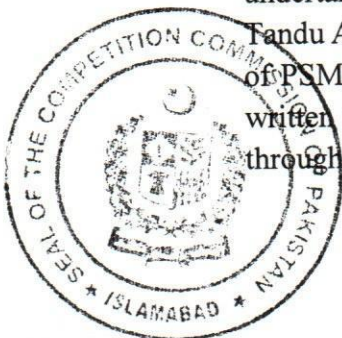
**Group 6 – Counsel Mr. Ali Sibtain Fazli**

24. Sixth group consists of two undertakings namely Hunza I Sugar Mill Ltd (SCN No. 71/2020) and Hunza II Sugar Mill Ltd (SCN No. 72/2020) who filed their written replies on 3 December 2020. The undertakings were given opportunity of hearing to present their case seven times. However, Counsel availed only three dates and argued his case at length. Primarily, he asserted the same defences as covered in the Common Grounds, however, gist of few arguments specific to these two undertakings are restated below:

- i. Alleged stoppage of crushing occurred on account of non-availability of sugarcane. The Enquiry Report refers to the call of PSMA to close crushing but there is no evidence as to closing of crushing. As per data provided by the undertakings along with its reply to the SCNs, there were no cane trollies at the gate of the undertakings, which shows unavailability of sugarcane.
- ii. Information is only shared with the Cane Commissioners. Information of one sugar mill can be accessed from the Cane Commissioner by another sugar mill. Hence, information is in public domain and does not constitute sensitive commercial information.
- iii. As to allegation that platform of the PSMA has been used for the USC tender, it is asserted that tenders of the USC are only meant for sugar mills having membership of the PSMA. USC issues tenders through TCP, therefore, it is the Government who creates the situation where only members of PSMA could participate in USC tender.

**Group 7 – Self Representation through Authorized Representatives**

25. Seventh group consists of the Omni Group comprising of nine sugar mills. One undertaking (New Thatta) is a sick unit. Two sugar mills (Chamber Sugar Mill and Fandu Allah Yar Sugar Mill) are not served SCNs on the account of not being members of PSMA. Remaining six undertakings listed below are served SCNs, who filed their written replies on 20 November 2020 and 21 January 2021 and were represented through the company officials:



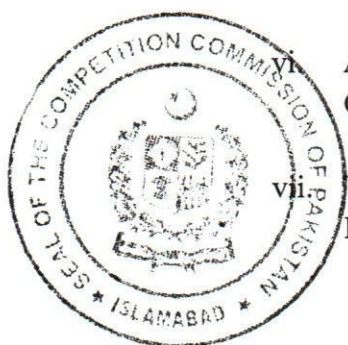
| Sr. No. | Name of Undertaking           | SCN No. |
|---------|-------------------------------|---------|
| 1.      | M/s. Khoski Sugar Mills Ltd.  | 115     |
| 2.      | M/s. Larr Sugar Mills Ltd     | 117     |
| 3.      | M/s. Naudero Sugar Mills Ltd  | 123     |
| 4.      | M/s. New Dadu Sugar Mills Ltd | 124     |
| 5.      | M/s. Bawany Sugar Mills Ltd   | 107     |
| 6.      | M/s. Ansari Sugar Mills Ltd   | 105     |

26. These undertakings availed opportunity of hearing on two different dates and briefly made assertion which are given below:

- i. Ansari Sugar Mills, a member of PSMA, is the only undertaking that is a listed company and represented the Omni Group on PSMA forum since 2015, whereas, other undertakings are not members of PSMA. The undertaking had attended the PSMA's meetings to discuss varieties of sugarcane and legal actions brought by the farmers against mills. However, the process of attending meetings has been discontinued for last three years. The only representative who would represent the Omni Group on PSMA forum is behind the bars since last year.
- ii. The undertakings have been under investigation and surprise inspections by different government agencies. Accounts are frozen whereas representative of the FBR have been constantly watching over for last two years to make sure that the undertakings have not held any carryover stock from the preceding year. Crushing and sugar production is carried out at a very limited capacity due to liquidity problems and sugar stocks finish soon. Therefore, the undertakings have not been in position to hold sugar stock in current season.
- iii. Last export by the undertakings was done in the year 2017-18. Last profit was made in 2016. Financial Statements have not been audited since 2017.
- iv. Sugar is a very competitive market. PSMA has different provincial chapters that do not operate together. It also has different committees, chairmen and separate dynamics.
- v. It is admitted that here are no barriers or checks over trans-provincial movement of sugar or sugarcane.

As to Bawany's participation in the USC tender, it is asserted that the Omni Group did not own Bawany in 2010. It was bought by the Group in 2011.

- vii. The undertakings denied to have supplied any information on stocks to the PSMA since such exercise would cause no effect on prices or advantage for the



undertakings. It is claimed that purpose of sharing information is only to pursue the Government to take timely decisions on export, failing which, blame for not informing the Government timely would be put on the undertakings. However, the undertakings admitted to have not refused PSMA to comply with the decision of PSMA taken in 47<sup>th</sup> AGM.

viii. It is admitted that the purpose of participation in Sindh Zonal Committee was to reflect on broader issues of the sugar sector.

### **Group 8 – Self Representation through Authorized Representatives**

27. This group consists of undertakings who submitted their replies on different dates and appeared in their individual capacity. These undertakings along with gist of their arguments are mentioned below:

#### **M/s Husein Sugar Mill Ltd**

28. The undertaking filed its reply to the SCN No. 76/2020 on 21 November 2020 and opportunity of hearing was availed on two different dates. The officials of the undertaking appeared and argued the case at length. Gist of arguments specific to the undertaking is given below:

- i. The undertaking plainly denied to have attended any meeting of the PSMA where alleged decision was made. However, it is admitted that the undertakings participated in the PSMA's meetings to discuss recommendations for changes to legislations.
- ii. It is claimed that the sugar industry is highly regulated and markets condition makes it inevitable to export sugar. The PSMA had been printing ads in every major newspaper asking the government to allow export without any subsidy.
- iii. The undertaking denied existence of any coordination on stock positions. It is claimed that different undertakings have a different percentage of stock sold/left over. Therefore, each undertaking in the industry is working on the basis of its own working capital requirements.
- iv. It is asserted that the coordinators in the coordination committee are all CFOs who are not entrusted with a job to sell sugar. The purpose of the coordination committees is solely to recommend legislative changes. However, the undertaking denied attendance in any meeting of the coordination committees.

Fact of the industry is that the undertakings with no political affiliations suffer.

As to allegation of cessation of crushing activity, the undertaking noted that the Cane Commissioner included its name mistakenly. Any decision of stoppage of crushing would not have made economic sense when majority of the



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undertakings had remained open and only 15 were closed. On top of that, the undertakings would have incurred cost due to closure of crushing. The reason behind stoppage of crushing was unavailability of sugarcane since the grower was not ready to provide sugarcane at a price unviable to them. Once price for sugarcane arose the undertakings started receiving sugarcane.

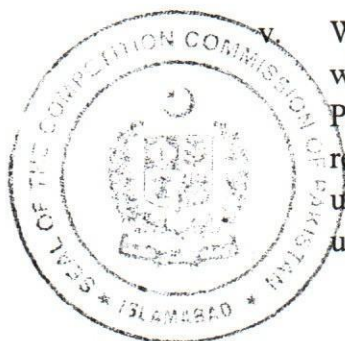
- vii. It is argued that cost incurred for production of sugar, as stated in the Enquiry Report did not take into account cost of sales and sales tax. The undertaking disagreed with the figures for cost of production since it varied from undertaking to undertaking and region to region. The Enquiry Report is claimed to have ignored the fact that shortage of sugar caused by other stakeholders in the industry is the real reason behind increase in prices.
- viii. The undertaking has blamed distinct Government policies in the Provinces, which are not addressed by the Enquiry Report, as a real reason for distortion of competitive condition in the industry.

M/s Shakarganj (I & II) Sugar Mills Ltd

29. The undertakings submitted rely to the SCN No. 92/2020 and 93/2020 on 21 November 2020 and availed opportunity of hearing on two different dates. Gist of arguments specific to these undertakings are as follows:

- i. The Enquiry Report has considered the undertakings as big producers by erroneously calculating market share of the mills as 5%. Actual market share of the undertaking is only 0.94%.
- ii. Due to financial constraints, large amount of stock of the undertaking is sold during the crushing season in order to generate working capital. Therefore, the undertaking is not usually left much of the stock at the end of crushing season; leaving it in a position not to participate in any cartel arrangement for stock sharing and/or for increasing prices.
- iii. The undertaking neither exported the sugar for last 3 years nor claimed subsidy for the exports it has previously made.
- iv. Production unit of the undertakings were closed on account of non-availability of sugarcane, not on account of the PSMA call.

With regard to ceasing crushing, the undertakings denied to have coordinated with PSMA. Instead, it was admitted that it had a difference of opinion with PSMA with regard to commencement of crushing and PSMA expressed its reservations to the undertaking for not followings its directions, when no other undertaking had operated in October. It was stated that this reflects that the undertaking has not colluded with PSMA.



- vi. Shakarganj has never denied supply to USC even during financial crunch and were ready to supply sugar against Letter of Credit of around 1000 MT (willing to negotiate contingent upon clearance of dues). The representative noted that they deal with USC themselves and PSMA has no role to play.
- vii. The undertakings are members of PSMA, however, they have not had any active participation nor exchanged any data with it.

M/s Kiran Sugar Mill Ltd

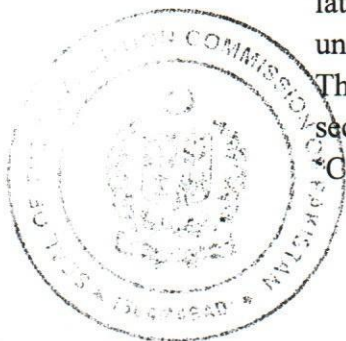
30. The undertaking submitted its reply to SCN No. 116/2020 on 16 November 2020 and availed opportunity of hearing on two different dates to make brief arguments. Primarily, it claimed to have received no subsidy from the Government nor has it been a member of PSMA. Moreover, it is also claimed that the allegation as to sugar stock or sharing information with respect to sugar stock is not sustainable for the reason that the undertaking has low production capacity and would sell its entire sugar stock during the season.

M/s Seri Sugar Mills Ltd and M/s TMK Sugar Mills Ltd

31. The two undertakings, represented by the same representative, submitted their reply to SCNs No. 129/2020 and 134/2020 on 24 February 2021 and availed opportunity of hearing on two different dates to make brief arguments. Primarily, it admitted to have PSMA's membership, however, it claimed that such membership had become redundant on account of non-payment of membership fee since 2012. It was further claimed that the undertakings have not been in operation since 2012. Consequently, it was claimed, the undertakings have had no participation in any of the meetings held by PSMA.

M/s Imperial Sugar Mills Ltd

32. The undertaking submitted its reply to SCN No. 78/2020 on 02 December 2020, availed opportunity of hearing on two different dates and made brief arguments as under:
  - i. It is claimed that the only evidence in the Enquiry Report against the undertaking is participation in the PSMA's 47<sup>th</sup> AGM dated 17 October 2012. Membership of the undertaking is suspended since 2014.
  - ii. Furthermore, it is claimed that the undertaking comprises two production units located in *Mian Channu* and *Phalia*, former is already sold in 2017, whereas latter is not in operation since 2014 and open for sale. Therefore, the undertakings have not been involved in any production activities since 2017-18. The undertaking also claimed to have shifted business activities from sugar sector to investment sector, for that reason and changed its name in 2020 from 'Colony Sugar Mill' to 'Imperial Sugar Mill'.



M/s Khazana Sugar Mills Ltd

33. The undertaking filed written reply to the SCN No. 139/2020 on 12 December 2020 wherein it simply denied to have any coordination with the PSMA. Representative for the undertaking, Mr. Muhammad Haroon, appeared before the Commission for hearing on 11 February 2021, when it was stated that the mill was an inactive member of PSMA since the last 10 to 15 years and had not participated in any meeting of PSMA.

M/s Sakrand Sugar Mills Ltd

34. The undertaking submitted its reply to SCN No. 127/2020 on 19 January 2021 and availed opportunity of hearing on two different dates. It argued as follows:

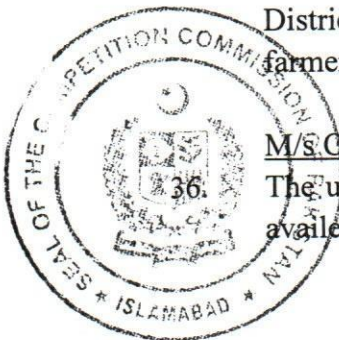
- i. It has the lowest market share in terms of stocks positions or production. The undertaking claimed to have issues with the stocks which ends even at the beginning of the year leaving behind nothing to export or to contribute in any alleged actions of the PSMA.
- ii. The undertaking also denied to have participated in alleged annual meetings of the PSMA and claimed itself to have kept itself separate from the PSMA. The undertaking denied to have obtained any benefits from the decisions of the PSMA. It also plainly denied to have endorsed any decision taken by the PSMA. The undertaking also claimed that neither it has ever supplied sugar to the USC nor has capacity to supply.
- iii. It is admitted that the undertaking is member of the PSMA, receives information in the form of circulars and provides information to the PSMA randomly if it requires. However, due to less voting shares, it claimed to have very little value in the PSMA.
- iv. It is admitted that the undertaking can sell sugar anywhere, there is no restriction on sale.

M/s Abdullah Sugar Mill

35. The undertaking filed its reply to SCN No. 57/2020 on 08 December 2020, availed opportunity of hearing on two different dates and briefly claimed suspension of its membership since 2013 on account of non-payment of membership fee to the PSMA. However, no evidence is produced in this regard. The undertaking also denied export of sugar and claimed to have sold its sugar stock in the domestic market. As to the year 2019-20, it is claimed that its crushing activity was stopped in March 2020 when the District Commissioner confiscated its sugar stock on account of non-payment to farmers.

M/s Chaudhary Sugar Mill

36. The undertaking submitted its reply to SCN No. 64/2020 on 18 December 2020 and availed opportunity of hearing on two different dates and argued as under:

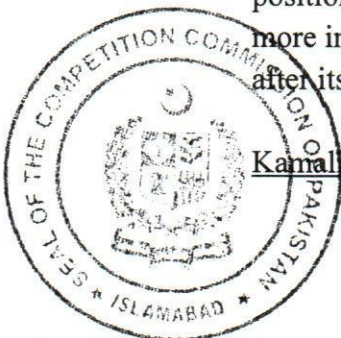


- i. Primarily, it claimed to have relocated from one geographical area to another. After relocation, the Supreme Court of Pakistan barred production activity in 2017. The undertaking claimed to have not been in operation since then nor shared any information on sugar stocks with the PSMA in the alleged meeting. As to the PSMA's membership, the undertaking claimed to have no active membership on account of non-payment of fee, hence, denied its participation in any meeting of PSMA since 2017. However, it admitted to have received letters from the PSMA even after 2017 which were not responded by the undertaking on account of inactive operations.
- ii. As to the presence of its data on production and stock position in the record of the PSMA, the undertakings stated that the last information shared with the PSMA was in March 2016 when the purpose of sharing information was to assist the Government and SAB through the PSMA. However, the undertaking claimed to be unaware of the fact that how information pertaining to September 2016 had reached the PSMA, which originally was shared by the undertaking only with the Cane Commissioner.
- iii. As for the undertaking's attendance of the 52<sup>nd</sup> AGM of PSMA held on 2 January 2018, it was solely for the purpose of Agenda items related to the annual review of sugar for the year 2016-2017 and approval of audited accounts for the year 2016-2017 as the undertaking had still been partially operational at the time.
- iv. The undertaking also argued that it had not been a part of any zonal committee or attended any meeting which had the agenda of forming a zonal committee.
- v. As for export of sugar, the undertaking simply claimed to have exported very little quantity of sugar so far.

M/s Haseeb Waqas Sugar Mills Ltd

37. The undertaking submitted its reply to SCN No. 70/2020 on 17 April 2021 and availed opportunity of hearing on two different dates. Primarily, it claimed to be no more member of the PSMA since 2014 on account of non-payment of membership fee. Further, it denied attendance of any meeting of the coordination committee of the PSMA as well as sharing of any information on its stocks with members of the PSMA. It also claimed to have no carry over stock, however, provided information on its stock position only to the Cane Commissioner. Moreover, the undertaking claimed to be no more in operations since 2016 on account of its closure by Order of the Supreme Court after its relocation. As to the export, the undertaking denied any export on its part.

Kamalia Sugar Mills



38. Kamalia was issued SCN No. 83/2020 on 4 November 2020. In furtherance of its reply dated 25 May 2021, Counsel for the undertaking presented oral arguments on 26 May 2021 as under:

- i. Kamalia had no knowledge of documents provided in Enquiry Report and denied involvement in any anti-competitive activities.
- ii. Kamalia had sold its entire assets to Two Star industries. This was after crushing season 2015-16. Kamalia has attached a letter of Two Star dated 15 November 2016 in which Two Star is informing the Cane Commissioner that it is commencing crushing, which shows that Two Star was operating the business.
- iii. The reason that the business was sold because the price of sugar in the years leading up to sales was below cost of production. Kamalia and its employees did not attend the alleged meetings.
- iv. Kamalia requested the Bench to take a lenient view keeping in mind the fact that information was for period after sale of the mill.

**Group 9 – No Appearance**

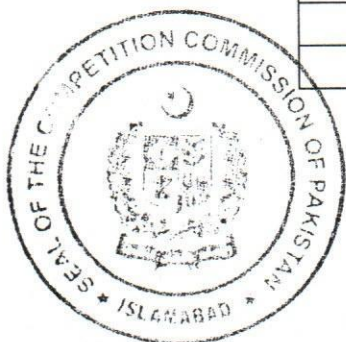
39. Following is the group of undertakings which are served SCNs, however, these three undertakings neither submitted written replies nor availed opportunity of hearing before the Commission despite service of notice that if no appearance is tendered or right of hearing is not availed, the Commission shall proceed *ex parte*:

| Sr. No. | Name of Undertaking            | SCN No. |
|---------|--------------------------------|---------|
| 1.      | M/s. Mirza Sugar Mills Ltd     | 121     |
| 2.      | M/s. Najma Sugar Mills Ltd     | 122     |
| 3.      | M/s. Brothers Sugar Mills Ltd. | 62      |

**Group 10 – No Appearance: where SCNs' were not received but published**

40. This category consists of two undertakings, which did not receive the SCN, therefore, the Commission decided to publish SCNs in the newspaper. Despite such publication, these undertakings did not appear before the Commission. Hence, the Commission has proceeded *ex-parte*:

| Sr. No. | Name of Undertaking           | SCN No. |
|---------|-------------------------------|---------|
| 1.      | M/s. Pangrio Sugar Mills Ltd  | 125     |
| 2.      | M/s. Huda Sugar Mills Limited | 73      |



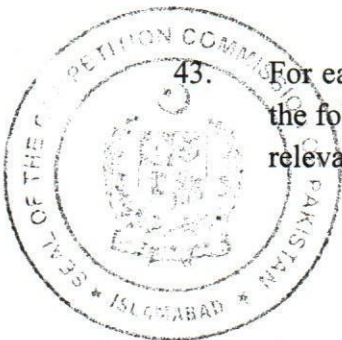
41. It is only appropriate to acknowledge all undertakings cooperated in the conduct of these proceedings. In particular, we record our appreciation for the able assistance rendered by Mr. Salman Akram Raja and Mr. Shehzad Elahi.

### ISSUES

42. In light of the written submissions, arguments and evidence presented by the undertakings, and the contents of the SCNs and the Enquiry Report, the following main issues arise in determining whether the undertakings are in violation of Section 4 of the Act:

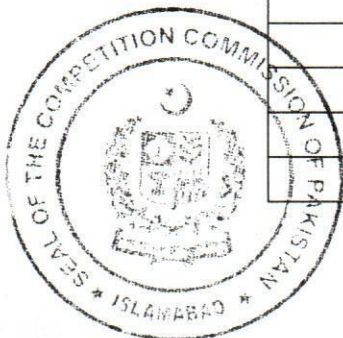
- I. *Whether PSMA and the undertakings have shared sensitive commercial stock information amongst themselves with the object or effect of distorting competition in the relevant market in violation of Section 4(1) read with Section 4(2)(a) of the Act?*
- II. *Whether the undertakings, including PSMA, made a collective decision to determine export quantities, amounting to fixing or setting/controlling supply of white refined sugar in the relevant market in violation of Section 4(1) read with Section 4(2)(c) of the Act?*
- III. *Whether such collective determination of export quantities led to an increase in or maintenance of a desired price level in the relevant market in violation Section 4(1) read with Section 4(2)(a) of the Act?*
- IV. *Whether PSMA made a decision/practice of creating zonal divisions in Punjab to coordinate sales, stock positions and production quota to monitor and control quantity to be sold in violation of Section 4(1) read with Section 4(2)(a) of the Act?*
- V. *Whether PSMA and its member undertakings who participated in the 2019 and 2010 USC tenders respectively took a collective decision/indulged in a collective bargaining practice to fix and divide the quantity of sale among themselves in violation of Section 4(1) read with Section 4(2)(c) of the Act?*
- VI. *Whether PSMA decided to cease crushing of sugarcane, thus, as a result of such decision, 15 undertakings in the Punjab zone ceased crushing activity in violation of Section 4(1) read with Section 4(2)(a) of the Act?*

43. For ease of reference and to facilitate a focused analyses, we classify undertakings in the following groups based on each issue or violation alleged to have been committed, relevant to the undertakings:



**Issue I – Sharing of Sensitive Commercial Information – 2012 to 2020  
(Punjab Mills)**

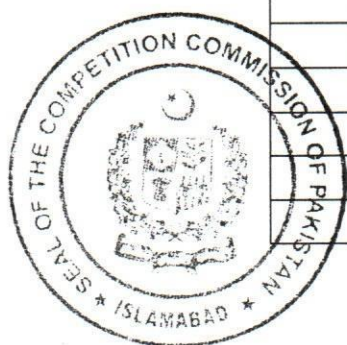
|    |  |
|----|--|
| 1  | Abdullah Sugar Mills Ltd                   |
| 2  | Al Arabia Sugar Mills                      |
| 3  | Adam Sugar Mills Ltd                       |
| 4  | Ashraf Sugar Mills Ltd                     |
| 5  | Baba Farid Sugar Mills Ltd                 |
| 6  | Brothers Sugar Mills Ltd                   |
| 7  | Chanaar Sugar Mills Ltd                    |
| 8  | Chaudhry Sugar Mills Ltd                   |
| 9  | SW Sugar Mills Limited (Formerly Chishtia) |
| 10 | Eithad Sugar Mills Ltd                     |
| 11 | Fatima Sugar Mills Ltd                     |
| 12 | Fecto Sugar Mills Ltd                      |
| 13 | Haq Bahu Sugar Mills Ltd                   |
| 14 | Haseeb Waqas Sugar Mills Ltd               |
| 15 | Hunza I Sugar Mills Ltd                    |
| 16 | Hunza II Sugar Mills Ltd                   |
| 17 | Huda Sugar Mills Ltd                       |
| 18 | Hamza Sugar Mills Ltd                      |
| 19 | Rasool Nawaz Sugar Mills Ltd               |
| 20 | Hussein Sugar Mills Ltd                    |
| 21 | Indus Sugar Mills Ltd                      |
| 22 | Ittefaq Sugar Mills Ltd                    |
| 23 | JDW-I Sugar Mills Ltd                      |
| 24 | JDW-II Sugar Mills Ltd                     |
| 25 | Kashmir Sugar Mills Ltd                    |
| 26 | Kamalia Sugar – Two Star Mills Ltd         |
| 27 | Layyah Sugar Mills Ltd                     |
| 28 | Safina Sugar Mills Ltd                     |
| 29 | Macca Sugar Mills (Pvt.) Limited           |
| 30 | Madina Sugar Mills Ltd                     |
| 31 | Noon Sugar Mills Ltd                       |
| 32 | Pattoki Sugar Mills Ltd                    |
| 33 | Ramzan Sugar Mills Ltd                     |
| 34 | Shahtaj Sugar Mills Limited                |
| 35 | Shakarganj I Mills Limited                 |
| 36 | Shakarganj II Mills Limited                |
| 37 | Sheikhoo Sugar Mills Ltd                   |
| 38 | Tandlianwala I Sugar Mills Limited         |
| 39 | Tandlianwala II Sugar Mills Limited        |



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|----|--|
| 40 | Imperial Sugar Mills Ltd                       |
| 41 | Popular Sugar Mills                            |
| 42 | R.Y.K. Sugar Mills Ltd                         |
| 43 | Jauharabad (Formerly Kohinoor) Sugar Mills Ltd |
| 44 | JK   |
| 45 | Almoiz II Sugar Mills Ltd.                     |
| 46 | PSMA   |

**Issue II & III – Collective Decision Export Quantities and resultant Control of Supply – 2012 to 2020**

|    |  |
|----|--|
| 1  | Abdullah Sugar Mills Ltd                   |
| 2  | Al Arabia Sugar Mills                      |
| 3  | Adam Sugar Mills Ltd                       |
| 4  | Ashraf Sugar Mills Ltd                     |
| 5  | Baba Farid Sugar Mills Ltd                 |
| 6  | Brothers Sugar Mills Ltd                   |
| 7  | Chanaar Sugar Mills Ltd                    |
| 8  | Chaudhry Sugar Mills Ltd                   |
| 9  | SW Sugar Mills Limited (Formerly Chishtia) |
| 10 | Eithad Sugar Mills Ltd.                    |
| 11 | Fatima Sugar Mills Ltd                     |
| 12 | Fecto Sugar Mills Ltd                      |
| 13 | Haq Bahu Sugar Mills Ltd                   |
| 14 | Haseeb Waqas Sugar Mills Ltd               |
| 15 | Hunza I Sugar Mills Ltd                    |
| 16 | Hunza II Sugar Mills Ltd                   |
| 17 | Huda Sugar Mills Ltd                       |
| 18 | Hamza Sugar Mills Ltd                      |
| 19 | Rasool Nawaz Sugar Mills Ltd               |
| 20 | Hussein Sugar Mills Ltd                    |
| 21 | Indus Sugar Mills Ltd                      |
| 22 | Ittefaq Sugar Mills Ltd                    |
| 23 | JDW-I Sugar Mills Ltd                      |
| 24 | JDW-II Sugar Mills Ltd                     |
| 25 | Kashmir Sugar Mills Ltd                    |
| 26 | Kamalia Sugar – Two Star Mills Ltd         |
| 27 | Layyah Sugar Mills Ltd                     |
| 28 | Safina Sugar Mills Ltd                     |
| 29 | Macca Sugar Mills (Pvt.) Limited           |
| 30 | Madina Sugar Mills Ltd                     |
| 31 | Noon Sugar Mills Ltd                       |

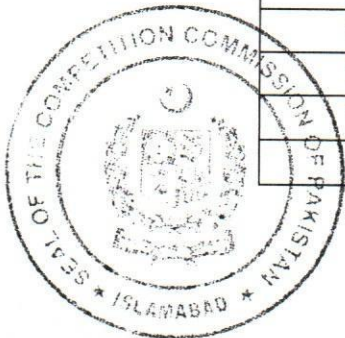


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|----|--|
| 32 | Pattoki Sugar Mills Ltd                        |
| 33 | Ramzan Sugar Mills Ltd                         |
| 34 | Shahtaj Sugar Mills Limited                    |
| 35 | Shakarganj I Mills Limited                     |
| 36 | Shakarganj II Mills Limited                    |
| 37 | Sheikhoo Sugar Mills Ltd                       |
| 38 | Tandlianwala I Sugar Mills Limited             |
| 39 | Tandlianwala II Sugar Mills Limited            |
| 40 | Imperial Sugar Mills Ltd                       |
| 41 | Popular Sugar Mills                            |
| 42 | R.Y.K. Sugar Mills Ltd                         |
| 43 | Jauharabad (Formerly Kohinoor) Sugar Mills Ltd |
| 44 | JK   |
| 45 | Almoiz II Sugar Mills Ltd                      |
| 46 | Abdullah Shah Ghazi Sugar Mills Ltd            |
| 47 | Al-Abbas Sugar Mills Ltd                       |
| 48 | Al-Noor Sugar Mills Ltd                        |
| 49 | Ansari Sugar Mills Ltd                         |
| 50 | Army Welfare Sugar Mills Ltd                   |
| 51 | Bawany Sugar Mills Ltd                         |
| 52 | Dewan Sugar Mills Ltd                          |
| 53 | Deharki Sugar Mills Ltd                        |
| 54 | Digri Sugar Mills Ltd                          |
| 55 | Faran Sugar Mills Ltd                          |
| 56 | J.D.W-III Sugar Mills Ltd                      |
| 57 | Habib Sugar Mills Ltd                          |
| 58 | Khairpur Sugar Mills Ltd                       |
| 59 | Khoski Sugar Mills Ltd                         |
| 60 | Kiran Sugar Mills Ltd                          |
| 61 | Larr Sugar Mills Ltd                           |
| 62 | Matiari Sugar Mills Ltd                        |
| 63 | Mehran Sugar Mills Ltd                         |
| 64 | Mirpur Khas Sugar Mills Ltd                    |
| 65 | Mirza Sugar Mills Ltd                          |
| 66 | Najma Sugar Mills Ltd                          |
| 67 | Naudero Sugar Mills Ltd                        |
| 68 | New Dadu Sugar Mills Ltd                       |
| 69 | Pangrio Sugar Mills Limited                    |
| 70 | Sakrand Sugar Mills Ltd                        |
| 71 | Sanghar Sugar Mills Ltd                        |
| 72 | Seri Sugar Mills Ltd                           |

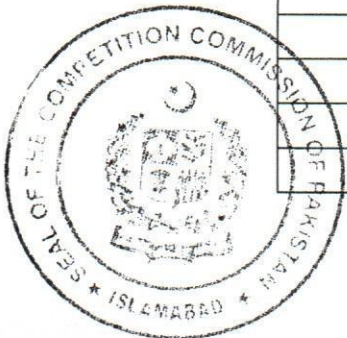


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|----|--------------------------------|
| 73 | Shahmurad Sugar Mills Ltd      |
| 74 | Sindh Abadgars Sugar Mills Ltd |
| 75 | SGM Sugar Mills Ltd            |
| 76 | Tharparkar Sugar Mills Ltd     |
| 77 | Ranipur Sugar Mills Ltd        |
| 78 | Chashma-I Sugar Mills Ltd      |
| 79 | Chashma-II Sugar Mills Ltd     |
| 80 | Al-Moiz I Sugar Mills Ltd      |
| 81 | Premier Sugar Mills            |
| 82 | Khazana Sugar Mills Ltd        |
| 83 | Tandlianwala Zamand            |
| 84 | TMK                            |
| 85 | PSMA                           |

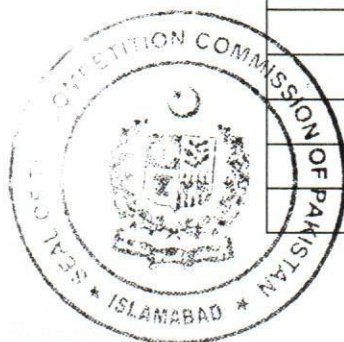
| <b>Issue IV – Zonal Divisions - 2017 to 2020 (Punjab mills)</b> |  |
|---|--|
| 1   | Abdullah Sugar Mills Ltd                   |
| 2   | Al Arabia Sugar Mills                      |
| 3   | Adam Sugar Mills Ltd                       |
| 4   | Ashraf Sugar Mills Ltd                     |
| 5   | Baba Farid Sugar Mills Ltd                 |
| 6   | Brothers Sugar Mills Ltd                   |
| 7   | Chanaar Sugar Mills Ltd                    |
| 8   | Chaudhry Sugar Mills Ltd                   |
| 9   | SW Sugar Mills Limited (Formerly Chishtia) |
| 10  | Eithad Sugar Mills Ltd                     |
| 11  | Fatima Sugar Mills Ltd                     |
| 12  | Fecto Sugar Mills Ltd.                     |
| 13  | Haq Bahu Sugar Mills Ltd                   |
| 14  | Haseeb Waqas Sugar Mills Ltd               |
| 15  | Hunza I Sugar Mills Ltd                    |
| 16  | Hunza II Sugar Mills Ltd                   |
| 17  | Huda Sugar Mills Ltd                       |
| 18  | Hamza Sugar Mills Ltd                      |
| 19  | Rasool Nawaz Sugar Mills Ltd               |
| 20  | Hussein Sugar Mills Ltd                    |
| 21  | Indus Sugar Mills Ltd                      |
| 22  | Ittefaq Sugar Mills Ltd                    |
| 23  | JDW-I Sugar Mills Ltd                      |



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|----|--|
| 24 | JDW-II Sugar Mills Ltd                         |
| 25 | Kashmir Sugar Mills Ltd                        |
| 26 | Kamalia Sugar – Two Star Mills Ltd             |
| 27 | Layyah Sugar Mills Ltd                         |
| 28 | Safina Sugar Mills Ltd                         |
| 29 | Macca Sugar Mills (Pvt.) Limited               |
| 30 | Madina Sugar Mills Ltd                         |
| 31 | Noon Sugar Mills Ltd                           |
| 32 | Pattoki Sugar Mills Ltd                        |
| 33 | Ramzan Sugar Mills Ltd                         |
| 34 | Shahtaj Sugar Mills Limited                    |
| 35 | Shakarganj I Mills Limited                     |
| 36 | Shakarganj II Mills Limited                    |
| 37 | Sheikhoo Sugar Mills Ltd                       |
| 38 | Tandlianwala I Sugar Mills Limited             |
| 39 | Tandlianwala II Sugar Mills Limited            |
| 40 | Imperial Sugar Mills Ltd                       |
| 41 | Popular Sugar Mills                            |
| 42 | R.Y.K. Sugar Mills Ltd                         |
| 43 | Jauharabad (Formerly Kohinoor) Sugar Mills Ltd |
| 44 | JK   |
| 45 | Almoiz II Sugar Mills Ltd                      |
| 46 | PSMA   |

| <b>Issue V – USC Tenders</b> |                       |
|------------------------------|-----------------------|
| <i>USC 2019 Tender</i>       |                       |
| 1                            | Indus                 |
| 2                            | Shakarganj I          |
| 3                            | Shakarganj II         |
| 4                            | Shahtaj               |
| 5                            | Layyah                |
| 6                            | Safina                |
| 7                            | Almoiz II Sugar Mills |
| 8                            | Ashraf                |
| 9                            | JDW – I               |
| 10                           | JDW – II              |
| 11                           | Huda                  |
| 12                           | Fatima                |
| 13                           | Pattoki               |
| 14                           | Etihad                |
| 15                           | Two Star (Kamalia)    |

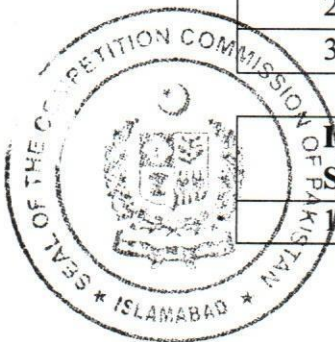


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|                        |                            |
|------------------------|----------------------------|
| 16                     | Sheikhoo                   |
| 17                     | Hunza I                    |
| 18                     | Hunza II                   |
| 19                     | RYK                        |
| 20                     | PSMA                       |
| <i>USC 2010 Tender</i> |                            |
| 1                      | SW Sugar Mills             |
| 2                      | Ramzan                     |
| 3                      | Chashma                    |
| 4                      | Tandlianwala I             |
| 5                      | Tadlianwala II             |
| 6                      | Tadlianwala (Zamand)       |
| 7                      | Fatima                     |
| 8                      | Hamza                      |
| 9                      | Ittefaq                    |
| 10                     | Kashmir                    |
| 11                     | JDW - I                    |
| 12                     | JDW -II                    |
| 13                     | JDW - III                  |
| 14                     | Channar                    |
| 15                     | Indus                      |
| 16                     | Bawani                     |
| 17                     | Faran                      |
| 18                     | Al-Abbas                   |
| 19                     | Shah Murad                 |
| 20                     | Mirpur Khas                |
| 21                     | Safina                     |
| 22                     | Layyah                     |
| 23                     | Hunza I                    |
| 24                     | Hunza II                   |
| 25                     | Al-Noor                    |
| 26                     | Almoiz Industries (Unit-I) |
| 27                     | Almoiz II Sugar Mills      |
| 28                     | Digri                      |
| 29                     | Sanghar                    |
| 30                     | PSMA                       |

**Issue VI – Cease Crushing of Sugarcane – 2019-2020 Crushing Season**

|   |        |
|---|--------|
| 1 | Chanar |
|---|--------|



|    |                    |
|----|--------------------|
| 2  | Hunza I            |
| 3  | Husein             |
| 4  | SW Sugar Mills     |
| 5  | Huda               |
| 6  | Safina             |
| 7  | Two Star (Kamalia) |
| 8  | Madina             |
| 9  | Tandlianwala I     |
| 10 | Hunza II           |
| 11 | JK                 |
| 12 | Haq Bahu           |
| 13 | Layyah             |
| 14 | Shakarganj II      |
| 15 | Baba Farid         |
| 16 | PSMA               |

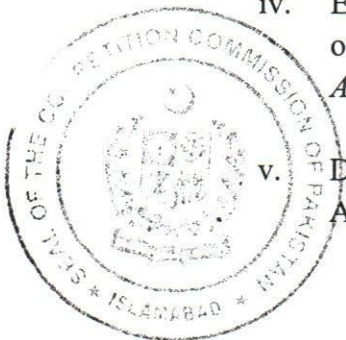
44. Arguments by Counsel on behalf of the undertakings, as outlined above, are discussed in turn with reference to the relevant issue.

### ANALYSIS

#### **C. PRELIMINARY/TECHNICAL OBJECTIONS**

45. Briefly, the undertakings have raised the following broad preliminary/technical objections

- i. Constitutional challenge to the *vires* of the Act.
- ii. No evidence of any decisions made by the Commission in relation to the delegation of powers to the Registrar, the Secretary and the Enquiry Officers. No proof of authorization of the 'enter and search' or forming of any opinion by the Commission before initiating proceedings under Section 30 of the Act.
- iii. The undertakings were not provided with any reasons and material on the basis of which the Enquiry Committee was reconstituted and TORs were amended. The Enquiry proceedings were not initiated as per the principles laid down in the *National Feeds* case.
- iv. Erroneous definition of the relevant market and SCNs do not state the 'spill-over effect' as determined by the Honourable Lahore High Court in the *LPG Association* case.
- v. Data was illegally obtained from FBR in violation of Section 155H of Customs Act 1969.



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- vi. Burden of proof or evidential burden is on the Commission to establish violations of Section 4 of the Act, which the Enquiry Report has failed to do. The standard of proof to be applied by the Commission is that of criminal proceedings where the infringement being proved by the Commission must be done through direct evidence which is beyond reasonable doubt.
  - vii. Presumption of innocence is in favour of the undertakings, i.e., where the proof is not of the required standard, the benefit of the doubt must be given to the undertakings concerned.
  - viii. Evidence/data obtained from mobile phones is inadmissible and even otherwise, as articles of evidence were collected illegally due to procedural lapses, the same are inadmissible.
  - ix. The undertakings were not included or requested to provide information at the Enquiry stage before the issuance of the SCNs.
46. The Commission deems it pertinent to address the aforementioned preliminary/technical objections in turn before proceeding further to the main issues specified above.

#### **Constitutional Grounds**

47. At the outset, it is a matter of record that a three-Member Bench of the Honourable Lahore High Court has upheld the Act as being constitutionally valid and has dismissed challenges assailing the legislative competence of the Federation to enact law on competition (see: LPG Association of Pakistan versus Federation of Pakistan 2021 CLD 214). Currently, the matter is pending adjudication before the Supreme Court of Pakistan.
48. The Commission has held time and again in its previous orders including the *LPG Association of Pakistan and Jamshoro Joint Venture Ltd Order* dated 14 December 2009 (the “**JJVL/LPGAP Order**”) that it is not for the Commission to address the objections raised as to the constitutionality and validity of the Act (Reliance is placed on Pir Sabir Shah v. Shad Muhammad Khan, Member Provincial Assembly N.W.F.P. PLD 1995 SC 66, Akhtar Ali Parvez v. Altaf ur Rehman PLD 1963 Lahore 390, Mehr Dad v. Settlement and Rehabilitation Commissions PLD 1974 SC 193 and Chempak (Pvt) Ltd. v Sindh Employees’ Social Security Institution (SESSI) 2003 PLC 380).

The aforementioned principle was also broadly stated in the case of Muhammad Khan and Other versus Province of Punjab and Others 2007 SCMR 1169, which pertained to a land dispute, wherein the Honourable Supreme Court observed that “*so far as special judicial tribunals are concerned, they are given jurisdiction to determine certain fact but they are not judges of the facts which are the foundation of their jurisdiction nor*”



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can they define the limits of their own jurisdiction.” There appears no reason to change the Commission’s view on this point.

50. Hence, we proceed on the assumption that the existence of the Commission and the Act where under it exercises power is legal and valid.

**Procedural Lapses & Admissibility of Evidence**

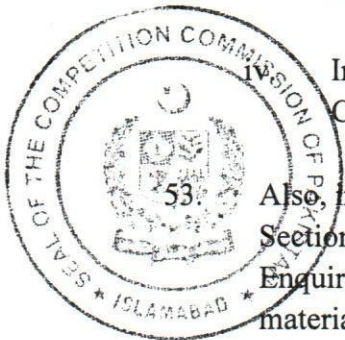
51. The undertakings have broadly argued that the requisite approval/authority was not duly delegated to the Enquiry Officers, the Registrar and the Secretary to the Commission. Hence, SCNs issued under Section 30 of the Act are invalid. These are not issued by the competent authority and that the search and inspection carried out by the officers of the Commission was also illegal and without lawful authority. Even otherwise, the undertakings have argued that the Act vests intrusive, excessive and unconstitutional powers to enter and search premises in terms of Section 34 of the Act. Also, undertakings were not provided any reasons or material basis for the amendments of TORs of the Enquiry Committee and that the undertakings were not provided with an opportunity of hearing during the Enquiry proceedings. In light of the above, the undertakings maintain that all documents and evidence collected are inadmissible as the same were collected without following due process and legal procedures. In addition, undertakings have relied on the case of National Feeds Limited versus Competition Commission of Pakistan and others, 2016 CLD 1688 stating that sufficient reasons were not present or provided to initiate an enquiry under the Act.

52. Section 28(2) of the Act provides the Commission with the power to delegate all or any of its functions and powers to any of its Members or officers as it deems fit. In this connection, the Commission duly provided all requisite authorizations, which are available on Commission’s record:

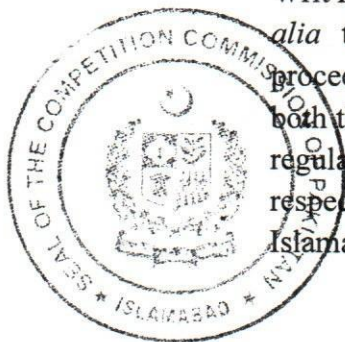
- i. Initiation of Enquiry in the Commission meeting held on 19 December 2019;
- ii. Re-constitution of the Enquiry Committee and amendment of ToRs in the Commission meeting held on 7 September 2020;
- iii. Authorization of search and inspections under Section 34 of the Act in the Commission meeting held on 10 September 2020 and *via* Resolution by Circulation dated 23 September 2020; and

Initiating proceedings under Section 30 of the Act and issuance of SCNs in the Commission meeting held on 22 October 2020.

Also, in the meeting of 7 September 2020, the Commission delegated all powers under Sections 33, 36 and 50 of the Act to the Enquiry Committee during the course of the Enquiry, which includes, the discovery and production of any document or other material object as evidence (Section 33(1)(b) of the Act).



54. With regard to the power of the Secretary and the Registrar, attention is drawn to Regulation 5(m) of the Competition Commission (Duties and Responsibilities of Registrar) Regulations, 2016 where under the Registrar is competent to draft and issue the show cause notice, with approval of the competent authority (which was duly given by the Commission in meeting dated 22 October 2020). The Commission in its meeting held on 10 September 2020 and through Resolution by Circulation dated 23 September 2021 specifically authorized the Secretary to the Commission to issue the authorization for the Search and Inspections under Section 34 of the Act.
55. We now advert to the arguments that the ToRs of the Enquiry Committee were amended suddenly without any reasonable basis, that the Commission could not have initiated an enquiry based on/with reference to the findings of the Sugar Inquiry Commission and that sufficient reasonable grounds as well as a *prima facie* opinion must be formed by the Commission to initiate an enquiry. In this regard, the Commission does not find merit in the arguments. Rather, it appears to be an attempt to deviate from the actual issues at hand. As briefly narrated above, the Commission in its meeting dated 19 December 2019 was presented with a working paper titled "Possible anti-competitive activities in the Sugar Industry". Pursuant to that, the Commission decided to conduct a *suo motu* investigation into the matter and the Enquiry Committee was constituted with the approved ToRs to review the sugar industry in terms of clauses (b) and (c) of sub-section (1) of Section 28 read with Section 37 of the Act and to ascertain the state of competition in the sugar industry while taking into account various aspects which included, *inter alia*, the cost of production of sugar (the "**Initial Enquiry**").
56. We note that during the pendency of the Initial Enquiry, the letter dated 27 July 2020 was received from the Advisor to the Prime Minister on Accountability & Interior with regard to the findings of the Sugar Inquiry Commission, which the Commission treated as a reference under Section 37(1) of the Act and directed the Cartels and Trade Abuses Department to prepare an independent internal working paper and propose ToRs in light of the potential anti-competitive practices prevalent in the sugar industry at the time. Subsequently, in its meeting dated 7 August 2020, after deliberating on the findings of the working paper, the Commission independently decided to initiate an enquiry and formulate its own ToRs in order to determine whether there was a *prima facie* violation of Section 3 and 4 of the Act (the "**Reference Enquiry**").
57. Prior to the decision to initiate the Reference Enquiry, certain undertakings had filed Writ Petitions before the Islamabad High Court and Sindh High Court challenging *inter alia* the decision to constitute the special Sugar Inquiry Commission and all proceedings, order, letters, etc. stemming from the same. Even in the said proceedings, both the Islamabad High Court and Sindh High Court recognized the independence of regulatory/statutory bodies to exercise their discretion in consonance with their respective mandates. In this regard, the Learned Single Judge of the Honorable Islamabad High Court in PSMA and Others versus Federation of Pakistan and Others

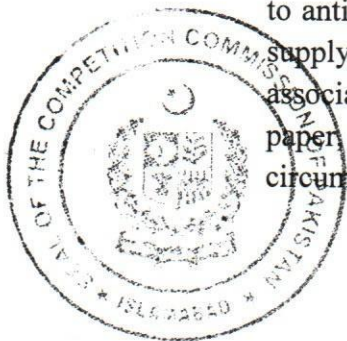




**W.P. No. 1544/2020** (which judgement was upheld in PSMA and Others versus Federation of Pakistan and Others ICA No. 156 of 2020) that:

“22. The Commission of Inquiry has made recommendations to the Federal Government for initiation of proceedings under various statutes...All these statutes are self contained legislative enactments and provide for distinct mechanisms to take cognizance and initiate proceedings. The Federal Government, at the most, can refer the matter to the concerned statutory authority for consideration. Even if it decides not to do so the respective statutory authorities cannot be restrained nor are prohibited to initiate proceedings on their own. The statutory authorities are not dependent on receiving a referral from the Federal Government...For the sake of argument, even if the Federal Government is restrained from taking appropriate decisions in the light of the recommendations made in the Report, or the Report is quashed, would it amount to restraining respective authorities from initiating independent proceedings in accordance with the provisions of the respective statutes? I am afraid that the answer to this question is an emphatic ‘No’. Even if the Federal Government decides not to take any action pursuant to the recommendations made in the Report, the statutory authorities cannot be restrained from fulfilling their obligations and duties under the respective statutes. Such an eventuality is inconceivable because it would virtually amount to suspension of legislative enactments.”

58. The Honourable Sindh High Court also directed in Mirpurkhas Sugar Mills Limited and 19 others versus Federation of Pakistan and Others Const. Petition No. D-3004 of 2020 (note: operation of the same has been suspended by the Honourable Supreme Court of Pakistan in terms of order dated 2 September 2020 in Federation of Pakistan and others versus Mirpurkhas Sugar Mills and others C.P. No. 2197/2020) that “*the CCP, SECP and SBP to fulfil their respective mandates in accordance with law with respect to the petitioners and the Sugar Industry without reference to the impugned report or any letters sent to them in connection with the impugned report.*”
59. Considering the stay granted by the Honourable Supreme Court and the then general lack of clarity regarding the status of the impugned report of the Sugar Inquiry Commission, in the Commission meeting dated 7 September 2020, the Reference Enquiry was put on hold. During this whole period, the Initial Enquiry was underway. However, the C&TA Department presented another working paper recommending the amendment of the ToRs of the Initial Enquiry as new facts had come to light, pertaining to anti-competitive activities in the sugar sector, in particular, price hike, shortage of supply, collective suspension of crushing activities by mills on behest of sugar mills association and non-supply to USC. The Commission, on the basis of the working paper in its meeting of 7 September 2020, took into consideration the peculiar circumstances and deemed it appropriate to amend the ToRs of the Initial Enquiry in

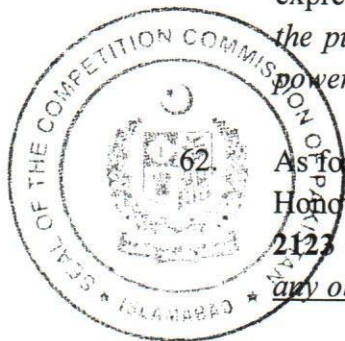


order to determine whether there was any *prima facie* violation of Sections 3 and/or 4 of the Act in the sugar industry.

60. Subsequently, in the Commission meeting held on 10 September 2020, a working paper was submitted by the Enquiry Committee stating that *“the conduct of PSMA/sugar mills, which includes, the collective stoppage of crushing in the season 2019-20, collective rise in prices and collective refusal to supply sugar to USC appeared to be commercial decisions taken by the association, which could be a prima facie violation of Section 4 of the Act.”* Therefore, in order to collect evidence of any communication/arrangements/decisions between PSMA/sugar mills in this regard, or any other conduct prohibited in terms of Section 4 of the Act, Enquiry Committee suggested that the Commission may authorize an ‘enter and search’ of the premises of PSMA under Section 34 of the Act. After deliberation of the same, the Commission authorized an ‘enter and search’ of premises in use of PSMA located in Islamabad and Lahore on 14 September 2020 for the purpose of enforcing Section 4 of the Act. The Commission also authorized its officers to conduct the same and that such officers *“were expressly authorized to collect, copy, and/or impound all the relevant information for the purposes of enforcing provisions of Section 4 of the Act, and exercise any or all powers provided under Section 34(2) of the Act.”*

61. Accordingly, the search and inspection of the aforementioned premises in use of PSMA was conducted on 14 September 2020. Subsequently, another working paper was submitted by the Enquiry Committee to the Commission on 22 September 2020, of *“possible sharing of sensitive commercial information, i.e., pertaining to price and stocks of sugar between sugar mills.”* The working paper also detailed facts, which suggested that an official of the JDW Group *“was nominated as the focal person for co-ordinating sugar stock position, by PSMA, in 2012 with email records showing that he is actively involved with sharing/receiving information in this regard in the intervening year.”* It was further stated that the compilation/consolidation of sensitive commercial information could be a *prima facie* violation of Section 4 of the Act. The Commission via Resolution by Circulation dated 23 September 2020 observed that *“reasonable grounds exist to conduct an inspection under Section 34 of the Act to gather further evidence of possible collusive behaviour in violation of Section 4 of the Act by sugar mills in terms of the working paper.”* The Commission also authorized certain officers to conduct an inspection under Section 34 of the Act of the premises in use of JDW Sugar Mills Ltd on 25 September 2020. The authorized officers were also expressly *“authorized to collect, copy, and/or impound all the relevant information for the purposes of enforcing provisions of Section 4 of the Act, and exercise any or all powers provided under Section 34(2) of the Act.”*

62. As for reliance on the *supra National Feeds* case, it would suffice to mention that the Honourable Supreme Court has held in CCP versus National Feed Ltd CP No. 2119 to 2123 of 2016 [unreported] that *“we don’t think the impugned judgement could create any obstacle or impediment in its way either to call for information or to inquire into*



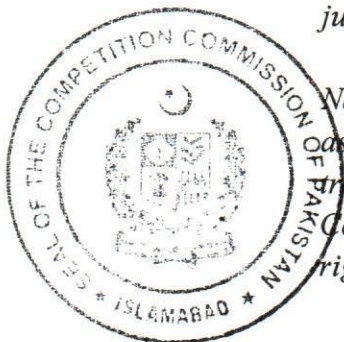
any matter required to be inquired into under the Act.” For ease of reference, the relevant portion is reproduced below:

*“A look at the concluding paragraph of the impugned judgement reveals that the hands of the Commission have not been tied. It could proceed under Section 37(1) or (2) of the Act. It could also proceed under Section 36 of the Act, even if no complaint in writing has been filed by an undertaking or registered association of the consumers. When the Commission can proceed under the provisions mentioned above, we don't think the impugned judgement could create any obstacle or impediment in its way either to call for information or to inquire into any matter required to be inquired into under the Act.”*

63. As for the objection regarding the forming of an opinion prior to initiation of proceedings under Section 30 of the Act, the Enquiry Report was taken up for consideration in the Commission meeting held on 22 October 2020. After deliberating on the findings of the Enquiry Report, the Commission formed the opinion that *“contraventions of Section 4 of the Act on account of PSMA and its Member-Undertakings in terms of the finding of the Enquiry Report is made out accordingly and it was resolved that in the interest of the public at large proceeding may be initiated against PSMA and its members under provisions of Section 30 of the Act for prima facie violation of Section 4 of the Act as per the findings of the Enquiry Report.”* In the given background, there was clearly a basis for initiating the Enquiry under Section 37(1) of the Act and for initiation of proceedings under Section 30 of the Act.
64. As for the requirement of involving the undertakings at the enquiry stage, the Commission in its previous Orders of *Pakistan Poultry Association* and *LPGAP/JJVL* has taken the position that there is no mandatory legal obligation on part of the Commission, under the Act or any subordinate legislation made thereunder, to involve undertakings at the enquiry stage. The relevant excerpt is reproduced below for ease of reference:

*“Linked with the above is the question whether the steps preceding the issuance of a Show Cause Notice, i.e. conduct of Enquiry in the subject proceedings was an adverse action and required compliance with principles of natural justice. As stated above, JJVL has argued that since it was not contacted during the conduct of the Enquiry therefore principles of natural justice have been violated. We deal with this question now.*

*Natural justice has been described as a concept ‘sadly lacking in precision’ (as per R v Local Govt. Board [1914] 1 K.B. 160, referred to by De Smith’s treatise ‘Judicial Review’, 6th Edition (2007) at Para 6-010). The Supreme Court of Pakistan has also held that rules of natural justice are not cast in a rigid mould and that depending upon the facts and circumstances of each*



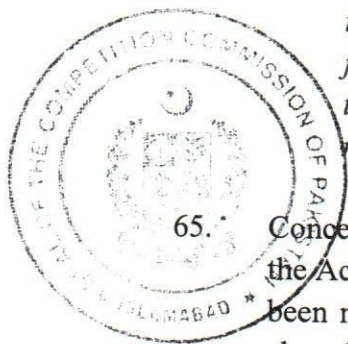
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case, there is no mandatory requirement of natural justice that in every case the other side must be given a notice before preliminary steps are taken. As per the Honourable Supreme Court, it might suffice if reasonable opportunity of hearing is granted to a person before an adverse action or decision is taken against him (*Commissioner of Income Tax and Others v Messrs Media Network and Others*; 2006 PTD 2502). Support can also be gleaned from the following precedents from the UK and USA.

*Rees and Others*; (1994) 1 All E.R. 833 at page 842-845: It was held by the Privy Council that there were many situations in which natural justice did not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the Courts to that conclusion had included the fact that the investigation was purely preliminary, that there would be a full 3 Read the Commission's Order available at chance adequately to deal with the complaints later, that no penalty or serious damage to reputation was inflicted [sic] by proceeding to the next stage without hearing, that the statutory scheme properly construed excluded such a right to know and to reply at the earlier stage.

*Parry Jones v Law Society and Others*; (1969) 1 Ch Division 1 at pp. 8 and 10: Held by the Court of Appeal that where the only inquiry was as to whether there was prima facie evidence, natural justice did not require that the party should be given notice of it. ...

Putting things in context, a reading of the Competition Ordinance and General Enforcement Regulations 2007 makes it clear that there is no mandatory requirement on the Commission to issue a notice/hold a hearing at the inquiry stage. Regulation 16 allows the Commission to commence an inquiry, inter alia, suo moto or in the case of a complaint. The standard to be satisfied in the latter case is if facts before it appear to constitute a contravention of sections 3, 4, 10, 11 and/or provisions of Chapter II of the Ordinance. Thus there is no requirement of notice or hearing at the stage of inquiry. Therefore it is our considered view that requirements of natural justice (a hearing) do not apply at the initiation of, and during an inquiry, by the Commission. Hence in light of clear local and foreign precedents we find no merit in the assertions made in this regard. (Emphasis Added)"



65. Concerning the unconstitutionality and excessive powers granted under Section 34 of the Act, we find the argument devoid of any merit and that the scope of Section 34 has been misunderstood by the undertakings. In this regard, many competition agencies abroad have similar powers. For instance: the Competition Act 1998 (UK) provides the Competition Markets Authority (formerly the OFT) with powers to investigate, which enable the CMA, UK to enter business premises without a warrant. The European

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Commission also has similar powers to demand written information, enter premises (dawn raids) and demand company information without a warrant. Also, the authorization/decision of national competition authorities is sufficient to conduct inspections of business premises of undertakings in Belgium, Cyprus, Czech Republic, Finland, Luxembourg, Malta, Romania and Slovakia<sup>1</sup>. The Turkish Competition Authority (“TCA”) also has the power to carry out on-site inspections as per Article 15 of the Turkish Competition Act<sup>2</sup>.

66. The intention of the Legislature is clear to provide and equip the Commission with a mechanism to detect cartels and protect consumers from anti-competitive practices. The Commission powers are not unique in that similar powers have been conferred upon SECP under Part VIII of the Securities and Exchange Commission of Pakistan Act, 1997. As noted above, the search and inspection authorization letters were provided to the undertakings representatives at the time of ‘enter and search’ (copies of which are annexed to the Enquiry Report). These duly record the reasonable grounds for conducting such search.
67. The undertakings have also argued that, even otherwise, the Enquiry Committee could only have impounded or taken information from ‘computers’, hence, the impounding of mobile phones was not in conformity with the provisions of the Act and any evidence used therefrom was inadmissible. In this regard, the Act and any subordinate legislation made thereunder does not define the term ‘computer’.
68. However, even when the Competition Ordinances were promulgated, smartphones were in the market and due to the ever-changing technological landscape, we find that the Competition Ordinances and the Act envisaged smartphones to fall under the term ‘computer’ and amount to computer stored information. In this connection, Regulation 26A(2)(a) of the Competition (General Enforcement) Regulations, 2007 (“General Enforcement Regulations”) specifies that:

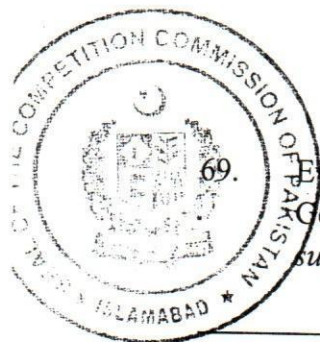
*“...The Commission may for the purpose of inquiry or investigation, as the case may be,*

*(a) admit evidence taken in the form of verifiable transcripts of tape recordings, unedited versions of video recording, electronic mail, telephone records including authenticated mobile telephone records...”*

Even otherwise, the term ‘document’ has been defined in Regulation 2(1)(g) of the General Enforcement Regulations as “any matter expressed or described upon any substance by means of letters, figures or marks, or by any other means, used or intended

<sup>1</sup> European Competition Network Investigative Powers Report (2012) Retrieved from: [https://ec.europa.eu/competition/ecn/investigative\\_powers\\_report\\_en.pdf](https://ec.europa.eu/competition/ecn/investigative_powers_report_en.pdf)

<sup>2</sup> [https://www.rekabet.gov.tr/en/Sayfa/Legislation/act-no-4054#\\_edn8](https://www.rekabet.gov.tr/en/Sayfa/Legislation/act-no-4054#_edn8)



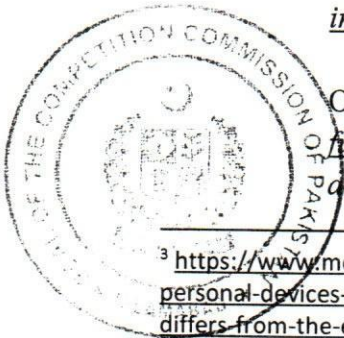
to be used for the purpose of recording that matter”. The said meaning is of wide import and refers to any material used to record any matter, hence, would also include digital forms of documentation such as e-mails, text messages, etc.

70. It is also emphasized that only the material and documents related to the instant matter were obtained from the mobile device with no leakage of any personal information. No such allegation is on record despite the passage of significant time and conclusion of arguments by the undertakings. The objective and purpose of the Digital Forensic Report by FIA is to confirm that the data has not been tampered with and that it belongs to the device impounded.
71. Internationally, many competition agencies in other jurisdictions have also evolved their digital forensics and have used even WhatsApp communication as evidence. In this regard, the TCA has employed the practice of examining personal devices and data. In the *Koçak Petrol* decision,<sup>3</sup> the on-site inspection was hindered by an executive of the undertaking under scrutiny on the grounds that the laptop subject to the examination was allocated for personal use and the warrant issued by the Board did not cover such inspection. The Board decided to impose an administrative fine against the relevant undertaking, since the executive was seen to delete certain documents from the laptop, which he alleged had been personal documents, and the case handlers could not commence the on-site inspection at the time intended.<sup>3</sup>
72. The Explanatory note on the European Commission Inspections dated 11 September 2015 further explains that the inspectors “*are entitled to examine any books and records related to the business, irrespective of the medium on which they are stored, and to take or obtain in any form copies of or extracts from such books or records. This includes the examination of electronic information and the taking of electronic or paper copies of such information.*” Clause 10 of the Explanatory Note further states that the inspectors may search the IT-environment, e.g. servers, desktop computers, laptops, tablets and other mobile devices and all storage media of the undertaking and that this applies also to private devices and media.
73. We also consider the ordinary dictionary meaning of a ‘mobile device’ as follows:

Black’s Law Dictionary: “*A mobile phone with many features of a computer included in its functions*”.

Oxford English Dictionary: “*A mobile phone that performs many of the functions of a computer, typically having a touchscreen interface, internet access, and an operating system capable of running downloaded apps*”.

<sup>3</sup> <https://www.mondaq.com/turkey/antitrust-eu-competition-/1005116/a-framework-for-examination-of-personal-devices-under-the-turkish-competition-authority39s-new-guidelines-how-it-converges-with-and-differs-from-the-eu-practice#ftn10>



Cambridge Dictionary: “*A mobile phone that can be used as a small computer and that connects to the internet*”.

Collins English Dictionary: “*A mobile telephone with computer features that may enable it to interact with computerized systems, send e-mails, and access the web*”.

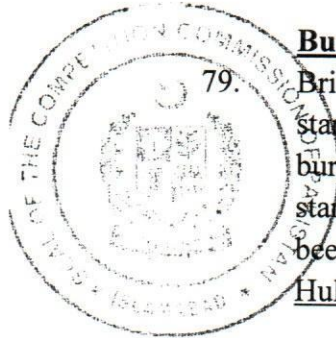
74. Considering the above definitions of a computer, we do not find any reason as to why the tablets, smartphones and other personal digital assistants (PDAs) are not to be regarded as personal computers as they are powered by microprocessors, they are programmable, they are electronic devices, they process information, they can store and transmit information and have a central processing unit (CPU).
75. Therefore, in light of the above, the Commission finds all documents, records and material obtained and attached with the Enquiry Report admissible in evidence given that all due processes and procedures were complied with and carried out accordingly.

**Data Obtained in accordance with Section 155H of the Customs Act**

76. The undertakings have argued broadly that the export data was illegally obtained from the FBR in violation of Section 155H of the Customs Act and the Enquiry Committee was not delegated powers to obtain the same.
77. It is not in the Commission’s purview to determine the legal obligations of the FBR under the Customs Act or to determine the scope and nature of Section 155H of the Customs Act. Nevertheless, the Commission, by virtue of Section 53 of the Act, can seek the assistance of any authority or agency for the performance of its functions under the Act. Moreover, the records were not made public by the Commission but only disseminated to the undertakings as a part of the Enquiry Report. Only aggregated export figures were used by the Enquiry Committee for analysis purposes.
78. Moreover, the Enquiry Committee has the power pursuant to Section 33(1)(b) and 33(a) and (b) to correspond with any authority for the purpose of collecting information in relation to an enquiry proceedings under the Act.

**Burden & Standard of Proof & Presumption of Innocence**

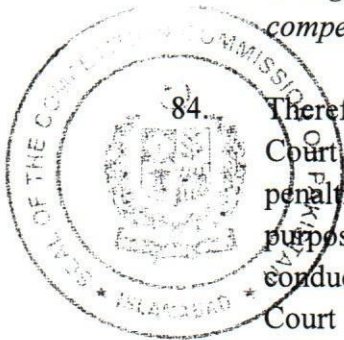
79. Briefly, Counsel have argued that the Enquiry Report must establish the requisite legal standard for alleged violations of the Act. In this regard, Counsel submitted that the burden of proof is on the Enquiry Committee to establish the contraventions and the standard of proof must be that of *beyond reasonable doubt*. Reliance in this regard has been placed on, *inter alia*, Montecatini v. Commission C-235/92 P (1999) [ECJ] and Huls AG versus DSM NV Case C-199/92 P [ECJ].



80. In this regard, it is imperative to understand the nature of the Act and the Commission's objective under the Act, which is to provide for free competition in all spheres of commercial and economic activity, to enhance economic efficiency and to protect consumers from anti-competitive behavior. The Act prohibits anti-competitive behavior.
81. The nature of the Act has been succinctly described by the Honorable Lahore High Court in the *supra LPG Association of Pakistan* case as follows:

*"51. The objective of the Act is consumer welfare that is to ensure that commercial and economic activities are free from anti-competitive behaviour. The Act also aims to ensure economic efficiency by regulating mergers and prohibiting certain agreements which may result in cartelization or allow a dominant position in the market. The purpose of the CCP is to ensure fair competition is maintained by regulating the prohibitions set out in Chapter-II. Therefore, the Act has a regulatory objective, to promote free competition and prevent anti-competitive behaviour and prescribe enforcement mechanisms to ensure compliance."*

82. Secondly, the consequences of violating competition law are remedial in nature (civil) instead of being purely penal (criminal). Here, the damages will be monetary for the defendants; nobody will go to jail for colluding or committing anti-competitive practices.
83. Another regulatory scheme under the anti-dumping legislation was considered by the Honorable Islamabad High Court in Messrs Aimnaz Pvt. Ltd versus Federation of Pakistan through the Secretary, Ministry of Law, Federal Secretariat, Islamabad and 2 Others 2018 PTD 1966. In this regard, the Court cited an unreported judgement of the Division Bench of the Honorable Sindh High Court, quoting, *inter alia*, a portion where the Honorable Sindh High Court analyzed the nature of an anti-dumping duty imposed in violation of the relevant provisions of the Anti-Dumping Duties Act, 2015 whereby the aim of imposing the same, although a penalty, was to remove the injury caused by the concerned accused. The Honorable Islamabad High Court agreed with the said interpretation and that the duty was not a tax but "*rather a form of penalty imposed to ensure that the goods are not dumped into Pakistan*". The Court added that the same is a "*regulatory measure or a remedial measure to protect the local industry from unfair competition because the goods are being dumped into Pakistan.*"



84. Therefore, applying the aforementioned reasoning of the Honorable Islamabad High Court in the instant matter, it is re-emphasized that the purpose of imposing any penalties on undertakings for any violation of the provisions of the Act is for the sole purpose of remedying the injury in the relevant market caused by the anti-competitive conduct at issue. The same was also acknowledged by the Honorable Lahore High Court in the *supra LPG Association of Pakistan* case wherein the Court observed that



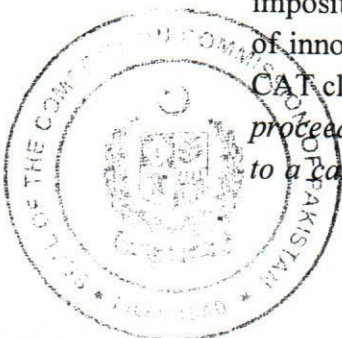
*“the nature of the orders and the proceedings in cases of contravention are preventive and restorative as per Section 31 of the Act [Competition Act]...the nature of the orders passed by CCP are preventive and corrective, aimed at restoring competition.”*

85. The Honorable Lahore High Court has also unanimously held in the *supra LPG Association of Pakistan* case that:

*“The CCP is a regulatory authority, with a regulatory objective and its purpose is not to exercise judicial power (Para 51).*

*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 functions with the sole objective to regulate anti-competitive behavior. 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 (Para 54).”*

86. Counsel have relied on *inter alia* the cases of *Montecatini* and *Huls* stating that the presumption of innocence lies in favour of the undertakings and applies to procedures relating to infringements of the competition rules. Hence, where there is doubt as to the allegations or evidentiary proof regarding such allegation, the benefit of that doubt must be given to the undertakings accused of the infringement.
87. As elaborated upon by the United Kingdom Competition Appellate Tribunal in the case of NAPP Pharmaceutical Holdings Limited and Subsidiaries versus Director General of Fair Trading 2002 CAT 1, the principle of presumption of innocence is enshrined in Article 6(2) of the European Convention on Human Rights and Fundamental Freedoms which states that *“everyone charged with a criminal offence shall be presumed innocent until proven guilty according to law.”* Hence, for the purpose of ECHR, due to imposition of penalties, the European Courts and the UK Courts apply the presumption of innocence in proceedings related to competition infringements. However, the UK CAT clarifies that this in no way means that the same *“are to be equated with criminal proceedings... or that the rights that apply in criminal proceedings automatically apply to a case under the Act... the fact that Article 6 applies does not of itself lead to the*

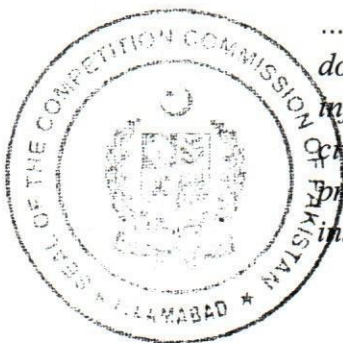


*conclusion that these proceedings must be subject to the procedures and rules that apply to the investigation and trial of offences classified as criminal offences”.*

88. In this regard, Counsel for Group 2 argued that the presumption of innocence was enshrined under Article 10A of the Constitution, hence, a fundamental right, the protection thereof being mandatory. Reliance was placed on the case of Muhammad Abid Farooq versus the State and another **2015 PCrLJ 224**. We find that the said case concerned a post-arrest bail matter where the Islamabad High Court applied the presumption of innocence as being the “*basic and fundamental pillar of criminal law.*”
89. As highlighted above, the nature of the orders and penalties under the Act are remedial in nature and the Act is not a criminal statute, neither can the proceedings thereunder be categorized as purely criminal in nature. Even otherwise, as highlighted by the UK CAT, applying the principle of presumption of innocence does not mean that competition infringement proceedings before the competent forum are to be equated with criminal proceedings and that such competition related proceedings are subject to procedures and rules that apply to investigations and trial of offences classified as criminal.
90. Coming to the burden and standard of proof applicable in proceedings before the Commission, in light of the above, the Commission, being an administrative tribunal and discharging quasi-judicial functions as well as administrative functions, is not bound by the formal laws of evidence and procedure. As stated above, the nature of the Act itself and the penalties imposed are remedial in nature. Thus, the standard of proof is not one of ‘*beyond reasonable doubt*’ being the criminal standard but one of a civil standard based on the ‘*balance of probabilities*’. In this regard, we find the *supra Napp* case instructive. Being the first appeal under the UK Competition Act 1998 against an infringement decision, the Court addressed the issue of burden and standard of proof, in particular, where penalties were imposed. The CAT held that:

*“The balance of probabilities is a sufficiently flexible standard to require that the Tribunal (or Director) should be more sure before finding serious allegations proved than when deciding less serious matters: per Lord Nicholls in In re H [1996] AC 563 at 586-587. The criminal standard of proof beyond reasonable doubt would not be appropriate in relation to the kind and range of issues this Tribunal has to determine under the Act.*

*... In our view the structure of the Act points to the conclusion that under domestic law the standard of proof we must apply in deciding whether infringements of the Chapter I or Chapter II prohibitions are proved is the civil standard, commonly known as the preponderance or balance of probabilities, notwithstanding that the civil penalties imposed may be intended by the Director to have a deterrent effect.*



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*ML.*

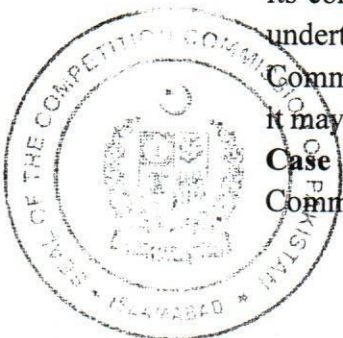
For sake of completeness, we also refer to the following observation of the UK CAT:

*... the conclusion we reach is that, formally speaking, the standard of proof in proceedings under the Act involving penalties is the civil standard of proof, but that standard is to be applied bearing in mind that infringements of the Act are serious matters attracting severe financial penalties..."*

91. Regarding *Montecatini* and *Huls* cited by Counsel, selective reliance has been placed on the same. Briefly, both cases dealt with undertakings that were participants in an agreement and concerted practice by which producers supplying polypropylene in the territory of the EEC *inter alia* contacted each other and met regularly in a series of secret meeting to discuss and determine commercial policies, set target/min prices for sale of product, allocating each producer an annual sales target or quota and agreed to various measures to facilitate the implementation of such target prices such as temporary restrictions on output, exchange of information on their deliveries, etc. The ECJ held that in the field of competition law, where there is a dispute as to the existence of an infringement, it is for the European Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement. However, the ECJ has not elaborated what the requisite legal standard ought be.
92. As discussed above, the standard is the civil standard based on the '*balance of probabilities*'. Furthermore, we understand that the ECJ refers to the European Commission proving the infringements after the conclusion of the administrative proceedings. Moreover, the European Commission agrees that the burden of proof is on the European Commission to establish liability when passing an order. However, we find that during administrative proceedings, the burden of proof is rebuttable as it follows from the ECJ's observation in the *supra Huls* case that:

*"Since the Commission was able to establish that Huls had participated in meetings between undertakings of a manifestly anti-competitive nature, it was for Huls to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs."*

93. Therefore, it follows that the undertakings must adduce evidence, which could rebut the findings on which the Commission or the Enquiry Committee forms the basis for its conclusions concerning the alleged anti-competitive conduct. It is settled law that undertakings must put forward arguments which cast the facts established by the Commission in a different light, allowing another plausible explanation. In this regard, it may be helpful to refer to the case of AC-Treuhand AG versus European Commission Case T-27/10 (upheld by the ECJ in Case C-194/14 P), wherein the European Commission's decision was contested pertaining to a number of undertakings



infringing Article 81 EC by participating in two sets of anti-competitive agreements and concerted practices covering the EEA and relating to, first, the in stabilizers sector and, second, the epoxidized soybean oil and esters sector. Each of those infringements consisted of price fixing, allocation of markets through sales quotas, allocation of customers and exchange of commercially sensitive information, in particular on customers, production and sales. The General Court held that:

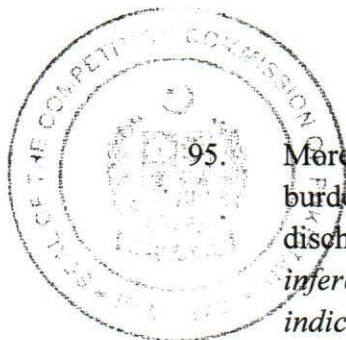
*“Likewise, when the Commission relies on evidence which is in principle sufficient to demonstrate the existence of the infringement, it is not sufficient for the undertaking concerned to raise the possibility that a circumstance arose which might affect the probative value of that evidence in order for the Commission to bear the burden of proving that that circumstance was not capable of affecting its probative value. On the contrary, except in cases where such proof could not be provided by the undertaking concerned because of the conduct of the Commission itself, it is for the undertaking concerned to prove to the requisite legal standard, first, the existence of the circumstance relied on by it and, second, that that circumstance calls into question the probative value of the evidence relied on by the Commission.”*

94. We also find the case of T-Mobile Netherlands BV versus Raad van bestuur van de Nederlandse Mededingingsautoriteit (Netherlands Competition Authority) Case C-8/08 instructive in this regard, wherein it has been held that:

*“The concept of a concerted practice, as it derives from the actual terms of that provision, implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two. Subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. That is all the more the case where the undertakings concert together on a regular basis over a long period...*

*... Where it can be established that such undertakings successfully concerted with one another and remained active on the market, they may justifiably be called upon to adduce evidence that that concerted action did not have any effect on their conduct on the market in question.”*

95. Moreover, as held by the UK CAT in the *supra* NAPP case, although the persuasive burden of proof is on the Director (OFT), it does not preclude the Director, in discharging the burden of proof, from relying, in certain circumstances, “from inferences or presumptions that would, in the absence of any countervailing indications, normally flow from a given set of facts, for example... an undertaking’s



*presence at a meeting with a manifestly anti-competitive purpose implies, in the absence of explanation, participation in the cartel alleged... Presumptions of this kind simply reflect inferences that can, in normal circumstances, be drawn from the evidence: they do not reverse the burden of proof..."*

96. Also, in the *supra* case of *AC-Treuhand*, it was held by the General Court that:

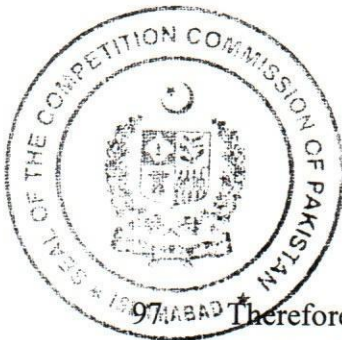
“59 *It must also be taken into consideration that since the prohibition on participating in anti-competitive practices and agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion... and for the associated documentation to be reduced to a minimum.*

60 *Furthermore, even if the Commission discovers evidence explicitly showing unlawful contact between traders, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it is often necessary to reconstitute certain details by inferences.*

61 *Accordingly, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.*

62 *According to the case-law, moreover, if there is no evidence directly establishing the full duration of an infringement, the Commission should adduce, at the least, evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates.*

63 *The Court of Justice has also held that, where the Commission has been able to establish that an undertaking had taken part in meetings between undertakings of a manifestly anti-competitive nature, the General Court was entitled to consider that it was for that undertaking to provide another explanation of the tenor of those meetings. In taking that approach, the General Court did not unduly reverse the burden of proof and did not breach the presumption of innocence.”*



Therefore, it must be borne in mind, in light of the above jurisprudence, that in discharging the burden of proof, the Commission can rely on inferences or

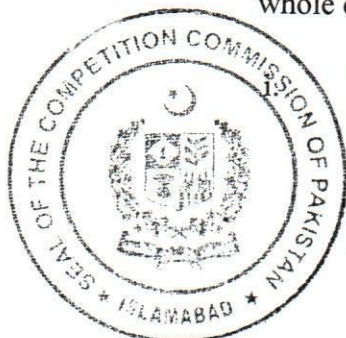
presumptions that, in the absence of any countervailing indications, normally flow from a given set of facts and, in this connection, the existence of the anti-competitive practice or agreement must be inferred from a number of coincidences and indicia. Thus, attention must be given to the scheme/pattern emerging/surfacing from all the given set of facts of a case including all the documents and submissions on record.

98. Moreover, as recognized by the ECJ and the UK CAT, it is normal for the activities related to anti-competitive practices and agreements to take place in a clandestine fashion and for documentation to be reduced to a minimum. Even if evidence is discovered, it will normally be only fragmentary and sparse so that it is often necessary to reconstitute certain details by inferences. Hence, even if there were fragmentary evidence attached to the Enquiry Report, as alleged by the Undertakings, it would be normal for a cartel like arrangement. The Commission must consider not only the findings of the Enquiry Report, but submissions and documents put on record by the undertakings and whether the alleged anti-competitive conduct has the object or effect of preventing or reducing competition in the relevant market.
99. Also, in the *supra T-Mobile* case, it was held that “...the number, frequency, and form of meetings between competitors needed to concert their market conduct depend on both the subject-matter of that concerted action and the particular market conditions... what matters is not so much the number of meetings held between the participating undertakings as whether the meeting or meetings which took place afforded them the opportunity to take account of the information exchanged with their competitors in order to determine their conduct on the market in question and knowingly substitute practical cooperation between them for the risks of competition... In so far as the undertaking participating in the concerted action remains active on the market in question, there is a presumption of a causal connection between the concerted practice and the conduct of the undertaking on that market, even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion.”
100. Therefore, we are not persuaded by the fragmentary evidence argument proffered by the undertakings and are in agreement that even if the alleged anti-competitive conduct is the result of a single meeting or a single occasion, it would be sufficient to find a prohibited agreement for the purposes of Section 4 of the Act.

#### **Definition of Relevant Market & Spill-over Effect**

101. Briefly, Counsel argued that the determination of relevant geographical market as the whole of Pakistan is erroneous due to the following factors:

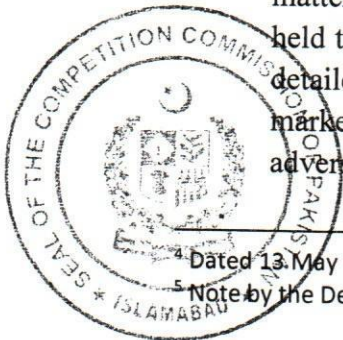
The observation of the Enquiry Committee in the Enquiry Report relating to the fact that “*the matter at hand pertains to prima facie anti-competitive activities by an association of undertakings covered under Section 4 of the Act, the delineation of relevant market is for reference purposes only*” is incorrect as the wording of Section 4 of the Act requires a relevant market to be defined.



- ii. The regulatory environment is not homogenous in the whole of Pakistan as there are differences of policy and laws. Attention of the Commission, in this regard, was drawn to the Punjab Sugar Factories (Control) Amendment Ordinance, 2020 which has made material changes to the regulatory environment as well as inter provincial barriers to trade, in particular, between Punjab and Sindh, hence, imposing restrictions on the free inter provincial movement of sugar.
  - iii. Sugar is sold by the mills on an ex-mill basis and the title/ownership of sugar produced is transferred at the factory gate. Hence, the relevant market should be restricted to the location of mills.
102. As held by the Commission in its previous orders and observed in the Enquiry Report, we find merit in the argument that defining the 'relevant market' is not essential for the application of Section 4 of the Act. Under Section 4, the emphasis is on the restrictive activity or prohibition being carried out through, *inter alia*, the form of an 'agreement', which may have the object of "*preventing, restricting or reducing*" competition. In this regard, we refer to the Commission's order in the matter of Amin Brothers Engineering et al<sup>4</sup> (the "**PESCO Order**"), wherein it was held that:

*"...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."*

103. As focus is more on the prohibited conduct, the definition of 'relevant market' under Section 4 is for reference purposes. In particular, in cases where the very object of the prohibited conduct is deemed anti-competitive and the nature of the challenged restraint has the tendency to harm competition, there is no need to assess market definition or evidence of actual competitive harm<sup>5</sup>. In this regard, we find the judgement of the US Supreme Court in FTC versus Indiana Federation of Dentists 476 US 447 (1986) instructive, wherein the association claimed that the decision of the FTC was wrong as matter of law because the FTC had not defined the relevant market. The Supreme Court held that a restriction requires some competitive justification even in the absence of a detailed market analysis and that the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition. However, the Court ruled that the finding of such



<sup>4</sup> Dated 13 May 2011

<sup>5</sup> Note by the Delegation of the USA, OECD Roundtable on Market Definition (2012)

adverse effects obviated the need for an inquiry into market power, which it termed as a mere “*surrogate for detrimental effects*”.

104. In any case, the issue in the instant proceedings is not whether or not the relevant market has been defined, as the Enquiry Report has indeed defined the same, but whether the same has been correctly defined as argued by Counsel on behalf of the undertakings, which we take up below.

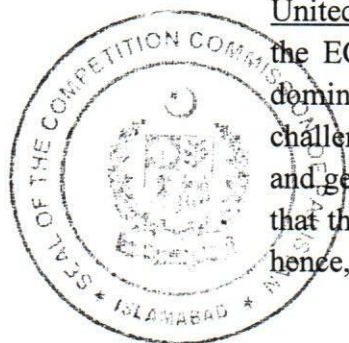
105. In this regard, the relevant market has been defined under Section 2(1)(k) of the Act:

*“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 or 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 competition are sufficiently homogenous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciable differing in those areas”.*

106. As seen above, emphasis is placed on conditions of competition being ‘*sufficiently homogenous*’ and not strictly homogenous. We believe that, in essence, the laws governing the sugar supply chain for Punjab, Sindh and KPK, during the enquiry period serve the same purpose and function with regard to, *inter alia*, fixing the minimum support price of sugarcane, having control over retail prices of sugar, designation of reserved areas for purchase of sugarcane, announcing the start of the crushing season and prevention of hoarding of sugar. Hence, such applicable laws, rules and regulations have the same impact on the sugar industry regardless of geographic locality.

107. The homogeneity of the product finds support from the fact that there is only one ‘Sugar Advisory Board’ where representatives of the mills, farmers, Provincial Governments and the Federation are members and collectively decide on policies as well as address concerns facing the sugar industry as a whole regardless of any provincial boundaries or locality. The ToRs of the SAB (reproduced below) including the rationalization of sugarcane cess across provinces clearly evidences the same.

108. In this regard, we find the ECJ decision in **Case 27/76 United Brands Company and United Brands Continentaal BV v. Commission [1978] ECR 207** instructive, wherein the ECJ upheld the European Commission’s decision in that UBC had abused its dominant position in the banana market in a number of ways. The applicant had challenged the definition of ‘relevant market’ stating, *inter alia*, that there are seasonal and geographic fluctuations, the German market was in a more privileged position and that there existed three substantially different systems of customs duty in such areas, hence, it was impossible to treat the market considered by the European Commission





as a single territorial market. Other factors alleging the differentiation the geographical markets were the size, consumer habits and market concentration. The ECJ held that the six States forming the relevant geographical market were “markets which are completely free, although the applicable tariff provisions and transport costs are of necessity different but not discriminatory, and in which the conditions of competition are the same for all... From the standpoint of being able to engage in free competition these six States form an area which is sufficiently homogeneous to be considered in its entirety.”

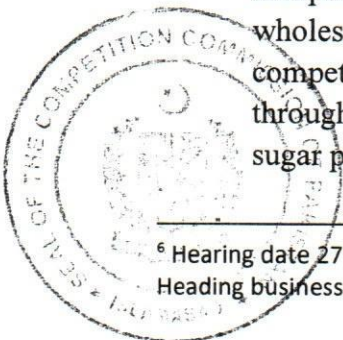
109. In **Case T-229/94 Deutsche Bahn AG v. Commission [1997] ECR II-1689**, which case pertained to *inter alia* an infringement of Article 86 of the Treaty, the applicant argued that the European Commission had wrongly defined the relevant market. The geographic market was the whole of Germany. The ECJ held that:

“92 In as much as the applicant submits that the Commission's definition of the geographical market is undermined by the difference in the competitive situation, it is sufficient to state that the definition of the geographical market does not require the objective conditions of competition between traders to be perfectly homogeneous. It is sufficient if they are 'similar' or 'sufficiently homogeneous' and, accordingly, only areas in which the objective conditions of competition are 'heterogenous' may not be considered to constitute a uniform market.”

110. Moreover, with regard to the title of sugar being transferred at ex-mill and the location of the relevant market being restricted to just the mill area, we are of the opinion that this argument is devoid of any merit. As admitted by one of the undertakings (Omni Group) before this Bench, Punjab has surplus sugarcane production and no control over borders, therefore, sugarcane is transported to Sindh for crushing. Whereas, sugar crushed in Sindh is transported to Punjab because Sindh generally has surplus sugar above its requirement<sup>6</sup>. This clearly demonstrates that mills have customers in the relevant market.

111. Furthermore, large buyers and industrial/commercial consumers purchase sugar directly from the mills. Sugar wholesalers can either purchase directly from the mills or through the mill's designated broker(s) who work on a commission basis. Wholesalers can then sell sugar onwards to sub-dealers or directly to retailers. In a competitive market, mills compete with each other for business based on price and wholesalers/commercial consumers lift sugar from the mill offering the most competitive prices. In light of the above, it is clear the sugar and sugarcane move freely throughout the relevant market and are not restricted to one geographical location and sugar produced by a single mill can be sold throughout the relevant market.

<sup>6</sup> Hearing date 27.01.2021. Omni Group represented by Group Chief Operating Officer and Head of Finance & Heading business groups

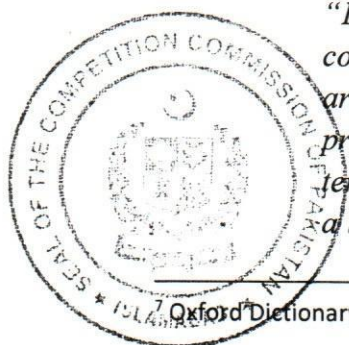


112. It is clear from the foregoing that the definition of relevant market as stated in the Enquiry Report is not erroneous. A similar argument was also raised in the Matter of PSMA (File No. 3(27)/Reg/Sugar/CCP/2009) (Order Dated July 2010), where the Commission also found that PSMA had failed to point out how the regulatory environment was different across four provinces. Moreover, the undertakings have put forward a news clipping published on The News dated 3 September 2020 as evidence that Punjab bans sugar transport to Sindh and Balochistan. No proper notification or any other applicable legal instrument has been provided by the undertakings. Reliance cannot be placed on the said news clipping as it appears contradictory in nature as it is admitted in the news clipping that the “*Punjab Food Secretary Asad Gilani said no major quantity was stopped from being transported to Sindh and Balochistan. It will be around 15 to 20 trucks only... Sources said inter-provincial movement was stopped on the NH but no such activities were reported on Motorway entry points.*” Hence, even otherwise, any restriction in inter provincial movement of sugar was only temporary and selective in nature and does not alter the impact for proposes of the present issue/context.
113. Counsel also argued that the requirements of showing the spill-over effect as per the Honourable Lahore High Court Judgment in the *supra LPG Association* case have not been fulfilled in the SCNs. In this regard, it has been argued that the analysis does not contain the reasons disclosing that the effect of anti-competitive behaviour is spilling over territorial limits of respective Provinces.
114. In economic terms, a spill-over is defined as:

*“A connection between different parts of the economy. Spill-overs may be pecuniary or non-pecuniary. A pecuniary spill-over occurs, for example, when changes in one industry affect factor supplies to another”<sup>7</sup>*

*“‘Spillover Effect’ is an economic term, used for positive or negative effect of an economic activity, causing benefit without paying or suffer without compensation. It is also termed as externality or neighbourhood effect. (LPG Association of Pakistan vs Federation of Pakistan & Others (and connected writ petitions) case, para 1.7, pg 93”.*

*“Externalities refers to situations when the effect of production or consumption of goods and services imposes costs or benefits on others which are not reflected in the prices charged for the goods and services being provided. Pollution is an obvious example of a negative externality, also termed an external diseconomy. Chemicals dumped by an industrial plant into a lake may kill fish and plant life and affect the livelihood of fishermen and*



<sup>7</sup> Oxford Dictionary of Economics by John Black

*farmers nearby. In contrast, a positive externality or external economy may arise from the construction of a road which opens a new area for housing, commercial development, tourism, etc". (Glossary of Industrial Economics & Competition Law, OECD).*

115. Essential commodities like sugar and flour are likely to have wide ranging spill-over effects due to following reasons:
- i. Composite Demand, which refers to goods, services or commodities, which have several/different uses. The concept is more significant when considering demand for essential commodities with multiple uses. For example, sugar is used by several/different industries such as beverages, confectionary, restaurants and pharmaceuticals. A rise in price of sugar will lead to rise in costs for products produced by each of these industries.
  - ii. Important components in the consumer basket of goods with widespread consumption by every household.
116. In the instant matter, we are of the opinion that the requirement of spill-over effect has been adequately addressed in the definition of the relevant market and Sector Review section in the Enquiry Report, which has been incorporated by reference in the SCNs. Even otherwise, it may be relevant to add that the Commission received the attested copy of the LHC judgement on 30 November 2020, whereas, the enquiry was concluded on 21 October 2020 and the SCNs were issued on 4, 5 and 6 November 2020 respectively.
117. As also highlighted above, it is clear that inter provincial movement of sugar takes place and that there can be no legal bar of movement of essential commodities by the Provinces in accordance with Article 151 of the Constitution except in certain specific circumstances such as Provincial Governments may resort to temporary bans in light of domestic shortages.
118. The spill-over effect is also evident from the calculation of sugar consumption figures and production statistics of sugar and sugarcane. For instance, as specified in the Enquiry Report,<sup>8</sup> Punjab and Sindh are the primary sugar producing regions and sugar production figures presented in Table 10 of the Enquiry Report show that 63% of sugar is produced in Punjab, 30% in Sindh, 7% in KPK and no sugarcane or sugar is produced in Balochistan. However, the national demand for sugar on the other hand is calculated on the basis of the overall consumption in the country, which is approx. 25kg per capita per year<sup>9</sup>, regardless of territorial boundaries. It is not plausible for any one Province to

<sup>8</sup> Refer to Table 1 and Table 10 of the Enquiry Report.

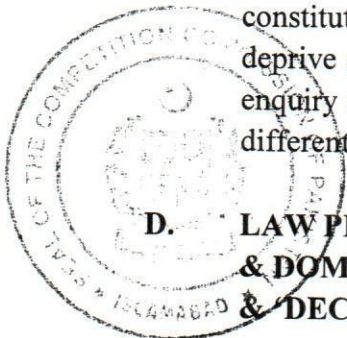
<sup>9</sup> Ministry of National Food Security and Research (MNFS&R) estimates an annual per capita consumption of 25 kg from SAB minutes. Quoted in paragraph 23 of the enquiry report.

meet this national demand as even Punjab only produces 63% of sugar. Moreover, certain Provinces such as KPK and Balochistan are sugar deficit regions relying on sugar supply from other Provinces to meet their requirements. Hence, there is clearly provincial movement of sugar from Punjab and Sindh to other Provinces.

119. Importantly, by virtue of being an essential commodity, we are more likely to observe significant spill-over effects. In this regard, the Schedule to the 'Price Control and Prevention of Profiteering and Hoarding Act, 1977 (the "**Hoarding Act**") contains 53 items listed as essential which includes *inter alia*: sugar, fruits and vegetables, wheat flour and other food products as well as non-food products such as fertilizers, tractors and cement. Products especially foodstuffs are deemed essential due to their wide range consumption amongst the general populace. We believe that the spill-over effect is evident to occur or is more pronounced where goods classified as essential commodities are involved due to (i) their wide consumption and (ii) their usage as inputs for other industries. In this regard, we take note of the Honourable Lahore High Court's observation in its order dated 2 April 2021 in the case of Munir Ahmad versus Government of Pakistan and Others W.P. No. 3834/2020 that "*The issue before this Court is of price control and fixation of basic commodities... particularly, when different prices of any essential commodity like Wheat or Sugar is fixed differently by the Provinces, necessary consequence of which is that Wheat or Sugar are transported to the Province where the price is high, which makes this issue as trans-provincial.*"
120. Hence, it is clear that the instant matter transcends provincial boundaries and is of national import. The product is essentially homogenous. The laws primarily of all provinces are substantively similar and no particular provision has been highlighted by the parties concerned in this regard.

**Miscellaneous Applications filed by Certain Undertakings**

121. Before coming to the analysis on the law and Issues framed above, we consider and dispose of the miscellaneous applications filed by Counsel on behalf of the Group 5 Undertakings (see facts narrated above), being frivolous and without merit and/or without any legal basis. As the applications are identical in nature, we shall deal with them collectively. The appeal provision in Section 41 of the Act provides an opportunity of appeal for undertakings aggrieved by any order made by a Member or authorized officer of the Commission. Any decision/order made by two or more Members can be appealed before the CAT by virtue of Section 42 of the Act. Hence, constitution of a larger Bench of the Commission of two or more Members does not deprive any undertaking of its right of appeal. Moreover, the scope and nature of the enquiry and the subject matter and decision of the 2010 PSMA Order were entirely different from the instant proceedings, hence, no conflict of interest arises.



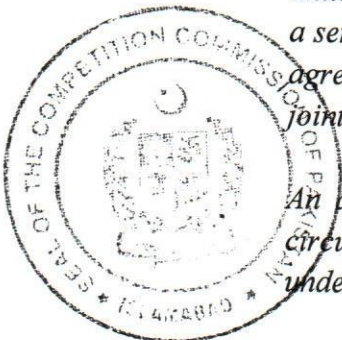
**D. LAW PERTAINING TO SECTION 4 VIOLATIONS – INTERNATIONAL (EU) & DOMESTIC JURISDICTIONS – CONCEPT OF 'CONCERTED PRACTICE' & 'DECISION' OF AN UNDERTAKING**

122. The alleged violations pertain to Section 4 of the Act. In the instant proceedings, there has been great debate on the application of Section 4 in relation to decisions/agreements between PSMA and its member undertakings (it has been argued that there is no decision/agreement for the purpose of Section 4). Hence, there can be no implementation of the same or any that participation of the undertakings in any concerted practice and there is no concurrence of wills, meeting of the minds or joint intention. Hence, such alleged conduct does not fall within the scope and ambit of Section 4 of the Act.
123. At the outset, the Commission seeks to clarify the application of Section 4 of the Act and principles in relation thereto. Briefly, none of the undertakings have contested that they do not fall within the definition of 'undertaking' under Section 2(1)(q) of the Act. In this regard, the Commission finds that each undertaking is a body corporate engaged in the 'production, supply, distribution of goods' and includes the association of undertakings, i.e., PSMA.
124. Section 4 of the Act is in congruity with Article 101 of the Treaty on the Functioning of the European Union (the "**Treaty**") (formerly Article 81 of the EC Treaty). The European Commission has categorized prohibited conduct under Article 101 of the Treaty as either being in the form of an 'agreement' or a 'concerted practice'. The UK Competition Markets Authority ("**CMA**") in the Tobacco Manufacturers Case No. CA98/01/2010/ Case CE/2596-03, aptly summarized the principles enunciated by the European Commission, General Court and ECJ decisions on the matter and their application on UK competition law infringements as follows:

*"An agreement does not have to be a formal written agreement to be covered by the Chapter I Prohibition. It may be constituted simply by way of an 'understanding', even where there is nothing to prevent either party going back on, or disregarding, the understanding. The Chapter I Prohibition is intended to catch a wide range of agreements, including oral agreements and 'gentlemen's agreements' as, by their nature, anticompetitive agreements are rarely in written form.*

*There is no requirement for an agreement to be legally binding, or for it to contain any enforcement mechanisms. An agreement may be express or inferred from conduct of the parties, including conduct that appears to be unilateral. An agreement may consist not only of an isolated act, but also of a series of acts or a course of conduct. As held by the General Court, for an agreement to exist: '[I]t is sufficient if the undertakings have expressed their joint intention to conduct themselves on the market in a specific way'."*

*An agreement within the meaning of the Chapter I Prohibition exists in circumstances in which there is a concurrence of wills, in that a group of undertakings intend to adhere to a common plan that limits, or is likely to*



*limit, their commercial freedom by determining the lines of their mutual action, or abstention from action.*

*Although it is essential to show the existence of a joint intention to act on the market in a specific way in accordance with the terms of the agreement, it is not necessary to establish a joint intention to pursue an anti-competitive aim as such. The form in which the parties' intention to behave on the market is expressed is irrelevant.*

*An agreement can also come into existence through tacit acquiescence. Tacit acquiescence requires an express or implied 'invitation' from one party to the other party to fulfil an anti-competitive goal 'jointly', which may be inferred from conduct.*

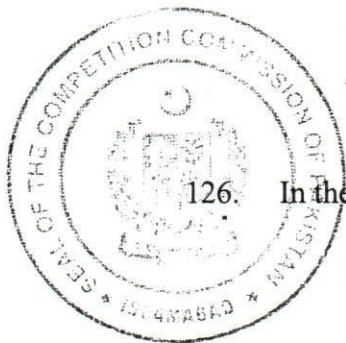
*The fact that a party does not abide fully by an agreement which is anticompetitive, does not relieve that party of responsibility for it.*

*A concerted practice does not require an actual agreement (whether express or implied) to have been reached... Rather, as the ECJ held... the object is to bring within the prohibition of that Article [101] a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.*

*The concept of a concerted practice must be understood in light of the principle that each economic operator must determine independently the policy it intends to adopt on the market.*

125. It has further been held by the ECJ, as relied upon by the CMA in the *supra Tobacco Manufacturers* case that:

*"It is not necessary, for the purpose of finding an infringement, to characterize conduct exclusively as an agreement or as a concerted practice. The concepts of agreement and concerted practice are not mutually exclusive and there is no rigid dividing line between the two. They are intended: 'to catch forms of collusion having the same nature and are only distinguishable from each other by their intensity and the forms in which they manifest themselves.'"*



126. In the *supra* case of *T-Mobile*, it has also been held by the ECJ that:

*"With regard to the assessment as to whether a concerted practice is anti-competitive, close regard must be paid in particular to the objectives which it is intended to attain and to its economic and legal context.*

...in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition. In other words, the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market.”

127. With regard to ‘decisions by an association of undertaking’, the European Commission, the General Court and/or the ECJ generally deduce whether the object or effect of the decision, regardless of its form, influences or coordinates the conduct of the members of the association. Through jurisprudence developed in that part of the world, the decisions by associations of undertakings, in particular, pertaining to information exchange, exist in different forms such as letters, orders, instructions, protocols, forecasts, recommendations, verifications, etc. In fact, in Re Nuovo CEGAM, 1984, OJ L 99/29, CMLR 484, the European Commission initiated the case as a result of an investigation into the insurance industry where the object of the foundation of the Italian association of engineering insurers and the effect of its activities was *prima facie* found to be to restrict or distort competition within the common market for the class of insurance concerned. The European Commission found that the founding documents of the Association constituted an “*agreement between undertakings and the activities of the Association are based on decisions by its organs, which constitute decisions by an association of undertakings.*” Mere recommendations by associations with no binding effect have also been held to be a ‘decision’ by the ECJ<sup>10</sup>.
128. In this regard, coming to the application of Section 4 of the Act, the Commission has held in its earlier orders, in particular, the *Pakistan Jute Mills Association and its Member Mills Order* dated 3 February 2011 “*that the term agreement used in Section 4 of the Act has a very wide scope. As per the definition given in Section 2(1)(b) of the Act, the term agreement can refer to any arrangement, understanding or practice.*” In this regard, the Commission has held that, due to the wide scope of the said definition, an agreement can take a variety of forms and “*does not have to conform to the usual notion of a standardized written, binding or legally enforceable instrument. In line with this definition, a practice that has continued over a period of time in a particular market or industry qualifies to be an “agreement” and such an agreement can be scrutinized by the Commission.*”
129. With regard to the term ‘decision’, the Commission in the *supra Pakistan Jute Mills* case, elaborated the scope of the term broadly, applying the wide interpretation developed in the EU, as stated above, where even rules, recommendations and co-

<sup>10</sup>Sofia Competition Forum (comprising of Balkan State Competition Authorities), *Guidelines on Information Exchange between Competitors*, 2013

Retrieved from: <https://unctad.org/meeting/first-meeting-competition-authorities-sofia-competition-forum>

ordination of an association falls within the purview of the same. In this regard, the Commission placed reliance on the cases of V/27.958 National Sulphuric Acid Association [80/917/EEC], where the rules adopted by the said association were decisions of that association and the case of C-96/82 IAZ International Belgium NV v Commission [1983] ECR 3369 where, with regard to the activities of an association named 'Anseau', it was held:

*"19. In the first place, Anseau observes that there can be no question of an 'agreement between undertakings' within the meaning of the above-mentioned provision. Anseau is an association of undertakings which does not itself carry on any economic activity. Article 85 (1) of the Treaty is therefore applicable to it only in so far as its member undertakings are legally bound by the agreement. In fact they are not since, under both the agreement and the statutes of Anseau, the latter is empowered only to make recommendations.*

*20. As the court has already held... Article 85 (1) of the Treaty applies also to associations of undertakings in so far as their own activities or those of the undertakings affiliated to them are calculated to produce the results which it aims to suppress. It is clear particularly from the latter judgment that a recommendation, even if it has no binding effect, cannot escape Article 85 (1) where compliance with the recommendation by the undertakings to which it is addressed has an appreciable influence on competition in the market in question."*

130. The Commission has also held, *inter alia*, in its previous orders that:

- i. A decision of an association reflects an understanding between the member undertakings of an association and, if implemented/acted upon by the member undertakings, results in an agreement between the association and the member undertakings<sup>11</sup>.
- ii. By being a member of an association, an undertaking is deemed to have accepted its constitution and to have empowered the association to undertake obligations on its behalf. Consequently, even where a member has not expressly approved an anti-competitive agreement concluded by the association but has not expressly opposed it, the member may be held to have acquiesced to the agreement (emphasis added).<sup>12</sup>



<sup>11</sup> Banks Order dated 10 April 2008

<sup>12</sup> All Pakistan Cement Manufacturers Association and its Member Undertakings Order dated 27 August 2009

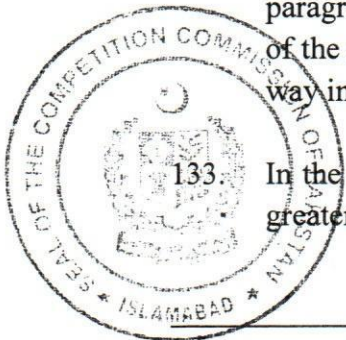


- iii. The prohibition contained in Section 4 of the Act pertains to 'entering' into a prohibited agreement and the implementation of the same is not required to be established for the purposes of violation being committed (emphasis added)<sup>13</sup>.
- iv. The term 'agreement' as conceived under the Act is very broad and encompasses the 'entering into' any/or all practices, arrangements and understandings that come within the purview of Section 4(1) of the Act. When this section is read with the definition of 'agreement' in the Act contractual elements like offer and acceptance, free consensus of parties, lawful consideration or for that matter enforceability of the agreement itself, are not relevant factors in determining the fact whether any 'agreement' has been entered into. The prohibition under Section 4 of the Act pertains to all agreements whether these are: legally enforceable or not, with or without consideration or entered voluntarily or involuntarily<sup>14</sup>.

131. Therefore, we fail to understand the selective reliance placed on the case in the Matter of Pakistan Automobile Manufacturers Authorized Dealers Association (PAMADA) and its Member Undertakings 2016 CLD 289 as well as the Commission's *Banks Order* that in order for member undertakings of an association to be held liable, 'decisions' must be implemented. The selective reliance by Counsel on the excerpt in the *Bank's Order* fails to appreciate the context that, in that particular case, the decision of the association was acted out and therefore, there was no doubt as to the existence of an agreement. It was not stated as a pre-requisite of an 'agreement'. To the contrary, the Commission determined that the term 'agreement' has a very wide scope. While the Commission in *PAMADA* cited the excerpt from the *Bank's Order*, they decided on the basis that the member undertakings had established their independence and non-adherence with respect to the price fixing decision. As for reliance on the Dole case, we will discuss it in Part E below.

132. As stated above, besides the term agreement having a very wide import, the Commission in its decision of *All Pakistan Cement Manufacturers Association* also observed that the emphasis under the Act is 'entering into' an agreement not implementation of the same. In this regard, we find the case of Case T-6/89 Enichem Anic versus European Commission instructive where the General Court observed, in paragraph 113 thereto, that the European Commission was not able to obtain any proof of the applicant's implementation of the price initiatives, however, that did not in any way impugn the finding that the applicant participated in those initiatives.

133. In the above legal context, we shall now proceed to determine on the main issues in greater detail, whether the undertakings are in violation of Section 4 of the Act and



<sup>13</sup> *ibid*

<sup>14</sup> In re-ICAP Appeal Order dated 11 March 2009

whether each alleged prohibited conduct amounts to an 'agreement' for the purposes of Section 4.

**E. ISSUE I – EXCHANGE OF COMMERCIALY SENSITIVE INFORMATION**

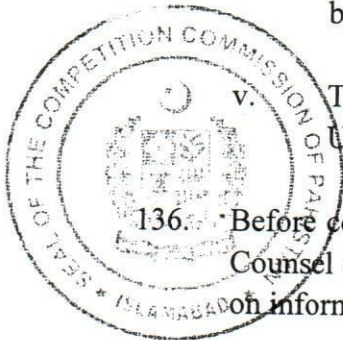
134. In summation, based on the findings of paragraphs 93-111 of the Enquiry Report, it is stated that since 2012 onwards, the platform of PSMA is being used by its member mills in Punjab zone to share stock information amongst themselves, which has also been considered by the Enquiry Committee to be sensitive commercial information and that the same has a direct bearing on the current and future price of sugar. Such information, the Enquiry Committee maintains is used to control prices and restrict and distort competition in the relevant market and is a *prima facie* violation of Section 4(1) read with Section 4(2)(a) of the Act. As will be discussed in further detail below under Part F, the Enquiry Report also found that all undertakings also exchanged commercially sensitive information as a part of a broader cartel arrangement/agreement to pre-determine export quantities, with the result of controlling supplies. We find that this information sharing is pursuant to the decision of PSMA as also pointed out in the Enquiry Report.

135. In this regard, Counsel have, *inter alia*, argued that:

- i. The context in which stock positions in Pakistan are shared between the undertakings has been ignored i.e. SAB asks for data regarding production, sales etc. Furthermore, the Federal Government itself seeks, solicits and demands input of PSMA as well as other stakeholders on the sugar stock and availability position, which in turn is used to form an opinion on the amount of exports/imports allowed.
- ii. The information shared is not 'commercially sensitive' as the same is easily accessible public information as it is also collected by the Provincial Cane Commissioners.
- iii. The 'Dole Test' referred to by the Commission in its previous orders is inapplicable in this regard due to various factors including that there is no stability in the sugar industry.
- iv. A rule of reason approach should be adopted instead of finding the same to be by object restrictive of competition.

v. The same does not amount to a 'decision' by PSMA or an 'agreement' between Undertakings.

136. Before coming to the relevant facts in the instant matter and the arguments raised by Counsel on behalf of the undertakings, it is important to state the principles laid down on information exchanges between competitors.



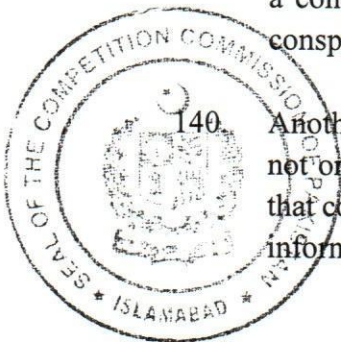
137. According to the OECD's Policy Roundtables on "*Information Exchanges between Competitors under Competition Law*" (2010) (the "**Information Exchange Policy Roundtable**"), generally, information exchanges among competitors may fall into three different scenarios under competition rules:

- i. "*as a part of a wider price fixing or market sharing agreement whereby the exchange of information functions as a facilitating factor;*
- ii. "*in the context of broader efficiency enhancing cooperation agreements such as joint venture, standardization or R&D agreements; or*
- iii. "*as a stand-alone practice, whereby the exchange of information is the only cooperation among competitors.*"

138. It has also widely been regarded by competition agencies, as stated in the Information Exchange Policy Roundtable that the exchange of information can facilitate collusion among competitors by allowing them to establish coordination, monitor adherence to coordinated behavior and effectively punish any deviations. While assessing the legality of information exchanges, competition agencies take into account the structure of the affected market and levels of concentration, characteristics/nature of the information exchanged and the modalities in which the information exchange takes place.

139. There are generally two approaches to the legal assessment of information exchanges, which varies from jurisdiction to jurisdiction. Harmful information exchanges are considered to be a part of a broader cartel agreement. What is important is that an agreement/arrangement must exist to constitute a violation and that information sharing is not an isolated act. This practice can be seen prevalent in USA and India in light of several judgments by the appropriate forum in relation to information exchanges between competitors. However, the US Supreme Court has also acknowledged in United States v. Container Corp., 393 U.S. 333 (1969) that where each appellee, upon request by a competitor, would furnish information as to the most recent price charged or quoted to individual customers, with the expectation of reciprocity and with the understanding that it represented the price currently being bid, that although there was no agreement in place to adhere to a pricing schedule, there was an exchange of information concerning specific sales to identified customers and current prices. Hence, a concerted action, which was considered sufficient to establish the combination or conspiracy, the initial ingredient of a violation of Section 1 of the Sherman Act.

Another approach towards information exchanges, prevalent in the European Union, not only at Community level but also in most Member States at the national level, is that concerted practice is sufficient, where collusion is sanctioned within the context of information exchanges. In this regard, according to the *Guidelines on the Applicability*



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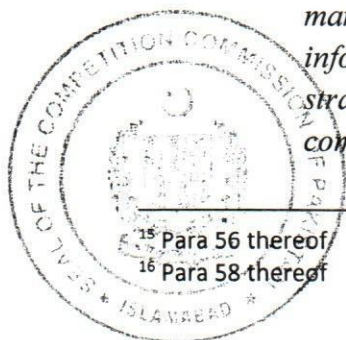
of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements (the “**Article 101 Guidelines**”), Section 2 relates to the general principles on the competitive assessment of information exchanges as laid down in Community decisions, in particular, the ECJ. The said provision acknowledges that data can be exchanged either directly between competitors or indirectly through a common agency such as a trade association or another third party such as a market research organization.

141. The Article 101 Guidelines describe information exchanges as “*agreements, decisions by associations of undertakings, or concerted practices under which information is exchanged, where the main economic function lies in the exchange of information itself*”<sup>15</sup>. The said Guidelines acknowledge that the exchange of market information may lead to “*restrictions of competition in particular in situations where it is liable to enable undertakings to be aware of market strategies of their competitors. The competitive outcome of information exchange depends on the characteristics of the market in which it takes place (such as concentration, transparency, stability, symmetry, complexity etc.) as well as on the type of information that is exchanged, which may modify the relevant market environment towards one liable to coordination*”<sup>16</sup>.

142. The Article 101 Guidelines further state that:

“60. Information exchange can only be addressed under Article 101 if it establishes or is part of an agreement, a concerted practice or a decision by an association of undertakings...

61. This [information exchanges] does not deprive companies of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors. It does, however, preclude any direct or indirect contact between competitors, the object or effect of which is to create conditions of competition which do not correspond to the normal competitive conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings, and the volume of the said market. This precludes any direct or indirect contact between competitors, the object or effect of which is to influence conduct on the market of an actual or potential competitor, or to disclose to such competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, thereby facilitating a collusive outcome on the market. Hence, information exchange can constitute a concerted practice if it reduces strategic uncertainty... Consequently, sharing of strategic data between competitors amounts to concentration, because it reduces the independence



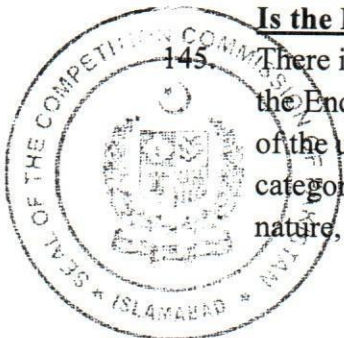
*of competitors' conduct on the market and diminishes their incentives to compete...*

*62... A situation where only one undertaking discloses strategic information to its competitor(s) who accept(s) it can also constitute a concerted practice. Such disclosure could occur, for example, through contacts via mail, emails, phone calls, meetings etc. It is then irrelevant whether only one undertaking unilaterally informs its competitors of its intended market behaviour, or whether all participating undertakings inform each other of the respective deliberations and intentions... For example, mere attendance at a meeting where a company discloses its pricing plans to its competitors is likely to be caught by Article 101, even in the absence of an explicit agreement to raise prices. When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly unless it responds with a clear statement that it does not wish to receive such data."*

143. It is reiterated that such principles have been aptly elaborated upon and enunciated in many ECJ decisions, one of the most prominent being Dole Food and Dole Germany v. European Commission C-286/13 P, which has been referred to by the Commission in its previous orders. In this regard, the Commission clarifies that the principles enunciated therein had summarily been defined, in previous orders, as the 'Dole Test', however, the term has been misconstrued by the undertakings to mean a limb-by-limb test where each limb must be satisfied in order for a finding that the information exchanged between competitors was anti-competitive. We consider this a misconception, as the Dole judgement mainly reiterates principles established by the ECJ over time when faced with instances of concerted practices/agreements where information was exchanged between competitors and does not provide for a mandatory limb test that must be adhered to in order to find a violation of such nature.
144. Coming to the merits of the instant matter, it has not been denied by any of the undertakings that there was no act of exchanging information. However, what is denied is the nature of the information exchanged, i.e., that the information was not commercially sensitive, the information exchanged was one-off instance or not frequent, hence, could not be termed as anti-competitive given the economic context of the relevant market.

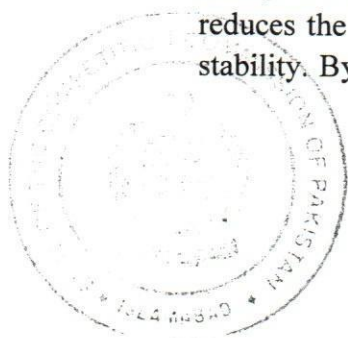
**Is the Information Exchanged 'Commercially Sensitive'?**

145. There is significant evidence attached to the Enquiry Report along with the findings of the Enquiry Report as well as documents and submissions made by Counsel on behalf of the undertakings evidencing exchange of stock information. The Enquiry Report has categorized sharing such information, in paragraph 94 thereof, to be highly sensitive in nature, since it allows the undertakings to assess and coordinate on future sales volumes



and pricing strategies and to control the supply of sugar in the market, visibly acting in a concerted and coordinated manner.

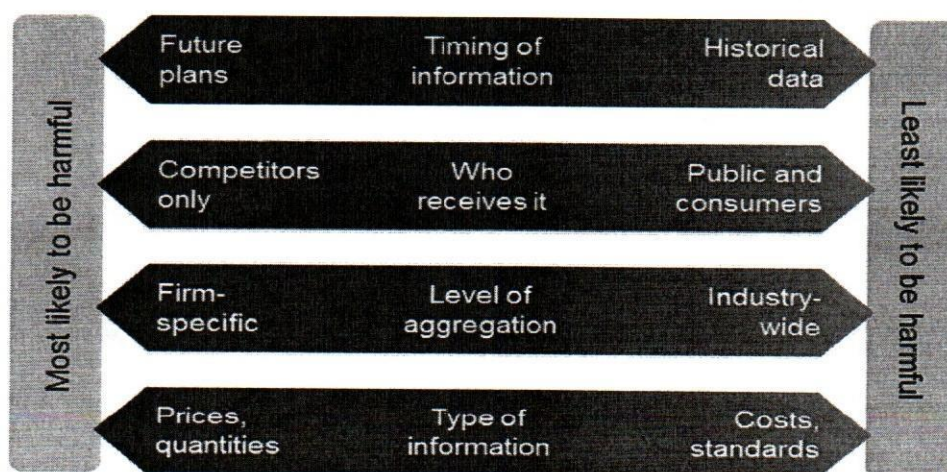
146. According to the Information Exchange Policy Roundtable, “*confidential information (i.e., information on the very nature of the business, such as prices, quantities, commercial strategies, and the like) generally cannot be disclosed to competitors. Competition law enforcers are often very suspicious when information is exchanged between competitors regarding these sensitive competitive variables... Agencies are usually concerned with exchanges of data regarding future strategies, including prices, sales, and capacities trends. This information is particularly sensitive and should remain within the corporate knowledge of each company... The exchange of current information is more likely to be considered an infringement of competition law if the information can be used to determine the conduct of participants in the market at the time of the exchange.*”
147. Upon analysis of the submissions made by the competition agency participants in the Information Exchange Policy Roundtable, when assessing the compatibility of the exchange of information between competitors with the competition rules and the potential anticompetitive object or effect of the same, briefly the following factors are considered:
- i. The purpose of the exchange
  - ii. The type of information exchanged – whether public, confidential or sensitive in nature
  - iii. The level of detail of information – whether aggregated or otherwise
  - iv. The frequency of the exchange
  - v. The characteristics of the product in question
  - vi. Level of market concentration
  - vii. Importance of the information exchanged for setting of prices, volumes or predicting (forecasting) commercial policies of other players
148. We deem it pertinent to examine here the economic theory behind information exchange and how it can help in achieving collusive outcomes. One of the fundamental assumptions of perfect competition is that firms and consumers have perfect information. In reality, however this is not the case. Regulators and consumer groups often see market transparency as a laudable goal, so it may be surprising that firms’ openness with respect to their own information can harm competition. A common theory of harm is that information exchange facilitates coordinated outcomes and reduces the risks inherent in competitive markets, replacing them with certainty and stability. By definition, any exchange of information will reduce uncertainty to some



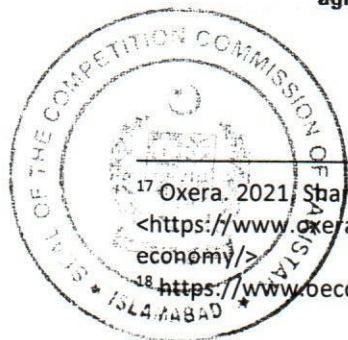
degree; so, the key question is whether such reduction harms competition in terms of overall output and prices<sup>17</sup>.

149. Data sharing to certain extent may be considered beneficial in terms of allowing firms to benchmark themselves in certain areas, *vis-à-vis* their competitors, and helps promote innovation and best practices or enhancing competition. However, conversely, rivals can indulge in exchange of information that is commercially very sensitive e.g. prices, supply volumes or terms of trade. Such exchange can be either ancillary to or adjunct to a cartel with the view to monitor any deviations from the conspiracy, or it can be a standalone form of exchange.
150. Generally, from a competition law perspective sharing of information between competitors can be placed along a spectrum, as given in Figure-2 below, ranging from information that will always be problematic at one end and on the other end information that is generally not considered problematic. The potential for anti-competitive effects depends on a number of key factors, such as the type of information exchanged and the structural characteristics of the market involved<sup>18</sup>.

**Figure 2 Spectrum of considerations for information exchange cases**



Source: Oxera, based on European Commission (2011), 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements', *Official Journal of the European Union*, 2011/C 11/01, section 2.



<sup>17</sup> Oxera. 2021. Sharing too much? Information exchange in the digital economy - Oxera. [online] Available at: <https://www.oxera.com/insights/agenda/articles/sharing-too-much-information-exchange-in-the-digital-economy/>

<sup>18</sup> <https://www.oecd.org/competition/cartels/48379006.pdf>

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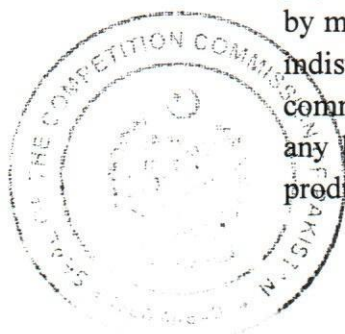
151. In light of the above spectrum, information that can be considered as problematic includes:

- i. Information exchanges among competitors of data regarding future prices and/or quantities (such as future sales, market shares, territories or customer lists);
- ii. Information sharing on current conduct that reveals intentions on future market behaviour (outside pricing and quantity information) or cases where the combination of different types of data enables the direct deduction of intended future prices and quantities to have the object of restricting competition; and
- iii. Any exchange of information that may not have the intention of restricting competition but may have that effect.

152. The Article 101 Guidelines state that the information exchanged must be strategic in nature and states that:

*“The exchange between competitors of strategic data, that is to say, data that reduces strategic uncertainty in the market, is more likely to be caught by Article 101 than exchanges of other types of information. Sharing of strategic data can give rise to restrictive effects on competition because it reduces the parties’ decision-making independence by decreasing their incentives to compete. Strategic information can be related to prices (for example, actual prices, discounts, increases, reductions or rebates), customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies and R&D programmes and their results. Generally, information related to prices and quantities is the most strategic, followed by information about costs and demand. However, if companies compete with regard to R&D it is the technology data that may be the most strategic for competition. The strategic usefulness of data also depends on its aggregation and age, as well as the market context and frequency of the exchange.” (emphasis added).*

153. The product market under question is that of white refined sugar, which can be differentiated from the other forms of sugar such as brown sugar and *gur* in terms of physical characteristics, price and intended usage. White refined white sugar produced by mills is homogenous and to the ordinary consumer, sugar produced by one mill is indistinguishable from that produced by another mill. Moreover, it is sold either to commercial consumers or at the retail level in open or pre-packed plastic bags without any branding, therefore, there is no product differentiation. In the absence of any product differentiation or branding producers can only increase their sales by reducing





prices. In a competitive market firms' prices might be near to or equal to cost. In such a scenario firms stand to gain if they chose to substitute the risks of open competition with collusion.

154. The second factor peculiar to sugar (and other agricultural commodities) is the fact that the main raw material is produced only once a year. The sugar sector has another distinguishing feature as compared to other essential commodities, for example, wheat is harvested only once a year however, it can be stored and flour is milled throughout the year. In contrast, sugarcane starts losing its weight and sucrose content after harvest and therefore, has to be crushed as soon as possible by sugar mills to give a better yield. Resultantly, sugar can only be produced in the three months known as the crushing season. Economic theory tells us that prices are a function of demand and supply. On the demand side, the consumption is fairly constant, as has been observed from consumption data over the years, hence, it is the supply situation which actually affects price of sugar in the market. Supply is the stock of sugar available for sale and since more sugar cannot be produced, sugar stock figures are determinants of future prices.

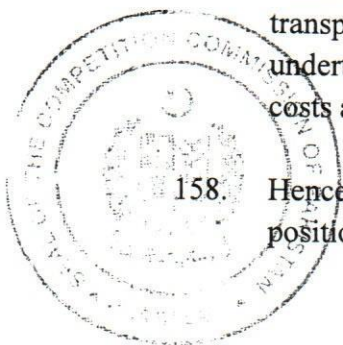
155. As sales are made they are subtracted from the total sugar quantity to give a figure for balance stock. This may be summarized through a simple accounting formula:

$$[\text{Opening stock} + \text{Sugar produced}] - \text{Sales} = \text{Balance/closing stock.}$$

156. Based on stock positions, availability or non-availability of stocks becomes a highly sensitive and critical information. The role of perception of shortage in this regard cannot be undermined as it leads to giving different market signals at different levels effecting not only the availability of the product but also, more likely than not, an upward price trend at any or all levels, be it manufacturers, wholesale dealers, retailers or consumers; contributing also largely to the market sentiments and having a role to play in creating any crisis like situation, which may very well even prompt speculation/*satta*.

157. As stated above, given the relative stability of demand, the ultimate factor leading to price competition in the relevant market is the stock information. The stock available is not only used to meet the national demand of sugar in the country, but also to determine the export quantities, if any, for the same in the event of any available surplus. Given that there is no restriction on the ex-mill price for undertakings to sell sugar and on traders to uplift sugar from specific mills except for normal cost-factors such as cost in transportation, being privy to stock information of a mill also influences an undertaking's independent commercial decision to sell its stock in order to recoup its costs and/or maximize its profit.

158. Hence, we find merit in what is argued in paragraph 94 of the Enquiry Report that stock position of each mill is highly sensitive in nature, since it allows sugar mills to assess

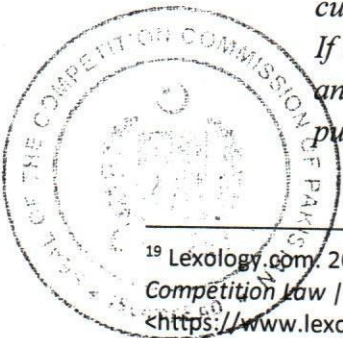


70  
ML

and coordinate on future sales volumes and pricing strategies, effectively distorting competition in an already highly regulated market.

159. Coordination will also be most likely where information is exchanged concerning factors on which firms may have an incentive to strategically coordinate. Exchanges relating to prices, quantities or other commercially sensitive or strategic information will usually raise more concerns than, for example, those relating to standards or safety records.<sup>19</sup> We reiterate the argument made above *vis-a-vis* how sugar stock position is strategic in the context of the sugar industry where sugar is produced only in the crushing season and sold throughout the year. The stock positions in essence are proxies for future production quantities.
160. Similarly, the frequency of communication among cartel members depends as well on the nature of the product. Homogenous goods sold in relatively small quantities are amenable to simple rules that limit the need for intra-cartel communication. Where there is a lot of product variety or sales are very lumpy, communication may be required for each transaction.
161. We now come to the question of whether the stock information is public knowledge, hence, not confidential, therefore, not commercially sensitive in nature. In this regard, the undertakings argued that stock information and data is available with the Provincial Cane Commissioners and is also compiled, collated and contained in the working papers, which are circulated and presented to all members of SAB, including PSMA and its members.
162. In this regard, we refer to, once again, the Information Exchange Policy Roundtable wherein it was observed that information exchange is genuinely public if it makes the exchanged data equally accessible to suppliers and customers. Furthermore, it was stated that:

*“Most agencies interpret the notion of “publicly available information” narrowly: in order not to give rise to competition concerns the information exchanged has to be genuinely public, i.e., the information must be readily observable and available to everyone (i.e., to both competitors and customers) and at no cost. Search and collection costs play an important role. If the information is available to the public but its research and its retrieval and difficult and costly, the information is not genuinely available to the public.”*

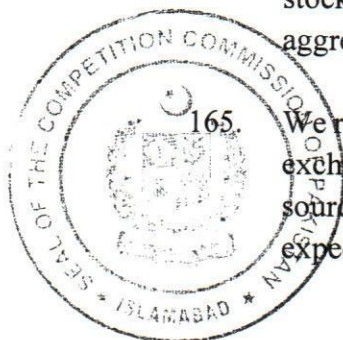
<sup>19</sup> Lexology.com. 2021. *Exchange of Commercially Sensitive Information among Competitors Violates Competition Law* | Lexology. [online] Available at: <<https://www.lexology.com/library/detail.aspx?g=8e1de4b5-4ae6-4cda-873f-725062934a5e>> [Accessed 3 May 2021]

163. In light of the above, we find that just because the information is available with a public body, i.e., the Cane Commissioner Office(s), and disseminated to industry stakeholders that are members of SAB, does not equate to the same being publicly available in absence of any dissemination to customers and suppliers alike. In any case, the stock information provided by the Provincial Cane Commissioners, as admitted by the undertakings in their own submissions, is collated and aggregated data without referring to any individual mill based stock data on a current/fortnightly basis. Any previous stock figures requested by SAB are also in the form of historical data. A table of the information provided by the Provincial Cane Commissioner in the SAB meetings is as follows:

| Description                     | 1-Punjab<br>(27.07.2020) | 2-Sindh<br>(15.07.2020) | 3-KPK<br>(15.07.2020)  | TOTAL<br>(1+2+3) |
|---------------------------------|--------------------------|-------------------------|------------------------|------------------|
| A-New Sugar produced 2019-20    | 3.057                    | 1.459                   | 0.363<br>(0.302+0.061) | 4.879            |
| B. Remaining Old stocks 2018-19 | 0.457                    | 0.001                   | 0.036                  | 0.506            |
| Total sugar stocks: (A+B)       | 3.512                    | 1.460                   | 0.400                  | 5.352            |
| Sold/off take                   | 2.553                    | 0.815                   | 0.324                  | 1.987            |
| Balance stocks as of 20.07.2020 | 0.960                    | 0.644                   | 0.075                  | 1.680            |

Source: Minutes of SAB meeting held on July 2020

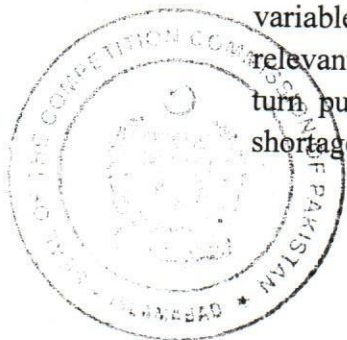
164. Moreover, certain undertakings (Counsels on behalf of Group 1-3) have also submitted excerpts from the 'Monthly Surveys of Industrial Production and Employment in Punjab' issued by the Punjab Bureau of Statistics, which showcases, only in a few monthly editions, *inter alia* mill-wise capacity figures, the same is an aggregate figure for a certain period. Moreover, although such monthly reports are available on the website of the Bureau of Statistics Punjab, however, data pertaining to the sugar sector (and various other manufacturing industries) in this report is in an aggregated form and includes: sugarcane crushed, production of sugar, sale of sugar and closing stock of sugar. It is important to note here that this information is aggregate and not mill-wise and secondly, this report presents historical information. For example, on 15 January 2021, the Bureau of Statistics Punjab's website contains a report for the month of September 2020. Hence, the same is a statistical publication put out by the Bureau of Statistics. Statistical information is distinguishable from the commercially sensitive stock information shared by PSMA and its members since it is, *inter alia*, a) in aggregate form and b) more importantly is historic in nature.



We refer to the *Dole* judgement, wherein the applicants maintained that the information exchanged fell within the public domain or was capable of being obtained from other sources such as trade publications, which even contained more detailed information on expected pricing direction in the relevant sector. In support of their claims, the

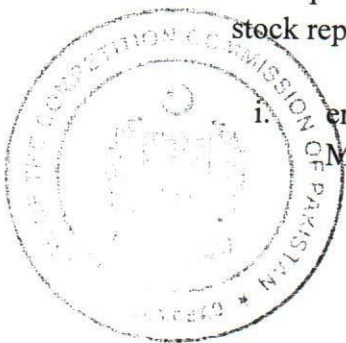
applicants referred to on-line periodicals which allegedly provided timely and comprehensive details on the banana market. The General Court, however held that Dole's or Weichert's point of view on certain information, which was significant for the conditions of supply and demand and which could not be obtained other than by means of discussions with the undertakings concerned, as well as its impact on the development of the market, did not by definition constitute publicly available information (Para 279 thereof). The General Court further distinguished that the publications referred to by the undertakings were issued after the weekly quotation prices were set and not before and one of the specific publications referred to did not make any mention of any price trends for the forthcoming week. In any event, it was held that the European Commission's findings, in itself, were not incompatible with its conclusion that the practice in issue had an anti-competitive object, which was based on an overall assessment of the practice.

166. Also, in **Case T-758/14 Infineon Technologies AG versus European Commission** (upheld by the ECJ), the European Commission's decision was under challenge whereby four undertakings had coordinated their market behavior by means of the exchange of commercially sensitive information concerning pricing generally and prices charged to specific customers, contract negotiation, production capacity or utilization of that capacity and their future conduct on the market. The applicants did not deny meetings or contest the content of the exchanges but that the information exchanged was not competitively sensitive. The General Court shared the European Commission's view that such an exchange of information on current and future prices, as well as on capacities, is capable of influencing directly the commercial strategy of competitors. Just because certain data was public also had no bearing on the finding that the applicant had unlawfully exchanged confidential information relating to their prices and future capacities (Paras 162-168).
167. In this connection, another example where PSMA was privy to non-public information can be seen from the minutes of the SAB meeting held on 13 September 2019 and 29 October 2019 respectively where 7 sugar mills in Sindh had refrained from providing their stock information due to pendency of cases before the National Accountability Bureau. Such figures were not included in the table provided by the Provincial Cane Commissioners, however, Chairman, PSMA explained that if such stocks were added then the actual closing stocks for the concerned period would be greater.
168. In light of the discussion above, we find that stock figures amount to information related to the very nature of the business of the undertakings, which are all active in a homogenous product market and by nature is considered to be a sensitive competitive variable as the availability of sugar stock is directly linked to price competition in the relevant market. More stock, generally, equates to more availability of sugar, which in turn puts a downward pressure on prices for the end-consumer, whereas, a stock shortage leads to insufficient supply to meet demand, hence, a likely increase in prices.



169. Coming to the allegation of whether such stock information has been shared and discussed by PSMA member undertakings, we find from the documents on record, that discussion, sharing and collection of stock information data dates back to 2012 for the duration of the enquiry period and that such information was required to be mill specific, not historical in nature and not provided in any aggregated form. The undertakings have acknowledged that stock information is collected and shared where the undertakings' own submissions state that stock data must be collected from all member undertakings of PSMA for the purpose of discussing the same in SAB meetings and corroborating the data provided by the Cane Commissioner. There is also clearly nothing on record, neither in the submissions of the undertakings or in any of the documents annexed to the Enquiry Report or provided by the undertakings that evidence any undertaking protesting to such sharing of information or questioning the need to provide the same to PSMA. Therefore, it is clearly inferred that such practice has continued during the enquiry period on a frequent basis.
170. The record also reveals that such information has been continuously provided to PSMA in the form of fortnightly reports and PSMA has required the cooperation of all its member undertakings to share stock information in this regard. We refer, in particular to the following AGM minutes:
- i. 47<sup>th</sup> AGM held on 17 October 2012 wherein it was stated that *"a committee was constituted to collect data from the mills and supply it to the PSMA centre office for compilation of fortnightly reports on regular basis and its further distribution to the quarters concerned. It was also agreed that the sugar mills may lose its membership in case it did not provide the production data"*
  - ii. 48<sup>th</sup> AGM held on 24 September 2013 wherein it was decided by the AGM that *"all mills to supply their production and stock figures to the PSMA zonal offices and PSMA centre office to enable them to come up with the correct figures in future."*
  - iii. 51<sup>st</sup> AGM held on 20 October 2016 wherein the representatives of PSMA stated that they would appreciate cooperation of the member mills to provide reliable data and production figures, to which the members expressed their support and cooperation.
171. The evidence attached to the Enquiry Report at Annex D1 pertaining to the email correspondence in which individual member undertakings sent PSMA 'fortnightly stock reports' include:

1. emails dated 3 January 2016 containing the stock report of Jauharabad Sugar Mills as at 31 December 2015;



- ii. email dated 23 January 2016 from Fatima Group containing stock report as at 31 December 2015
- iii. email dated 23 February 2016 from Hunza Sugar Mills containing stock report as at 15 February 2016
- iv. email dated 10 December 2016 from Ittefaq Sugar Mills containing stock report as at 30 November 2016, reproduced as follows:

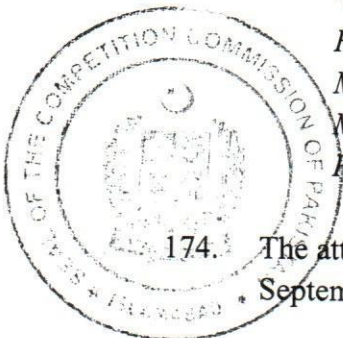
*"From: Ittefaq Sugar [mailto:ittefaqsugar@hotmail.com]  
Sent: Saturday, December 10, 2016 4:41 PM  
To: PSMA LHR; Sameem  
Subject: FORTNIGHTLY ENDING REPORT 30-11-2016*

*Dear Sir,  
Kindly find an attached herewith sugar stock report of the fortnight ending 30-11-2016 for your kind information please.  
Thanking you, we remain.  
AGM(Finance)  
Ittefaq Sugar Mills Limited  
Shafiabad - Channi Goth"*

- 172. The above emails depict that mill-specific information related to cane crushed, sugar produced, carry forward/old stock, total sugar, quantity sold, balance stock and sold percentage is typically obtained from each mill-undertaking. The same is also evidence of instances where the decisions of PSMA in the aforementioned AGMs have been implemented and member-undertakings have cooperated by sharing their stock information.
- 173. We note, as highlighted in the Enquiry Report that such information has also been discussed by member undertakings located in Punjab, i.e., forming a part of PSMA Punjab zone, *inter se* and that the member undertakings located in Punjab were able to access the same. In this regard, Annex D1 consists of an email dated 9 September 2016 sent from m.arif@psma.pk to nadia.sarwar@chanarsugar.com and which is titled 'Fortnightly Report as on 09-09-2016' and states:

*"Plz find upto date report of Stock position of Sugar.*

*Regards,  
Muhammad Arif  
Manager Admin & A/c  
PSMA(PZ)"*



- 174. The attachment to the above email contains mill-wise stock and sales positions as of 9 September 2016, which shows that the information is current and not historical.

Similarly, there are two other email exchanges where the PSMA office is sending mill wise stock information to officials of Jauharabad Sugar Mills (emails dated 23 January 2017 and 20 March 2018). In the 20 March 2018 email, said stock positions were also shared by the PSMA office with Chanar Sugar Mills. Hence, proving that commercially sensitive information was consistently exchanged/discussed by PSMA and the member undertakings located in Punjab.

175. The exchange of commercially sensitive stock information amongst the member undertakings located in Punjab is further evidenced by the WhatsApp group itself, consisting of 48 participants and which is titled as 'PSMA – PZ (Official)' and which was created by an official of PSMA, Lahore (Mr. Arif) on 7 July 2020 (refer to Enquiry Report Annex A5 at pg 9). The existence of this group was also not rebutted by any undertaking concerned. There is clear sharing of current, mill-specific stock positions and discussion thereon (Annex D2). For ease of reference, relevant excerpts are reproduced below:

Above stocks consolidated by punjab Government on yesterday 17th July  
923008427701@s.whatsapp.net (923008427701@s.whatsapp.net)  
7/18/2020 - 5:09:58 PM  
Media/WhatsApp Documents/Consolidated Sugar Report 17.07.2020.pdf  
923008427701@s.whatsapp.net (923008427701@s.whatsapp.net)  
7/18/2020 - 5:09:58 PM  
We need to recheck current stocks once again.  
923218461083@s.whatsapp.net (923218461083@s.whatsapp.net)  
7/18/2020 - 5:10:17 PM  
Then total consumption is 3,552,000 for 7 1/2 months and monthly consumption works out to be 473,600 per month.  
923218461083@s.whatsapp.net (923218461083@s.whatsapp.net)  
7/18/2020 - 5:13:07 PM  
According to this calculation remaining stocks are hardly sufficient for 4 months and remaining period to season is 4 1/2 months from mid July to end Nov.  
923218461083@s.whatsapp.net (923218461083@s.whatsapp.net)  
7/18/2020 - 5:18:02 PM

Quote

At: 7/18/2020 - 5:09:58 PM

Message ID: 3AEC0F1BE7B82CCC0CD8

This seems correct. As 1.1 mln ton stock

923008633666@s.whatsapp.net (923008633666@s.whatsapp.net)

7/18/2020 - 5:18:31 PM

Need a very careful calculation and review of data before giving any suggestion to the Govt.

923218461083@s.whatsapp.net (923218461083@s.whatsapp.net)

7/18/2020 - 5:19:20 PM



ML.

Can confirm each mill  
923008633666@s.whatsapp.net (923008633666@s.whatsapp.net)  
7/18/2020 - 5:19:50 PM

Quote

At: 7/18/2020 - 5:20:44 PM

Message ID: 3A95F6053B61D298CE2A

Punjab 1.1 million, Sindh 0,6 million and Kpk 0.1 million tons  
923218461083@s.whatsapp.net (923218461083@s.whatsapp.net)  
7/18/2020 - 5:25:24 PM

Closing stocks as July 17, 2020. JDW1 121,694 tons. JDW2. 32,028 tons and JK1 (Mianchanu). 17,510 tons.

923218461083@s.whatsapp.net (923218461083@s.whatsapp.net)  
7/18/2020 - 5:29:56 PM

Closing stock at Indus on 17/7 is 64150 m.ton

923008453939@s.whatsapp.net (923008453939@s.whatsapp.net)  
7/18/2020 - 5:36:11 PM

Quote

At: 7/18/2020 - 5:36:11 PM

Message ID: 0D57C5A2A9F2DF3E078B71EC32A72568

Physical stocks?

923218461083@s.whatsapp.net (923218461083@s.whatsapp.net)  
7/18/2020 - 5:37:21 PM

Yes it's Godown position.

923008453939@s.whatsapp.net (923008453939@s.whatsapp.net)  
7/18/2020 - 5:38:13 PM

Quote

At: 7/18/2020 - 5:25:24 PM

Message ID: 3A476384407893228530

I think Sind position need to re check

923008633666@s.whatsapp.net (923008633666@s.whatsapp.net)  
7/18/2020 - 5:39:11 PM

KPK 100k doubtful

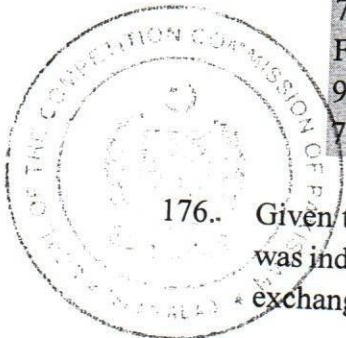
923008403011@s.whatsapp.net (923008403011@s.whatsapp.net)  
7/18/2020 - 5:39:39 PM

Pl get current data from both provinces.

923218461083@s.whatsapp.net (923218461083@s.whatsapp.net)  
7/18/2020 - 5:41:38 PM

Fsm stock correct

923008633666@s.whatsapp.net (923008633666@s.whatsapp.net)  
7/18/2020 - 5:41:38 PM

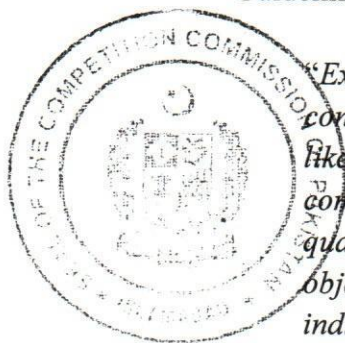


176.. Given the frequency of the stock information exchanged, the fact that the information was individualized, the fact that it was recent and current in the form of daily/fortnightly exchanges, based on the discussions of the same between the member undertakings



located in Punjab *inter se* and with PSMA as evidenced by the documents on record including discussions in the annual general meetings of PSMA, the fact that it ultimately has an impact on price developments in the relevant market, hence, ultimately being a price-setting factor and the fact that it is intrinsically linked to the commercial policy of undertakings makes the stock information 'commercially sensitive' in nature.

177. The issue, therefore, is that a decision was made regarding the sharing of commercially sensitive stock information and data by all member undertakings with PSMA and that the member undertakings located in Punjab, as per evidence, went a step further to concert with each other in discussing and disseminating stock information amongst themselves. We find that the undertakings participated in a series of meetings and communications during which the information was exchanged. Hence, through this conduct, each undertaking took part in a concerted action, together with its competitors, the purpose of which was to influence conduct on the market, including collectively determining exportable surplus of sugar stock and controlling supply thereto (discussed in further detail below) and to exploit as well as influence the independent commercial policy of each independent mill.
178. Although the evidence on record attached with the Enquiry Report is termed as 'fragmented' by the undertakings concerning the provision of stock information, we are of the considered view that all member undertakings have admittedly provided the stock information to PSMA. As stated earlier, provision of stock information sharing has not been denied for whatever purpose that may be. There is also sufficient evidence, as highlighted above, to show that PSMA has time and again decided that stock information and data must be shared, even placing a sanction on all member undertakings for failing to comply with the same. The fact that even in the WhatsApp group, member undertakings in Punjab are required to share their stock figures by the day's end in the year 2020 is further evidence that the practice is prevalent throughout the aforementioned enquiry period during 2012 to 2020.
179. In light of the findings above, it is evident that such sharing of information by its very object, i.e., by its very nature, in the given dynamics and peculiarities of the sugar industry, has to be treated as a per se violation where stock information is the ultimate factor leading to price competition in the relevant market. In this regard, the Article 101 Guidelines state that:

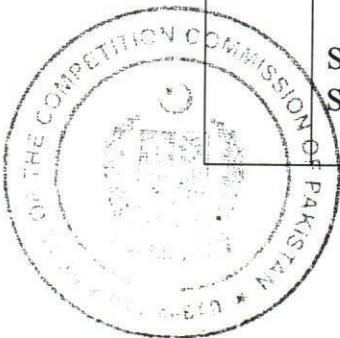


*“Exchanging information on companies’ individualised intentions concerning future conduct regarding prices or quantities (3) is particularly likely to lead to a collusive outcome...Information exchanges between competitors of individualised data regarding intended future prices or quantities should therefore be considered a restriction of competition by object. In addition, private exchanges between competitors of their individualised intentions regarding future prices or quantities would*

*normally be considered and fined as cartels because they generally have the object of fixing prices or quantities.”*

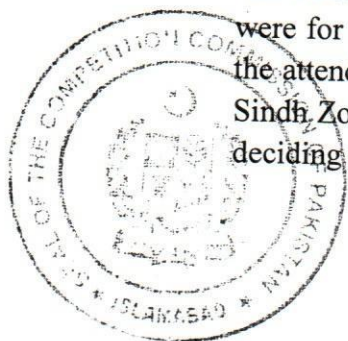
180. We, however, note that the remaining sugar mills (be they located in Sindh or KPK) have not been show-caused for sharing sensitive commercial stock information. Whereas, some of the documents on record indicate that such information sharing was taking place as follows:

| S. No  | Brief Details of Evidence   | Annex No. of Enquiry Report |      |     |       |       |        |        |        |  |         |                             |
|--------|---|-----------------------------|------|-----|-------|-------|--------|--------|--------|--|---------|-----------------------------|
| 1.     | <p>Annex C3 relates to a series of documents impounded from premises JDW Group, which show documents with tables titled “Stock Production Punjab Sugar Till 04<sup>th</sup> November 2019”, “Stock Production Sindh Sugar Till 04<sup>th</sup> November 2019” and “Stock Production KPK Sugar Till 04<sup>th</sup> November 2019”</p> <p>Each table contains mill wise stock positions till 4<sup>th</sup> November 2019 and in the end there is a total of stocks for Punjab, Sindh and KPK.</p>   | Annex C3 of Enquiry Report. |      |     |       |       |        |        |        |  |         |                             |
| 2.     | <p>Hard copy of email from M. Rafique of JDW to himself dated 02.10.2019 which states:</p> <p>“Physical stock position<br/> Csm 1 15,371.70 tons<br/> Csm 2 15,410.75 tons<br/> Khazana 26.25 tons<br/> Psm 5929.5 tons<br/> Almoiz 32500 tons<br/> Meeran 8750 tons”</p> <p>Mr. Rafique then has a hand written note:<br/> “As on 30.9.2019</p> <table style="margin-left: 40px;"> <tr> <td></td> <td style="text-align: right;">Tons</td> </tr> <tr> <td>KPK</td> <td style="text-align: right;">78000</td> </tr> <tr> <td>Sindh</td> <td style="text-align: right;">392000</td> </tr> <tr> <td>Punjab</td> <td style="text-align: right;">758000</td> </tr> <tr> <td></td> <td style="text-align: right;">1228000</td> </tr> </table> <p>Say: 1200000 “<br/> Signature on document in the end.</p> |                             | Tons | KPK | 78000 | Sindh | 392000 | Punjab | 758000 |  | 1228000 | Annex C3 of Enquiry Report. |
|        | Tons  |                             |      |     |       |       |        |        |        |  |         |                             |
| KPK    | 78000   |                             |      |     |       |       |        |        |        |  |         |                             |
| Sindh  | 392000  |                             |      |     |       |       |        |        |        |  |         |                             |
| Punjab | 758000  |                             |      |     |       |       |        |        |        |  |         |                             |
|        | 1228000   |                             |      |     |       |       |        |        |        |  |         |                             |



|    |   |                             |
|----|---|-----------------------------|
|    | Note: The mills above Chashma 1-2 and Khazana are located in KPK whereas Meeran (Mehran) is located in Sindh.   |                             |
| 3. | Another document impounded from JDW titled "PSMA Sindh Sugar Stock Position. Listing stock positions on 06.08.2019, 03.09.2019 and 01.10.2019 for mills located in Sindh. It also lists the "lifting" of sugar for August and September 2019 for these same dates.  | Annex C3 of Enquiry Report. |
| 4. | Email of <a href="mailto:m.arif@psma.pk">m.arif@psma.pk</a> to <a href="mailto:cfo@jsml.com.pk">cfo@jsml.com.pk</a> Dated 22.05.2018 with two documents attached:<br>"1. Crushing season 2017-18.xls =(Punjab Production)<br>2. Centre fortnightly report. Xls= Sheet 30.4.2018 (Data for KPK and Sindh)."<br><br>The document attached at No. 2 has sugar production figures as of 30.04.2018 (towards end of crushing season) for mills in Punjab, KPK and Sindh. In the end of the document it states: "Copy forwarded to Zonal Offices".  | Annex D1 of Enquiry Report. |
| 5. | Consists of an email thread with the original email sent from the account of <a href="mailto:psma_sz@ymail.com">psma_sz@ymail.com</a> dated 22.08.2019 which appears to be the account used by the office/secretariat of Sindh Zone.<br><br>The following email has been sent to various mills in the Sindh zone:<br>"Subject: Stock Position of sugar as on August 22, 2019.<br>Attn: Chairmen/Managing Directors/Chief Executives of PSMA-Sindh Zone Member Sugar Mills.<br><br>Stock position of sugar as on August 22,2019<br>It is requested that all sugar mills may kindly provide the above information on top priority, so that the same may be compiled and consolidated<br>Regards,<br>PSMA-Sindh Zone". | Annex D1 of Enquiry Report. |

181. Moreover, regardless of the number of mills having physical representation in each AGM, which presence in any case indicates their acquiescence to such 'decisions' by PSMA and participation in such concerted practices, the minutes and decisions taken were for all member undertakings and circulated to all member undertakings. In fact, the attendance for some AGMs shows participation of the representative(s) of PSMA Sindh Zone as well as of mills located in KPK and Sindh. The collective decision on deciding the quantum of exports, as discussed below and as pointed in the Enquiry



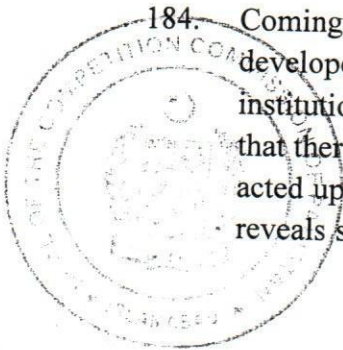
Report, could also not have been without having the stock positions of all members. Therefore, a show cause on the ground of sensitive commercial stock information sharing as a violation of Section 4 of the Act should have been issued to all member-undertakings, rather than just Punjab sugar mills alone. The Registrar is accordingly directed to issue the SCN on this ground and proceed in accordance with law against all such remaining member undertakings.

182. As for the Punjab sugar mills who are members of PSMA, they have also concerted and/or are in an agreement together, having gone so far as to discuss and disseminate stock information amongst each other. The sharing of sensitive information is further strengthened by the evidence available showing the formation of zonal committees (discussed further in Part below) and sharing of current stock figures *inter se* the parties. The Punjab member undertakings were privy to each other's stock information and kept each other informed, hence, coordinating their conduct and establishing the element of cooperation and uniformity, ultimately having an impact on the independence of a single mill's commercial operations. This is even more alarming given that Punjab produces approximately 63% of all sugar in the country, hence, retains the most stock and provides the bulk of supply of sugar. Hence, violation at their end is clearly made out.

183. In this connection, we find the following observation in Imperial Chemical Industries plc versus European Commission Case 48/69 instructive:

*"a concerted practice within the meaning of Article 85 exists every time that the conduct of several undertakings on the market proceeds from a common will on the part of the interested parties, whether that common will is the offspring of reciprocal action or of the action of a third party. There is a common will not only when the undertakings come to an understanding as to their conduct on the market but also when they deliberately ensure that there can be no lack of knowledge about their future conduct by keeping each other informed, and, in so doing, they coordinate their conduct. The element of cooperation consists in the fact that, by reason of the common will, each of the participants can rest assured that the others will adopt either a uniform or a different course of conduct according to an allocation of roles worked out in advance. Therefore it is not necessary to show that the participants have collaborated or drawn up a common plan in order to argue that there exists a concerted practice for the purposes of Article 85..."*

184. Coming to the role of PSMA, the concept of an 'association of undertakings' has been developed through numerous jurisdictions to prevent anti-competitive practices under institutionalized forms of cooperation. In this connection, the undertakings' assertion that there is no 'decision of an association' and in any case, that the same has not been acted upon is without merit and is not based on any evidence. We find that the record reveals sufficient evidence showcasing a pattern where PSMA is collecting and using



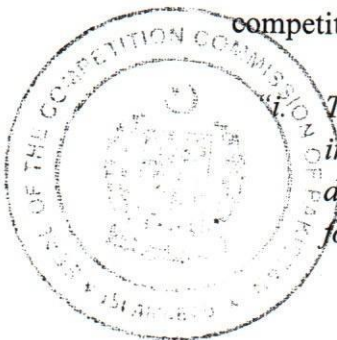
stock information and member undertakings are sharing the same during the period 2012 to 2020. The 47<sup>th</sup> AGM minutes (2012), 48<sup>th</sup> AGM minutes (2013) and even 51<sup>st</sup> AGM minutes (2016) all state that mills supply their production and stock figures to PSMA. In fact, in the 2012 AGM, PSMA went so far as to place a sanction on member-undertakings for failing to supply such information; the purpose of the same is only to add a coercive measure to ensure that its member undertakings adhere to its decisions. Nevertheless, the label of 'decision' is not pertinent and the Commission has provided a broad interpretation of the same. A letter, rules or even a recommendation may be considered to be a 'decision' for the purposes of Section 4 of the Act.

185. For the sake of completeness, we consider it relevant to address the defense, where PSMA and undertakings have relied on its Memorandum of Association asserting that as its Object/part of its mandate, in particular, Article 3(h) provides that it can "*collect, compile and circulate statistics pertaining to sugar industry to facilitate dealing with issues of vital importance connected thereto*". In this regard, it may be noted that the Commission has previously held in its previous *PSMA Order*, that on perusal of its Objects:

*"PSMA can very likely serve as a platform to facilitate collective conduct amongst would be/supposed competitors and the same seem to facilitate collective decision making by potential competitors, without drawing any distinction between matters that can or cannot be legitimately discussed. Competitors may exchange information on certain matter, however trade associations bear the burden of drawing a distinction between matters that they may or may not collaborate on. That is why trade associations are subjected to special scrutiny by most competition enforcement agencies in the world."*

186. In this regard, it is emphasized that PSMA has not '*compiled and circulated statistics*' in the instant matter that would be regarded compliant with competition law principles. Moreover, no bifurcation or separate committee independent of stakeholders or officials from member mills was created to maintain the confidentiality of stock information. We refer to the decision of the TCA, whereby, in its opinion in response to an application by the Turkish Cement Manufacturers Association ("**TCMA**") on its practice of gathering information, making projections and sending them to cement manufacturers, the TCA refused to clear the information exchange and provided that following principles that should be followed at data collection and distribution stages by the TCMA in order to eliminate its concerns and prevent infringements of competition law:

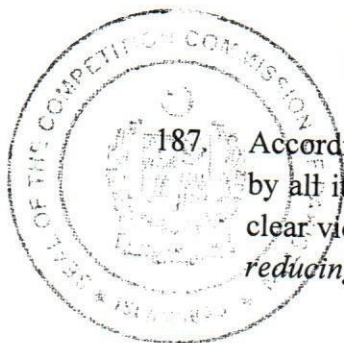
*The tables showing the data related to quantities (production, sales, inventory, export, etc.) should be prepared in a manner that prevents their disclosure on the basis of an undertaking or groups of undertakings which form an economic unit. Therefore, these tables should contain only data*



related to total production, sales, import, export and inventory for each geographic region. If the number of groups of undertakings forming an economic unit is less than three in a region, the data related to that region should be shown in a table combined with the data from one of the neighboring regions so that it would not be possible to make calculations on an individual basis.

- ii. *Tables showing comparisons between undertakings depending on any kind of data should not be prepared.*
- iii. *Statistical data included in the tables should not be discussed in meetings where representatives of undertakings are present.*
- iv. *Any comment, analysis or advice, as well as the distributed statistics that may affect competitive behaviour of undertakings should not be given.*
- v. *Tables showing the quantities of the production of each good in a certain period should be prepared in accordance with the principles related to the concealment of individual information. Therefore, product types should be divided into three groups at the most and published in regional sums.*
- vi. *Estimations related to the future conditions of prices, sales and use of capacity rates should not be made.*
- vii. *Associations of Undertakings should ensure that officials responsible for the collection and tabling of data conceal competition sensitive information (in particular individual quantity data collected from undertakings) from members of the Association and third parties.*
- viii. *In case there is a possibility that competition sensitive information related to a particular undertaking could be inferred, summaries and total sums should not be published.*
- ix. *Tables showing monthly data should not be distributed in two months following the respective month...*
- x. *The relationships with public bodies that request statistical information (TSI [State Statistics Institute], SPO [State Planning Organisation], etc) may continue in the same way. ...”*

187. Accordingly, we have no doubt that PSMA's 'decision' of provision of stock positions by all its members related to sharing of commercial sensitive information, which is a clear violation of Section 4 of the Act, having the object of "preventing, restricting or reducing" competition in the relevant market.



**Whether the State Action Doctrine can be invoked by PSMA or any of the other Undertakings with respect to Sharing of Stock Information to the Federal Government?**

188. At the outset, we must state that we do not find merit in Counsel's contention that the Enquiry Report has failed to take into account the role of SAB in collection of stock data. The regulatory environment of the sugar sector is discussed at length under Part I of the Enquiry Report titled "Industry Overview..." and at paragraph 93, the Enquiry Report notes:

*"...production, sales and stock positions are closely monitored by the government at the level of SAB who receive information from provincial cane commissioners. Similarly, FBR gathers stock positions for purposes of tax collection".*

189. Counsel on behalf of the undertakings have alleged that the context and purpose with which stock information is gathered has been ignored as well as the fact that PSMA was mandated to collect the same by SAB and/or the Government of Pakistan. In this regard, we deem it pertinent to look at SAB's role. SAB was constituted vide notification dated 27 November 2001 in the Ministry of Industries & Production (attached as Annex D of the reply to SCN filed on behalf of JK Sugar Mills). It includes members from the Federal and Provincial Government as well as the sugar industry, which is represented by the Chairman PSMA, Zonal Chairmen of PSMA (Punjab, Sindh and KPK), Kissan Board, Farmers Association etc. SAB's Terms of Reference are as follows:

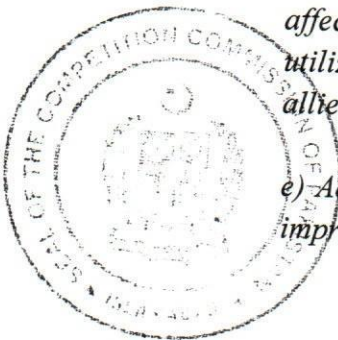
*a) Identify issues pertaining to Research and Development of sugarcane with regard to crop varieties, quality seed, seed treatment, fertilizers, pesticides insect pests, disease, integrated post management and provide guidelines for improvement in productivity of cane.*

*b) The board will study the farmers investments in sugarcane production and suggest profitable prices wherein farmers, millers and consumers can coexist.*

*c) Address the issues faced by the farmers in marketing their cane including weighment, payment, cane delivery and premium on sugar recovery.*

*d) Rationalize sugarcane cess across various provinces, take measures to affect recoveries of sugarcane cess from defaulting mills and assure effective utilization of cess funds for research and development of sugarcane and other allied matters as development of rural roads to sugar mills.*

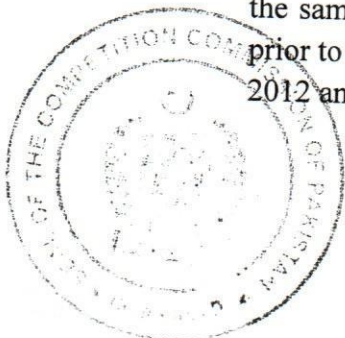
*e) Address the liquidity and working capital requirement of sugar industry, improve their working efficiency and increase recovery of sugar from cane.*



f) *Identify suitable regions and propose mechanisms for promotion of sugarbeet to substitute sugarcane.*

g) *Workout domestic requirement of sugar and assess supply prospects and make suggestions to Government to signal imports or exports of sugar.*  
(emphasis added)

190. TOR (g) of SAB above pertains to the assessment of supply prospects of sugar for the purpose of making import or export suggestions to the Government. It is noted that for the purposes of performance of this function, SAB requires data with respect to sugar production, consumption and stocks. Such information is collected by the respective Provincial Cane Commissioners (or more recently by Deputy Commissioners) from individual sugar mills and is then collated before being presented at SAB's forum.
191. The undertakings have continuously referred to SAB's TORs as proof that PSMA has been assigned with the task to collect data. However, from the above, it appears that neither do the TORs of SAB require PSMA to nor is PSMA asked at the level of SAB to collect mill-wise stock position. Neither PSMA nor its member undertakings have placed on record any document or communication from SAB or the Government asking PSMA to collect mill-wise stock or sales information. We also note that there are inherent contradictions in the stance taken by PSMA and its member undertakings *vis-a-vis* collection of stock positions. On the one hand, PSMA argues that this information has to be collected for what it terms as '*meaningful participation in SAB meetings*' and to recheck the Cane Commissioner's figures as PSMA's counsel has argued that "*One of the functions PSMA has to perform here is to monitor the stock data collected by Cane Commissioners. This is the expectation from PSMA in SAB meetings*". On the other hand, some member mills have adopted the argument that this stock information is collected by and available with the Cane Commissioners and is a public information.
192. The inherent contradiction with regard to data collection for purpose of participation in SAB meetings is highlighted in the below mentioned minutes of the SAB meetings. The undertakings have also only submitted a notification dated 28 November 2007 issued by PSMA to all members which states that as requested by the Government, PSMA is to "*supply information on sugarcane crushing, sugar production, recovery percentage, lifting and stock of Sindh sugar mills on a daily and fortnightly basis.*" This notification does not have any proof attached thereto that either the Federal or Provincial Government has expressly directed PSMA to do so. In fact, it only proves that the practice of collecting sensitive stock information by PSMA and adherence to the same by the members has been prevalent since 2007, which is even further back prior to the enquiry period. In any event, the stock position sharing decision pertains to 2012 and the above mentioned subsequent years.





193. We note that all members of SAB are required to share their views on the sugar industry in order to deliberate on important matters such as availability of stocks, sugar prices and exportable surplus. However, the stock figures and data relied upon are always provided by the Provincial Cane Commissioners in an aggregated form through working papers circulated for the concerned SAB meeting. Where any discrepancy is raised as to the data provided, the concerned Provincial Government representative also provides its viewpoint. This is also true in the reverse where PSMA has stated estimated or actual figures related to production, consumption and/or available stocks as well as surplus available, which other stakeholders have disagreed with. Reference may be made, *inter alia*, to:

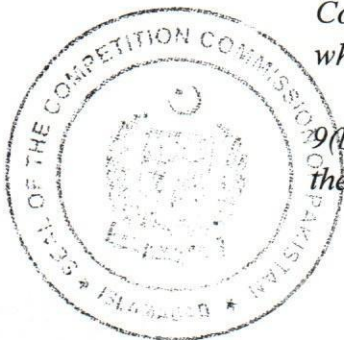
- i. the minutes of the SAB meeting held on 13 September 2019, wherein, in paragraph 3, Chairman, PSMA commented on the fact that 7 sugar mills of Sindh did not provide stocks due to NAB cases and that the sugar stocks of Sindh mills were overstated by 0.400 MT. The Government of Sindh was not present in the meeting, to which the Chair of the SAB meeting expressed his displeasure.
- ii. The minutes of the SAB meeting held on 13 November 2013, wherein although PSMA forecasted sugar production to be 5.7 million tons for the crushing season 2013-14, the actual estimated amount agreed upon was 5.167 MT (paragraph 3 thereof).

194. Furthermore, we note from the minutes of the SAB meetings that where there is a discrepancy in stock figures calculated by PSMA, PSMA has itself stated that the stock figures are provided by the Provincial Cane Commissioner and mills provide the stock figures directly to the Provincial Cane Commissioner without any interference or input by PSMA. The other stakeholders have also stated in SAB meetings that stock figures are collected by and provided by the Provincial Cane Commissioners. In fact, the Chair of SAB has expressly stated that the Provincial Cane Commissioners should develop and need to have their independent data collection source. At most, the assistance or input of the FBR with regard to collection of stock figures has been mentioned on record. We highlight the following excerpts in this regard:

- i. Minutes of SAB meeting held on 11 May 2020:

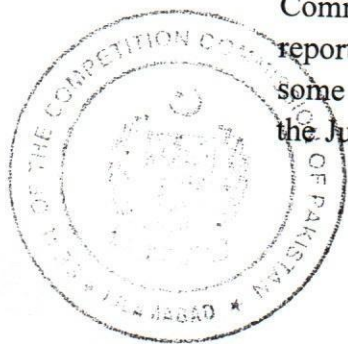
*“6. The Chair directed that in the next meeting, last five year stocks be provided by Provincial Cane Commissioner to understand the better picture of stocks. Moreover, he expressed that Provincial Cane Commissioners do not have their independent data collection source which need to be developed.*

*9(b). After consulting all stakeholders, it was concluded unanimously by the Sugar Advisory Board that Provincial Cane Commissioners should*



*develop their independent data collection source they might involve FBR to recheck the actual production figures.”*

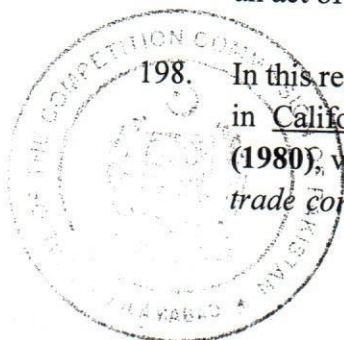
- ii. Minutes of SAB meeting held on 22 July 2020 wherein stock figures were provided by the Provincial Cane Commissioner. In the last SAB meeting of 11 May 2020 (see above), the stock figures endorsed by the Provisional Cane Commissioners and PSMA showed stocks lasting till December 2020. However, the current stocks put forward in this meeting showed that stocks would only last till mid November 2020. When the Chair inquired about the said discrepancy, the representative for PSMA stated that the reason why the figures show such high off-take was because of an error in reporting in previous figures wherein for certain sugar mills, more stocks were shown than were actually available. PSMA also clarified that stock data was collected directly from sugar mills by the Cane Commissioner Offices without any involvement of PSMA. The Chair highlighted that, previously, the stocks data was confirmed as correct by PSMA representatives in the last SAB meeting and directed the Cane Commissioner Punjab to explain stock collection process (see para 4 on page 2 of the said minutes). The Cane Commissioner Punjab then stated that the “*discrepancy in data is due partly to a change in method of data collection*”. It was clarified that till the submission of the report on 2 July 2020, mills used to provide data directly to Cane Commissioner Office(s), whereas now from last 20 days Deputy Commissioner Offices collect data of sales on daily basis from the mills. Chairman PSMA once again endorsed his statement and also clarified that stock data is collected directly from sugar mills by Cane Commissioners without any involvement of PSMA (see para 5 of the said minutes).
- iii. Minutes of SAB meeting held on 6 May 2019 wherein, in paragraph 8 thereof, the Joint Secretary (I&P) informed that the Ministry of Industries and Production collects the production figures from Provincial Cane Commissioners and the stock position is accordingly updated.
- iv. Minutes of SAB meeting held on 4 November 2015 wherein, in paragraphs 2 to 4 thereof, the stock figures had been disputed by PSMA in the SAB meeting held in July 2015 where 3.5 million tons had been reported as sugar stock available as on 30 June 2015 by the Provincial Cane Commissioners, whereas, PSMA had conveyed that stocks were 1.9 million tons. The Chair, SAB had then opined that keeping in view the stock reported by PSMA, there would be no sugar surplus and actually, sugar would have to be imported to meet the deficit. However, the representatives of PSMA were of the view that the sugar industry considers the sugar stocks reported by the Provincial Cane Commissioners as true figures. The PSMA figures are based on the stocks reported by the Provincial Cane Commissioners and there might have been some mistake in the calculation as regards the sugar stock reported by PSMA in the July meeting. The Chair, SAB declared that in future, sugar stocks will be



analyzed on the basis of figures reported by the Provincial Cane Commissioners.

195. In light of the above, it is clear that PSMA has not been requested by any stakeholder to collect stock figures, whereas, the role is entrusted to Provincial Cane Commissioners and PSMA has itself admitted that the sugar stocks reported by the Cane Commissioners are true figures and it has no role in collecting data related to the same. At most, PSMA has only been requested to present the long-term sugar policy in consultation with other stakeholders. Even when considering PSMA's contradictory admissions in the SAB meetings, and as stated in the submissions made on behalf of certain undertakings, that the data 'used' by PSMA is that obtained from the Provincial Cane Commissioner, we find no merit in the stance taken by the PSMA, that they were required to collect, on an individual basis, figures from its members.
196. Moreover, for arguments sake, we are also unable to understand on how PSMA can give truly accurate stock figures or be requested to do so, when there are sugar mills present in the relevant market that were never or are no longer members of PSMA. Moreover, PSMA has admitted in the SAB meeting held on 4 November 2015 that the sugar industry considers the data published by the Provincial Cane Commissioner to be true. This, again, raises the question of why PSMA would even need to collect data itself from its members on an individual basis and discuss/share the same when it has admitted to the data by the Provincial Cane Commissioner being accurate.
197. In this regard, we note that Counsel for PSMA has also relied on the US State Action Doctrine where any anti-competitive conduct, i.e., restraint upon trade or monopolization, is not found liable under the Sherman Act if the same is the result of valid governmental action and cited *inter alia* Parker v. Brown, 317 U.S. 341 (1943) to this extent. In the *Parker* case, certain programs adopted by the State under the California Agricultural Prorate Act were challenged as being in conflict with federal antitrust laws. The programs pertained to regulating the handling, disposition, and prices of raisins produced in California. Any antitrust issue was not the principle issue in this case. Instead the Court held, relying on the authority of the State to issue policies of such nature under the California Agricultural Prorate Act, such policies were not unlawful by the Sherman Act as the wording and legislative history of the same did not cover State Action. But that the policy was created by the State and enforced by the State in the execution of Governmental policy. The State, in adopting and enforcing the prorate program, made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly, but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

198. In this regard, we note that the *Midcal* test further elaborated the State Action Doctrine in California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), where the Court considered a California law requiring producers to post a 'fair trade contract' specifying a wholesale resale price and then requiring all wholesalers



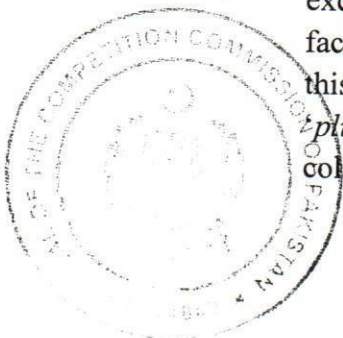
in the region to charge no less than that price. In its survey of the state action case law, Justice Powell's opinion discerned "*two standards for antitrust immunity under Parker v. Brown. First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself.*" This two-pronged test is now the standard inquiry for state action cases.

199. We, therefore, find the State Action Doctrine to be inapplicable in the present proceedings as neither there was any policy to collect information has been clearly articulated and affirmatively expressed in the instant case nor was there any active supervision by the Government.
200. We now come to the case examples provided by Counsel on behalf of the undertakings where mere exchange of commercially sensitive information was not found to be in contravention of competition law principles. However, we find that the said cases are clearly distinguishable on facts unique to the circumstances of those cases and/or its application of law towards information exchanges as some jurisdictions regard information exchanges to be mere plus factors, i.e., evidence of a larger cartel arrangement or price-fixing agreement. For the sake of brevity, the Commission has distinguished only those cases that are relevant to the arguments made by Counsels on behalf of the concerned undertakings and most cited by various Counsel on behalf of the undertakings as follows:

- i. In Re: Alleged Cartelisation in Flashlights Market in India **Suo Motu Case No. 01 of 2017 (CCI)**, an application filed by OP1 under the CCI (Lesser) Penalty Regulations, 2001, wherein it submitted that there was exchange of information pertaining to sales and production of flashlights through the medium of an association i.e., Association of Indian Dry Cell Manufacturers.

It was alleged that the details of production and sales data were being provided to the AIDCM by OP-1, OP-2 and OP-3 on monthly basis from year 2008 till 2016, while the exchange of data with OP-4 was only till April 2012. Further, OP-1 also revealed instances of communication amongst OP-1, OP-2 and OP-3 whereby information in relation to intended price increase or market information in relation to prices, discount schemes, etc. was exchanged amongst them regarding the product 'flashlights' to monitor the activities of competitors in the market.

Here, the main allegation related to fixing of prices. All parties admitted to the exchange of information, which the Indian Commission observed could facilitate collusion in an organized segment of the flashlights market. However, this isolated conduct of exchange of information was considered to be only a '*plus factor*', instead as no other cogent evidence was present to determine that collusion was present in the market. Hence, the DG relied on other evidence to



showcase the agreement/understanding to increase the prices, which finding the Indian Commission upheld as being present. However, the said agreement was never implemented by any of the Opposite Parties (OP) individually, hence, showing that they were not abiding by the anti-competitive decision.

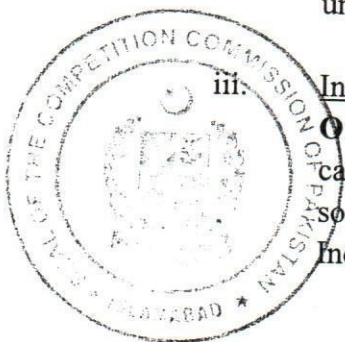
The approach to commercially sensitive information in India is akin to the United States where the same is considered to be a part of a larger cartel agreement to fix prices, etc. In the instant proceedings, the Commission is hereby holding that, in the context of the sugar industry, the sensitive stock information sharing is by object and on stand-alone basis in violation of Section 4 of the Act and sufficient evidence exists with respect to sharing of stock positions by the undertakings.

- ii. In Re: Sugar Mills Suo Motu Case No. 1 of 2010 (CCI), the Indian Commission took note of a news article that the ISMA and the National Cooperative Sugar Mills Federation (NSMF) had indulged in anti-competitive activities, whereby both parties held a meeting in which it was decided to book the ex-factory price of sugar in order to prevent open market sugar prices falling below the cost of production. It was alleged that the cooperative and private sugar mills had formed a cartel to boost the same.

Importantly, it was noted by the Indian Commission that the Government of India also controlled the supply of sugar and mills were not free to determine their own releases and the same was subject to issuance of release orders. In this given scenario, the Indian Commission observed that the possibility of successful cartelization of sugar prices is remote because the releases in the market are not in the hands of sugar mills and there is a pressure to make timely payment of sugarcane. The allegation was fixing a minimum floor price, however, many sugar mills provided evidence showcasing they had set their ex-mill prices below the purported fixed minimum floor price. Also, two of the largest associations, ISMA and NSMF did not take part in such meeting.

Therefore, the said case is also distinguishable from the instant proceedings in that the sugar industry was more heavily regulated in India than in Pakistan at that point in time as conditions of supply were also controlled, which is not the case at hand. In the instant proceedings, PSMA, the only association is at the forefront of such anti-competitive conduct (as discussed above). Moreover, the undertakings concerned have all admitted to the act of exchanging information.

- iii. In the matter of Shailesh Kumar vs M/s Tata Chemicals Limited & Others Order Dated 16-04-2013 [CCI], the Informant/complainant alleged cartelization by certain enterprises in the market of manufacturing and sale of soda ash in India under the umbrella of Alkali Manufacturers Association of India (AMAI). It was alleged that the opposite parties, under the aegis of AMAI,



formed a cartel with a view to manipulate prices and volume of production of soda ash in India by sharing information relating to data on production, installed capacity, capacity utilization, capacity expansions including data on demand and supply, imports, exports, international prices in violation of the provisions contained in Section 3 of the Act.

The Indian Commission found, in absence of any evidence put forward by the complainant, the website and Annual Reports contained the same information, which was also made available to not only the Government, but other industry associations and economic think tanks. Moreover, the Indian Commission also observed that there was no evidence on record to show that AMAI was collecting the pricing or production data of soda manufacturers and sharing this data with them and that if AMAI was disseminating the aggregated data of the industry, it cannot be held that it was facilitating collusion among the soda manufacturers.

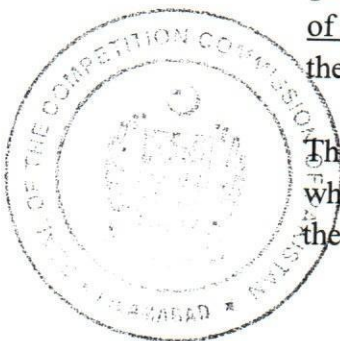
In the instant matter, sharing of sensitive stock data has not only been done by the undertakings with PSMA but also has been done, in case of Punjab mills, *inter se*. Data is not in any aggregated or statistical form.

- iv. In Maple Flooring Manufacturers' Assn. v. United States, 268 U.S. 563 (1925), information was shared with the association but not directly transmitted to members. The association shared aggregate data, collating the information it received from its members without disclosing the number of members that disclosed it and the identity of the members in connection with any specific data.

The names of purchasers were not reported and later, even the identifying number of mills making the report was omitted. All reports of sales and prices dealt exclusively with past and closed transactions. These aggregate statistics were also given wide publicity, being published in trade journals and also sent to the Dept. of Commerce as well as banking entities and were generally available to anyone at any time desiring to use them.

Moreover, the statistics did not include any information that may be used as a competitive advantage such as current price quotations, geographical distribution of shipments, name of customers, future customers, the geographical origin of orders and importantly and it did not include the names of members having surplus stocks on hand. The statistical data was generally the aggregate surplus stock.

The Court also highlighted that the nature of information in the above para, which was not shared in the instant case, if gathered and disseminated among the members of a trade or business, may be the basis of agreement or concerted



action to lessen production arbitrarily or to raise prices beyond the levels of production. Such concerted action constitutes a restraint of commerce, and is illegal.

We deem the case at instance distinguishable as there was clear information sharing and the information discussed was not in aggregate form and individually provided mill-wise.

201. Counsel for certain undertakings have further relied on the previous orders of the Commission in the matter of *PAMADA* and in the matter of *Pharma Bureau (2019 CLD 1152)*, stating *inter alia*, that an undertaking must have implemented the decision of the association in question and there is no decision of PSMA in the instant matter, associations serve as a platform to share useful information about the sector such as historical pricing data and that the subject stock information was shared with Government stakeholders, hence, cannot be a tool to eradicate uncertainty from the market. We find these cases distinguishable.
202. First and foremost, the Commission has held time and again, as evident from the jurisprudence and deliberations under Part D above, that the term 'decision' is to be interpreted broadly and may even relate to rules, recommendations or even the association's own objects. It can also be in the form of an understanding between the association and its members. As stated above, the language in the concerned AGM minutes (47<sup>th</sup>, 48<sup>th</sup> and 51<sup>st</sup>) purports to an understanding between PSMA and the member undertakings and also purports that a decision has been made by PSMA, given the inclusion of a 'penalty' in the form of losing membership in order to ensure that information is being sent to it by the member undertakings. With regard to implementation of a decision, we have already discussed this at length under Part D above and it is re-emphasized that a decision is not required to be implemented. The purpose for stating so in the *PAMADA Order* was due to the fact that the member undertakings of *PAMADA* had, through evidence, demonstrated their non-compliance with *PAMADA*'s decisions. In the instant proceedings, we find a collective will between PSMA and the undertakings to share, collect, disseminate and discuss stock information. In fact, the member undertakings located in Punjab have also shared and discussed such sensitive stock information *inter se*.
203. Furthermore, we do not contest that associations may serve as a platform to share useful information, however, such sharing of information must be done in a manner and method compliant with competition law principles such as be in the form of statistical, historical and/or aggregated data. Even the method of collection should be, ideally, done by an independent party/committee with no nexus to the member undertakings and the same should not be discussed in meetings<sup>20</sup>. The Commission has repeatedly in

<sup>20</sup> The Information Exchange Policy Roundtable (pg 32-33) wherein it was recommended that "In order to avoid the risk of violating competition law trade associations should put in place extra safeguards against

its policy notes emphasized that the Government should have an independent method of collecting data and analysis of the impact on the total supply of sugar in the country as well as to not encourage any collusive behavior or anti-competitive practices. In this connection, SAB, in its meeting held on 11 May 2020, also stressed that the Provincial Cane Commissioners must have their own independent data collection source.

204. The facts of the *Pharma Bureau Order* are also different as the communications largely were in response to requests made by DRAP. As discussed in detail above, we find no evidence that PSMA was ever directed to collect stock information and even otherwise, to discuss the same with its members. In any case, this Bench is not fully in agreement with the findings of the *Pharma Bureau Order* as the facts of the case called for much stricter scrutiny.

#### F. ISSUE II & III – COLLECTIVE DECISION TO DETERMINE EXPORT QUANTITIES

205. We found under Part E above that sharing of stock information is commercially sensitive in nature and by object is preventive and restrictive of competition in contravention of Section 4 of the Act. It also important to recognize whether the anti-competitive conduct of sharing of stock information enabled the undertakings to control supply in the relevant market through decisions on export quantities, using the platform of PSMA and, in case of Punjab mills, its Zonal divisions.
206. Briefly, paragraphs 67 to 83 of the Enquiry Report record findings that starting from 2012 to date, the conduct of PSMA and all its members *vis-à-vis* collective discussion on stock positions leading to a decision on the quantity to be exported is tantamount to fixing or setting/controlling supply within the relevant market, which has resulted in a price hike that is not based on actual/available supply and demand. Hence, a *prima facie* violation of Section 4(1) read with Section 4(2)(c) of the Act. Furthermore, this reduction in domestic stocks/supplies leads to an increase in or maintenance of a desired price level in the relevant market. The Enquiry Report, *inter alia*, in paragraph 75 quoted the minutes of the 51<sup>st</sup> AGM wherein it was stated that exports would keep prices stable in the market. Thus, a case for *prima facie* violation of Section 4(2)(a) of the Act by PSMA and the member undertakings.
207. The aforementioned allegation is broken down into two issues. First, that there was a collective discussion on stock positions (evidence of which has been found, as deliberated in Part E above, that the same was shared with PSMA), based on which collective decisions on export quantity were made by PSMA with the participation of

*anticompetitive spill-overs from their institutional tasks. For instance, associations should... make the collected information available to non-members; ensure participation in the statistical programs is voluntary and open to non-members; verify that the trade association does not become the forum for further discussions between members about the data disseminated and its bearing on commercial strategies; and ensure management of the trade association is independent from the members of the association."*



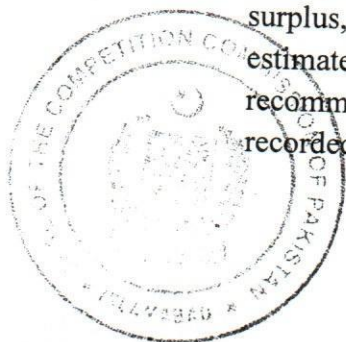
the member undertakings concerned. Second, that this is tantamount to controlling supply of sugar and that the resultant reduction in stocks (the local availability) led to (or at least was aimed at achieving a desired price level in the relevant market for the mills. In our view, the collective decision on the quantity of export with the background of sharing the stock positions and discussions thereon, in itself, if established would be sufficient to constitute a violation in terms of Section 4(1) of the Act.

208. Counsel for the undertakings have mainly argued that:

- i. The ultimate decision to export rests with the Federal Government and the same must be authorized by the ECC;
- ii. PSMA is not reaching or making any decision on export quantities. At best, it can be said that PSMA requests/suggests what it feels is a suitable/viable figure for export to SAB under its role as a member.
- iii. In any case, lobbying is a legitimate function of an association and is legal under competition law principles, as held by the Commission in its previous orders (*JJVL and LPGAP Orders*). Had the Government not banned exports, there would be no need for this lobbying to take place.

209. The Commission does not contest that the ultimate decision lies with the Federal Government or respective Provincial Governments to approve the amount of sugar to be exported from any sugar surplus and to allot quotas to individual mills concerning the same. However, in order to reach the stage where the matter is referred to the ECC for approval, SAB must determine in its meetings what amount can be recommended for export, which requires not only calculation of exportable surplus, expected production and stocks available, but also consideration of prices in the relevant market. In this regard, it has been acknowledged time and again, in particular, in the Export of Sugar Office Memoranda (where the ECC allows exports on the condition, *inter alia*, that if there is any abnormal increase in the domestic price of sugar, then the Committee shall recommend stoppage of exports. In this regard, we refer to the 2017-2018 Memoranda provided in Volume I of the documents submitted by Mr. Shehzad Elahi, representing Group 2 undertakings) that export of sugar is linked to payment to the sugarcane growers and the issue of price stability in the market.

210. The Commission's concern is primarily on the alleged anti-competitive conduct by PSMA and its member undertakings whereby, through discussion of supplies and stock of sugar, they come to a determination *inter se* that x amount will be the exportable surplus, taking a collective decision. The record showcases actual supply figures and estimates being influenced to determine the exportable surplus, which PSMA then recommends in SAB meetings. As seen below, in certain instances this has been recorded to have caused a shortage of supply in the market, which has also resulted in



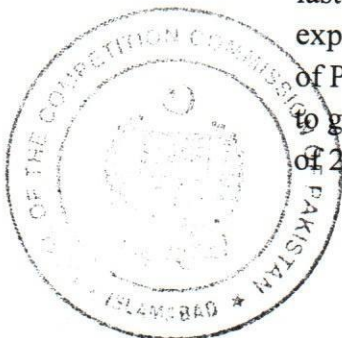
the increase in prices for the end consumer and caused price instability, a concern for the Government.

211. In order to reach a finding on the above, we shall first analyze the relevant minutes of PSMA's AGMs as follows:

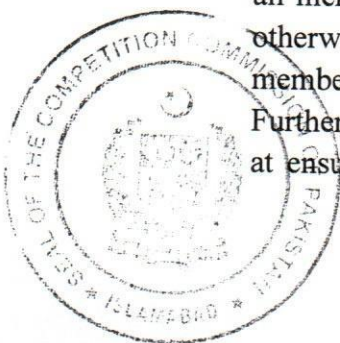
- i. In the minutes of the 47<sup>th</sup> AGM held on 17 October 2012, discussion took place concerning the possible surplus (based on estimated production of 5 million tons) and sizeable quantity available for export as well as that a time limit shall be given to exporting mills. In case they failed to export, then their quota could be transferred to other mills that performed well in export.
- ii. In the minutes of the 48<sup>th</sup> AGM held on 24 September 2013, exports and production figures were discussed in the crushing season 2012-2013 where it was stated that the sugar made during the said period was 5 million tons, which was at par with PSMA's estimates for the previous crushing period and above the domestic requirement of 4.3 million tons. The carry forward of 1.394 million tons from 2011-2012 when added made the total inventory of 6.44 million tons versus domestic requirement of 4.3 million tons for the year 2012-13. With this surplus stock, it was stated that PSMA has been able to get approval for sugar export of 1.2 million tons of which about 1.145 million tons had been exported.

The members further discussed the sugar situation in view of the upcoming cane crop and current surplus in detail and came up with the following suggestions, *inter alia*:

- a. In view of the good sugarcane crop in 2013-14 and to enable the sugar industry to pay off the growers, the Government may be approached to allow 30% of the total production plus carry over for export along with the given subsidies. It was also suggested that 5% export would be mandatory.
- b. It was also decided in the said AGM that all mills to supply their production and stock figures to the PSMA zonal offices and PSMA centre office to enable them to come up with the correct figures in future.
- iii. In the minutes of the 49<sup>th</sup> AGM held on 21 October 2014, it is evident that once again discussions took place concerning the exportable surplus. It was stated that the current year carry forward would be up by another 0.4 million tons over last year's carry forward. Therefore, if the same was not exported then it was expressed that it would be another dilemma for the sugar industry. The members of PSMA agreed to the proposal to take up the matter with the Government and to get approval of additional export of 0.750 million tons in the crushing season of 2013-14.



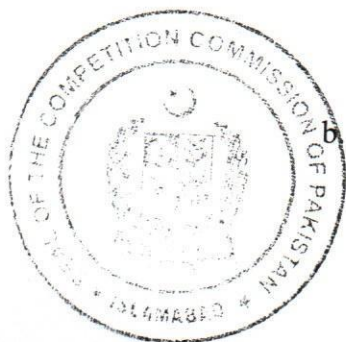
- iv. In the minutes of the 50<sup>th</sup> AGM held on 21 October 2015, the Chairman informed the members that PSMA had already written to the Government to allow export of 0.5 million tons of sugar, however, members of PSMA were of the opinion the said amount should be raised to 1 million. Hence, it was decided to request the Government of Pakistan for export of one million tons of sugar to off-load surplus stock.
- v. In the minutes of the 51<sup>st</sup> AGM held on 20 October 2016, exports were also discussed where it was stated that the carry forward inventory of 1.7 million tons was expected in 2016-17. Hence, it was likely to be a clear surplus of a million tons, hence, permission would be sought from the Federal Government to allow export of a million tons, which would not only keep the price stable but also help improve mills' liquidity. In this regard, the representatives of PSMA stated that they would appreciate cooperation of the member mills to provide reliable data and production figures, to which the members expressed their support and cooperation.
- vi. In the minutes of the 53<sup>rd</sup> AGM held on 11 October 2018, export surplus was discussed where it was stated that due to higher sugarcane production in 2017-18, prices of sugar remained subdued due to surplus and there were inordinate delays in making payments to sugarcane farmers. The Chair informed that after export of two million tons there still remained a stock of two million tons, which could not be taken up with the Caretaker Government. However, the matter was pursued with the new Government, which allowed one million tons for export in the SAB meeting held on 11 September 2018. The same was later approved by the ECC.
- vii. In the minutes of the 54<sup>th</sup> AGM held on 18 December 2019, it was highlighted that 1.1 million tons of sugar was allowed in December 2018, which stabilized price of sugar in the domestic market and also it helped to pay off the grower dues.
212. From the above, it can be seen that significant discussions took place between the member undertakings *inter se* using PSMA as their platform and PSMA facilitating the same with collective decisions being made on what quantities to recommend for export. The process entailed a discussion on the stock positions of member undertakings, the need for its sharing and accuracy and co-operation by all. While, at the meetings, the number of participant undertakings may have varied from 3 to 36, however, it is clearly available on record that either zonal representative was present or it was circulated to all member undertakings as it was in the AGM. Sharing of stock position has, even otherwise, not been denied and no evidence has been placed in this regard by the member undertakings in any of the AGMs or otherwise to contest or rebut the same. Furthermore, the concern for the '*subdued prices*' at the PSMA forum is perhaps aimed at ensuring '*stabilized prices*', which also ought not to be a collective decision or



subject of discussion or concern either for the PSMA or the member undertakings, who should be free to determine price and compete on this aspect.

213. Annex B1 of the Enquiry Report also shows a presentation for an Emergent General Meeting of the PSMA Punjab Zone dated 19 April 2017 wherein it was stated that the Government allow exports of 1.0 million as further evidence that the members and PSMA come to an agreement regarding the exportable surplus amount to be recommended. Certain undertakings contested the same as the export figures allowed were different from the figure mentioned in the said presentation. It is highlighted that the figure of 1 million MT correlates with the figure decided upon in the 51<sup>st</sup> AGM. Even otherwise, it is obvious that the Commission is neither concerned nor is second-guessing ECC approvals from time to time but the core question of the behavior of PSMA and its member undertakings. This assessment is to be made regardless of export figures ultimately approved by the ECC. The Commission is only concerned with the collusive behavior and decisions of the member undertakings and/or PSMA pertaining to export recommendations by discussing (prior in time) commercially sensitive stock data amongst themselves and by controlling or determining indirectly domestic supply/quantities for the collective purpose of improving mills' liquidity. The presentation is a further proof of such prohibited behavior.
214. The following minutes of SAB meetings evidence PSMA asserting an estimate for exportable surplus, which is pre-decided amongst themselves, based on higher estimates of the surplus stock available (as per the commercially sensitive stock positions shared by member undertakings of PSMA) or even providing, at times, a significantly higher production estimate. In most of the cases, the said figures are at variance with what was being recommended by other stakeholders/SAB officials. Certain meetings of SAB have also been convened on the request of PSMA or certain agenda items for SAB meetings have been put forward by PSMA to consider the availability of stocks and current stock information to workout exportable surplus. In this regard, reference is made to the following:
- i. *Crushing Season 2012 – 2013*
- a. Minutes of SAB meeting held on 01 October 2012 wherein the representative of PSMA predicted a sugar production of 5.0 million tons during 2012-2013 against the projection made by other stakeholders of 4.7 million tons. The Federal Secretary, MOI expressed his concern regarding the expected sugar price hike in the wake of further sugar exports. However, representative of PSMA countered that there would be bumper production during the coming seasons, thus, no chance of sugar price hike in the country in the wake of exports. It was decided that 200,000 tons sugar export may be allowed.

b. Minutes of SAB meeting held on 15 November 2012 wherein consensus that present sugar stocks were around 1.5 million tons. PSMA forecasted

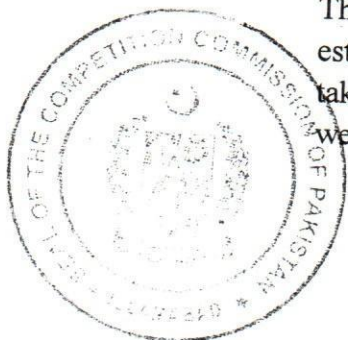


4.7 to 5.0 million tons of sugar production. Deducting the consumption for the last month of the previous crushing season, there would be an opening stock of 1.2 million tons, thus, a total stock of 5.9 million tons against the consumption of 4.2 to 4.3 million tons. Hence, PSMA recommended further export of 0.5 million tons sugar, and we note that the same was approved.

- c. Minutes of SAB Meeting held on 29 May 2013 wherein present sugar stocks were 3.197 million tons (against total stocks available at the start 5.390 MT). The representatives of PSMA complained that the State Bank of Pakistan had refused to re-allocate the export quota to some other sugar mills from the sugar mills who had failed to export the sugar even after the expiry of the 90 days period and the sugar mills be allowed to avail the sugar export quota. Hence, PSMA proposed a separate meeting of all stakeholders to resolve these issues.
- d. Minutes of the SAB meeting held on 4 September 2013 wherein present sugar stocks available were 1.834 Million Tons (against total stocks of 5.318 MT). Representative of PSMA forecasted 5.8 million tons sugar production for crushing season 2013-14 instead of 5.4 million tons as forecasted by MOI&P. Also he recommended 1.2 million tons of sugar as exportable surplus during crushing season 2013-14. Instead, SAB approved export of 0.5 million tons of sugar as Joint Secretary, Ministry of Commerce, opined that a decision cannot be taken on the basis of assumptions.
- e. Minutes of the SAB meeting held on 12 November 2013 wherein present sugar stocks available were 0.936 MT (against total production of 5.039 MT). PSMA forecasted sugar production for crushing season 2013-14 to be 5.7 MT. However, other stakeholders stated that sugar production would be 5.167 MT. Sugar export potential estimated as 1.167 MT including 0.5 MT already approved.

ii. *Crushing Season 2013-2014*

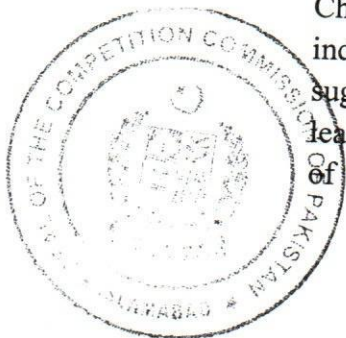
- a. Minutes of SAB meeting held on 13 March 2014. Stock figures available as on said date were 3.55 MT (against total production of 4.50 MT). Representative of PSMA forecasted sugar to be 5.3 MT against earlier estimate of 5.167 MT, which was agreed by all participants. However, Provincial Cane Commissioners disagreed with PSMA regarding the sugar stock carried over from 2012-13 crushing season, i.e., 0.8 million tons. Sugar stock reported on 30 November 2013 was 0.517 million tons. Therefore, MOI&P estimated surplus to be 0.717 MT against PSMA estimated surplus of 0.800 MT. PSMA explained that this surplus should be taken care of by allowing the sugar mills to export more sugar. Sugar mills were allowed to export further 0.5 million tons of sugar.



- iii. *Crushing Season 2014-2015*
- a. Minutes of SAB meeting held on 4 November 2015 wherein stocks had been disputed by PSMA in meeting held in July 2015 where 3.5 million tons had been reported as sugar stock as on 30-06-2015 by the Provincial Cane Commissioners, whereas PSMA had conveyed that stocks were 1.9 million tons. PSMA representative admitted that there may have been a mistake in the calculation of stocks reported in the July 2015 meeting. Stocks reported as on 3 November 2015 were 1.112 MT. Chair, SAB opined effective sugar surplus to be 0.312 MT. PSMA stated urgent need to export the surplus sugar of 1.1 million tons. The Chair opined the same was not possible to decide right now due to uncertainty regarding start of crushing season in Sindh.

Even in this particular instance where PSMA had quoted a lower estimate of stock positions in the July 2015 SAB meeting, PSMA was quick to rectify the same in the subsequent SAB meeting, in order to emphasize the urgent need to export surplus sugar of 1.1 MT.

- iv. *Crushing Season 2016-2017*
- a. A SAB meeting was held on 19 December 2016 with the agenda to evaluate the claims of PSMA regarding inventory position of sugar stocks before the start of crushing season 2016-17, estimated production of sugar in 2016-17, estimated consumption and surplus sugar and sharing its findings for further action. After detailed deliberation, it was agreed that total stock availability and production was 6.396 MMT and expected closing inventory before start of crushing season 2017-2018 was 0.871 MMT. Hence, 0.3 MMT of surplus sugar was considered for export.
- b. A SAB meeting was held on 17 May 2017 with the agenda proposed by PSMA, i.e., to review overall availability and stock position of sugar and to workout exportable surplus, if any. Chairman, PSMA apprised SAB about the unprecedented production of 7.054 MMT during the crushing season 2016-17. Total availability of sugar stock was calculated to be 8.039 MT and net excess, after deducting consumption, to be 1.884 MT. Hence, 1.200 MMT would be recommended for export.
- c. A SAB meeting was held on 7 September 2017 on the request of PSMA to review the availability of sugar stock, estimated consumption before start of the next crushing season 2017-18 and workout exportable surplus, if any. Chairman, PSMA, apprised SAB of problems being faced by the sugar industry *inter alia* concerning approval for export of smaller quantities of sugar *vis-à-vis* large exportable surplus. Keeping in view the situation, at least 2 MMT of sugar be allowed for export. Secretary Food, Government of Punjab, recommended export of 1.5 MMT as there was a surplus of 1

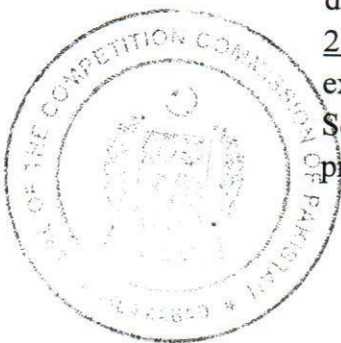


MMT for export before next crushing season and sugarcane production was estimated to increase. PSMA Sindh zone also approached Government of Sindh for request to export 1.8 million tons of sugar. Chair, SAB asked PSMA that estimates of next crushing season 2017-18 may not be mixed up with the current crushing season and the surplus sugar needs to be reviewed on a quarterly basis. The available stock as on 1 September 2017 was made out to be 2.788 MT and expected closing inventory 0.989 MT. PSMA further stated that as the next crushing season will commence in November 2017, strategic reserves may not be deducted from the closing inventory and they may be allowed 2.00 MMT to export including the remaining quantity of already approved quantity of sugar. However, after consulting all stakeholders, exportable surplus approved was 1.5 MMT, without taking account of previously allowed quantity.

- d. A SAB meeting was held on 27 October 2017 on the request of PSMA with the agenda proposed by PSMA to review overall availability and stock position of sugar and to workout exportable surplus, if any. PSMA agreed with sugar stock figures as on 20 Oct 2017 and stated in crushing season 2016-17, production of sugar was 7.00 MMT. In the upcoming season PSMA was expecting 8.00 MMT production of sugar and after deduction of expected consumption of 5.100 MMT, around 3.00 MMT would be surplus. Chairman, PSMA proposed that keeping in view the aforesaid situation 1.5 MT may be allowed for exports. 1.5 MMT was decided to be recommended for export by SAB.

v. *Crushing Season 2017-2018*

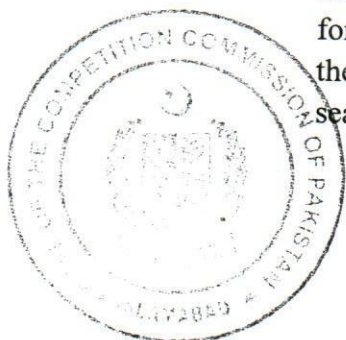
- a. Minutes of the SAB meeting held on 17 April 2018 where representative of PSMA endorsed sugar stock positions and stated that in crushing season 2017-2018, production of sugar reached a figure of 5.581 MT. Final production figure would be available by the end of the first week of May. The ECC of the Cabinet had allowed 0.500 MT for export on 14 September 2017 and 1.500 MT on 22 December 2017. It was observed that adequate sugar would be available in the domestic market during the upcoming month of Ramadan and there seemed no chance of shortage of sugar.
- b. Minutes of the SAB meeting held on 11 September 2018 wherein the Chairman, PSMA apprised SAB about the production of 6.617 MMT sugar during the recent crushing season in the country with the net excess of about 2.00 MMT. PSMA requested *inter alia* the surplus stocks to be allowed for export as soon as possible. The Secretary, Ministry of National Food Security and Research explained that due to water shortage there will be low production of sugarcane in upcoming crushing season. Total available



stocks were 7.158 MT with the net excess being 1.096 MT by the end of the crushing season. It was concluded that it would be safe to recommend export of 1.00 MMT.

vi. *Crushing Season 2018-2019*

- a. Minutes of SAB meeting held on 15 April 2019 to discuss the Agenda items proposed by PSMA and Government of Punjab to review the overall availability and stock position of sugar and the increasing trend of prices of sugar. Chairman, PSMA stated production figures of Sindh should be corrected from 1.559 MMT to 1.870 MMT, hence, total production as on mid-April 2019 would be 5.402 MT. Expected surplus at the end of the crushing year would be 0.511 MMT. Due to increasing prices, it was agreed that if the prices are decreased during the month of Ramadan, the Chair, SAB would take up the matter with the Government to keep the export door open for the industry.
- b. Minutes of SAB meeting held on 6 May 2019 wherein the Chairman, PSMA was asked to present his view on the recent increase in prices. It was stated that the sugar for Ramadan had already been sold out. The Chair, SAB directed to update the stocks position.
- c. Minutes of SAB meeting held on 20 June 2019. The Secretary (I&P) informed that the ECC of the Cabinet vide its decision dated 2 October 2018 and 4 December 2018 allowed sugar of 1 MMT and 0.100 MMT respectively. The sugar stocks position up to 18 June 2019 pertaining to total production was 5.203 MMT where Sindh's production was less than the figure provided by PSMA in the earlier meeting in April 2019 (1.870 MMT) as 7 mills did not provide production figures for the current season and the carryover stocks were also less compared to figures reported in the April 2019 meeting. Hence, stocks at mills, excluding exports and consumption was 3.476 MMT. The net stocks at the end of the crushing year were calculated to be -0.191 MMT.
- d. Minutes of SAB meeting held on 13 September 2019 where the Chair inquired about production figures for the crushing year, which were shown as 5.267 million tons, however, PSMA stated that the production figures for Sindh sugar mills were overstated by about 0.400 MT, however, representative from the Sindh Government was not present to comment on the same. Secretary MOI&P also commented that this was not a viable time for further exports due to high prices of sugar in the domestic market and the remaining balance from exports already allowed by ECC in the crushing season.



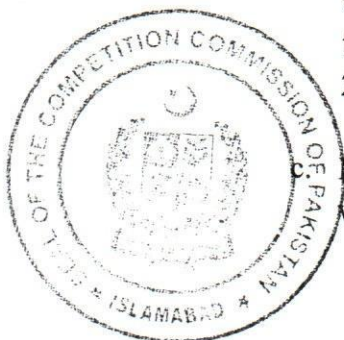


- e. Minutes of SAB meeting held on 29 October 2019 wherein stock figures were discussed as on 28 October 2019. Production figures were 5.267 MMT, however, carryover stocks had depleted and available stocks were, thus, 6.762 MMT. Balance as at 23 October 2019 was 1.638 MMT, which further depleted to 1.411 MMT as on 28 October 2019. The net stocks at the start of the new season were estimated to be -0.276 MMT. PSMA commented that if the stocks of the missing 7 sugar mills of Sindh were incorporated then closing balance would be 1.611 MMT instead of 1.411 MMT.
- f. Minutes of SAB meeting held on 27 November 2019 showed closing balance of 0.948 MT. Estimated production for the next crushing season of 19-20 was forecasted to be 4.770 MT with closing balance of 0.168 MT. PSMA, however, projected production figures to be 5.00 MMT and that the Cane Commissioner Punjab had a very pessimistic approach in their estimates.

vii. *Crushing Season 2019-2020*

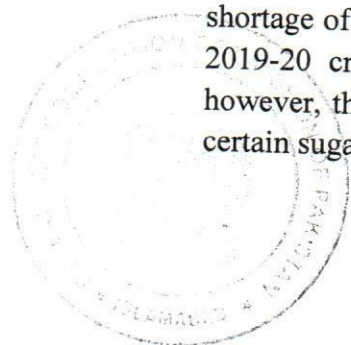
- a. Minutes of SAB meeting held on 16 January 2020 wherein, regarding supply and demand situation for the crushing year 2019-20, representatives of PSMA stated that they mostly agreed with the estimates of Industries & Production Division but they believed that the figure for estimated consumption for the crushing year 2019-2020 is inflated as according to them consumption will go down by 5% as they had a tough time selling sugar due to a variety of factors. PSMA further stated that previously allowance for buffer stock for two months used to be included in the calculations but now it was not. Moreover, it was of the opinion that if estimate for consumption is revised to reflect the true situation, closing balance at the end of the crushing year 2019-20 would be more than 0.5 million tons instead of Industries & Production Division estimate of 0.35 million tons. PSMA also stated that currently sugar was always available in retail outlets and there was no shortage.
- b. Minutes of SAB meeting held on 28 January 2020 wherein Secretary, Food Department, Punjab explained that currently stocks situation was satisfactory till end of the crushing season. However, it was highlighted that sugarcane crop and the production of sugar was expected to be on the lower side and Punjab may have no carryover stocks for next year due to the expected shortage of production. It was decided to approach ECC to stop the remaining export quota (out of the total approved exports of 1.1 MT in 2018) till the end of the crushing season to safeguard buffer stocks.

Minutes of SAB meeting held on 18 March 2020 wherein PSMA was of the view that consumption would slow-down due to Covid-19. Estimate of total

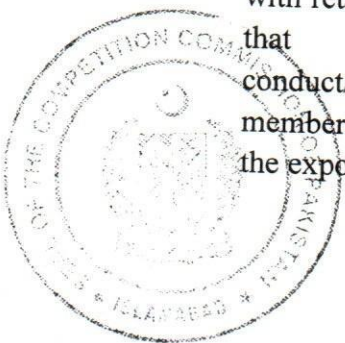


availability of sugar stock was 5.634 MT during the season (2019-20) and PSMA commented that the estimated consumption figure of 5.5 MT was on the 'very higher side'. The representative of National Food Security and Research Division commented that the estimated consumption would be 5.3 MT, hence, after deducting export quota utilized in December 2019 and January 2020, closing stocks would be 0.296 million tons. Chair pointed out that currently there are adequate stocks available in the country. PSMA also stated that actual exports would be less than the quota allocated by SBP.

- d. Minutes of SAB meeting held on 11 May 2020 wherein balance of sugar stocks as on 8 May 2020 was 3.365 MMT. Estimated remaining stocks without any exports at the end of the crushing season was worked out to be 0.271 MMT. It was found that the sugar stocks were satisfactory, hence, no need to import sugar.
- e. Minutes of SAB meeting held on 22 July 2020, balance stocks were 1.680 MMT. When compared with the figures in the last meeting, i.e., in May 2020, it was observed that the stock would only be sufficient to last till mid-November 2020 instead of end of December 2020 as previously forecasted. As stated above in Part E, when the Chair inquired about the said discrepancy, PSMA admitted to there being a higher off-take in current figures because of an error in reporting in previous figures wherein for certain sugar mills, more stocks were shown than were actually available. It was observed that the issue was due to misreporting of mills and only a few sugar mills provided correct information regarding stocks to concerned provincial departments. The Chair highlighted that, previously, the stocks data was confirmed as correct by PSMA representatives in the last SAB meeting. As earlier noted, PSMA itself clarified during the SAB meetings that stock data was collected directly from sugar mills by the Cane Commissioner Offices without any involvement of PSMA.
215. Generally, as seen from the SAB minutes above, any error in PSMA's statements or endorsement of figures was always attributed to error in calculation of data collected from mills. At the same time, PSMA acknowledges that it has no role in the collection of data and it is for the Cane Commissioners to compile and collect the same (as discussed earlier under Part E of this Order above). For instance, as seen above, exports for crushing season 2018-19 that were allowed amounted to total 1.1 MT of sugar, however, this was stopped as, despite PSMA's statements that there was no shortage of sugar and optimistic outlook that production figures for the 2019-20 crushing season would be on the higher side, there was a drastic increase in domestic prices and actual shortage of sugar in the market. Importantly, PSMA maintained the stance during the 2019-20 crushing season that consumption figures would be on the lower side, however, the data showed higher off-take figures, and PSMA admitted itself that for certain sugar mills, more stocks were shown than were actually available.



216. The undertakings have argued that they were merely lobbying in the interests of the sugar industry and that the ultimate decision of export quantities is by SAB and then the ECC. In this regard, counsel for PSMA relied on the case of Eastern R. Conference v. Noerr Motors, 365 U.S. 127 (1961) where a group of trucking companies and their trade association alleged that the defendants (group of railroads, a railroad association and a public relations firm) had conspired to restrain trade in, and monopolize, the long-distance freight business, in violation of Section 1 and 2 of the Sherman Act. They alleged, *inter alia*, that the railroads had engaged the public relations firm to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers.
217. The US Supreme Court found that the railroad parties had merely solicited governmental action with respect to the passage and enforcement of laws. Nevertheless, it recognized that where “*a publicity campaign, ostensibly directed towards influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor*” then the application of the Sherman Act would be justified. Therefore, even the US Supreme Court recognized that lobbying activities where they aim at influencing governmental action may be a mere sham to cover anti-competitive practices.
218. However, in the instant proceedings, no violation has been alleged on account of lobbying in the SCNs. Therefore, the matter may rest here. Nevertheless, even in the Commission’s previous *JJVL/LPGAP Order*, where JJVL argued that it was merely undertaking lobbying activities, the Commission found that through the said advocacy and lobbying activities, JJVL managed to introduce “*a pricing mechanism for LPG which allowed it to influence the producer price of LPG and hence eventually the derivative consumer price.*”
219. The member undertakings through PSMA are clearly lobbying as a mechanism to pursue a favorable decision regarding quantum of exports and thereby controlling domestic supply of sugar that is likely to have a resultant impact on prices. The Commission is not concerned with whether or not an undertaking has exported sugar (as argued by several undertakings) but that of the act of collectively pre-determining the export quantity by the member undertakings using PSMA’s platform.
220. Counsel on behalf of the undertakings argued that the Commission is mainly concerned with retail prices, whereas, the undertakings sell on ex-mill basis. It is re-emphasized that the Commission is concerned with the anti-competitive conduct/agreement/decision of pre-determining export quantities by PSMA and the member undertakings. As stated above, it is pertinent to note that any determination on the export quantity, invariably and directly, reflects the stock availability for domestic



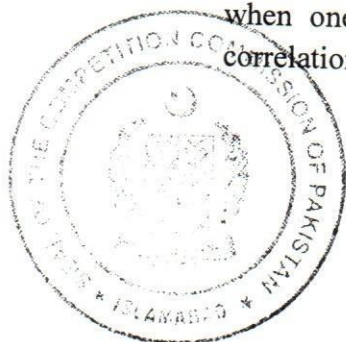
supply. These are bound to be interrelated. This link between the amount of exports and the domestic price of sugar has even been highlighted and remained a concern for Government stakeholders as stated in the SAB meetings. Export approvals also carried the condition that the appointed committee shall recommend to the ECC to stop exports in the event of any abnormal domestic price increase.

221. Moreover, we also note that retail prices are positively correlated with ex-mill prices of sugar as evidenced by the table below:

|                           | Ex mill<br>Average | Retail<br>price | Difference | % Age<br>Increase/<br>(Decrease)<br>in ex mill<br>price | % Age<br>Increase/<br>(Decrease)<br>in Retail<br>Price |
|---------------------------|--------------------|-----------------|------------|---|--|
| Oct-18                    | 48.9               | 54.78           | 5.88       | -   | -  |
| Nov-18                    | 49.65              | 54.87           | 5.22       | 1.5%  | 0.2%   |
| Dec-18                    | 51.44              | 55.63           | 4.19       | 3.6%  | 1.4%   |
| Jan-19                    | 53.67              | 58.47           | 4.8        | 4.3%  | 5.1%   |
| Feb-19                    | 54.81              | 59.13           | 4.32       | 2.1%  | 1.1%   |
| Mar-19                    | 57.06              | 61.15           | 4.09       | 4.1%  | 3.4%   |
| Apr-19                    | 61.67              | 65.63           | 3.96       | 8.1%  | 7.3%   |
| May-19                    | 62.72              | 67.99           | 5.27       | 1.7%  | 3.6%   |
| Jun-19                    | 63.49              | 70.83           | 7.34       | 1.2%  | 4.2%   |
| Jul-19                    | 66.26              | 72.38           | 6.12       | 4.4%  | 2.2%   |
| Aug-19                    | 69.76              | 75.38           | 5.62       | 5.3%  | 4.1%   |
| Sep-19                    | 69.26              | 75.02           | 5.76       | -0.7%   | -0.5%  |
| <b>Average<br/>change</b> |                    |                 |            | <b>3.2%</b>   | <b>2.9%</b>  |

(Source: PSMA 2019 Annual Report)

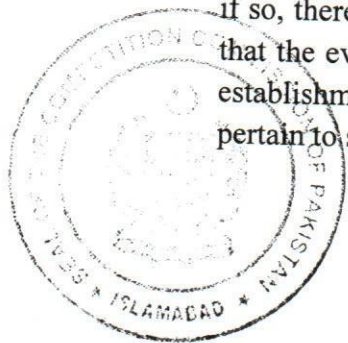
222. In order to measure the relationship between 2 variables, in the instant matter between ex-mill and retail prices, we have calculated the correlation coefficient based on the data above. The correlation coefficient is measured on a scale that varies from + 1 through 0 to - 1. Complete correlation between two variables is expressed by either + 1 or -1. When one variable increases as the other increases the correlation is positive; when one decreases as the other increases it is negative. Complete absence of correlation is represented by 0.



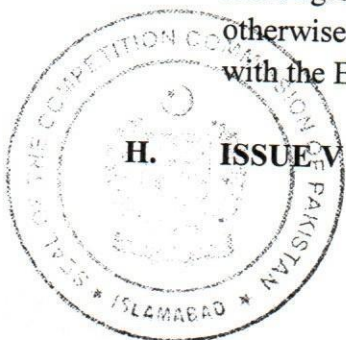
223. The correlation co-efficient between ex-mill and retail prices is 0.9931, which indicates a high positive correlation between the above two variables. This means that a rise in ex-mill price will almost always result in a rise in retail prices.
224. However, it is re-emphasized that for the purposes of establishing a violation under Section 4 of the Act in the instant violation, i.e., collective decision making on export quantity, the Commission is not required, at this juncture, to go into an effects-based analysis on prices. In this connection, we find the position held in the *supra T-Mobile* case instructive wherein it was held that “...the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted. Concerted practices may have an anti-competitive object if they ‘directly or indirectly fix purchase or selling prices or any other trading conditions’. In order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices.”
225. Therefore, to sum up our findings above, in the residual field of competition (that is left after considering what areas are controlled by the Government), mills are free to independently decide where to supply sugar and whether or not to export. Exports quotas are also assigned on a ‘first come, first serve basis’. Collection of current or real-time stock position used for the purpose of collectively determining export quantities at PSMA’s end are not justifiable and would constitute a violation of Section 4(1) of the Act. Such information can allow mills to coordinate future sales volumes, export and pricing strategies causing further distortion and removing the degree of uncertainty in the domain left for players to compete or decide freely in an already highly regulated market. We also note that, although the other stakeholders provide their independent analysis, PSMA also actively pursues influencing Government actions *vis-a-vis* pre-determined export quantity, and many-a-times, it appears to have succeeded.

**G. ISSUE IV – ESTABLISHMENT OF ZONAL DIVISIONS OF PUNJAB MILLS**

226. The Enquiry Report, in general and in paragraphs 84 to 92 in particular, and the documents relied therein holds that since 2017, certain member undertakings (including in the Punjab zone) used PSMA’s forum to coordinate sales, stock positions and production quota and to monitor and control quantity to be sold which, *prima facie*, constitutes a violation Section 4(1) read with Section 4(2)(a) of the Act.
227. Counsel on behalf of the undertakings argued that there are no sales committees and there is no evidence of any sales committees ever meeting or being formed, and, even if so, there is no evidence showcasing the context of those meetings. They also stated that the evidence relied upon is not conclusive or provides a decision concerning the establishment of the same and the different sets of emails attached to the Enquiry Report pertain to sales committees but not zonal divisions.

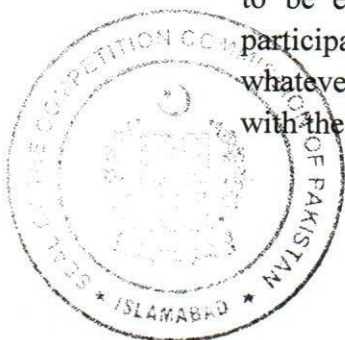


228. The evidence contained in the Enquiry Report with regards to zonal committees is detailed below:
- i. Annex B1: Power Point presentation titled “Emergent General Meeting of the PSMA “PZ” 19th April, 2017”.
  - ii. Annex ‘C1’: Email dated 13 October 2018 sent from the account of Mr. Muhammad Arif (Manager Admin & Accounts) PSMA Lahore, to be sent to all Members PSMA Punjab zone.
  - iii. Annex ‘C2’: Email dated 6 November 2018 titled ‘FW: Co-Ordination Committee’ originally sent from email address of Muhammad Rafique.
  - iv. Annex ‘C3’ Series of documents impounded from premises of JDW Group titled ‘Co-ordination Committee PSMA-Punjab Zone’.
229. The idea that these committees were ‘stillborn’ as suggested by Counsel and were not created does not hold merit as Mr. Muhammad Rafique, an official of JDW group, received the email from Mr. Arif regarding intimation to Punjab Zone members about formulation of coordination committees. The email placed at Annex C2 originally sent from the email account of Mr. Muhammad Rafique also shows that Huda Sugar Mills requested for transfer to Group 5 from Group 6 of the zonal sub-committees.
230. There is also mention in this email of an Executive Committee meeting, which took place on 31 October 2018 wherein it was decided to appoint Mr. Sohail Khokhar as Chief Coordinator for follow up with all the Coordination Committee on all issues to be passed on to it (we note these issues pertain to sales and stocks as stated in the presentation appended to the Enquiry Report as Annex B1). This email is also copied to all the coordinators. The existence of the zonal committees cannot, therefore, in all reasonableness, be contested.
231. The functioning of the zonal committees is also evident from a series of documents impounded from JDW group titled Co-ordination Committee PSMA-Punjab Zone. These documents contain stock positions of various mills in Punjab marked according to the zonal divisions described above. Due to the practice of sharing commercially sensitive stock information as established in Part E and F above, we find that the establishment of such committees is to streamline the process of collecting stock figures from each sub-region/group, which further substantiates violation of Section 4 of the Act on account of sensitive commercial information sharing making such violation more egregious. No proof has been adduced by the undertakings concerned to establish otherwise or provide a plausible explanation for the evidence collected and attached with the Enquiry Report.

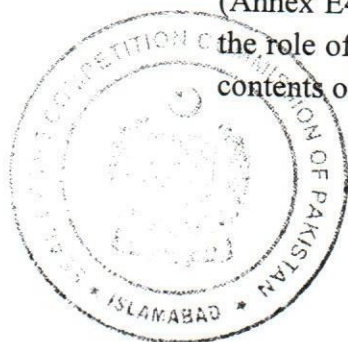


#### H. ISSUE V – FIXING QUANTITIES IN USC TENDERS

232. Briefly, in terms of paragraphs 113 to 118 of the Enquiry Report, for two USC tenders dated 28 March 2019 (the “**2019 USC Tender**”) and 26 March 2010 (the “**2010 USC Tender**”) respectively there is a *prima facie* violation of Section 4(2)(c) of the Act as PSMA and its participating member undertakings are fixing or setting quantity of productions post-bid, despite the tender being competitively awarded to select few sugar mills in an attempt to share the profits from the same.
233. The arguments against the findings of the Enquiry Report presented by Counsel on behalf of the undertakings are briefly as follows:
- i. The USC tender was valid under PPRA laws and other applicable laws, hence, no violation. Even otherwise, public tenders such as the one at issue can be awarded to more than one undertaking as large quantities are demanded and one undertaking may not be able to fulfill the whole tender due to financial or other constraints.
  - ii. The point of competition is on price. Since the mills were matching the lowest price there is no loss to consumer welfare.
  - iii. In any case, PSMA had no role in facilitating any anti-competitive collusive conduct in relation to the award of the USC tender and it was merely a post-office, i.e., conveying the decision of individual member undertakings and negotiating on their behalf with USC, in particular, due to USC’s history of defaulting on payments to sugar mills.
234. The validity of the USC Tenders has not been at issue. It is the conduct of PSMA and its member undertakings concerned, which has been flagged as *prima facie* violation. In this regard, the tender process broadly has three phases – advertisement of the same and obtaining the bid documents, bidding for the same in accordance with the requirements of the tender and then award of the same. PSMA has, for whatever reason, interfered with the award of the same by deciding to divide the tender amount for supply of sugar amongst the participating member undertakings in both 2019 and 2010. PSMA has, in its written submissions, admitted on record for both the USC tenders that “*admitted position that the required quantity of white refined sugar, i.e., 20,000 MT and 100,000 MT was supplied to USC by member sugar mills. It is also an admitted position that the aforementioned quantity was supplied by the respective sugar mills by matching the price offered by the lowest bidder*” (para 4.20 of its Reply to the SCN). In its oral submissions, Counsel on behalf of PSMA also admits that any division was after the conclusion of the tender process, that other mills had requested the tender amount to be equally divided between them and that PSMA had inquired whether the participating undertakings were fine with the division. This is sufficient proof that, for whatever purpose, PSMA and the participating undertakings concerned had interfered with the competitive process of the award of the USC tenders.



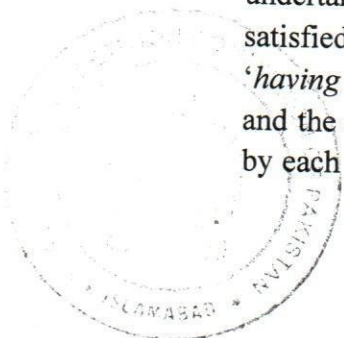
235. Regarding the 2019 USC Tender, although PSMA's anti-competitive role cannot be denied, as stated above, nevertheless we are inclined to take a lenient view on the participating undertakings as there is not enough evidence on record, apart from the draft letter attached as Annex E2 to the Enquiry Report to show that the said undertakings had agreed collectively with PSMA to divide the tender amount amongst themselves. In light of the information provided by USC (at Annex E3 of the Enquiry Report), we find that only eleven mills had actually participated in the USC tender and that the tender was eventually awarded to only five (we understand Thal Industries means Layyah and Safina) mills by the USC tender committees, who had won the bid, for a total amount of 8000 MT (which we note is way below the advertised tender amount). Interestingly, PSMA's letter is dated 25 April 2019 after the award of the tender, i.e., 23 April 2019 includes the name of mills that had not even participated in the 2019 USC tenders. Although, we must note that the non-participating mills were not awarded the tender, as per USC's record.
236. For the 2019 USC Tender, while we note that in the SAB meeting held on 15 April 2019, one of the Government officials urged PSMA representatives to show a gesture to the Federal Government by providing sugar at reduced rates to USC. Nevertheless, this request does not provide PSMA with a 'safety-net' for pursuing anti-competitive practices. PSMA only agreed to participate in the said tender in the said SAB meeting. Thus, at most PSMA, as an association, could request or urge its members to participate but could not fix quantities to be shared amongst participating or even non-participating mills thereby unlawfully interfering in the tender process either post or during the bidding process.
237. As for the 2010 USC Tender, we hold that PSMA and the concerned member undertakings are liable for colluding and deciding amongst themselves to divide the amount of sugar between themselves. This is even more alarming concerning that the total amount of the tender was 100,000 tons of sugar with the approximate value of PKR 5835 million (@ PKR 58,350 per ton). In this regard, Counsel for undertakings failed to provide any evidence to the effect that USC, itself, approached mills in order to divide tender quantities equally amongst them. No undertaking has denied the participation in the 2010 USC Tender, except for Tandlianwala I, II & Zamand. However, we find, to this extent, that no evidence has been provided by Counsel on behalf of Tandlianwala sugar mills to counter the express list of bidders attached to the Enquiry Report (at Annex E4) and the aforementioned admitted position of PSMA on record.
238. The language used by PSMA in its letters to USC dated 24, 26 and 29 March 2010 (Annex E4 of the Enquiry Report), including, threat of legal action demonstrates that the role of PSMA went beyond that of a mere 'post office'. For ease of reference, the contents of the evidence on record is summarized below:





- i. A draft of the 24 March 2010 letter and a confidential list of the bid rates against each participating mill for the 2010 USC Tender were faxed from the Premier Group, Head Office on 24 March 2010, after the bids had been submitted to USC. We find such sharing of confidential bid rates prior to any decision on the award of the bid, in itself, proof that the participating member undertakings and PSMA had shared the total quantity and bidding rate with each other.
- ii. The letter from PSMA to USC dated 24 March 2010 wherein PSMA requests that the tender quantity be distributed among the 21 PSMA member sugar mills that had participated in the same in equal quantity as it would be '*serious controversy*' in case quantities are awarded to facilitate any particular participant, in order to "*ensure the spirit*" behind USC tenders, i.e., ensuring timely payment to growers. The said letter was copied to all PSMA Zonal Offices indicating that, although PSMA was the front-runner, the participating member undertaking were also aware and supported the collective fixing of quantities, in particular, as they had shared their bids with PSMA as evidenced above.
- iii. The letter from PSMA to USC dated 26 March 2010 wherein PSMA itself admits that the 2010 USC tender has been allotted to few participants who have quoted large quantities at the minimum rate. It is actively found to interfere in this competitive process of awarding the tender by stating that the same "*is extremely unfair, the law requires that all parties that have participated in the tender to be asked to match the lowest established rate, specially as the purpose of this tender... is to facilitate farmer's outstanding payment across the board, not for the benefit of few individual mills to dispose off their entire holdings.*" The Counsel on behalf of the undertakings failed to specify exactly what law requires all participating parties of a tender to be asked to divide quotas and match the lowest rates post-bidding process.
- iv. The letter from PSMA to USC dated 29 March 2010, wherein PSMA resorts to threat of legal action by stating that the quantities be divided amongst sugar mills in order to "*enable the mills to release pending payments to sugarcane growers instead of favoring a few*", failing which PSMA reserves "*the right to challenge the award of tender in the court of law*" is yet another evidence highlighting its lead role in pursuing what is not permitted under Section 4 of the Act.

239. In light of the above, we are not satisfied with the mere defense argued by the undertakings that the purpose of the USC tenders, to achieve the lowest price, has been satisfied. We observe that protecting or promoting competition does not solely mean '*having the lowest price*'. We observe that the choice to participate in a competitive bid and the submission of bid rates are all independent commercial decisions to be made by each individual sugar mill notwithstanding even if the underlying objective was to



'release payments to sugarcane growers'. The PSMA's conduct negates the whole concept behind a competitive tender by advocating the division of the tender amongst all participating mills only to take away the award of the tender from successful bidders for the clear purpose of accommodating those who were unsuccessful, largely for their own financial security. It is not plausible that PSMA could have addressed USC on this matter without having the consent or support from the concerned undertakings, especially when PSMA admits that '*the quantity was supplied by the respective sugar mills*'. The participating undertakings have not produced any evidence to rebut that the tender was not equally divided amongst them or any evidence to show contrary to what has been alleged.

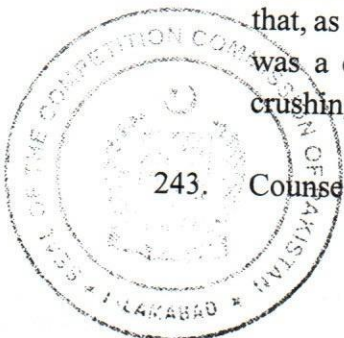
240. With regard to the USC 2010 Tender, Counsel for Group 3 undertakings has also argued that the Commission cannot take cognizance of the 2010 USC Tender and facts related thereto as the events transpired were before the promulgation of the Act. We find this argument devoid of any merit due to the fact that there was a competition law in place covering the period of the 2010 USC Tender. The Competition Ordinance, 2009 was promulgated on 26 November 2009 till 26 March 2010 followed by the promulgation of the Competition Ordinance, 2010 from 20 April 2010 to 18 August 2010. As held unanimously by the Honorable Lahore High Court in the *supra LPG Association* case, the gap between the 2009 and 2010 Ordinances is covered by the retrospective effect granted by Section 1(3) of the 2010 Ordinance from the date of lapse of the 2009 Ordinance (paragraph 70 thereof). We understand that the validation and savings clause under Section 62 of the Act relates to continuity of proceedings and orders initiated before the promulgation of the Act. The Commission was very much in existence since 2007 under the then prevailing competition law. In our understanding, without the continuity of law, as per the legislative instruments, the actions and proceedings could not have been validated. Therefore, we do not find anything that bars the Commission from taking cognizance of the anti-competitive conduct in relation to fixing of quantities with regard to the 2010 USC Tender.

241. In light of the above, we find the interference of PSMA and the act of fixing quantities amongst participating member undertakings for the 2010 USC Tender in violation of Section 4(1) read with Section 4(2)(e) of the Act. Accordingly, we also find the participating member undertakings of the 2010 USC Tender liable for the violation.

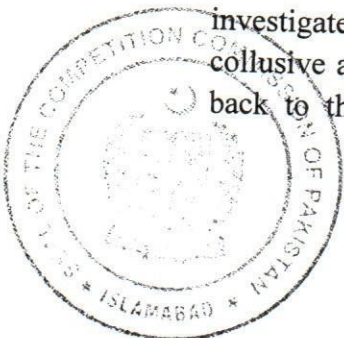
#### I. ISSUE VI – CEASING OF SUGARCANE CRUSHING

242. The Enquiry Report maintains that during the crushing season 2019-20, PSMA Punjab zone ceased to crush sugar from 30 December 2019 to 11 January 2020. It is also stated that, as evident from the data received from the Cane Commissioner Punjab, this closure was a collective decision on part of PSMA Punjab zone wherein 15 mills ceased crushing on the call of PSMA.

243. Counsel on behalf of undertakings have argued broadly that:



- i. Newspaper reports cannot form the basis of an affirmative finding.
  - ii. Report of the Cane Commissioner (Annex F1) contains two tables. On these particular dates reason for closure was non-availability of sugarcane. The document has no reasons and no backing evidence. Sugarcane sellers were holding the product. The document is unsigned and there is no documentary chain.
  - iii. With regard to emails containing the Agenda items, receipt of such notices were denied and participation in any meetings regarding the same was also denied.
244. The Commission observes that the Punjab Cane Commissioner's report has some inherent contradictions. It states that out of 40 operational mills in Punjab, 27 were closed. Out of these 27, 15 mills were closed on PSMA's call and 12 were closed due to no cane or less cane. Under the heading of name of closed mills on PSMA's call (15), the column '*No. of available trollies at the mill gate*' shows that for the mills closed on the call of PSMA there was either '*no cane*' or in the case of Layyah (13 trollies), Safina (50) and Madina (50). Similarly, under the heading '*Status of Non-functional mills because of no cane or less cane (12 mills)*' under column '*No. of available trollies at the mill gate*', we can see that a lot of the mills that were closed on account of no cane actually had trollies at their gates such as, Ramzan Sugar Mills (280 trollies), Noon (230 trollies) and Abdullah (65 trollies). Therefore, this document alone cannot be relied upon.
245. The fact that during the procurement period, PSMA Punjab held 11 meetings (from 24 December 2019 to 10 February 2020) where the agenda item was sugarcane procurement/sugarcane scenario ties up with the Power Point presentation wherein a strategy of the zonal committees is to coordinate the start of crushing with each other. However, due to the inconsistency in the Cane Commissioner's report, it does not sufficiently establish that the sugar mills were closed on the call of PSMA as a result of a collective decision to stop crushing.
246. We also observe that in the minutes of the SAB meeting held on 16 January 2020, representatives of PSMA have attributed the shutting down of sugar mills due to farmers holding back the crop in order to ask for higher price and that in Sindh, sugar mills shut down for a week. It was further stated that rains in Punjab compounded the problem.
247. Hence, we are of the view that the Enquiry Committee needed to probe further and investigate to corroborate and determine that the mills ceased crushing due to a collusive agreement/decision. We, therefore, deem it expedient to remand the matter back to the Enquiry Committee for further probe and independent corroboration.

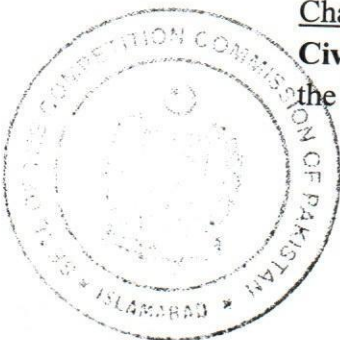


Subject to finding the same, the Enquiry Committee may then proceed in accordance with law.

**J. VIOLATIONS ESTABLISHED**

248. As discussed in the 'Analysis' part of this Order above, we find from the record that an agreement and/or a concerted practice falling within the purview of '*prohibited agreement*' exists between PSMA and its member undertakings. In this regard, there is a concurrence of wills to not only share sensitive commercial information, but also, to collectively pre-determine export quantity with the result of controlling supply of sugar in the relevant market with the mutual objective of maintaining/increasing financial health of the undertakings and pursuing policies favorable to the undertakings.
249. In administrative proceedings, we observe in light of the discussion under Part C above, that the burden of proof is rebuttable. It was for the undertakings to provide other viable explanation for the tenor of the AGMs and decisions decided therein as well as any other plausible explanation for their participation in the subject prohibited activities. We find that the undertakings have failed to discharge such burden. They failed to put forward any cogent evidence demonstrating a different set of circumstances or rationale to justify their conduct against the allegations in the SCNs.
250. Before moving on to sum up of the findings and imposition of penalty, we attend to the specific request by the following undertakings who have requested the Commission to take a lenient view, keeping the extent of their participation in the violation of Section 4 of the Act. After consideration of all the evidence and their submissions, both oral and written, we hold the following:
- i. *Chaudhry Sugar Mills – concerning the allegation of commercially sensitive information sharing (Issue I & IV) as well as the collective decision on export quantities (Issue II & III) – Issues discussed in Parts E to G of this Order*

The undertaking contends that it has been non-operational since 2017 and submitted the following court orders as evidence of the same: (a) Order of the Honorable Supreme Court dated 9 February 2017 in JDW SM Ltd and another versus Ittefaq SM Ltd and Others Civil Petition Nos. 3364 to 3366 of 2016; (b) Order of the Lahore High Court dated 2 March 2017 in Chaudhry Sugar Mills Ltd and Others versus Province of Punjab and Others ICA No. 1456/2016; (c) Judgment of the Lahore High Court dated 11 September 2017 in Chaudhry Sugar Mills Ltd and Others versus Province of Punjab and Others 2017 LHC 3082; (d) Order of the Honorable Supreme Court dated 13 September 2018 in Chaudhry Sugar Mills Ltd and Others versus Province of Punjab and Others Civil Appeals No. 104 to 132 of 2018 (collectively, hereinafter referred to as the "Mill Relocation Ban Proceedings").



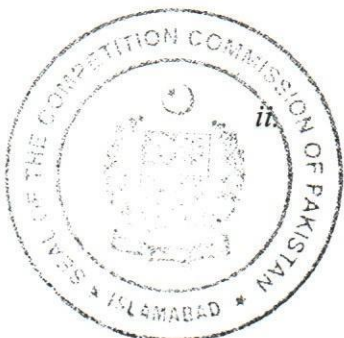
Briefly, as per the court proceedings above, the Honorable Supreme Court had, in its first Order remanded the case back to the Honorable Lahore High Court to decide the stay applications of the respondents and, meanwhile, restricted the respondents from carrying out any manufacturing activities and their operations. The Lahore High Court by its March 2017 Order decided to restrain Chaudhry Sugar Mills amongst others from undertaking any operations until the final disposal of the proceedings. Through its judgment, the Honorable Lahore High Court declared the relocation of the relevant mills illegal and directed Chaudhry Sugar Mills, amongst others, to dismantle and remove the said mills from the location. The Honorable Supreme Court upheld this judgment by its Order of September 2018.

We also note that the Cane Commissioner Report as on 4 January 2020 (Annex F1 of the Enquiry Report) lists the undertaking as a non-operational sugar mill as it is “*under relocation as per direction of Honourable Supreme Court of Pakistan*”.

The undertaking has also contended that it was not a member of PSMA for the year 2017 onwards and it last paid the membership fee on 12 April 2016 for the year 2016-2017. Its purpose of attending the 52<sup>nd</sup> AGM held on 2 January 2018 was due to the fact that certain agenda items related to the crushing season for the year 2016-2017 during which it was still a member of PSMA and it was partly operational. Furthermore, the undertaking argued that stock sharing data has been submitted directly to the Cane Commissioner Punjab and attached stock reports dated 10 March 2016, 9 September 2016, 10 January 2017 and 20 January 2017.

In light of the above, we find that the undertaking cannot be culpable for any anti-competitive conduct spanning over a period of almost 4 years from 2017 to 2020 as it was not operational for the crushing seasons during such period and it was no longer a member of PSMA. Nevertheless, we find that the undertaking had presence as a member of PSMA for the years prior to 2017, in particular, was present in the 47<sup>th</sup> AGM where it was collectively decided to prepare and collect fortnightly reports and provide data. It was also present in the 51<sup>st</sup> AGM again where PSMA requested all members to cooperate and continue to provide reliable data and production figures in order to determine the ‘*correct*’ export figures, to which the members agreed to do so. Therefore, Chaudhary Sugar Mills is liable for taking part in the concerted practice of sharing commercially sensitive stock information as well as pre-determining export quantities during the period 2012 till 2017.

*Haseeb Waqas Sugar Mills - concerning the allegation of commercially sensitive information sharing (Issue I & IV above) as well as the collective*



*decision on export quantities (Issue II & III above) - Issues discussed in Parts E to G of this Order*

The undertaking by its reply dated 17 April 2021 contended that it had not been operational since 2016 citing Orders issued by the Honorable Lahore High Court and the Honorable Supreme Court in the Mill Relocation Ban Proceedings. It further stated that it had not been a member of PSMA since 2013-2014.

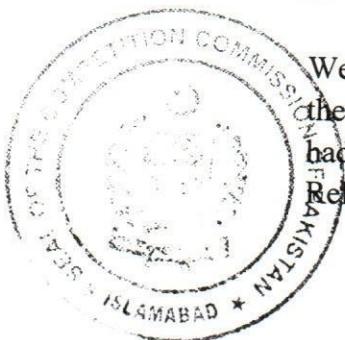
As per the *supra* Honorable Supreme Court Order of September 2018 in the Mill Relocation Ban Proceedings, we find that the relocation of the undertaking was declared illegal and the undertaking was directed to remove its mill from the location. The Civil Review Petition Nos. 693 & 717/2018 and 24/2019 against the said decision of the Honorable Supreme Court was also dismissed in this regard by Order dated 26 February 2019 (appended to the undertaking's reply).

Moreover, as per the Cane Commissioner Report as on 4 January 2020, the undertaking is listed as a non-operational sugar mill as it is "*under relocation as per direction of Honourable Supreme Court of Pakistan*". Hence, we find that the undertaking was not operational from the crushing season 2016-2017 till 2020 due to the Mill Relocation Ban Proceedings, thus, cannot be held liable for any exchange of commercially sensitive stock information and the collective pre-determination of export quantities during the said period.

However, as for its contention that it has not paid membership fees and, therefore, is not a member of PSMA since 2013, no evidence has been provided. Hence, in absence of any proof to the contrary, the Commission is not inclined to take a lenient view and finds the undertaking complicit in the concerted practice, by using the platform of PSMA, of sharing commercially sensitive stock information (Issue I) and for pre-determining export quantities with the resultant control in domestic supply (Issue II & III) from 2012 till crushing season 2015-2016.

iii. *Ittefaq Sugar Mills Limited - concerning the allegation of commercially sensitive information sharing (Issue I & IV above), the collective decision on export quantities (Issue II & III above) and the collective decision to fix tender quantities in the USC 2010 Tender (Issue V above) - Issues discussed in Parts E to H of this Order*

We find (although Counsel for the undertaking failed to highlight this aspect in the proceedings) that, as the undertaking was part of the three sugar mills that had relocated to different areas in Punjab prior to the initiation of the Mill Relocation Ban Proceedings, it was not operational during the same by Order



of the appropriate forum and was ultimately directed by the Honourable Supreme Court to dismantle and remove its mill from the location.

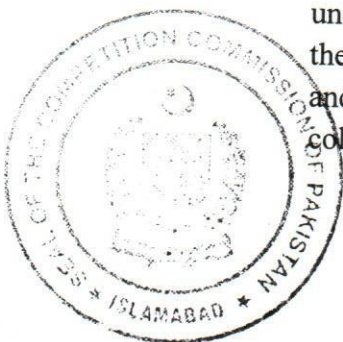
Moreover, as per the Cane Commissioner Report as on 4 January 2020, the undertaking is listed as a non-operational sugar mill as it is “*under relocation as per direction of Honourable Supreme Court of Pakistan*”. Hence, we find that the undertaking was not operational from the crushing season 2016-2017 till 2020 due to the Mill Relocation Ban Proceedings, thus, cannot be held liable for any exchange of commercially sensitive stock information either to PSMA itself and/or amongst member undertakings of PSMA Punjab zone as well as taking part in the collective decision of pre-determining export quantities during the said period.

However, we find that the undertaking has not denied the exchange of information with PSMA and nor has it denied its membership of PSMA. In light of the same and our findings above, we, therefore cannot take a lenient view regarding taking part in sharing of stock information and pre-determining export quantities for the period of 2012 to end of crushing season 2015-2016. We also find that it was operational and had bid for the USC 2010 Tender, hence, we also hold it liable for agreeing with PSMA and the other participating undertakings to fix the tender quantity and divide the same amongst themselves.

iv. *Khazana Sugar Mills - concerning the allegation regarding the collective decision on export quantities (Issue II & III above) - Issues discussed in Part F of this Order*

In terms of its additional reply to the SCN dated 13 February 2021, the undertaking contended that it was not a member of PSMA. As proof of the same, it provided a cheque dated 5 August 2014 of the last paid membership fees of PSMA and a copy of PSMA’s letters dated 10 February 2014 concerning renewal of membership for the year 2014-2015 and 10 February 2021 concerning renewal of membership for 2020-2021 and payment of fees. The undertaking contended in this regard that it had not renewed its membership with PSMA after the 2014-2015 year.

Although, we do not understand the purpose of PSMA sending the 2020 renewal of membership letter to the undertaking as it no longer was a member, nevertheless, in light of the other evidence provided by the undertaking, the undertaking is held liable only to the extent of its participation from 2012 till the end of crushing season 2014-2015, where it remained a member of PSMA and privy to as well as participating in all its decisions, in particular, related to collection of commercially sensitive stock information and export quantities.



- v. *Imperial Sugar Limited - concerning the allegation of commercially sensitive information sharing (Issue I & IV above) as well as the collective decision on export quantities (Issue II & III above) - Issues discussed in Parts E to G of this Order*

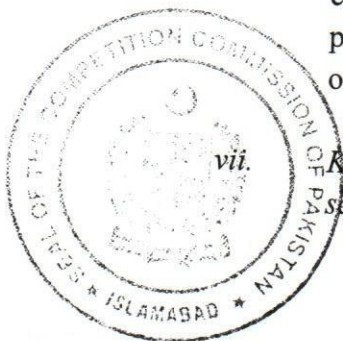
The undertaking in terms of its additional reply dated 4 February 2021, has stated that it had ceased sugar manufacturing since 2014-15 cane crushing season and that it had not paid its membership fees to PSMA since the year 2013-2014. Financial statement from the year 2012 onwards were also provided. We note that the 2015 Annual Report states that the undertaking did not operate its production facilities located in Bahauddin and the 2016 Annual Report states that operations of both its units remained suspended during the year and any sales were made out of stocks available from the preceding years. The undertaking also attached a letter from PSMA dated 1 February 2021 confirming that it had not been a member of PSMA since bill year 2013-14.

Therefore, in light of the same, the Commission is inclined to take a more lenient view and impose a penalty on it for only the years 2012 and 2013 for sharing commercially sensitive stock information in order to collectively decide export quantities at the platform of PSMA.

- vi. *JK Sugar Mills - concerning the allegation of commercially sensitive information sharing (Issue I & IV above) as well as the collective decision on export quantities (Issue II & III above) - Issues discussed in Parts E to G of this Order*

Counsel on behalf of the undertaking highlighted that the undertaking had only become operational on 13 April 2017 and that it only became a member of PSMA on 27 October 2018. Moreover, that it only took part in the last three crushing seasons. Attached to its reply dated in support of the same was its Certificate of Incorporation dated 13 April 2017 (Annex A thereof) and the PSMA Membership Certificate dated 27 October 2018 (Annex B thereof).

Nevertheless, Counsel on behalf of the undertaking has not denied the provision of stock information to PSMA, rather he has argued that the same is not commercially sensitive and that PSMA was required to collect the same. For the sake of brevity we shall not reiterate our findings in detail. Suffice to say that in light of the above, we find that the undertaking has disseminated and shared commercially sensitive stock information and has taken part in a concerted practice with the common objective of pre-determining export quantities by way of manipulating such stock data and controlling supply from the year 2019-20.



- vii. *Kamalia Sugar Mills & Two-Star – concerning the allegation of commercially sensitive information sharing (Issue I & IV above), the collective decision on*



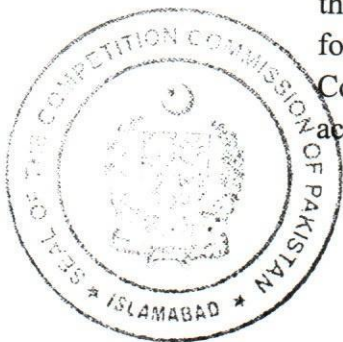
*export quantities (Issue II & III above), the collective decision to fix tender quantities in the USC 2019 Tender (Issue V above) and ceasing crushing on the call of PSMA (Issue VI above) - Issues discussed in Parts E to I of this Order*

Concerning the USC 2019 Tender, we have already taken a lenient view where the undertakings concerned are not being imposed a penalty. The question whether the mills ceasing crushing on the call of PSMA has been remanded to the Enquiry Committee for further probe and investigation.

As for the remaining allegations, the undertaking contended, as stated in its response to the SCN through Counsel dated 25 May 2021 that it had sold its assets, including its land, buildings, plant and machinery and operations along with all NOCs to Two Star Industries (Private) Ltd in the year 2016. The last crushing season carried out by the undertaking was stated to be the crushing season 2015-2016. The undertaking also appended a commencement of crushing notification by Two Star Industries dated 15 November 2016, which was sent to the Cane Commissioner Punjab. In terms of its response dated 8 June 2021, it provided a copy of a credit rating report dated 3 May 2019 published by VIS Credit Rating Company Limited for Two Star Industries, which stated that it was incorporated in October 2016 after acquiring the manufacturing facility of Kamalia Sugar Mills Limited.

We find the documents provided by the undertaking insufficient and failing to discharge the burden of proving the exact date of sale or transfer of title to Two Star Industries as well as the nature of the transaction. The Commission has learnt, subsequent to the hearings, that the undertaking has belatedly filed a merger application with the Commission for the transfer of the said assets wherein the Asset Sale Agreement is dated 16 November 2016. We fail to understand why the undertaking could not provide the requisite documents during the proceedings. In any case, such transfer does not absolve the undertaking of liability from the period 2012 till the end of the crushing season 2015-2016 as it was still part and parcel of the sugar industry and a member of PSMA, where decisions and communications as well as the minutes of the AGM are duly circulated to all member mills. Hence, we find the undertaking to be held liable for the aforementioned period.

In relation to the allegations pertaining to the sharing of commercially sensitive information, which is further substantiated by creation of zonal divisions and the collective decision on exports with the resultant control of supply of sugar for the period beginning from the crushing season 2016-17 onwards, the Commission directs the Registrar to issue a SCN to Two Star Industries accordingly.



- viii. *Abdullah Sugar Mills - concerning the allegation of commercially sensitive information sharing (Issue I & IV above) as well as the collective decision on export quantities (Issue II & III above) - Issues discussed in Parts E to G of this Order*

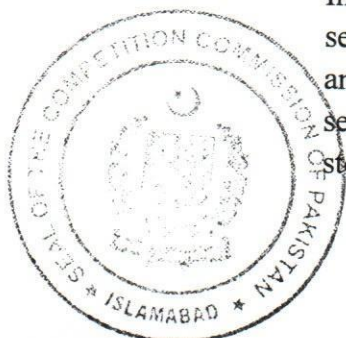
The undertaking in terms of its reply dated 8 December 2020 had submitted that it had not been a member of PSMA since 2013. However, no proof of the same was submitted with the Commission in this regard. We note that Abdullah Sugar Mills is mentioned in the sub-divisions formed by the PSMA Punjab zone for the purpose of coordinating and facilitating sharing of commercially sensitive stock information as well as the stock position data appended with the Enquiry Report.

The undertaking has further stated that in the crushing season 2019-20 it sold all stocks during the crushing period and that over the last five years, the undertaking has had no closing stock at the end of the crushing seasons up till 2019. However, as stated above, the stock reports/data appended with the Enquiry Report does not evidence the same as it merely showcases the amount of unsold sugar stock remaining with the mill. Also, our concern is not with the sale of stock or market power of any undertaking, but whether commercially sensitive information has been shared by the undertaking with PSMA and other member undertakings of the Punjab zone as well as whether the undertaking has participated in the collective decisions on export quantities.

Therefore, we hold that the undertaking is complicit and a part of the concerted practice of sharing commercially sensitive stock information with PSMA and amongst the member undertakings of PSMA Punjab zone as well as to pre-determine export quantities and control supply, particularly when decisions were taken for and on behalf of all member undertakings of PSMA in its AGMs pertaining to the same. Therefore, no lesser penalty can be imposed on or offered to the said undertaking.

- ix. *Shakarganj I & II - concerning the allegation of commercially sensitive information sharing (Issue I & IV above), the collective decision on export quantities (Issue II & III above) and the collective decision to fix tender quantities in the USC 2019 Tender (Issue V above) - Issues discussed in Parts E to H of this Order*

In its reply dated 21 November 2020, the undertaking contended that it usually sells its entire stock within the crushing season. In this regard, the undertaking annexed a stock position table wherein, with the exception of the crushing season 2012-13 and 2018-19, the undertaking had sold over 80 percent of its stock during the crushing season. It also corrected the market share figure in the



Enquiry Report by stating that it has a share of 0.94% of the overall white sugar market in Pakistan, hence, does not have any influence in the relevant market.

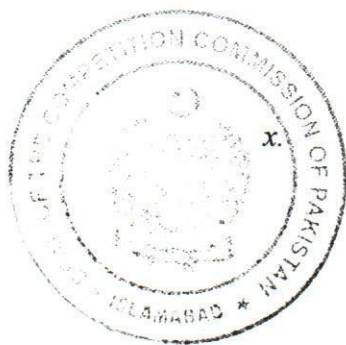
In this regard, we find that as the case is not one of abuse of dominance under Section 3 of the Act, the market share and level of influence of an undertaking in the relevant market is irrelevant to that extent. The focus of Section 4 of the Act is participation in collusive or anti-competitive conduct in the form of any concerted practice, decision or agreement. In any case, regardless of its market share or size, other competitors/undertakings were made aware of the stock information of Shakarganj (I & II) and could have adjust their independent market conduct accordingly. Moreover, Shakarganj, being a member of PSMA, has also participated in the 47<sup>th</sup>, 51<sup>st</sup>, 52<sup>nd</sup> and 53<sup>rd</sup> AGMs, as is apparent from the record, wherein it was agreed by all member undertakings to share commercially sensitive stock information *inter se* and with PSMA as well as in order to pre-determine exports with the resulting control of supply in the relevant market. In this connection, as stated above, the Article 101 Guidelines clearly state that “...*When a company receives strategic data from a competitor (be it in a meeting, by mail or electronically), it will be presumed to have accepted the information and adapted its market conduct accordingly....*”

As for the 2019 USC Tender, we have already taken a lenient view where the undertakings concerned are not being imposed a penalty. Interestingly, Shakarganj in its response stated that:

*“... Additionally, the company did not participate in the tender referred to in the report, i.e. the tender closing on 28<sup>th</sup> March 2019 and it was conveyed to us via PSMA that various government entities were upset at low participation from member mills and were refusing to accept the position that mills were unwilling to supply to Utility Stores Corporation due to the difficulties faced in receiving payments. As the company has never objected to the Utility Stores Corporation purchasing sugar on advance payment or via letter of credit, the company expressed its willingness to supply a token quantity of 1,000 MT if a letter of credit was provided”.*

No further documentary proof was provided with regard to the above contention, nevertheless, we find that the same is a clear admission of PSMA's involvement in going beyond its role as an association to negotiate and allocate quantities for the 2019 USC Tender, which otherwise was to be competitively awarded.

*Sakrand Sugar Mills - concerning the allegation regarding the collective decision on export quantities (Issue II & III above) - Issues discussed in Part F of this Order*



The undertaking submitted that it, generally, has low stocks and sells most of its stock during the crushing season. Therefore, it contends that it usually is not left with much stock at the end of the crushing season, leaving it in a position not to participate in any cartel arrangement for stock sharing or increasing prices.

In this connection, the undertaking, in terms of its reply no. SSML/Acct./09/2021 dated 19 January 2021 to SCN no. 127/2020, only submitted a single page of its unaudited financial statements for the period 31 March 2020 showing that there was no stock in hand at the end of the quarter as compared to the stock figure in the financial statements for the year end 30 September 2019. We find this evidence to be insufficient as it does not even cover the full enquiry period. Being a public listed company, the undertaking should also have had access to its audited financial statements, in particular for March 2020.

The undertaking also participated in the 49<sup>th</sup> AGM of PSMA (held in October 2014) as noted from the evidence on record. Hence, it was involved in the concerted practice of pre-determining export quantities for that year as well as privy to the decisions to share commercially sensitive stock information. Thus, we are inclined not to take a lenient view in this regard. Having low stocks does not automatically mean that its stock data was not shared with PSMA for the purpose of collectively deciding the export quantity as such decision takes into account the entire domestic stock of sugar in the country; be it whatever amount.

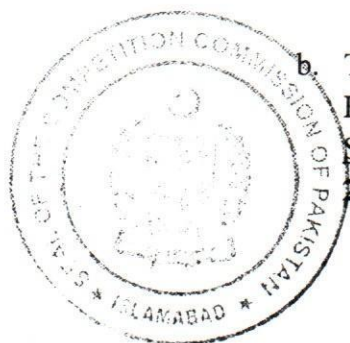
251. In light of specific facts and circumstances, the Commission finds that the following undertakings are absolved from any liability on account of being non-members of PSMA and having no other evidence on record regarding their participation:

*i. Seri & TMK Sugar Mills*

As both undertakings are under the same management and as the contentions are largely similar, they are both being dealt with collectively. Vide replies dated 24 February 2021, both undertakings shared:

a. The membership certificate of PSMA whereby membership was valid till 31 March 2009, after which no further membership fee payments have been made.

b. The mills have been closed due to pending litigation in the Honorable Sindh High Court. The undertakings attached Order No. 10 December 2015 in Southern Sugar Mills (Pvt.) Ltd versus Seri Sugar Mills Ltd Suit (S) 2096/2015, which seems to be a dispute over possession of the mills.



c. No participation in AGMs is recorded as is noted from evidence on record.

We find the evidence lacking with regard to the pending litigation and closure of the mills as no attested/certified copy of the Sindh High Court has been provided by the undertakings. Even otherwise, the document on record does not provide details regarding closure of the mills or cessation of operations. Nevertheless, we are inclined to take a lenient view based on the fact that the undertakings have not been members of PSMA during the impugned time period in the Enquiry Report.

ii. *Kiran Sugar Mills*

The undertaking contends that it has never been a member of PSMA. It also provided a copy of letter no. PSMA-040/2021 from PSMA dated 15 March 2021, wherein it states that "*Kiran Sugar Mills Ltd. has not been the member of PSMA in the past.*"

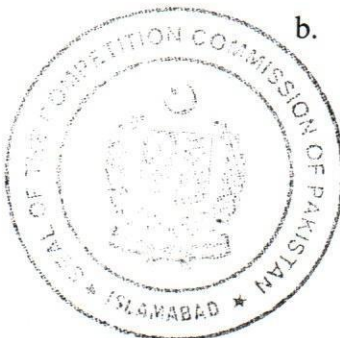
No participation in any AGMs is also recorded as is noted from the evidence on record. Therefore, based on the above, we find that the undertaking cannot be held in violation of Section 4 of the Act for the alleged contraventions.

252. Without prejudice to the specific aspects discussed above, undertakings have been found liable for having committed the following contraventions:

i. PSMA has been found in contravention of Section 4 of the Act on four distinct counts:

a. It acted as a frontrunner in providing a platform for the member undertakings located in Punjab and requiring the said member undertakings, during the period 2012 to 2020, to collect and discuss commercially sensitive stock information with these member undertakings in Punjab. PSMA further facilitated the collection, sharing and discussion of such commercially sensitive stock information *inter se* the member undertakings of Punjab during the period 2016 to 2020 by taking the decision of creating zonal sub-divisions amongst the member undertakings of PSMA Punjab zone, sending emails to member undertakings of Punjab zone containing stock data and creating a WhatsApp group of only Punjab zone mills for purposes of active discussion and sharing of current and real-time stock figures.

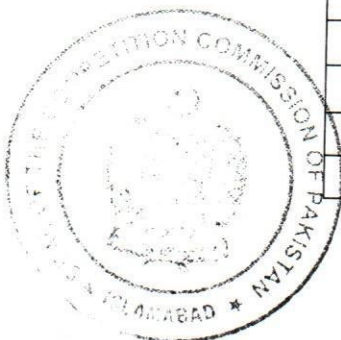
b. During the period 2012-2020, PSMA required all member undertakings to provide recent and reliable stock figures and production data to pre-determine and collectively decide export quantities, in violation of Section 4(1) read with Section 4(2)(c) of the Act with the resultant intended control of supply of sugar in the relevant market. While, lobbying by PSMA in this



regard has not been alleged as a distinct offence in the SCN, we consider it relevant to observe that PSMA's conduct is ostensibly that of perpetuating anti-competitive decision from competitors and then, under the garb of lobbying, seeking to secure corresponding or complimentary decisions or governmental action. For instance, we see sufficient evidence of the role played by PSMA in pursuing SAB during the crushing season 2016-2017 to review the availability of sugar stock, estimated consumption and workout exportable surplus. Therefore, such conduct calls for stricter scrutiny under the competition law regime. Such artifice ought to be discouraged and, this Commission expects that PSMA shall ensure its outlook on such aspect of the matter.

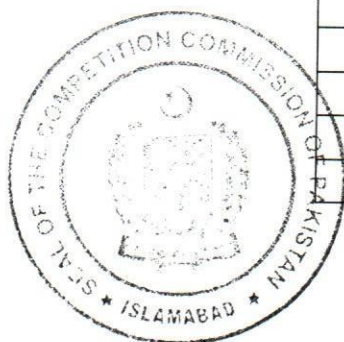
- c. By deciding and dictating to divide and allocate the subject tender quantities of the 2019 and 2010 USC Tenders pertaining to supply of sugar amongst all the concerned participating member undertakings, which tenders were otherwise to be awarded on a competitive basis.
- ii. During the period 2012 to 2020, contravention has also been made out on part of all member undertakings of PSMA, including that of Punjab, Sindh or KPK (named below), except those specified above in paragraph 251 of this Order for pre-determining and collectively deciding export quantities, in the backdrop of sharing commercially sensitive stock position/information with PSMA. Any resultant control of supply as a consequence of this decision, which further required approval of the competent authority is not being treated in this Order as a distinct contravention. Such act of collective decision-making is based on decisions by PSMA whereby it urged all member undertakings to provide recent and reliable stock and production data in order for PSMA to determine the 'correct figures' in future concerning the quantum of exports. The undertakings acting in concert have extended their cooperation to achieve their desired objective, i.e. collectively pre-determining export quantities which otherwise should have been an independent economic decision for each of the undertakings. Such collective cooperation manifests a prohibited agreement by and between PSMA and its member undertakings concerned, which is a clear violation of Section 4(1) of the Act. The following undertakings are liable on this count:

|   |                            |
|---|----------------------------|
| 1 | Abdullah Sugar Mills Ltd.  |
| 2 | Al Arabia Sugar Mills      |
| 3 | Adam Sugar Mills Ltd       |
| 4 | Ashraf Sugar Mills Ltd     |
| 5 | Baba Farid Sugar Mills Ltd |
| 6 | Brothers Sugar Mills Ltd.  |
| 7 | Chanaar Sugar Mills Ltd.   |

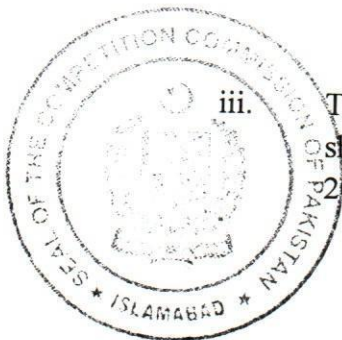


ML.

|    |   |
|----|---|
| 8  | Chaudhry Sugar Mills Ltd (only for the year 2012 to 2017)                     |
| 9  | SW Sugar Mills Limited (Formerly Chishtia)                                    |
| 10 | Eithad Sugar Mills Ltd.   |
| 11 | Fatima Sugar Mills Ltd  |
| 12 | Fecto Sugar Mills Ltd.  |
| 13 | Haq Bahu Sugar Mills Ltd.   |
| 14 | Haseeb Waqas Sugar Mills Ltd. (only for 2012 to end of crushing season 15-16) |
| 15 | Hunza I Sugar Mills Ltd.,   |
| 16 | Hunza II Sugar Mills Ltd.,  |
| 17 | Huda Sugar Mills Ltd  |
| 18 | Hamza Sugar Mills Ltd   |
| 19 | Rasool Nawaz Sugar Mills Ltd.   |
| 20 | Hussein Sugar Mills Ltd.  |
| 21 | Indus Sugar Mills Ltd.  |
| 22 | Ittefaq Sugar Mills Ltd (only for 2012 to end of crushing season 15-16)       |
| 23 | JDW-I Sugar Mills Ltd   |
| 24 | JDW-II Sugar Mills Ltd  |
| 25 | Kashmir Sugar Mills Ltd   |
| 26 | Kamalia Sugar Mills (only for 2012 to end of crushing season 15-16)           |
| 27 | Layyah Sugar Mills Ltd  |
| 28 | Safina Sugar Mills Ltd  |
| 29 | Macca Sugar Mills (Pvt.) Limited,   |
| 30 | Madina Sugar Mills Ltd.   |
| 31 | Noon Sugar Mills Ltd  |
| 32 | Pattoki Sugar Mills Ltd.,   |
| 33 | Ramzan Sugar Mills Ltd  |
| 34 | Shahtaj Sugar Mills Limited   |
| 35 | Shakarganj I Mills Limited  |
| 36 | Shakarganj II Mills Limited   |
| 37 | Sheikhoo Sugar Mills Ltd  |
| 38 | Tandlianwala I Sugar Mills Limited  |
| 39 | Tandlianwala II Sugar Mills Limited   |
| 40 | Imperial Sugar Mills Ltd (only for the years 2012 & 2013)                     |
| 41 | Popular Sugar Mills   |
| 42 | R.Y.K. Sugar Mills Ltd  |
| 43 | Jauharabad (Formerly Kohinoor) Sugar Mills Ltd                                |
| 44 | JK Sugar Mills (only for the year 19-20)                                      |
| 45 | Almoiz II Sugar Mills Ltd.  |



|    |   |
|----|---|
| 46 | Abdullah Shah Ghazi Sugar Mills Ltd   |
| 47 | Al-Abbas Sugar Mills Ltd.   |
| 48 | Al-Noor Sugar Mills Ltd.  |
| 49 | Ansari Sugar Mills Ltd.   |
| 50 | Army Welfare Sugar Mills Ltd.,  |
| 51 | Bawany Sugar Mills Ltd  |
| 52 | Dewan Sugar Mills Ltd   |
| 53 | Deharki Sugar Mills Ltd   |
| 54 | Digri Sugar Mills Ltd   |
| 55 | Faran Sugar Mills Ltd   |
| 56 | J.D.W-III Sugar Mills Ltd   |
| 57 | Habib Sugar Mills Ltd.,   |
| 58 | Khairpur Sugar Mills Ltd  |
| 59 | Khoski Sugar Mills Ltd  |
| 60 | Larr Sugar Mills Ltd  |
| 61 | Matiari Sugar Mills Ltd   |
| 62 | Mehran Sugar Mills Ltd  |
| 63 | Mirpur Khas Sugar Mills Ltd   |
| 64 | Mirza Sugar Mills Ltd   |
| 65 | Najma Sugar Mills Ltd.,   |
| 66 | Naudero Sugar Mills Ltd   |
| 67 | New Dadu Sugar Mills Ltd  |
| 68 | Pangrio Sugar Mills Limited   |
| 69 | Sakrand Sugar Mills Ltd   |
| 70 | Sanghar Sugar Mills Ltd   |
| 71 | Shahmurad Sugar Mills Ltd.  |
| 72 | Sindh Abadgars Sugar Mills Ltd  |
| 73 | SGM Sugar Mills Ltd.  |
| 74 | Tharparkar Sugar Mills Ltd.,  |
| 75 | Ranipur Sugar Mills Ltd.,   |
| 76 | Chashma-I Sugar Mills Ltd.  |
| 77 | Chashma-II Sugar Mills Ltd.   |
| 78 | Al-Moiz I Sugar Mills Ltd   |
| 79 | Premier Sugar Mills   |
| 80 | Khazana Sugar Mills Ltd. (only for the year 2012 till end of crushing season 14-15) |
| 81 | Tandlianwala Zamand   |



iii. The member undertakings located in Punjab (named below), have not only shared commercially sensitive information with PSMA throughout the period 2012 to 2020, but have also disseminated and discussed the same *inter se*



through WhatsApp messages and other correspondence. In this regard, PSMA officials have also emailed representatives of Punjab mills (in 2016, 2017 and 2018) sharing stock information and created zonal sub-committees facilitating the same. The undertakings have also participated in the meetings of PSMA or have had zonal representation, in particular the 47<sup>th</sup>, 48<sup>th</sup> and 51<sup>st</sup> AGMs where member undertakings expressed their cooperation to provide reliable data to PSMA. Such exchange and participation is clearly tantamount to a concerted practice falling within the purview of a 'prohibited agreement' that has the object of distorting, reducing, preventing or restricting competition in the relevant market and is tantamount to a violation of Section 4(1) of the Act. The sharing of such information, as discussed in detail earlier, has been found to be of sensitive nature given the dynamics of the sugar industry and its link to the price of the product, i.e., sugar. The following undertakings are found liable on this count:

|    |   |
|----|---|
| 1  | Abdullah Sugar Mills Ltd.   |
| 2  | Al Arabia Sugar Mills   |
| 3  | Adam Sugar Mills Ltd  |
| 4  | Ashraf Sugar Mills Ltd  |
| 5  | Baba Farid Sugar Mills Ltd  |
| 6  | Brothers Sugar Mills Ltd.   |
| 7  | Chanaar Sugar Mills Ltd.  |
| 8  | Chaudhry Sugar Mills Ltd (only for the year 2012 to 2017)                     |
| 9  | SW Sugar Mills Limited (Formerly Chishtia)                                    |
| 10 | Eithad Sugar Mills Ltd.   |
| 11 | Fatima Sugar Mills Ltd  |
| 12 | Fecto Sugar Mills Ltd.  |
| 13 | Haq Bahu Sugar Mills Ltd.   |
| 14 | Haseeb Waqas Sugar Mills Ltd. (only for 2012 to end of crushing season 15-16) |
| 15 | Hunza I Sugar Mills Ltd.,   |
| 16 | Hunza II Sugar Mills Ltd.,  |
| 17 | Huda Sugar Mills Ltd  |
| 18 | Hamza Sugar Mills Ltd   |
| 19 | Rasool Nawaz Sugar Mills Ltd.   |
| 20 | Hussein Sugar Mills Ltd.  |
| 21 | Indus Sugar Mills Ltd.  |
| 22 | Ittefaq Sugar Mills Ltd (only for 2012 to end of crushing season 15-16)       |
| 23 | JDW-I Sugar Mills Ltd   |
| 24 | JDW-II Sugar Mills Ltd  |
| 25 | Kashmir Sugar Mills Ltd   |

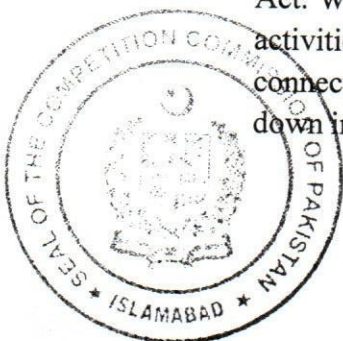


|    |   |
|----|---|
| 26 | Layyah Sugar Mills Ltd  |
| 27 | Safina Sugar Mills Ltd  |
| 28 | Macca Sugar Mills (Pvt.) Limited,                                     |
| 29 | Madina Sugar Mills Ltd.   |
| 30 | Noon Sugar Mills Ltd  |
| 31 | Pattoki Sugar Mills Ltd.,   |
| 32 | Ramzan Sugar Mills Ltd  |
| 33 | Shahtaj Sugar Mills Limited   |
| 34 | Shakarganj I Mills Limited  |
| 35 | Shakarganj II Mills Limited   |
| 36 | Sheikhoo Sugar Mills Ltd  |
| 37 | Tandlianwala I Sugar Mills Limited                                    |
| 38 | Tandlianwala II Sugar Mills Limited                                   |
| 39 | Imperial Sugar Mills Ltd (only for the years 2012 & 2013)             |
| 40 | Popular Sugar Mills   |
| 41 | R.Y.K. Sugar Mills Ltd  |
| 42 | Jauharabad (Formerly Kohinoor) Sugar Mills Ltd                        |
| 43 | JK Sugar Mills (only for the year 19-20)                              |
| 44 | Almoiz II Sugar Mills Ltd.  |
| 45 | Kamalia Sugar Mills (only for 2012 till end of crushing season 15-16) |

- iv. For the 2010 USC Tender, we find the participating member undertakings, (as per the Annexures) to be liable for the collective decision and fixing/allocating the tender quantity amongst themselves as well as using PSMA as a platform to do so, in contravention of Section 4(1) read with Section 4(2)(e) of the Act.

For the 2019 USC Tender, we are inclined to take a lenient view with respect to the role of the member undertakings concerned in light of our findings under Part H of this Order (mainly that the quantum of the tender was revised and remained small and that it was awarded amongst 5 mills, who had won the bid). Therefore, no penalty shall be imposed on each participating member undertaking.

253. We find each of the above acts/conduct of PSMA and the undertakings concerned having the object of distorting, "*preventing, restricting or reducing*" competition in the relevant market, as discussed in detail earlier. Hence, violation of Section 4(1) of the Act. We also find that the aforementioned conduct does not fall under the permissible activities of an association in light of the express provisions of the Act. In this connection, we refer to the '*Dos and Don'ts/Guidelines for Trade Associations*' laid down in the 2010 PSMA Order where we listed suspect activities, which by nature may



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be considered anti-competitive, to include, collusively tendering and bid-rigging, standard setting and information exchanges.

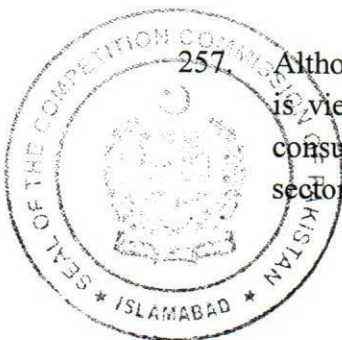
254. At this juncture, it is pertinent to note that both PSMA and its member undertakings are separate legal entities. However, the member undertakings have empowered PSMA to undertake obligations on their behalf and absent an express opposition, this is sufficient to expose them to anti-trust liability. Hence, separate economic operators acting through a collective structure or a common body, i.e., the member undertakings are found to be in breach of competition law principles as well as PSMA itself for facilitating the breach of the same.
255. In this regard, in the Roofing felt case (86/399/EEC), at issue was the conduct of Cooperative Association of Belgian Asphalters ('Belasco') and certain business undertakings that were members of Belasco as well as two non-members in relation to certain agreement(s) between the undertakings with the intent to control the Belgian roofing-felt market by adopting common pricing policies, implementing minimum selling prices, setting quotas for sales, imposing ban on members for certain reasons, etc. The European Commission found not only Belasco liable as it was involved in the operation of the said agreement and penalized members for exceeding quotas, but also the member undertakings of the association as they were engaging in a restriction of competition. In this regard, the European Commission observed that "*the members must be considered to be equally responsible for the cartel, including the agreements with non-members.*"

#### K. PENALTIES

256. While imposing penalty we take into account the gravity of the contravention and the prevailing circumstances bearing in mind the deterrent or dissuasive effect of such penalty. It may be relevant to refer to the observations of the Honourable Islamabad High Court in relation to the importance of sugar in Pakistan in the *supra* PSMA case that:

*"The importance of sugar in the daily life of a common man in Pakistan cannot be overstated. Sugar is indeed one of the essential commodities for the general public... The sugar industry is one of the major industries in the country. Sugar, therefore, is an integral part of the quality of life for the general public and its availability in the market at an affordable price inevitably attracts the constitutional guaranteed right to life under Article 9 of the Constitution."*

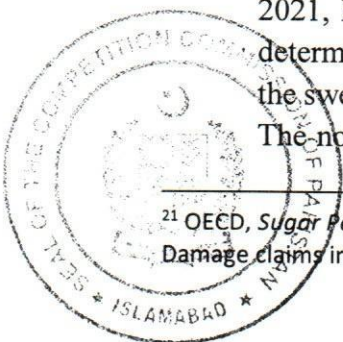
257. Although 53 essential commodities are listed in the Schedule of the Hoarding Act sugar is viewed as amongst the top 10 of the essential commodities. Sugar is not only consumed in and of itself in households but also constitutes an important input for other sectors such as bottled beverages, pharmaceuticals, confectionary and bakery,



restaurants, food processing (some of which use sugar as one of their major inputs e.g. in chocolates and biscuits). The products manufactured by these industries are also widely consumed all over Pakistan. Any change in prices of sugar will generate externalities for these sectors which utilize it as an input. An increase in prices of sugar will generate negative externalities and a decrease in prices will generate positive externalities. Moreover, sugar production generates various by-products and if these are factored in then spill-over effects are amplified further.

258. We need to remain mindful that Governmental interventions at any end makes it all the more important to preserve the latitude for competition that remains in the relevant market. Cartelization in the sugar industry appears to be compulsive or pathological where players collude and engage in collusive practices as a means to an end. PSMA and its member undertakings have also applied the same ideology by continuing to take part in collusive activity, which the Commission has continued to take cognizance of as far back since the enquiry proceedings were initiated in 2009 with regard to the 2010 Order.
259. The regulatory intervention model of the sugar industry in Pakistan is not unique, with other countries facing similar or even more stringent concerns and heavy regulation in the sugar sector. In fact, OECD has described sugar markets as “*one of the most subsidised and distorted of all agricultural markets*”, where distortion in the market increases the incentive to collude.<sup>21</sup> As also observed in the Commission’s decision in 2010, this is not the first time that the regulated industry faces charges of anti-competitive conduct before the competition authority. Global experiences in this regard from the more mature competition regimes are instructive and persuasive.
260. The undertakings have contended that distortions if any in the market are largely due to Government regulation, however, we are of the considered view that that notwithstanding the regulated aspects, there certainly still exists latitude for competition in the residual field within the relevant market. As far as these proceedings are concerned, the Government did not regulate the ex-mill prices nor did it control in any manner the supply of sugar in the market. With respect to the subject contraventions committed by PSMA or its member undertakings (concerned), we are not convinced that any compulsion existed for and on account of Governmental acts/intervention(s).
261. In this regard, it may be pertinent to point out that most recently, the Controller-General of Prices, Ministry of Industries and Production, had announced, in the month of July 2021, PKR 70.42 per kg as the ex-mill rate of sugar. It is reported that the rate was determined on the basis of the tax returns filed by the sugar mills regarding the sale of the sweetener (sugar) during the six-month period – from December 2020 to May 2021. The notification issued by the Controller-General also fixed the per kg retail price of

<sup>21</sup> OECD, *Sugar Policy Reform in the European Union and in World Sugar Markets* (2007)  
Damage claims in the Spanish Sugar Cartel, Working Paper IE Law School. Francisco Marcos, 2014.

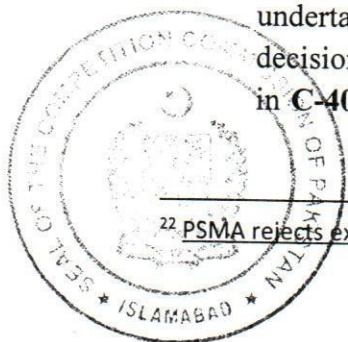


white crystalline sugar at PKR 88.28 after including 17% sales tax, ancillary costs, profits of wholesaler and retailers. The reported response of PSMA is clear defiance of the Government's decision stating that the decision is erroneous and against the SECP rules and the free trade clause of the Constitution<sup>22</sup>. Here it is interesting to see how PSMA turns around and acts independently of any Governmental intervention, even where it entails enforcement risk for non-compliance. Nevertheless, the Commission has clearly stated its position in the past, and most recently in its 2021 Policy Note on the 'Fixing of Maximum Retail Price of Sugar by the Government of Punjab.' The Commission has cautioned regarding the unintended consequences of price controls, as it rarely works and fails to protect those consumers who are the intended beneficiaries. The negative implications, both temporary and long-term, directly and indirectly, far exceed their benefits to consumers.

262. Here, we wish to articulate a very elementary point, which cannot be lost amidst alleged intricacies of any business or commercial activity. There is no cavil with the argument that businesses must prosper and employ all resources that they may to maximize profits and enhance shareholder value. But, this *per se* permissible objective cannot be divorced from the reality of conducting business within the four corners of the law. The State remains the final arbiter in determining the rights of its citizens, within the legal framework afforded at a time. The Act embodies the contemporary policy doctrine of the State that it is committed to enhancing economic efficiency as well as the capacity of businesses to grow subject, however, to there always being a level playing field. This Commission is the manifestation of the will of the people of Pakistan that anti-competitive enterprise is a bane, as it offends collective interests of the public. This Commission is never inclined to stifle any business or a group of businesses, including their preference to combine under the umbrella such as an association, but it expects that such platform will not be a tool or means to distort competition or adversely affect markets or otherwise be employed as a means to adversely affect the production and supply of goods and services. This Commission is cognizant that it must engender best practices in the conduct of business and continue to encourage businesses to adopt behavioral change, so that not only do they individually achieve greater economic efficiency and benefit but their responsible business ethic passes on the benefits of the economic enterprise at the national level.

263. While Provincial Governments do fix a support price for sugarcane, the freedom to supply or the ability to decide the quantum of sugar export (albeit subject to the approval of the competent authority) remained primarily driven by PSMA and its members. Similarly, the Government nowhere appears to have compelled the member undertakings to share the sensitive data *inter se* or with PSMA and/or to take collective decision with respect to the USC Tenders. In this regard, we find the ECJ's observation in C-40/73 Suiker Unie and others versus the European Commission instructive that

<sup>22</sup> PSMA rejects ex-mill sugar price announced by govt - Pakistan - DAWN.COM



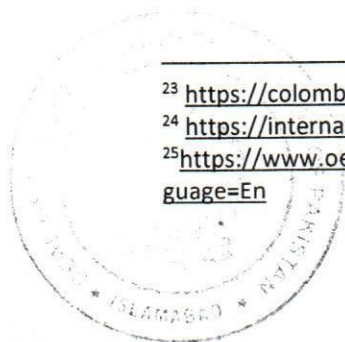
*“the fact remains that if it [the national quotas] leaves in practice a residual field of competition, that field comes within the provisions of the rules of competition.”*

264. Despite Governmental regulation, the sugar sector has been and continues to remain under the radar of many competition agencies across the globe. Internationally, cartels in the sugar sector have been imposed heavy fines by competition authorities, such as, in 2014 Germany’s Bundeskartellamt announced a fine of \$384 million on three sugar producers that had colluded to divide markets and restrict sales. The General Court in **T-202/98 Tate & Lyle and Others versus the Commission** (upheld by the ECJ in **C-359/01 P**) upheld the European Commission’s decision in relation to the fines of Euros 39.6 million on British Sugar and 1.8 million euros on Napier Brown but decreased the fine to 5.6 million euros for Tate & Lyle. In 2015, the Columbia’s sugar cartel was fined approx. USD 113 million<sup>23</sup>. In 2016 Mexico’s competition authority imposed fines of nearly US\$4.9 million on sugar producers<sup>24</sup>. In a case from 2007, Korea imposed fines of US\$44.9 million on a sugar cartel<sup>25</sup>.
265. It is interesting to see how in Pakistan, despite the numerous amount of players present in the relevant market, the undertakings, in pursuit of their common objective, still choose to resort to collusion in an attempt to control the residual areas that are free from Governmental intervention. At the forefront of such collusive anti-competitive practice is the unfortunate and persistent conduct of PSMA. Its active role must be condemned, discouraged and deterred. PSMA is only as good or bad as its members when seen from compliance of law perspective. It is inconceivable that members are law cognizant and abiding while their collective action PSMA banner results in contravention of the law. Thus, one cannot avoid liability for the acts of the other, unless irrefutable evidence of the disconnect is placed on record. None whatsoever has been forthcoming. To the contrary, there is sufficient evidence of collusive and prohibited behaviour/acts.
266. Keeping in view the volume and value of the USC Tenders and the evidence available, in particular, the 2010 USC Tender quantity was 100,000 tons of sugar with the approximate value of PKR 5,835 million (@PKR 58,350 per ton), as well as PSMA’s lead role in the act of fixing quantities, we impose on PSMA the maximum fixed penalty of PKR 75 million for each of the USC Tenders for acting in violation of Section 4 of the Act. Therefore, taking a holistic view of all facts and circumstances, we are of the considered view that the ratio of these findings calls for imposition of the maximum penalty on PSMA, i.e., PKR 75 million, for the role played by it for each of the four contraventions committed above (see para 252(i)), amounting to a total of PKR 300 million. Given that PSMA was found in grave contravention of the Act in 2010, this is

<sup>23</sup> <https://colombiareports.com/colombia-sugar-cartel-receives-record-fines-for-anti-competitive-conduct/>

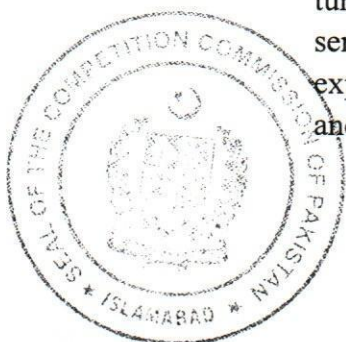
<sup>24</sup> <https://internationalsugarjournal.com/mexico-price-fixing-sugar-cartel-fined-us4-9-mln/>

<sup>25</sup> [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2008\)18/29&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2008)18/29&docLanguage=En)



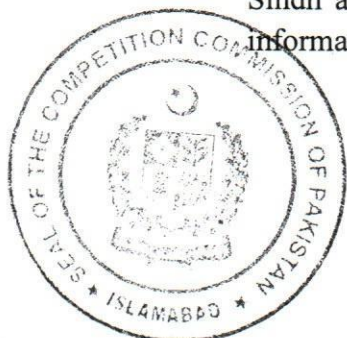
not the first time it has acted in contravention of the Act. Hence, maximum penalty is justified.

267. To serve the interest of justice, we deem it appropriate to impose a higher and deterrent penalty also on the member undertakings of PSMA (except for those mills specified in paragraph 251 above, who neither participated nor are members of PSMA) for each of the contraventions committed in terms of this Order to the tune of:
- i. 5% of the respective 2019 annual turnover of each of the member undertakings, located in Sindh, KPK and Punjab for collectively deciding the quantum of exports, invariably affecting/controlling the domestic supply of sugar in the relevant market for the period 2012 to 2020. This applies to 74 sugar mills mentioned in paragraph 252(iii) above, and for the 7 mills (6 in Punjab and 1 in Sindh) as specified in 267(iii) below, we are imposing a lesser penalty, keeping in view the duration of the contraventions.
  - ii. 7% of the respective 2019 annual turnover of each of the member undertakings located in Punjab, for sharing and discussing sensitive commercial stock information with PSMA for the period 2012 to 2020, which violation was more egregious given the fact that they had shared and discussed the same amongst each other by creating zonal sub-committees and communicating real-time stock figures in the WhatsApp group. This applies to the 39 undertakings mentioned in paragraph 252(iii) above, and for the 6 mills (in Punjab) as specified in 267(iii) below, we are imposing a lesser penalty, keeping in view the duration of the contraventions.
  - iii. Keeping in view that the period of violations by some undertakings is of a lesser duration, the penalty imposed on the following undertakings is as under:
    - a. For Chaudhry Sugar Mills, Haseeb Waqas Sugar Mills, Ittefaq Sugar Mills and Kamalia Sugar Mills a penalty of 4% of the annual turnover each for each contravention of sharing and discussing commercially sensitive stock information and for collectively deciding the quantum of exports. This penalty pertains to the period 2012 to 2017 for Chaudhry Sugar Mills and the period 2012 till end of crushing season 2015-2016 for Haseeb Waqas, Ittefaq and Kamalia Sugar Mills.
    - b. For Imperial Sugar Mills and JK Sugar Mills, a penalty of 2% of the annual turnover for each contravention of sharing and discussing commercially sensitive stock information and for collectively deciding the quantum of exports. This penalty pertains to the period 2019-2020 for JK Sugar Mills and the years 2012 and 2013 for Imperial Sugar Mills.



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- c. For Khazana Sugar Mills, a penalty of 4% of the annual turnover only for the contravention in relation to collectively deciding the quantum of exports. This penalty pertains to the period 2012 till the end of the crushing season 2014-2015.
- iv. A fixed penalty of PKR 50 million on each of the 22 participating member undertakings (as per the Annexures) in the 2010 USC Tender.
268. For ease of reference, the penalty imposed on each undertaking found in contravention of Section 4 of the Act is specified in Annex 1, which identifies the name of the undertaking, the period of violation and the penalty imposed.
269. For Punjab mills, the 2019 turnover figures were only available for 31 mills (including the Punjab mills specified in paragraph 267(iii) above). The penalty imposition of 7% and, where applicable, 4% and 2%, of the 2019 annual turnover, on account of the contravention of Section 4 pertaining to sharing of commercially sensitive information for the said 30 mills comes up to approximately PKR 18 billion, against the aggregate turnover of approximately PKR 268 billion (including the consolidated turnover of some of the group mills). However, for the remaining 14 mills, the turnover figures were not available, thus, they are directed to provide the turnover figures as per their respective 2019 annual financial statements and are liable to pay the penalties accordingly.
270. We note that for penalty on account of collective decision on export quantity, the 2019 turnover figures were only available for 55 mills out of 81. The 5% and, where applicable, 4% and 2%, the penalty amount for these 55 mills comes up to approximately PKR 24 billion against the aggregate turnover of approximately PKR 495 billion (this includes the consolidated turnover of some group mills).
271. The total amount of penalty imposed on PSMA and its member-undertakings (excluding those undertakings whose turnover figures for the year 2019 is not yet available with the Commission) comes up to approximately PKR 44 billion.
272. Those member undertakings whose 2019 turnover figures are not available with the Commission named in Annex 2 are directed to provide the turnover information as per their financial statement and deposit the penalty amount accordingly.
273. The Registrar is directed to issue SCNs to all the member undertakings/mills located in Sindh and KPK for contravention on account of sharing of commercially sensitive information (as discussed in para 180-181 of this Order).



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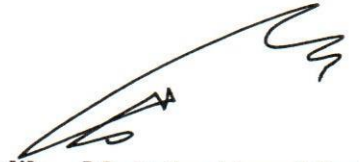
274. With respect to the alleged contravention regarding ceasing crushing on the call of PSMA, the Commission remands the matter back to the Enquiry Committee for further probe and independent corroboration (as discussed in para 247 of the Order). Subject to finding the same, the Enquiry Committee may then proceed in accordance with law.
275. The Registrar is also directed to issue SCNs to Two Star for contraventions on account of sharing of commercially sensitive information and collective decision on the quantum of exports for the period November 2016 onwards Industries (as discussed in para 250(vii) of this Order).
276. The subject undertakings are directed to discontinue and stop the aforesaid violations forthwith and directed to deposit the penalty within sixty (60) days of the issuance of this Order. The subject proceedings stand disposed off in terms of this Order.



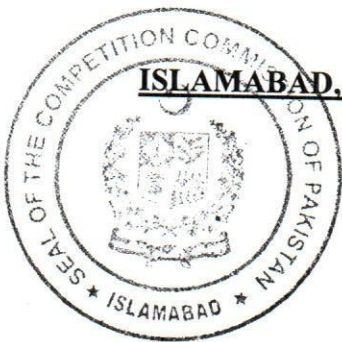
**Rahat Kaunain Hassan**  
Chairperson

**Shaista Bano**  
Member

**Bushra Naz Malik**  
Member



**Mujtaba Ahmed Lodhi**  
Member

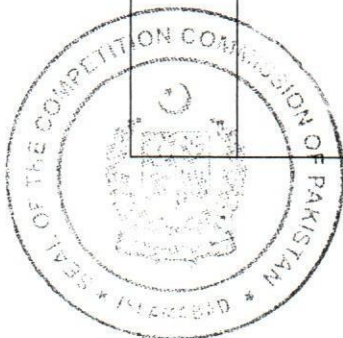


**ISLAMABAD, THE 6<sup>TH</sup> DAY OF AUGUST, 2021**

**ANNEX I**

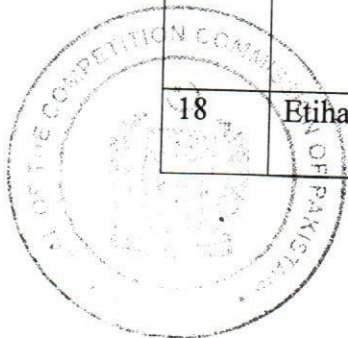
**List of Undertakings (whose 2019 turnover figures are available with the Commission),  
the Penalty Amount & Contraventions**

| S. No | Name of Undertaking  | Contravention   | Duration                                     | Penalty Amount (in PKR)  |
|-------|----------------------|---|--|--|
| 1     | JDW-I Sugar Mills    | Commercially sensitive information sharing, collective decision on export quantities, 2010 USC Tender | 2012 to 2020<br><br>Only 2010 for USC Tender | Total, based on the consolidated turnover:<br>@5%<br>3,411,573,183<br><br>@7%<br>4,776,202,456<br><br>PKR 50 million |
| 2     | JDW-II Sugar Mills   |   |  |  |
| 3     | JDW-III Sugar Mills  |   |  |  |
| 4     | Layyah Sugar Mills   | Commercially sensitive information sharing, collective decision on export quantities, 2010 USC Tender | 2012 to 2020<br><br>Only 2010 for USC Tender | Total, based on the consolidated turnover:<br>@5%<br>717,980,661<br><br>@7%<br>1,005,172,925<br><br>PKR 50 million   |
| 5     | Safina Sugar Mills   |   |  |  |
| 6     | Hussein Sugar Mills  | Commercially sensitive information sharing, collective decision on export quantities                  | 2012 to 2020                                 | @5%<br>285,778,634<br><br>@7%<br>400,090,087   |
| 7     | Hunza I Sugar Mills  | Commercially sensitive information sharing, collective decision on export quantities, 2010 USC Tender | 2012 to 2020<br><br>Only 2010 for USC Tender | Total, based on the consolidated turnover:<br>@5%<br>629,704,597<br><br>@7%<br>881,586,436<br><br>PKR 50 million     |
| 8     | Hunza II Sugar Mills |   |  |  |



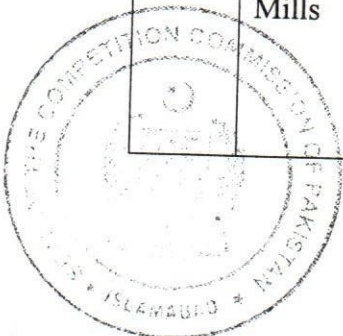
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| 9  | Al-Moiz Industries (Unit-I) | Collective decision on export quantities, 2010 USC Tender   | 2012 to 2020             | Total, based on the consolidated turnover:<br>@5%<br>1,007,526,332<br>@7%<br>1,410,536,864<br>PKR 50 million |
| 10 | Al-Moiz II Sugar Mills      | Commercially sensitive information sharing, collective decision on export quantities, 2010 USC Tender | Only 2010 for USC Tender |  |
| 11 | Deharki Sugar Mills         | Collective decision on export quantities  | 2012 to 2020             | @5%<br>747,369,598   |
| 12 | Ashraf Sugar Mills          | Commercially sensitive information sharing, collective decision on export quantities                  | 2012 to 2020             | @5%<br>348,198,908<br>@7%<br>487,478,471   |
| 13 | Chashma-I Sugar Mills       | Collective decision on export quantities, 2010 USC Tender   | 2012 to 2020             | Total, based on the consolidated turnover:<br>@5%<br>6,712,908,450<br>PKR 50 million                         |
| 14 | Chashma-II Sugar Mills      |   |                          |  |
| 15 | Baba Farid Sugar Mills      | Commercially sensitive information sharing, collective decision on export quantities                  | 2012 to 2020             | @5%<br>6,080,369<br>@7%<br>8,512,517   |
| 16 | Chanaar Sugar Mills         | Commercially sensitive information sharing, collective decision on export quantities, 2010 USC Tender | 2012 to 2020             | @5%<br>159,223,622<br>@7%<br>222,913,071<br>PKR 50 million   |
| 17 | Chaudhry Sugar Mills        | Commercially sensitive information sharing, collective decision on export quantities                  | 2012 to 2017             | @4% for each contravention<br>81,302,332(x2)<br>Total: 162,604,664   |
| 18 | Btihad Sugar Mills          | Commercially sensitive information sharing,   | 2012 to 2020             | @5%<br>670,729,438   |



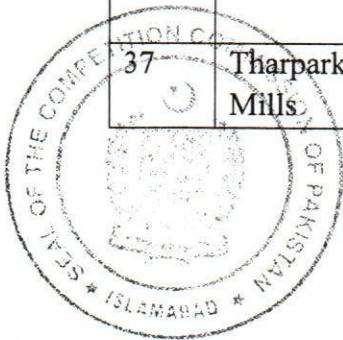
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|    |                          | collective decision on export quantities  |  | @7%<br>939,021,213   |
| 19 | Fatima Sugar Mills       | Commercially sensitive information sharing, collective decision on export quantities, 2010 USC Tender | 2012 to 2020<br><br>Only 2010 for USC Tender | @5%<br>338,326,589<br><br>@7%<br>473,657,224<br><br>PKR 50 million |
| 20 | Rasool Nawaz Sugar Mills | Commercially sensitive information sharing, collective decision on export quantities                  | 2012 to 2020                                 | @5%<br>72,152,738<br><br>@7%<br>101,013,833                        |
| 21 | Sheikhoo Sugar Mills     | Commercially sensitive information sharing, collective decision on export quantities                  | 2012 to 2020                                 | @5%<br>582,006,489<br><br>@7%<br>814,809,084                       |
| 22 | RYK Sugar Mills          | Commercially sensitive information sharing, collective decision on export quantities                  | 2012 to 2020                                 | @5%<br>628,419,528<br><br>@7%<br>879,787,340                       |
| 23 | Indus Sugar Mills        | Commercially sensitive information sharing, collective decision on export quantities, 2010 USC Tender | 2012 to 2020<br><br>Only 2010 for USC Tender | @5%<br>332,329,234<br><br>@7%<br>465,260,927<br><br>PKR 50 million |
| 24 | Noon Sugar Mills         | Commercially sensitive information sharing, collective decision on export quantities                  | 2012 to 2020                                 | @5%<br>283,560,950<br><br>@7%<br>396,985,330                       |
| 25 | Jauharabad Sugar Mills   | Commercially sensitive information sharing, collective decision on export quantities                  | 2012 to 2020                                 | @5%<br>172,074,150<br><br>@7%<br>240,903,810                       |



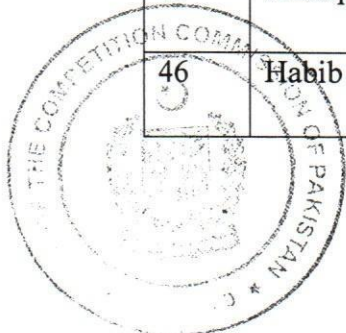
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| 26 | Shahtaj Sugar Mills             | Commercially sensitive information sharing, collective decision on export quantities                  | 2012 to 2020                                 | @5%<br>230,477,000<br><br>@7%<br>322,667,800   |
| 27 | Shakarganj I Sugar Mills        | Commercially sensitive information sharing, collective decision on export quantities                  | 2012 to 2020                                 | Total, based on the consolidated turnover:<br>@5%<br>312,595,350<br><br>@7%<br>437,633,490                           |
| 28 | Shakarganj II Sugar Mills       |   |  |  |
| 29 | Tandlianwala I Sugar Mills      | Commercially sensitive information sharing, collective decision on export quantities, 2010 USC Tender | 2012 to 2020<br><br>Only 2010 for USC Tender | Total, based on the consolidated turnover:<br>@5%<br>1,364,793,732<br><br>@7%<br>1,910,711,224<br><br>PKR 50 million |
| 30 | Tandlianwala II Sugar Mills     |   |  |  |
| 31 | Tandlianwala Zamand Sugar Mills |   |  |  |
| 32 | Fecto Sugar Mills               | Commercially sensitive information sharing, collective decision on export quantities                  | 2012 to 2020                                 | @5%<br>124,525,577<br><br>@7%<br>174,335,808   |
| 33 | Khazana Sugar Mills             | Collective decision on export quantities  | 2012 till end of crushing season 2014-2015   | @4%<br>37,451,180  |
| 34 | Sindh Abadgar Sugar Mills       | Collective decision on export quantities  | 2012 to 2020                                 | @5%<br>110,565,256   |
| 35 | SGM Sugar Mills                 | Collective decision on export quantities  | 2012 to 2020                                 | @5%<br>168,328,510   |
| 36 | Ranipur Sugar Mills             | Collective decision on export quantities  | 2012 to 2020                                 | @5%<br>85,682,786  |
| 37 | Tharparkar Sugar Mills          | Collective decision on export quantities  | 2012 to 2020                                 | @5%<br>110,672,481   |



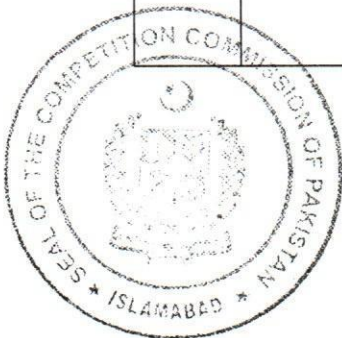
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|    |                        |   |              |                    |                          |                |
|----|------------------------|---|--------------|--------------------|--------------------------|----------------|
| 38 | Al-Abbas Sugar Mills   | Collective decision on export quantities, 2010 USC Tender | 2012 to 2020 | @5%<br>358,243,100 | Only 2010 for USC Tender | PKR 50 million |
| 39 | Mirpurkhas Sugar Mills | Collective decision on export quantities, 2010 USC Tender | 2012 to 2020 | @5%<br>186,449,300 | Only 2010 for USC Tender | PKR 50 million |
| 40 | Faran Sugar Mills      | Collective decision on export quantities, 2010 USC Tender | 2012 to 2020 | @5%<br>230,953,600 | Only 2010 for USC Tender | PKR 50 million |
| 41 | Dewan Sugar Mills      | Collective decision on export quantities                  | 2012 to 2020 | @5%<br>285,399,466 |                          |                |
| 42 | Sanghar Sugar Mills    | Collective decision on export quantities, 2010 USC Tender | 2012 to 2020 | @5%<br>138,521,950 | Only 2010 for USC Tender | PKR 50 million |
| 43 | Shahmurad Sugar Mills  | Collective decision on export quantities, 2010 USC Tender | 2012 to 2020 | @5%<br>474,877,600 | Only 2010 for USC Tender | PKR 50 million |
| 44 | Al-Noor Sugar Mills    | Collective decision on export quantities, 2010 USC Tender | 2012 to 2020 | @5%<br>467,001,550 | Only 2010 for USC Tender | PKR 50 million |
| 45 | Khairpur Sugar Mills   | Collective decision on export quantities                  | 2012 to 2020 | @5%<br>212,613,850 |                          |                |
| 46 | Habib Sugar Mills      | Collective decision on export quantities                  | 2012 to 2020 | @5%<br>493,656,700 |                          |                |



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|    |                                 |  |              |   |
|----|---------------------------------|--|--------------|---|
| 47 | Matiari Sugar Mills             | Collective decision on export quantities   | 2012 to 2020 | @5%<br>165,021,795  |
| 48 | JK Sugar Mills                  | Commercially sensitive information sharing, collective decision on export quantities | 2019 to 2020 | @2% for each contravention:<br>307,557,588 (x2)<br><br>Total: 615,115,176 |
| 49 | Army Welfare Sugar Mills        | Collective decision on export quantities   | 2012 to 2020 | @5%<br>84,764,231   |
| 50 | Abdullah Shah Ghazi Sugar Mills | Collective decision on export quantities   | 2012 to 2020 | @5%<br>7,655,500  |
| 51 | Mehran Sugar Mills              | Collective decision on export quantities   | 2012 to 2020 | @5%<br>265,588,657  |
| 52 | Adam Sugar Mills                | Commercially sensitive information sharing, collective decision on export quantities | 2012 to 2020 | @5%<br>115,731,158<br><br>@7%<br>162,023,621                              |
| 53 | Pattoki Sugar Mills             | Commercially sensitive information sharing, collective decision on export quantities | 2012 to 2020 | @5%<br>103,100,528<br><br>@7%<br>144,340,739                              |
| 54 | Popular Sugar Mills             | Commercially sensitive information sharing, collective decision on export quantities | 2012 to 2020 | @5%<br>118,631,825<br><br>@7%<br>166,084,555                              |
| 55 | Madina Sugar Mills              | Commercially sensitive information sharing, collective decision on export quantities | 2012 to 2020 | @5%<br>513,458,039<br><br>@7%<br>718,841,255                              |

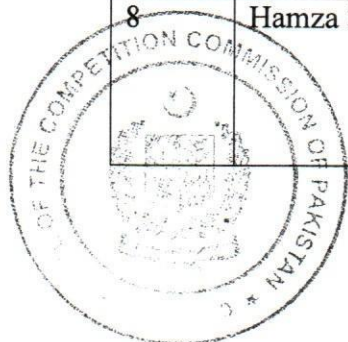


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## ANNEX II

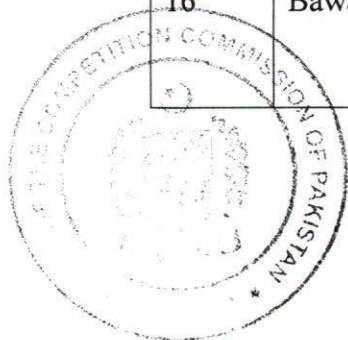
### List of Undertakings who's 2019 Turnover Figures are not available with the Commission

| S. No | Name of Undertaking      | Contravention   | Duration                                     |
|-------|--------------------------|---|--|
| 1     | Abdullah Sugar Mills     | Commercially sensitive information sharing, collective decision on export quantities  | 2012-2020                                    |
| 2     | Al-Arabia Sugar Mills    | Commercially sensitive information sharing, collective decision on export quantities  | 2012-2020                                    |
| 3     | Brothers Sugar Mills     | Commercially sensitive information sharing, collective decision on export quantities  | 2012-2020                                    |
| 4     | SW Sugar Mills           | Commercially sensitive information sharing, collective decision on export quantities,<br><br>2010 USC Tender – fixed penalty PKR 50 million | 2012 to 2020<br><br>Only 2010 for USC Tender |
| 5     | Haq Bahu Sugar Mills     | Commercially sensitive information sharing, collective decision on export quantities  | 2012-2020                                    |
| 6     | Haseeb Waqas Sugar Mills | Commercially sensitive information sharing, collective decision on export quantities  | 2012 till end of crushing season 2015-2016   |
| 7     | Huda Sugar Mills         | Commercially sensitive information sharing, collective decision on export quantities  | 2012-2020                                    |
| 8     | Hamza Sugar Mills        | Commercially sensitive information sharing, collective decision on export quantities,   | 2012 to 2020<br><br>Only 2010 for USC Tender |

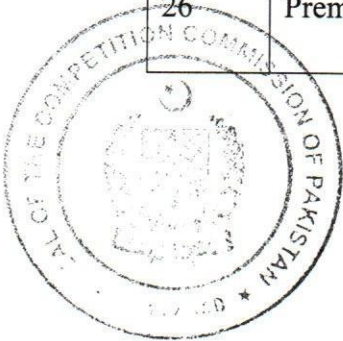




|    |                      |   |  |
|----|----------------------|---|--|
|    |                      | 2010 USC Tender – fixed penalty PKR 50 million  |  |
| 9  | Ittefaq Sugar Mills  | Commercially sensitive information sharing, collective decision on export quantities,<br><br>2010 USC Tender – fixed penalty PKR 50 million | 2012 till end of crushing season 2015-2016<br><br>Only 2010 for USC Tender |
| 10 | Macca Sugar Mills    | Commercially sensitive information sharing, collective decision on export quantities  | 2012-2020  |
| 11 | Ramzan Sugar Mills   | Commercially sensitive information sharing, collective decision on export quantities,<br><br>2010 USC Tender – fixed penalty PKR 50 million | 2012 to 2020<br><br>Only 2010 for USC Tender                               |
| 12 | Imperial Sugar Mills | Commercially sensitive information sharing, collective decision on export quantities  | 2012 & 2013  |
| 13 | Kamalia Sugar Mills  | Commercially sensitive information sharing, collective decision on export quantities  | 2012 till end of crushing season 2015-2016                                 |
| 14 | Kashmir Sugar Mills  | Collective decision on export quantities,<br><br>2010 USC Tender – fixed penalty of PKR 50 million  | 2012 to 2020<br><br>Only 2010 for USC Tender                               |
| 15 | Ansari Sugar Mills   | Collective decision on export quantities  | 2012 to 2020   |
| 16 | Bawany Sugar Mills   | Collective decision on export quantities,   | 2012 to 2020   |



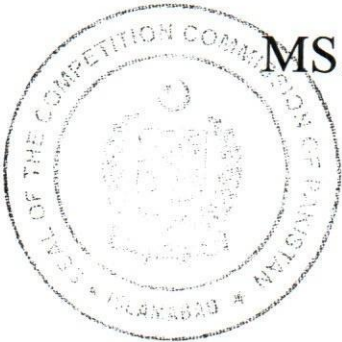
|    |                      |  |  |
|----|----------------------|--|--|
|    |                      | 2010 USC Tender – fixed penalty of PKR 50 million  | Only 2010 for USC Tender                     |
| 17 | Digri Sugar Mills    | Collective decision on export quantities,<br><br>2010 USC Tender – fixed penalty of PKR 50 million | 2012 to 2020<br><br>Only 2010 for USC Tender |
| 18 | Khoski Sugar Mills   | Collective decision on export quantities   | 2012 to 2020                                 |
| 19 | Larr Sugar Mills     | Collective decision on export quantities   | 2012 to 2020                                 |
| 20 | Mirza Sugar Mills    | Collective decision on export quantities   | 2012 to 2020                                 |
| 21 | Najma Sugar Mills    | Collective decision on export quantities   | 2012 to 2020                                 |
| 22 | Naudero Sugar Mills  | Collective decision on export quantities   | 2012 to 2020                                 |
| 23 | New Dadu Sugar Mills | Collective decision on export quantities   | 2012 to 2020                                 |
| 24 | Pangrio Sugar Mills  | Collective decision on export quantities   | 2012 to 2020                                 |
| 25 | Sakrand Sugar Mills  | Collective decision on export quantities   | 2012 to 2020                                 |
| 26 | Premier Sugar Mills  | Collective decision on export quantities   | 2012 to 2020                                 |



OPINION OF BENCH MEMBERS MS. SHAISTA BANO

&

MS. BUSHRA NAZ MALIK



**Shaista Bano Gilani & Bushra Naz Malik, Members:** Before expressing our opinion, we acknowledge the efforts and hard work put in for incorporating and integrating the arguments, objections and materials to shape up the issues by our learned colleagues Ms. Rahat Kaunain Hassan Chairperson and Mujtaba Ahmad Lodhi Member, while authoring their opinion. We have the luxury of not repeating much in terms of fact, disposal of legal issues and case law on interpretation of various concepts involved in the analysis of issues. After reading the opinion, while we agree with background facts, issues, preliminary/technical objections including relevant market and spillover effect, as well as decision with respect to issue No. VI, we have different opinion and decision on the remaining five issues which are discussed below.

#### **SENSITIVE INFORMATION SHARING (Issue I & IV)**

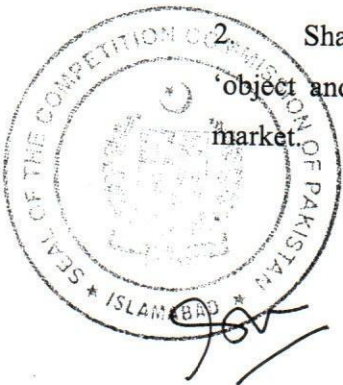
*I. Whether PSMA and the Undertakings have shared sensitive commercial stock information amongst themselves with the object or effect of distorting competition in the Relevant Market, hence, a violation of Section 4(1) read with Section 4(2)(a) of the Act ?*

*IV. Whether PSMA had made a decision/practice of creating zonal divisions in Punjab to coordinate on sales, stock positions and production quota to monitor and control quantity to be sold, hence, constituting a violation of Section 4(1) read with Section 4(2)(a) of the Act?*

1. The ‘**theory of competitive harm**’ developed by the Enquiry Committee (EC) on the basis of evidence and materials available with them, solely rests on a key assumption that ‘stock position’ is a highly sensitive commercial information that allows sugar mills to *inter alia*:

- (i) Assess and coordinate on future sales volumes
- (ii) Formulate Pricing strategies
- (iii) Control supply of sugar in the market

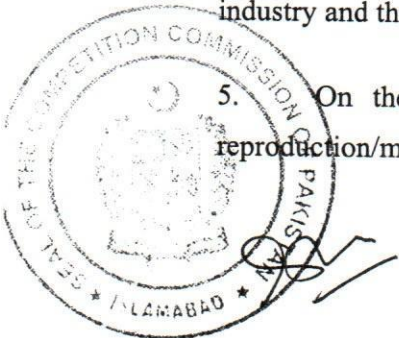
Sharing of this information being ‘highly sensitive commercial/strategic’, has the ‘object and ‘effect’ of preventing, restricting or reducing competition within the relevant market.



3. In order to make a determination on the above 'theory of competitive harm' we shall first analyze the possible role of 'stock position' in the price discovery mechanism pertaining to sugar mills in Pakistan.

4. In a 'competitive' or more specifically 'unregulated market', price is a function of supply and demand, this is also true in case of 'commodities'. An increase in demand leads to increase in price that provides suppliers with an incentive to increase supply for maximizing gains, the increased supply puts downward pressure on price and the suppliers starts decreasing the supply, this process goes until an eventual 'competitive price discovery'. This is a basic economic principle which has also been alluded to in various parts of Enquiry Report dated 21-10-2020 (ER), particularly in para '69' and '110' where placing reliance on this basic economic principle, ER establishes 'stock position' to be a highly sensitive commercial information that sugar mills share and collectively deliberate upon to control supply of sugar in the market and maintain 'desired' price levels. However, in para '27' the EC being adamant of the regulatory factors, goes on to state "The value chain- from the purchase of sugarcane from the growers to the sale of refined sugar to retail consumers is relatively long and involves a number of players which can create opportunities for the forces of competition to operate at different points. However, the determination of price is not being done through the forces of demand and supply because throughout the supply chain economically and politically connected families are present which tend to hamper the presence of free competition". The discussion on regulatory framework continues in para 28 which in relevant part states "Also, the start and close of crushing season are decided by the provincial governments which leads to a regulated environment yet sugar mills have the latitude and the ability to act independently in the sphere of making payments to the growers above the support price and setting the ex-mill prices and or quantity to be sold or product /by products development or any branding." It is clear from the above two excerpts from different paras of the ER, that the role of stock position/available supply assumed by EC in paras 27 & 28 is negated by itself while making important conclusions with respect to conduct of PSMA discussed in Para 69 & 110. These contradictory assertions in the ER amply question the relevance and applicability of general economic principle of determination of prices on the basis of supply and demand in the context of sugar industry and the relevant findings of the ER relying solely on this principle.

5. On the basis of the above discussion, it is abundantly clear that the mere reproduction/mentioning of the mechanism of price discovery on the basis of supply and

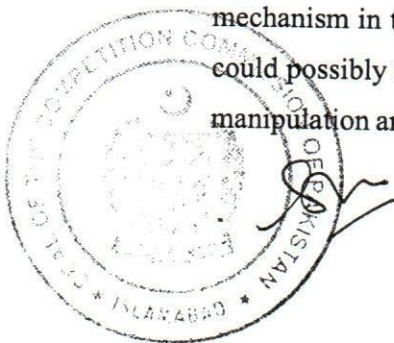


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demand conditions that is only relevant to a 'competitive/unregulated market' (as admitted by EC itself) without any substantiation of the same in the backdrop of peculiar regulatory circumstances prevalent for the sugar mills, is not sufficient to convincingly construe 'stock position/available supply' to be a sole determinant of prices or the only factor to assess competitive constraints for sugar mills. In our considered view, there was a need for EC to conduct a further analysis into various 'factors' affecting the price discovery mechanism in sugar industry including its peculiar regulatory circumstance, in order to arrive at a 'key' conclusion that the stock position is highly sensitive commercial information, sharing of which is alone sufficient to establish an anti-competitive conduct on 'per se' basis.

6. One possible factor could have been 'behaviour of ex-mill prices in response to the changes in stock levels. Interestingly, on perusal of document appended with the ER, we observe that a letter was written by EC to all sugar mills on 27-01-20, wherein the sugar mills were asked to provide information with respect to 'Quarterly Sugar Stock Positions (In and Out Details) as maintained by the Sugar Mills starting from the FY 2016-17 to-date' and 'Average monthly Ex-Mill prices of sugar starting from the FY 2016-17 to date'. As per para '4' of the ER, a total of 52 mills provided complete information sought from them, which shows that the EC has available with it, data pertaining to stock levels of 52 mills and corresponding 'average monthly ex-mills prices' and based on the data there was a possibility of conducting an analysis to draw a nexus between the stock levels and the ex-mill prices to arrive at a finding on how 'sensitively' the ex-mill prices (which are one of the two areas where admittedly mills could compete, keeping in mind the regulatory environment') behave towards the changes in stock levels.

7. Another 'factor' that escaped the attention of the EC is the 'role of wholesalers/suppliers/stockiest' or more appropriately 'market intermediaries' and the 'sugar stock levels' held by them. ER in para 69 states *'Moreover, sugar cannot be produced throughout the year which makes stock positions crucial for determining supply and prices in the market.'* In such scenario there is a possibility of bulk purchasing and hoarding of sugar stocks during crushing season by the market intermediaries such as large dealers/wholesalers and stockists. In order to conduct a wholesome analysis of factors affecting price discovery mechanism in the sugar industry taking into account the role of wholesalers/stockists, the EC could possibly had analysed the stocks held by market intermediaries and their role in market manipulation and distortion of competition individually, collectively and/or in connivance with



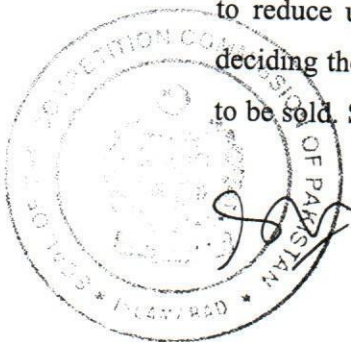
mills. This analysis required collection of information about large wholesale customers of sugar mills and information available to government functionaries with respect to sugar stocks held by market intermediaries. It is important to note that the market intermediaries possessing sugar stocks, without any pressure of making payments to growers or indulge in compulsory start of fresh crushing and building additional stocks, have more freedom, opportunities and incentives, to make use of 'market perceptions' for market manipulations and short-term gains through 'satta' and/or 'forward contracts'.

8. Moving further with the 'competitive assessment' of the 'stock information' being shared by sugar mills, we need to make an opinion on specific nature and manner of information shared, that would be necessary to aid/allow a sugar mill to devise a pricing strategy or to adapt a certain conduct towards market.

9. Undoubtedly, sugar is a homogenous commodity which is freely transportable anywhere in the country. It has been maintained by sugar mills in their submissions that they sell sugar on 'ex-mill' basis and their customers/buyers may belong to anywhere in Pakistan i.e. relevant market. Keeping this fact in view, it would be reasonable to presume that a mill operating in a particular geographic vicinity may face competition from another mill that is operating in another geographically distant vicinity, therefore, for a mill to devise a strategy with respect to release of stock in the market or setting ex-mill price, the more relevant factor would be the overall availability of sugar in the market, as compared to stocks held individually by PSMA member mills. Also, as elaborated above, with the perspective of supplying sugar to various customers in the market, the wholesalers/stockiest also compete with sugar mills, as the also hold significant sugar stocks.

10. For the purpose of analysis, we can develop two independent hypothesis in relation to the information exchange that was taking place by and between PSMA and its Member Undertakings in terms of evidence/information provided in the ER.

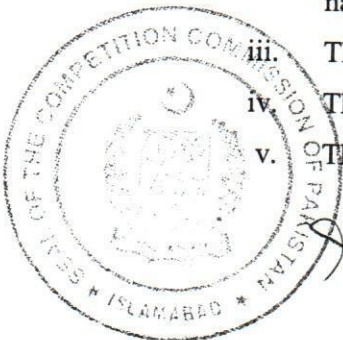
11. The first hypothesis is based on the presumption that the 'information exchange' is the only element of collusion, mills share stock information with PSMA and *inter-se* each other and such information being highly 'sensitive and commercial in nature' is not only sufficient to reduce uncertainty towards the market in question, but also allows/aids sugar mills in deciding their future behaviour towards market by way of setting an ex-mill price or quantity to be sold. Such information exchange being an 'end' in itself and not a 'mean' to achieve an



'end', has the 'object' and 'effect' of distorting competition in the relevant market, hence, constitutes a *per se* violation of the provisions of Section 4 of the Act. Concurrence of such hypothesis, requires a 'competitive assessment' of information exchange. More specifically, for an information exchange to qualify under the hypothesis of 'per se' doctrine, it would be necessary to establish that the information exchange that took place inter se PSMA and sugar mills was 'strategic and sensitive' in nature and manner of information exchange was consistent and frequent enough to allow mills to adopt a future behaviour on market in question, with respect to setting the price and/or controlling supply. It would be relevant here to analyze how 'exchange of sensitive commercial information' can probably be treated under provisions of Section 4 of the Act, as insinuated by the ER.

12. When examined, on a textual basis, the provisions and language of Section 4(1) read with Section 4(2)(a) of the Act do not capture mere exchange of information between competitors. In order to fall within the scope of Section 4(1) read with Section 4(2)(a) of the Act, therefore, at the very least, in addition to direct, clear and convincing evidence of sharing of information *inter se* competitors which would clearly reduce uncertainty for competitors in the relevant market, there must additionally be clear indication that the "object" or "effect" of such exchange is of preventing, restricting or reducing competition within the relevant market. Such an analysis is absent in the ER in which the mere exchange of information claimed to be *inter se* competitors has been taken to be sufficient to establish contravention of Section 4(1) and 4(2)(a) of the Act. Also, in our view, the "*per se* doctrine" referred to in earlier decisions of the Commission and derived from the Dole Judgments cannot in totality be extended to any "agreement" the example of which is not expressly contained and clearly covered by any of the provisions of Sections 4(2)(a) to 4(2)(g) of the Act. In the context of International Case Laws, we find it relevant to refer to the submissions made by the competition agency participants in the Information Exchange Policy Roundtable, for 'competitive assessment' of the information exchange to assess its 'object' or 'effect' the following factors are generally considered.

- i. The purpose of exchange
- ii. The type of information exchanged- whether public, confidential or sensitive in nature
- iii. The level of details of information- whether aggregated or otherwise
- iv. The frequency of the exchange
- v. The characteristics of the product in question





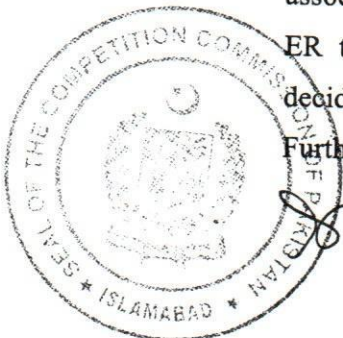
- vi. Level of market concentration
- vii. Importance of the information exchanged for setting of price, volumes or predicting (forecasting) commercial policies of other players

13. The second hypothesis presumes the existence of a collusive arrangement between the sugar mills under the auspice of PSMA and/or its Zones, whereby an overall stock positions to be maintained by mills is agreed, every mill releases sugar (fortnightly/monthly/quarterly) as per pre-agreed quantity/quota and information on stock position is shared to monitor compliance with the collusive arrangement. Examination of evidence under this hypothesis would require an analysis with respect to the 'object' or 'effect' of the underlying collusive arrangement as the information shared is being used only to monitor the compliance with an underlying collusive arrangement and not in itself constituting a violation of the Act.

14. Under the above two hypothesis, we shall now proceed to examine the preponderance of evidence contained in the ER and the submissions made by the respondents to arrive at a conclusion with respect to the issues.

15. The first set of evidence in the ER, relevant to exchange of sensitive commercial information is provided in paragraphs 84 to 93, summary of which is discussed below:

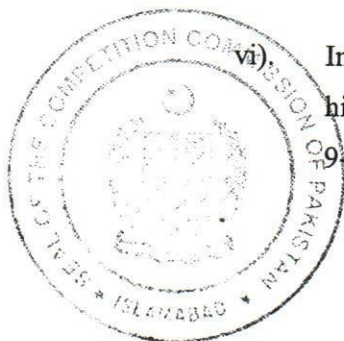
- i). An email sent on 19-4-2017 from an official of the Lahore office of PSMA to another PSMA official titled 'follow up', with which a power point presentation was attached. The subject of the said presentation was "Emergent General Meeting of PSMA "PZ" 19<sup>th</sup> April 2017". Slide 5 of the presentation shows a map of the Punjab in which the sugar mills of that Province are divided in 5 zones. Slide 6 of the presentation lists sugar mills in each of the 5 zones and gives a figure stated to be "Balance (M. Tons)" which the ER states is the then available stock of each sugar mill. Slide 7 is titled "strategy" and contains three bullet points. The first states "mills be divided into five (5) zones", the second "sales committee, comprising of one member from each zone, to meet periodically", and third "start-up date for mills to be coordinated for next crushing season". Respondents including PSMA in their reply have denied any association with this presentation on the grounds that there is no evidence in the ER to establish whether this presentation was mutually deliberated upon, decided and circulated to PSMA member mills and/or Punjab Zone mills. Furthermore, ER has not provided any evidence on the holding of the said



emergent meeting. Respondents have further maintained that this could be a proposal by someone that was not presented in the meeting or was not accepted.

- ii). An email dated 13-10-2018 referring to constitution of a coordination committee for sugar mills in PSMA (Punjab Zone). An attachment with the said email titled "Division Coordinators" shows Punjab divided into 5 zones. However, as noted in the ER, the division of sugar mills within the 5 zones is different from that in slide 5 of the presentation attached with the email of 19-4-2017. Therefore, the two documents are not completely consistent with each other.
- iii). An email dated 6-11-2018 sharing revised list of Coordination Committee which refers to 6 instead of 5 groups and names an individual as "Chief Coordinator". The related excel sheet is, however, stated to contain 5 zones. The zonal classification also has a column mentioning 'share in sugar production %age' which is emphasized in the ER.
- iv). The above three pieces of evidence contain three different tables with respect to zoning in para 88, 90 and 91 of ER the contents of which differ with each other. However, the ER is silent on these differences. Further it has not been identified if zones are 5 or 6 as stated above nor the difference between group and zone has been identified. Email reproduced in para 89 and attached in annex C2 talks about transferring of Huda Sugar Mill from group 6 to 5. Hence there is a possibility of existence of some grouping of sugar mills along with zoning. However this aspect has not been elaborated in the ER which needs to be relooked and connection between these aspects established.
- v). Three impounded documents, which show the stock of sugar mills: (a) in the Punjab Zone as at 31-8-2019, 30-9-2019, and 4-11-2019; and (b) in Sindh Zone as at 6-8-2019, 3-9-2019, 1-10-2019 and 4-11-2019. However, ER discusses only the Punjab Zone sharing aspect.

In annex C3 there is an email dated 2-10-2019 of an official of JDW Mills to himself stating consolidated stock position of KPK, Sindh and Punjab as at 30-9-2019.



*[Handwritten signature]*

*[Handwritten signature]*

16. The conclusion of evidence summarized above as provided in para 92 of the ER is as follows:

92. From the evidence presented above, it appears that since 2017, PSMA Punjab Zone has:

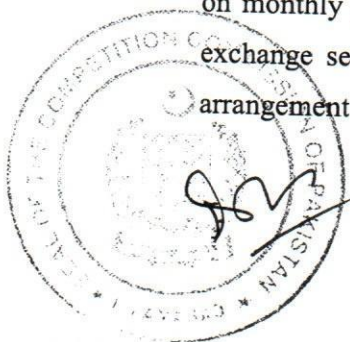
- a). Created zonal divisions for the purposes of coordination among respective mills on local sales as the phrase 'sales committee comprising of one member from zone to meet periodically' indicates. Share of each zone vs total production in Punjab is mapped out which shows that the coordination in sales is based on shares in production.
- b). Stock positions of each mill in each zone are mapped out on a monthly basis.
- c). Mills are also coordinating for start of crushing activity in the respective zones

This zonal division and coordination on sales, stock positions and production quota appears to be none other than monitoring the position with respect to each mill to control local sales and quantity to be sold which is a prima facie violation of Section 4(1) read with Section 4(2) (a) of the Act.

17. Bare reading of the above para indicates that zonal division and coordination is serving as a 'monitoring arrangement' installed collectively to monitor the behaviour of sugar mills with respect to controlling local sales and quantity to be sold; thereby, making it suitable for analysis in context of the second hypothesis developed in para 13 above.

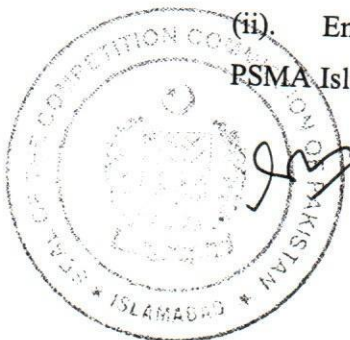
18. Keeping aside the inconsistencies, errors and omissions in the evidence provided in and appended with the ER, which ostensibly contributes in reducing its 'probative value' we find no attempt by the EC to dig into the analysis with respect to 'object' or 'effect' of the possible 'underlying collusive arrangement'. We note that the evidence/information essentially required to conduct such analysis was available with EC, at least in respect of 52 mills in terms of supra letter dated 17-01-20 and para 4 of the ER.

19. In order to unearth the underlying collusive arrangement inter se PSMA and Member undertakings, various 'data simulations' were possible for the EC to undertake; such as the correlation in the stock levels and ex-mill prices for each mill over the period of allegation, on the basis of zonal divisions or groups within zones, an analysis of the share of a particular mill in the overall production with its share in overall stock released for local sales by all mills, the relationship between average ex-mill prices and the average stock levels maintained by mills on monthly basis etc. As elaborated in para 13 above, under the hypothesis of information exchange serving as a monitoring tool to ensure compliance with an underlying collusive arrangement to fix prices or quantities of production/sale, may require an additional analysis



to establish the object and/or effect of such underlying collusive arrangement. The analysis of simulations described earlier, if carried out, may help provide a 'plus factor' in holding anti-competitive conduct vis-à-vis violation of Section 4(1) read with Sections 4 (2) (a) as alleged in SCN in affirmative.

20. On a side note, another observation is with regard to invoking Section 4(2) (a) for suspected conduct of controlling local sales of sugar, as opposed to Section 4(2) (c) that in our opinion, more precisely relates to the anti-competitive conduct of 'fixing or setting the quantity of production, distribution or sale with regard to any goods or the manner or means of providing any services'.
21. In the supra annex 'C3' of ER sugar stock position of Sindh Zone is also attached mill wise. These documents also indicate some sort of coordination/information sharing mill wise from Sindh and KPK but this aspect has not been touched upon in the ER consequently the SCN issued to them doesn't allege them for any contravention with respect to violation regarding sensitive information sharing or coordination with respect to sales and or coordination committees.
22. It is pertinent to note here that the Show Cause Notice itself does not raise any allegation of 'coordination by sugar mills with respect to commencement of crushing season', although this is alluded to in the ER and hence needs to be examined and analysed especially with respect to issue (v) alleging stopping of crushing on call of PSMA Punjab Zone.
23. Now coming to the other set of evidence provided in Paragraphs 93 to 111 of the ER wherein evidence and material in support of the allegation of sharing "sensitive stock information" is discussed. This includes:
- (i). Minutes of PSMA's AGM held on 10-12-2012 (that as a matter of fact was actually held on 17-10-2012) in which a committee is stated to be constituted and an official of a Member Undertaking is appointed to head it "to collect data from the mills and supply it to the PSMA central office for compilation of fortnightly reports on regular basis and its further distribution to the quarters concerned".
  - (ii). Email correspondence in which individual mills send PSMA (Punjab Zone and PSMA Islamabad Secretariat) 'fortnightly stock reports', including emails dated 13-1-



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2016 (from Fatima Group), 23-2-2016 (from Hunza Sugar Mill), 10-12-2016 (from Ittefaq Sugar Mills), 23-1-2017 (from JSML) & 03-01-2016 from JSML.

(iii). Email correspondence from PSMA dated 9-9-2016 (to Chanar Sugar Mills), 23-01-2017 to JSML, 20-3-2018 (to JSML) and 22-5-2018 (to JSML), with which a consolidated 'fortnightly report' is shared.

(iv). Email dated 24-8-2019 from the official appointed to head the committee relating to 'fortnightly reports' to a PSMA official stating that a request to all Punjab member mills seeking their stock position on 25-10-2019 shall be sought.

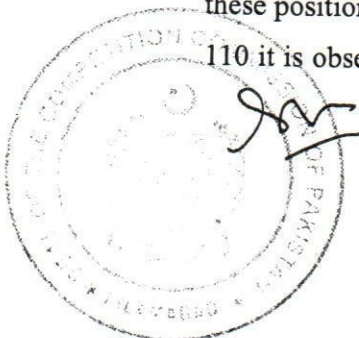
(v). Email dated 28-6-2019 from an official of PSMA to an official of a Punjab member sugar mill attaching the agenda for an Emergent Meeting of PSMA (Punjab Zone) on 29-6-2019 to, amongst others, "discuss about availability of sugar stocks in the country".

(vi). Presence of a WhatsApp Group titled "PSMA PZ (Official)" stated to be used to exchange information on sugar stocks and prices including a message; (a) dated 18-7-2020 seeking sugar stock balances of each mill by 18-7-2020; (b) dated 18-7-2020 seeking comments from members on the monthly consumption figure of sugar assumed by the Sugar Advisory Board (SAB); (c) dated 18-7-2020 stating that current stocks given by members should be rechecked before forthcoming meeting of SAB; (d) dated 18-7-2020 which underscores the need to undertake a "very careful calculation and review of data before giving any suggestion to the Govt.";

(vii). various messages in which stock position of sugar mills as at 17-7-2020 is shared.

(viii). Price data for the period January 2020 to September 2020 of the Pakistan Bureau of Statistics which shows increase in retail price of sugar by approximately 13% during that period in the four Provincial capitals.

26. Based on the foregoing, in paragraph 109 of the ER it is observed that "from as far back as 2012 to July 2020 there has been continuous involvement of PSMA in collecting and coordination of stock positions amongst its member mills" and concluded that "it appears that these positions are then used to control supply and price of sugar in the market". In paragraph 110 it is observed that sharing of sensitive commercial information would be violation of the



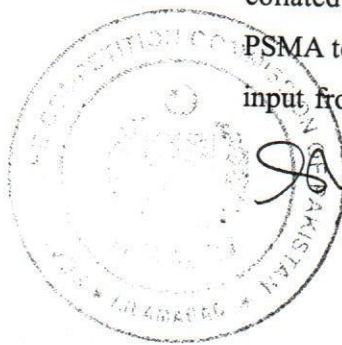
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Act if it reduced uncertainty *vis-à-vis* the market in question and that stock positions are vitally important for controlling current and future price levels.

27. The Undertakings (or Member Undertaking) confronted with the above allegation in their respective Show Cause Notices have not directly contested or specifically denied the fact that 'fortnightly reports' (which according to the ER, typically contain data on cane crushed, sugar produced, total volume of sales to date, balance stock and percentage of balance production) were prepared and submitted to PSMA from time to time. However, in their defence, the individual sugar mills made the following two-fold submission:

i). Precisely the same information which is contained in the 'fortnightly reports' submitted to PSMA with respect to sugarcane crushed, sugar production and balance stocks of refined sugar, the sharing or coordination respect of which by the individual sugar mills (Undertakings) is questioned by the Commission is also required to be submitted by each sugar mill to the concerned Cane Commissioner under applicable law on a daily and monthly basis and also at the end of the season as a statutory obligation. In this connection reference has been made to various daily, weekly and end of season reports submitted to the Cane Commissioners by individual sugar mills which have been placed on record (including Form RT-4) as part of their replies to the Show Cause Notices. As such, it is claimed by the Undertakings in question that this information is in the "public domain" as it can be obtained by any party from the office of the Cane Commissioner and, therefore, cannot be classified as "sensitive". In the same context, reference has also been made to the "Monthly Survey of the Industrial Production & Employment in the Punjab" published by the Bureau of Statistics (Planning & Development Department) of the Government of the Punjab available on its website, which have been placed on record. Based, thereon, it is claimed that the same information as is alleged to be "sensitive" and being shared is also available on the said website. Hence, any sharing thereof cannot constitute violation of Section 4 of the Act and classification of the same as "sensitive" is erroneous in the facts and circumstances; and

ii). The data on sugar production, sales and available stocks is collected and collated by the PSMA from Undertakings (or Member Undertaking) in order to enable PSMA to faithfully and meaningfully fulfil its role as a member of SAB at which forum input from PSMA is sought and demanded by the Government of Pakistan on sugar



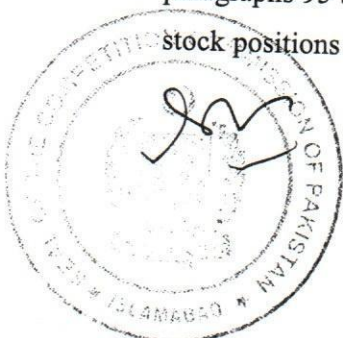
production, sales and available stocks and allied matters. It is contended that without up-to-date stock information, it would be impossible for PSMA to fulfil its role as envisaged in the Terms of Reference of SAB and as assigned to it from time to time by the Government of Pakistan. The object and purpose of collection of such data by PSMA is, therefore, not to engage in any anticompetitive practice, but to provide informed input at the forum of SAB which is a body established through notification of the Government of Pakistan. Hence, it is submitted that neither PSMA nor the Undertakings (or Member Undertaking) can be held to have contravened Section 4(1) read with Section 4(2)(a) of the Act for providing such information to PSMA.

28. The conclusion with respect to analysis of evidence presented in para 93 to 110 of the ER is provided in para 111 which states as under:

*111. From the foregoing and the evidence available, it appears that since 2012 onwards, the platform of PSMA is being used by its member mills in Punjab Zone to share stock information amongst themselves which is considered as sensitive commercial information and such information having a direct bearing on the current and future price of sugar thereby used to control prices and restrict and distort competition in the relevant market in prima facie violation of Section 4(1) read with section 4(2)(a) of the Act.*

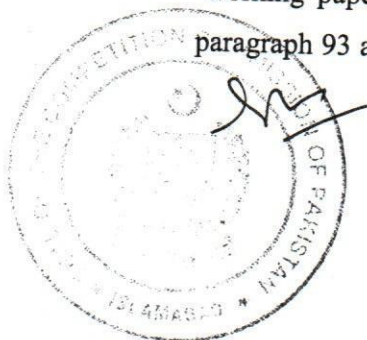
29. ER in the above para and also in para 110 of the ER asserts 'stock information' to be a highly sensitive commercial information, therefore, keeping in view the stance maintained in paras 4, 5 and 11 above, the analysis of information exchanged between mills shall be carried out under first hypothesis relating to the situation of an act of information exchange being in violation of the Act on per se basis.

30. The existence of a practice whereby Undertakings (or Member Undertaking) shared a 'fortnightly report' (or equivalent containing balance sugar stock information of a sugar mill) via email or on a WhatsApp Group with PSMA is demonstrated by the documents (emails and WhatsApp messages) referred to in paragraphs 95 to 106 of the ER. However, the "object" and "purpose" of these 'fortnightly reports' indeed being as asserted in the ER and Show Cause Notices (i.e., to distort competition in the relevant market "by reducing uncertainty" therein as to available stocks and "to control prices and restrict and distort competition" is not borne out directly, clearly and convincingly by the material relied upon. The material relied upon in paragraphs 95 to 106 of the ER merely demonstrates the existence and sharing with PSMA of stock positions by certain Undertakings (or Member Undertakings). There is limited evidence



on record of sharing of such stock information between *inter se* individual Undertakings (or Member Undertaking). The record shows that the 'fortnightly report' of stock as at 9-9-2016 was shared by PSMA with Chanar Sugar Mills, and on 20-3-2018 with Jauharabad Sugar Mills of stock as at 19-3-2018. There is also indication of exchange of stock information on the WhatsApp Group named "PSMA-PZ Official". This is, however, in respect of a limited number of individual Undertakings (or Member Undertaking). The WhatsApp messages are only with regard to July 2020 (exchanged on a single specific date). Therefore, on its own, the WhatsApp messages cannot substantiate the underlying allegation of such practice being in vogue ever "since 2012" by all the Undertakings (or Member Undertaking). Therefore, whilst there is some evidence that Undertakings (or Member Undertaking) shared their stock information with PSMA, the evidence of sharing of the same 'fortnightly report' or stock information with each other (i.e., *inter se* the individual Undertakings (or Member Undertaking) sugar mills) is far more scanty and insufficient to safely condemn all of the Undertakings (or Member Undertaking), whether in Punjab Zone or otherwise, as direct evidence of submission of stock information by each and every individual Undertakings (or Member Undertaking) to which Show Cause Notices have been issued certainly does not appear in the documents relied upon in paragraphs 93 to 110 of the ER. Most importantly, the material on record does not represent an "unbroken chain" of related or connected evidence on exchange of sensitive commercial information on sugar stocks covering the span of alleged behaviour, that not only reduced uncertainty vis- a- vis market in question, but also helped individual sugar mills to devise pricing strategies and control supply.

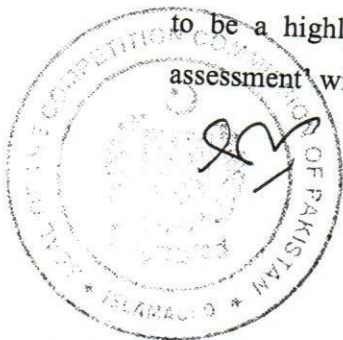
24. With regard to whether the stock information shown to be shared with PSMA by Undertakings (or Member Undertaking) can objectively be classified as "sensitive", the secrecy and sensitivity attached to such stock information by the concerned Undertakings (or Member Undertaking) themselves and other sources of such or similar information are relevant factors which require further consideration. The fact that stock information of Undertakings (or Member Undertaking) is shared and available with concerned Cane Commissioners and the Federal Board of Revenue is acknowledged in the ER itself. It is obvious from the minutes of meetings of SAB and 'working papers' prepared therefor available on record that the Cane Commissioners then share such information with the Federal Government (Ministry of Industries & Production) and the forum of SAB. The source of stock information in the 'working papers' for SAB meetings is undoubtedly the Cane Commissioners. The ER at paragraph 93 acknowledges that "production, sales and stock positions are closely monitored





by the Government at the level of SAB". Accordingly, the stock information classified as "highly sensitive" (in paragraph 93 of the ER), as "sensitive commercial information" (in paragraph 110) and as "sensitive" in the Show Cause Notices is admittedly shared with the Cane Commissioners, who share the data with other agencies and instrumentalities of the Provincial and Federal Government. The Federal Board of Revenue also separately monitors the same data. The stock information is, therefore, certainly not of a nature which is only available and known to the Undertaking concerned. This is different from the facts in Dole and T-Mobile. The information in the bilateral exchanges proven to have existed in Dole was not shared by the concerned undertakings with government departments or regulators, there was no other indication that similar or analogous information at least in aggregated form is also published by the government's own bureau of statistics and that it is theoretically and legally possible to procure the same information under a right of information request. These are material distinguishing features not considered in the ER. Also, there is no express confidentiality obligation imposed in any statute on the Cane Commissioners with regard to the stock information it regularly requires and receives from every Undertaking. The fact that the Cane Commissioners share this data with other agencies and instrumentalities of the Provincial and Federal Government indicates that such data is not inevitably and necessarily being treated as "highly sensitive" by the recipient or indeed the supplier, given its onward fairly wide dissemination. The Sugar Factories Control Act, 1950 (under which Cane Commissioners exercise jurisdiction) does not expressly declare such stock information as commercially or otherwise sensitive, confidential or proprietary unlike Customs Act. Instead, it is known that the data is shared by the Cane Commissioners and is otherwise also available with the Federal Board of Revenue besides the Bureau of Statistics of the Punjab. PSMA ultimately also ends up having access to all of the data available with the Cane Commissioners at the forum of SAB as the same data is employed to prepare the 'working papers' which always include detailed account of balance stocks and other projections. In other words, the Ministry of Industries & Production effectively ends up sharing up-to-date stock availability and other figures necessary to assess and project sugar availability and prices etc. with PSMA itself at the forum of SAB. The above factors contended by PSMA have not even been taken into consideration in the ER.

25. Considering the first hypothesis in para 10 above, in order to hold 'stock information' to be a highly sensitive commercial information we needed to perform a 'competitive assessment' with respect to the information exchange in accordance with the factors identified



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in Para 12 above. For this purpose, we deliberated on the evidence presented in the ER and the submissions of respondents with respect to the rational/purpose of information shared by PSMA and member mills on fortnightly, monthly, quarterly and annual basis and also the 'WhatsApp' communication taking place on a specific date indicating the details and frequency of information exchange between competitors during the period of alleged violation i.e. 2012 to 2020. We also reiterate our discussion in para 4 and 5 above, with regard to the basis on which the EC has considered 'stock information' to be a highly sensitive commercial information in view of the peculiar factors related to product in question i.e. sugar for setting of price, volumes or predicting(forecasting) commercial policies of other players. As maintained by EC in para 63 of the ER, that "the market does not appear to have an oligopolistic structure, secondly the enquiry committee has found no evidence on record that seems to suggest that a few large groups have economic linkages", which indicates low market concentration level. All this discussion leads us to conclude that owing to the absence of 'competitive assessment' of allegedly 'sensitive commercial information' shared by and between PSMA and Member Undertakings, the EC failed to develop a 'sustainable theory of competitive harm'. In our considered view, an in-depth analysis with respect to all factors discussed in Para 13 above was essential to make a sustainable affirmative finding on the assertions contained in ER with respect to the issue in question.

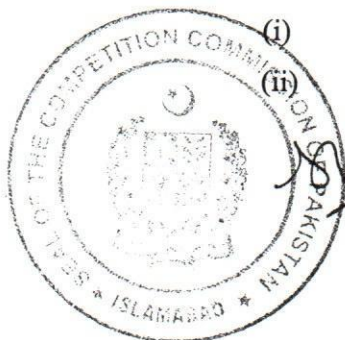
#### **EXPORT DECISION (Issue II & III)**

**II. Whether the undertakings including PSMA have made a collective decision to determine export quantities, amounting to fixing or setting/controlling supply of white refined sugar in the relevant market, hence, being a violation of Section 4(1) read with Section 4(2)(c) of the Act.**

**III. Whether such collective determination of export quantities lead to an increase in/or maintenance of a desired price level in the relevant market in violation of Section 4(1) read with Section 4(2)(a) of the Act.**

26. The above issue is based on Paragraphs 9 and 10 of the SCN, which primarily take into account the conduct of PSMA and Member Undertakings *inter alia*

- (i) collective decision to determine export quantities
- (ii) reduction in domestic supplies

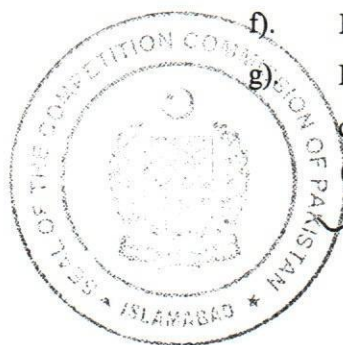


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(iii) Increase in or maintenance of desired price levels and alleges *prima facie* violation of Section 4 (1) read with Section 4(2) (c) and Section 4(2) (a) of the Act.

27. Paragraphs 67 to 82 of the ER discuss the material forming the basis of these allegations, summary of which is reproduced below:

- a). An email sent on 19-4-2017 from an official of the Lahore office of PSMA to another PSMA official titled 'follow up', with which a power point presentation was attached. The subject of the said presentation was "Emergent General Meeting of PSMA "PZ" 19<sup>th</sup> April 2017". Slide 5 of the presentation shows a map of the Punjab in which the sugar mills of that Province are divided in 5 zones. Slide 6 of the presentation lists sugar mills in each of the 5 zones and gives a figure stated to be "Balance (M. Tons)" which the ER states is the then available stock of each sugar mill.
- b). Extracts of AGM purportedly held on 03-11-2012 (that as a matter of fact was actually held on 17-10-2012).
- c). Extract from the minutes of 49<sup>th</sup> AGM held on 21.10.2014, Extract from the minutes of 51<sup>st</sup> AGM held on 20-10-2016.
- d). Extract from the minutes of 52<sup>nd</sup> AGM held on 02.01.2018 (Regarding this particular piece of evidence, it is important to note that ER mentions the extract to be taken from the minutes of AGM, however, in actual, this is the extract from the message of chairman reproduced in the Annual Report of PSMA for the year 2017, the credence of this evidence was contested by the Respondents and we are not inclined to consider it for our opinion).
- e). Letter addressed to Secretary Food, Punjab by PSMA Punjab Zone dated 04.08.2017. (This letter was not annexed with the ER and was only shared during the course of proceedings with the respondents who contested this omission).
- f). Extract from minutes of 53<sup>rd</sup> AGM held on 11.10.2018.
- g). Extract from the minutes of 54<sup>th</sup> AGM held on 18.10.2019,-again this extract quoted by EC purportedly from minutes of AGM, instead, is taken from the



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message of chairman PSMA cited in the Annual Report 2018 and we are not inclined to include it for our opinion.

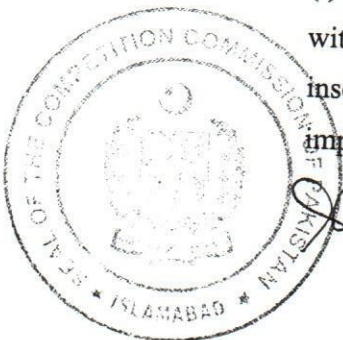
28. Paragraph 83 of ER summarizes and concludes discussion as reproduced below:

*“Based on the foregoing analysis, it appears that starting from 2012 to date, the conduct of PSMA and all its members vis-à-vis collective discussion on stock positions leading to a decision on the quantity to be exported tantamount to fixing or setting/controlling supply within the relevant market this has resulted in price hike that is not based on actual/available supply and demand. Hence a prima facie violation of Section 4(1) read with Section (4) (2) (c) of the Act. Furthermore, this reduction in domestic stocks/supplies leads to an increase in or maintenance at desired price levels in the relevant market, as admitted by PSMA through evidence presented above, which constitutes a prima facie violation of Section 4(2) (a) of the Act by PSMA members”*

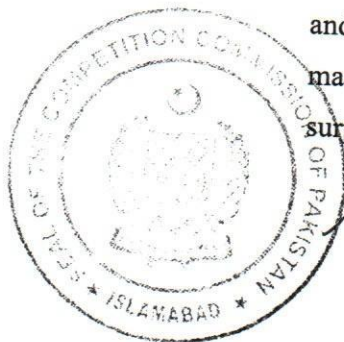
29. At this point, it would be relevant to look at a synopsis of the sugar export process based on documents/materials in ER and the submissions of the Respondents, including *inter alia*: Terms of Reference (TORs) of the Sugar Advisory Board (SAB), various SAB minutes of meeting & working papers, office memorandums issued by Ministry of Commerce & circulars of the State Bank of Pakistan (SBP)'s Exchange Policy Division (EPD).

- As per the prevailing Export Policy Order, the export of sugar is prohibited and can only be allowed by Economic Coordination Committee (ECC) of Federal Cabinet.
- The governmental body mandated to make a recommendation in respect of allowance of export of sugar as well as the quantity thereof is Sugar Advisory Board, under Ministry of Industries & Production (MoIP) with a broad based composition which, *inter alia*, includes Trading Corporation of Pakistan, provincial food department representatives, representatives of Cane Commissioners of Punjab, Sindh and KP, officials of State Bank of Pakistan, members of PSMA, FBR, Ministry of National Food Security & Research and representatives of the sugarcane growers associations. The Terms of Reference of the SAB are set out in a notification dated 27-11-2000 reproduced below:

- (i) Identify issues pertaining to Research and Development of sugarcane with regard to crop varieties, quality seed, seed treatment, fertilizers, pesticides insect pests, disease, integrated post management and provide guidelines for improvement in productivity of cane.



- (ii) *The Board will study the farmers investments in sugarcane production and suggest profitable prices wherein farmers, millers and consumers can coexist.*
- (iii) Address the issues faced by the farmers in marketing their cane including weighment, payment, cane delivery and premium on sugar recovery.
- (iv) Rationalize sugarcane cess across various provinces, take measures to affect recoveries of sugarcane cess from defaulting mills and assure effective utilization of cess fund for research and development of sugarcane and other allied matters as development of rural roads to sugar mills.
- (v) Address the liquidity and working capital problems of sugar industry, improve their working efficiency and increase recovery of sugar from cane.
- (vi) Identify suitable regions and propose mechanisms for promotion of sugar beet to substitute sugarcane.
- (vii) Workout domestic requirement of sugar and assess supply prospects and make suggestions to Government to signal imports or exports of sugar.”
- SAB meetings are held routinely during crushing season or on requisition/request of stakeholders
  - A Working Paper is circulated by the MoIP to all SAB members comprising agenda for meeting, province-wise stock positions, production estimates and actual production till the date of meeting, consumption patterns, safety stock, availability with TCP, Utility Stores, price trends of sugar etc.
  - Review of SAB meeting minutes unveils that during the proceedings of the SAB meeting all members are asked for their opinion and/or input on the varsity and concurrence of calculations/estimations presented in the working papers.
  - After deliberation and concurrence by all members a stock position is agreed and surplus if any is determined by SAB and recommendation is accordingly made to ECC to consider the quantity to be exported on the basis of available surplus.



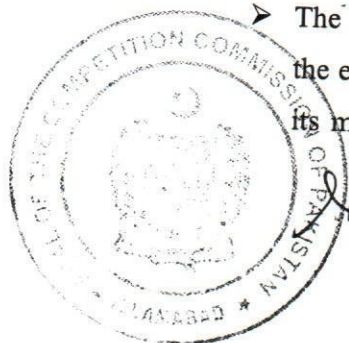
- The working papers and minutes also show that in determining the 'net excess amount' available for export to be recommended by SAB, strategic reserves of sugar (usually of two months stock is taken into account in the calculations). One such calculation is illustrated below:

**Total Consumption:**

| Description                       | Qty in Million Tons |
|-----------------------------------|---------------------|
| Total Consumption(12 months@ 425) | 5.100               |
| Strategic reserve (45 days)       | 0.630               |
| Export already allowed            | 0.425               |
| Total Consumption                 | 6.155               |
| Total Availability                | 8.039               |
| Total Consumption                 | 6.155               |
| Net excess difference             | 1.884               |

Source: M/o NFSR

- From the calculated surplus, a quantity for 'export' is determined. Upon the exportable surplus being recommend by SAB, ECC after deliberation decides on the actual quantum of and time frame of export with or without subsidy.
- Grant of subsidy is also a sole decision of ECC based on local cost of production of sugar and international prices of sugar.
- Once the quantum and time frame of export is decided by ECC and endorsed by Federal Cabinet, the decision to allow exports is communicated by Ministry of Commerce
- The communication by Ministry of Commerce stipulates conditions for export and an independent monitoring mechanism of the Government in relation to the conditions so stipulated.
- Export Quotas are allotted to mills on first come first serve basis by SBP and aspirant mills are generally required to submit their export contract along with certificate of the Cane Commissioner confirming that (i) the mill has paid outstanding dues to growers; and (ii) it has started crushing in time.
- The Federal Government retains the discretion and authority to stop exports in the event of a surge in domestic sugar prices during the export period through its monitoring mechanism. An example of such action is the decision of the



Federal Government to terminate exports prematurely upon the surge in sugar prices in January 2020.

30. In the context of the issue under consideration and the conclusions in the ER referenced above, it is appropriate to note that PSMA (and thus its constituent zones) is included in the membership of an inter-ministerial, inter-provincial body of the Government of Pakistan which also has sugar growers and other sugar industry representative as members through a formal notification. SAB, according to the notification dated 27-11-2001, is constituted "in" the Ministry of Industries & Production.

31. As submitted by the Counsels of Respondents and demonstrated in SAB minutes, routinely, all SAB members including PSMA are asked to provide input on matters which include *inter alia* the stock position of sugar, expected production, consumption, surplus and recommendations with regard to the need for and quantity of sugar to be exported. Any meaningful input by PSMA or any other member on such matters would, of necessity, reasonably require it to have access to up-to-date sugar stocks in the country as well as data on consumption patterns.

32. The documents appended with ER show that PSMA has received stock information from its members through 'fortnightly reports'. However, that issue is the subject matter of separate contraventions alleged in separate paragraphs of the SCN and also addressed in separate parts of the ER. In the said paragraphs contravention is alleged on the basis of coordination of sales, stock positions and production quota to monitor and control quantity to be sold and distortion of competition through sharing of sensitive commercial stock information. Neither the SCN nor the ER make specific reference to or confront the respondents with the latter allegations in the particular context of the contravention based on alleged collective determination of export quantities specifically. Therefore, the contraventions alleged in paragraphs 9 -10 of the SCN and material related thereto or findings thereon (which are connected to paragraphs 67 - 83 of the ER) and those in paragraphs 11 - 12 of the SCN (and connected to paragraphs 84 - 111 of the ER) cannot, at this stage, be clubbed together and evidence in respect of one, which has not been confronted in the ER in respect of the other issue now be relied upon against the respondents unilaterally.

The rationale of PSMA being a member of SAB is as a representative of the sugar manufacturers, who certainly are relevant and important stakeholders in the entire process.



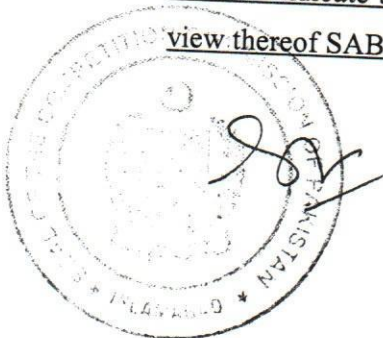
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PSMA being the only association of sugar manufacturers has a legitimate role in promoting the legitimate and lawful interests of its members. Seen in this context, it appears relevant for PSMA to receive input from its members and convey its assessment with respect to various issues at the forum of SAB in the background of SAB's stated function "to work out the domestic domestic requirement of sugar", "assess supply prospects" and "make suggestions to Government to signal imports or exports of sugar".

34. As mentioned earlier, matters relating to province-wise estimated and actual sugarcane and sugar production, stock availability, payment to growers, liquidity position of sugar mills, sugar consumption patterns, taxation and prices of sugar and crushing season etc. are generally discussed in SAB meetings apart from net surplus and exportable quantity calculations. Cane Commissioners of each Province provide their production, consumption and surplus estimates and they also comment on the consolidated figures presented before them. PSMA representatives from central office and zonal offices also opine on the figures presented in the working paper based on the information available with them. In some of the SAB meetings, PSMA zonal offices have taken positions different to that of PSMA Central Office on sugar stocks, production estimates and surplus sugar. It is also noteworthy that as a matter of record, Kissan Board (a representative body of cane growers) also offer comments regularly on all matters of SAB, including stock positions and production estimates.

35. SAB meeting minutes reveal that in March 2012 export of 0.1 MMT of sugar was allowed as against the agreed surplus of 0.5MMT. Similarly, on 15.11.12, export of 0.5MMT was recommended by SAB while the agreed surplus was 1.2MMT. In the SAB meeting of 04.09.13, a surplus of 1.2 MMT was agreed and again 0.5MMT export was recommended. On 13.03.2014 a surplus of 0.8 MMT was agreed and an export of 0.5 MMT was recommended.

36. The meeting of SAB held on 17.05.17 has significance as most likely it corresponds to supra e-mail of PSMA PZ containing a presentation which has formed the basis of some key assertions in the ER. It is noteworthy that, as per the said presentation relied upon in the ER, the exportable surplus calculated by PSMA is 1 MMT. Accordingly, PSMA appears to have decided to lobby the government for export of 1 MMT. Interestingly, the corresponding SAB minutes indicate that the agreed surplus as worked out unanimously was 1.884 MMT and in view thereof SAB's recommended export quantity was 1.2MMT.





37. In the SAB meeting dated 07.09.17, PSMA Central office estimated surplus of 2MMT, PSMA Sindh Zone estimated 1.8 MMT and actual export of 1.5 MMT was decided.

38. On 11.09.18 in the SAB meeting a surplus of 1.9 MMT was agreed and export of 1 MMT was allowed.

39. In the 28.01.20 meeting of SAB, a decision was taken to stop the remaining allowed exports in lieu of rising domestic prices. The relevant extracts of the minutes of that meeting of SAB are reproduced below:

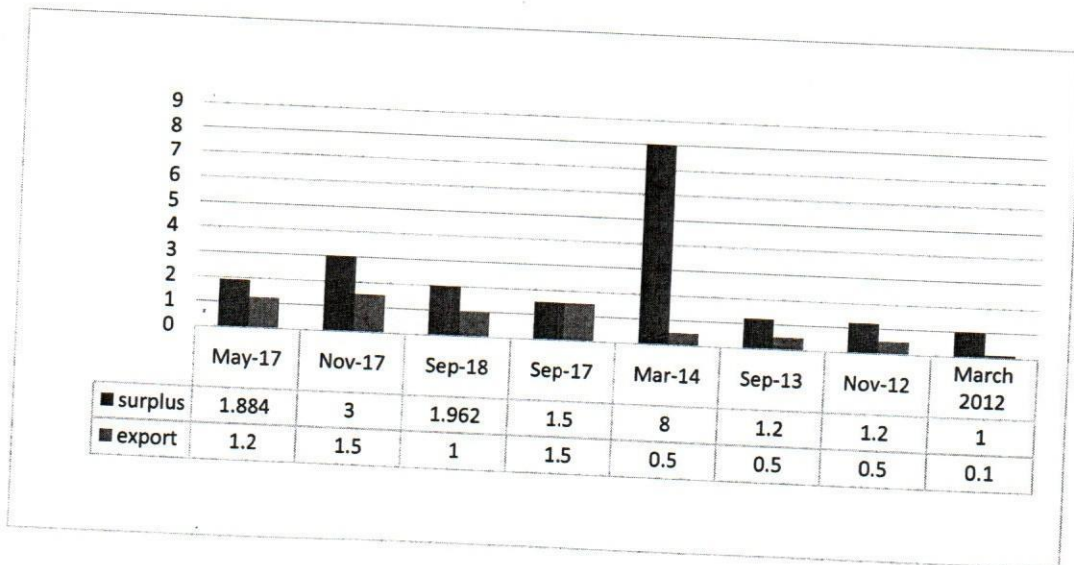
“...8. Representatives of PSMA said that they agreed to review their costing modes with I&P Division and Punjab Government previously some deliberations were done but a slow pace.

9. Representatives of Kissan Board of Pakistan explained that due to shortage of sugarcane in the market the mill owners offered higher prices to the farmers.

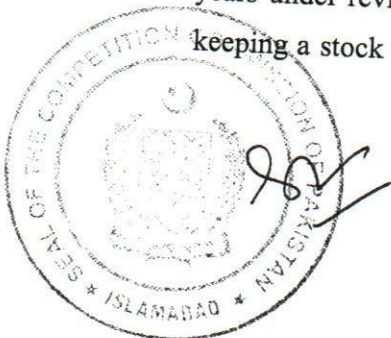
10. After consulting all the stakeholders, it was concluded unanimously by the Sugar Advisory Board (SAB) that:

i. Commerce Division should approach ECC of the Cabinet to stop the remaining export quota immediately.

ii. Joint media strategy to be developed regarding overall availability of sugar stocks in the country...”



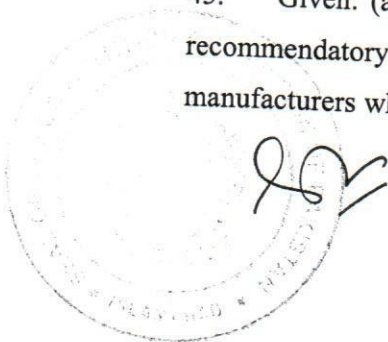
40. Above figure charts the comparison of 'surplus' and 'export quantity' determined during SAB meetings held in the span of 2012 to 2020 and precisely shows that in the last 9 years under review, it has not been the case that all surplus was allowed for export without keeping a stock well over and above domestic requirement. The working papers and minutes



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also note the "strategic reserves" of two months stock is also kept while determining excess available quantity.

41. The decisions at SAB with regard to its function "to work out the domestic domestic requirement of sugar", "assess supply prospects" and "make suggestions to Government to signal imports or exports of sugar" are made independently and objectively on the basis of input from all members, including respective government departments, sugar industry and growers.
42. Given the above facts and circumstances, the assertion in ER that exportable surplus calculated by PSMA is intended to reduce the domestic supply remains unsubstantiated. This is besides the fact that, in the ER, no actual independent analysis of adverse impact on available quantity of domestic supply given known consumption patterns has even been undertaken. Therefore, it is reasonable to conclude, that the calculation and preferred quantity for export of PSMA does not seem to get any extra weight in the decision-making process. However, even though PSMA is the only entity representing commercial interest of sugar mills on SAB, there is no credible or cogent evidence on record to demonstrate that the recommendations by SAB on export of sugar were made under the influence of PSMA's lobbying as maintained in the ER.
43. When: (a) the Federal Government itself has constituted an official body to perform the aforementioned functions and made PSMA, as a representative of the sugar manufacturers, a member of such body to enable the sugar mills to give input on the recommendations to be made on the issue of exports, including quantity and time period of exports for consideration by the Federal Government; and (b) such input, of necessity, requires some discussion and consensus with respect to stocks among the sugar manufacturers for such purpose, it follows that in such particular facts and circumstances, such discussion and consensus cannot be reasonably termed contravention of Section 4(1) read with Section 4(2)(c) of the Act.
44. Section 4(2)(c) of the Act, *inter alia*, captures "fixing the quantity of goods to be sold", which has the object or effect of preventing, restricting or reducing competition in the relevant market.
45. Given: (a) the process for determination of export quantities outlined above; (b) the recommendatory role of SAB and the function of PSMA in SAB as a representative of the sugar manufacturers who are also relevant stakeholders; the discussions on even consensus amongst



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Member Undertakings of PSMA to lobby for a certain quantity to be exported and propose the same at the forum of SAB or otherwise does not fall within the language and intended scope of Section 4(2)(c).

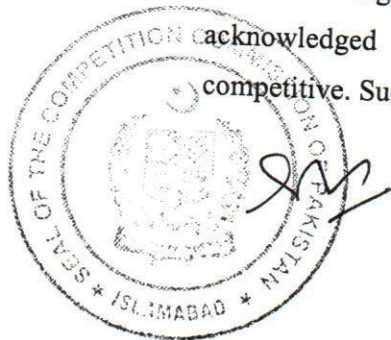
46. In the facts and circumstances discussed above, neither PSMA nor any Members Undertakings come to any collective "agreement" or "decision" to "fix" the quantity of sugar to be sold. The material relied upon in the ER to reach the contrary conclusion does not show any such "agreement" to "fix" the quantity to be sold. That conclusion in the ER is based on unsubstantiated inferences, which are unwarranted.

47. As the Federal Government itself has created a forum at which PSMA as a representative of sugar manufacturers has a stated and formal role and function to give input in the context of working out of the domestic domestic requirement of sugar, assessment of supply prospects and the making of suggestions to the Federal Government to signal imports or exports of sugar, any discussions at PSMA or amongst its Member Undertakings on stock positions in the context of quantity to be proposed for export and any consensus reached thereon amongst themselves for onward discussion or lobbying with the Federal Government does not constitute "fixing" the quantity to be goods to be supplied which has the object or effect of preventing, restricting or reducing competition in the relevant market.

48. The decision to "fix" the quantity to be actually exported is, in any event, not and cannot be that of PSMA, Member Undertakings or indeed even of SAB.

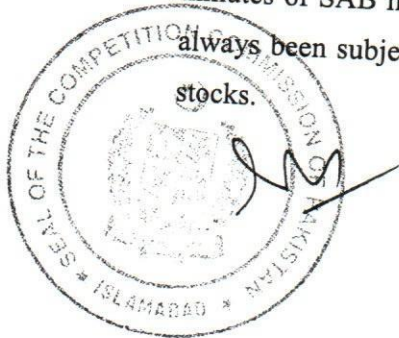
49. The object and purpose underlying the discussions and any consensus amongst PSMA and or its Member Undertakings is, therefore, legitimate i.e., so as to enable its own assessment and views on the need and quantity of export to be placed before the Federal Government for consideration, in the decision to be taken by the latter. To declare such lobbying and other actions anticompetitive would effectively negate and undermine the opportunity to convey their preferred stance which has been created and granted by the Federal Government itself through constitution of SAB and, hence, also unreasonably impinge on the basic freedoms of association and speech enshrined in the Constitution.

50. As regards lobbying efforts, the Commission itself in previous orders has acknowledged that to lobby government for a favorable concession is not per se anti-competitive. Such lobbying activity is also part of the "objects" of PSMA in its Memorandum



of Association which is approved under the Trade Organization Act, 2013. In any event, such lobbying is considered legitimate and not anticompetitive, given that the Federal Government itself has created a forum such as SAB and given PSMA a voice at such forum in the specific context of working out and making recommendations in respect of exports, export quantities, as well as matters of improving the liquidity of sugar mills and payment to growers. In addition, the Commission has previously “recognised the right of an undertaking to lobby the Government to achieve favourable results”. In this context, In its **Order dated 14-12-2009 in the matter of Show Cause Notices to Jamshoro Joint Venture Limited & LPG Association of Pakistan**, at paragraph 139, the Commission clarified that “lobbying for a particular policy or government action is by no means anti-competitive” and that an undertaking “is free to lobby for deregulated prices”. It was further observed by the Commission that “lobbying” is “a legitimate and lawful practice”. The same was also affirmed by the Commission in paragraph 170 of its Provisional Order dated 16-7-2017 in the matter of Pakistan Sugar Mills Association that “PSMA, in light of the relevant Government notification and subsequent policy was well within its rights to advocate and even lobby against establishment of new sugar mills ...”. The Commission further recognized therein the “... the right of an undertaking to lobby the Government to achieve favorable results” and observed that “the right to lobby for favorable policies and actions appears to us to be in line with the basic freedoms of association and speech enshrined in the Constitution”. At paragraph 173 of the same order, it was held that “undertakings and their officers are free to lobby for a policy at a particular time and are equally free to argue against it at a later date. This does not constitute a contravention of the law...” Moreover, in relation to exchange of information, at paragraph 189 of the said Order, the Commission observed that “in general, the sharing of historical and aggregated data is often not objected to by the anti-trust enforcement authorities.” The above view is, therefore, consistent with earlier observations of the Commission.

51. Another assertion in the ER that exports are pursued by PSMA for ‘price stability’ is mainly based on the Extracts of minutes of PSMA’s Annual General Meetings, wherein there are statements about pursuing exports for ‘price stability’, however, PSMA claims that these statements are in the context of PSMA’s successful lobbying to get export permissions and resultant price stability and improved liquidity of mills. In this regard the extracts from various minutes of SAB meetings are instructive which demonstrates that the decision to export has always been subjected to stability in domestic prices, and availability of sufficient domestic stocks.



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52. In the minutes of meeting of SAB held on 12.03.12 following extracts is important in the context of prices and exports:

*“c) Chairman PSMA Mr. Javed A Kayani, shared that after start of February, 2012 crushing reduced due to prolonged winter spell and frost. As such an abundant precaution PSMA advised to halt the export decision till the end of crushing season....d) He also underscored that the sugar price has reduced from RS. 75 per kg in August 2011 to Rs.50/kg. h) Secretary Food Punjab informed that....He stressed that exports decision should be made once the crushing season is over and final figures in this regard are in hand. i) Representative from PSMA Punjab Zone opined that 20-25 days are left in this crushing season. Sugar is already in surplus Any delay in sugar export decision will render export as less desirable option due to Brazilian sugar entering the market and driving international prices down.*

*3. The meeting validated the decision of ECC for export of 100,000/- tons sugar. (Surplus was 1 Million tonns)”*

53. In the minutes of the SAB meeting of 17-5-2017 the following is noteworthy:

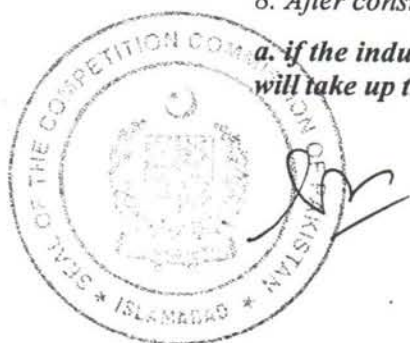
*“The Chair, in view of the likely price hike during the month of Ramzan, sought firm assurance of PSMA to maintain price stability. Chairman. PSMA proposed that Trading Corporation of Pakistan (TCP) may purchase sugar upto 0.200 to 0.300 MMT for strategic reserve and in case of rise in price; TCP may release the stocks in the market to maintain price stability. The representative of the Ministry of Commerce advised that the issue of TDAP may be taken up separately. Regarding purchase of sugar by TCP, he apprised the Board that the TCP is not having sufficient resources and its past experience is not all too encouraging. **On the desire of the Chair, PSMA vowed to send in writing its firm resolve to maintain price stability.”***

54. Similarly, the minutes of the SAB meeting of 15-4-2019 following extract needs to be considered :

*7. The Chairman PSMA informed that as per agreement with the Government of Punjab, they will provide sugar at reduced rates of Ramzan Bazars in the holy month of Ramzan. The Chair urged the PSMA representatives to show same gesture to the Federal Government by providing sugar at reduced rates through Utility Stores Corporation (USCs) across the country in the holy month of Ramzan. The Secretary (I&P) suggested that physical sugar to the tune of 50,000 tons be provided to the USC, in response Chairman PSMA assured that they will participate in the tender as advertised by MOIP.*

*8. After consulting the stakeholders, it was mutually agreed that;*

*a. if the industry decrease the prices of sugar in the holy month of Ramzan the chair will take up the matter with the government to keep export door open for the industry.*



*h*

55. In the SAB meeting dated 29.10.19 following was discussed

7. On the issue of high prices the Chari elaborated that the Prime Minister has serious concerns on this issue. Chairman PSMA explained that the Ex-mill price of sugar have come down from Rs. 69.26 in September to Rs. 65 in October, 2019. However, wholesale and retail price did not decrease.

8. After consulting all the stakeholders, it was concluded unanimously by the Sugar Advisory Board (SAB) that:

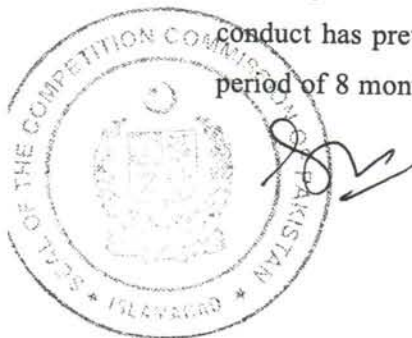
a. Sugarcane prices will be worked out expeditiously for next crushing year 2019-20.

b. To reduce the gap between Ex-mill price and retail price, the Secretary (I&P) will approach the Provincial Governments to regulate differentials to bring them down at reasonable margin to manage the recent price hike in wholesale and retail markets of their respective province.

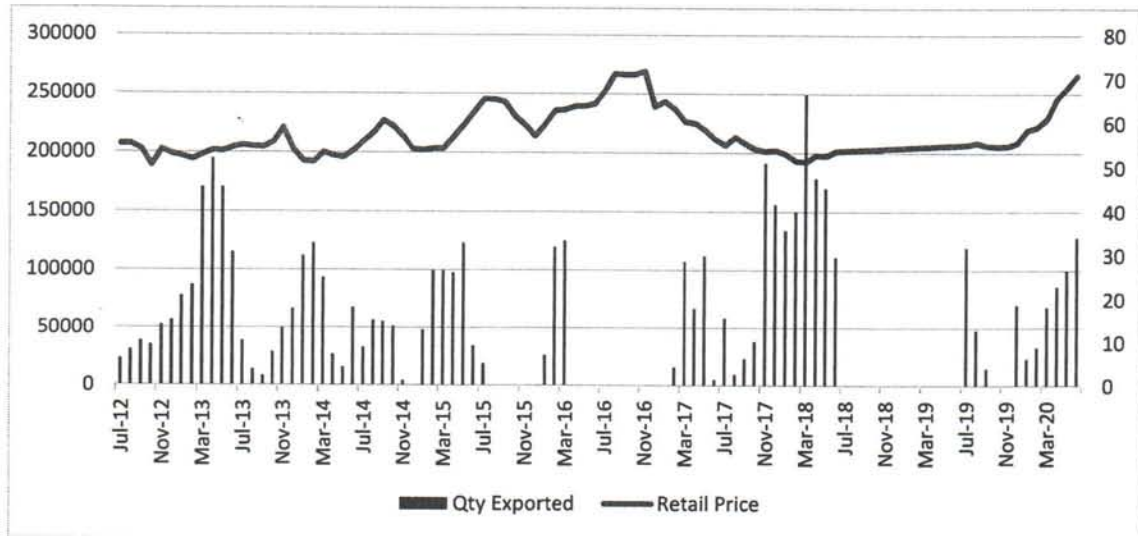
c. MNFSR in consultation with MOIP will review costing models of sugar as shared by PSMA.

56. A relevant case in point with respect to exports of sugar is California **Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S> 97(1980)**, where the Court considered a California law requiring producers to post a “fair trade contract” specifying a wholesale resale price and then requiring all wholesalers in the region to charge no less than that price. In its survey of the State Action Case law, Justice Powell’s opinion discerned “*two standards for antitrust immunity under Parker vs Brown First, the challenge restraint must be one clearly articulated and affirmatively expressed as state policy: Second, the policy must be actively supervised by the state itself.*” This two pronged test is fully applicable in the scenario of export of sugar in Pakistan, where Government not only sanctions quantity and timeframe for export and also closely monitors the process through an independent monitoring mechanism as elaborated in earlier paras.

57. ER maintains that exports always results in domestic price hike, it would be instructive to consider submission of Respondents, which through data substantiates that out of various instances of permission for exports by the government, domestic supplies actually remained unaffected and resulted domestic prices either reduced or remained stable during the period of glut as against the stance maintained by the EC in the ER regarding the correlation between export quantities and the resultant impact on prices. It has been alleged in the ER that such conduct has prevailed since 2012, whereas the data set presented in evidence only covers a period of 8 months in 2019 without explaining how a trend claimed in respect of an 8 month



time period can be extrapolated to 8 years backwards. Therefore, it appears that at the time the contravention of Section 4 “since 2012” was alleged there was no material before the EC to substantiate this view. This limited and deficient analysis cannot be improved upon at this stage. The table below actually charts the relation between exports and domestic price levels:



58. The chart above makes it abundantly clear that there is no cogent relationship between quantity exported and domestic price level. Maximum quantity was exported in Nov 17 to Mar 18 where prices touched bottom, whereas, in the months where there were no exports, prices remained higher.

59. Submissions of Member Undertakings that the data relevant to sugar mills is the ex-mill price data as opposed to retail price data which has been relied upon by the EC while calculating the impact of exports on domestic prices of sugar, and that too for a limited period of 8 months as opposed to since 2012, also are relevant. Although retail price is primarily a function of ex-mill price, however, the determining factors of retail and ex-mill price cannot be treated as same. Ex-mill price primarily depends on input costs, while retail price depends on ancillary factors. On one side it is a valid argument that the retail price increases with every increase in the ex-mills price, the converse of it may not be true in certain cases i.e., a reduction in ex-mill price may not instantly decrease the retail price as has been the case in October 2019 where decrease in ex-mill price was not reflected in retail price. Similarly, an increase in retail price may not corresponds to increase in ex-mill price as sometimes retail price may rise due to change in distribution costs or transportation costs etc. The ER itself admits that the latitude



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of competition is only present at the ex-mill level keeping in view the highly regulated sugar industry. Therefore, the comparison of sugar export with effect on retail prices is, irrelevant keeping in view the assertion in the ER about conduct of PSMA and Member Undertakings vis-à-vis determination of export quantities intended to reduce domestic supply and maintain price level. Any analysis, if relevant, here was the analysis of impact of determination of export quantities on the ex-mill prices of sugar which is absent in the ER.

60. At this juncture, the examination of the conduct of individual sugar mills and their ability to individually make a choice to export sugar on the basis of their individual commercial circumstance is also relevant.

61. All Member Undertakings of PSMA denied their involvement in any collusive decision to determine export quantity and also contended the selective reliance of the EC on a speech of individual office bearer i.e. the 'Chairman' as proof of a "decision" by PSMA (or an "agreement" between Member Undertakings) to be unwarranted and insufficient evidence. They have maintained that neither PSMA nor any of its Member Undertakings have the power or authority to either make any such "decision" and nor enforce or implement any such "decision". The decision to export refined sugar as well as the "determination of the quantity" of sugar to be exported and permissions and processes in this regard are all decisions taken and enforced by the Federal Government and its agencies and instrumentalities and not by any one or more Member Undertakings or the PSMA. Any proposal in support of a decision to export cannot itself be portrayed as the "determination" of a decision to export or export a particular quantity.

62. As elaborated above, once the decision to export certain quantity of sugar is made on the basis of input and or recommendation of SAB, the same is communicated through Ministry of Commerce and the role of SBP's Exchange Policy Division becomes relevant.

63. Examination of export decisions announced over the span of past 9 years indicate that export permission may or may not be time-bound. Usually, the rationale behind making a time bound decision is to put pressure on the mills to avail export opportunity without wasting time and liquidate their position within prescribed time. The EPD circular also contain other terms and conditions for export.



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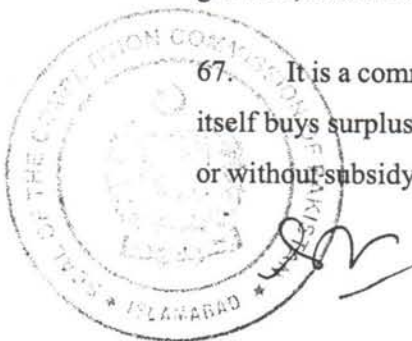


64. From the contents of EPD circulars following two factors transpire (i) It is the decision of individual mill to take part in exports based on its individual stock availability, liquidity position and its ability to engage export customers. (ii) export permission is given to mills by the SBP on first come first serve basis and based on the satisfactory compliance with the export conditions stipulated in EPD circulars.

65. Figures of utilized/unutilized export quota are also presented in SAB meetings. In terms of SAB minutes of meeting, PSMA at various occasions have stressed the need to expedite the lengthy process through which exporting mills have to go through and have complained that due to this lengthy process the exports orders are usually wasted and mills are not able to avail the profitable export window in lieu of fluctuating international prices. They have therefore, at various occasions requested the SBP to allot unutilized quota to those mills who are willing to export in order to meet the ultimate objective of ensuring liquidity for the industry. In response to the request of PSMA the export quota was enhanced from 5000 tons per mill to 15000 tons per mills and resultantly export targets were also achieved by mills. Since PSMA is only making a generic demand while requesting increase in quota per mill, therefore, in my opinion there is no anti- competitive intent behind this pursuance.

66. Export is usually allowed when local production/stocks substantially exceed domestic demand as a result of a glut in production. Surplus is not made by choice because the decision to plant sugarcane rests with the farmer and district administration force mills to start crushing at the notified time and not stop until all cane is crushed in the vicinity of mills. The practice is mandated under the provisions of Sugar Factories Control Act, 1950 whereby, the sugar mills are required to start crushing as per notified dates, regardless of the fact that they have previous year's surplus lying in their mills and non-compliance entails penalties. Therefore, to produce or not to produce is in fact not a commercial decision by the sugar mills. The resultant impact on the liquidity of mills therefore, cannot be termed as the individual commercial problem of a certain mill without contextualizing it in the light of obligatory requirement to crush every available kilogram of cane and producing more than the domestic requirement. The assertion in the ER stating that the mills demand export on the pretext of payment to growers, is therefore, unfounded.

67. It is a common practice in various sugar producing countries that either the government itself buys surplus stock from mills directly to generate liquidity for mills or allow export with or without subsidy when the international prices are lower than the domestic cost of production.



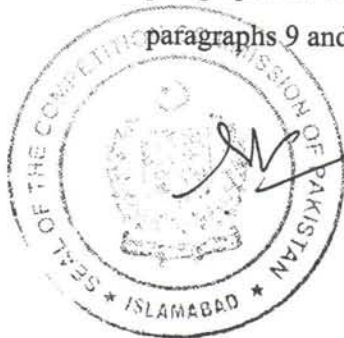
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Examples of this practice are common in sugar producing countries like India and Thailand particularly where the industry and cane growers have not been able to improve sugar cane recovery ratios and hence there is relatively high production cost as is the case in Pakistan where at least 78% cost of production is the cost of sugarcane. There is also a carrying cost attached to the surplus sugar which has to be born either by the government, in case it buys surplus itself or by the industry where industry carries the surplus. Usually, a cost vs. benefit analysis is carried out by the government entities concerned while allowing subsidy in exports.

68. It is pertinent to understand that export of surplus sugar fetches two major benefits for the Federal and Provincial Governments. On the one hand valuable foreign exchange and on the other hand release of payment to the cane growers for revival of rural economic cycle, which cannot be achieved through any other means as the surplus sugar cannot be disposed of locally. This is a key objective of exports and is also part of the Terms of Reference of SAB, which has not been given due weight in the ER and payment to growers has been observed therein to be a mere pretext to stabilize domestic prices. As noted above, payment to growers is also a pre-condition for eligibility of exporting sugar mills. The fact that there is no other means of improving liquidity has also not been given weight in the ER. In the context of improving liquidity and ensuring payment to growers, the liquidity of the sugar mills is a condition precedent.

69. It is important to note that the decision to discontinue exports in the wake of surge in domestic prices was taken in Jan 2020. In Feb 2020, 30 % duty on import of sugar was also lifted and private importers were allowed to import sugar. Government has recently announced an import of 600,000 tons of sugar by TCP to meet the domestic requirements and to put downward pressure on sugar prices which are touching around Rs.110 per kg at retail level. These facts reasonably question the relevance of the assumption that the price hike only through exports.

70. In view of the above discussion and analysis, we conclude that the assertions in paragraphs 67 to 83 of ER and the contraventions of the Act alleged on the basis thereof, in paragraphs 9 and 10 of SCN remain unsubstantiated. These are accordingly all set aside.



b

## USC TENDERS (Issue V)

*V. Whether PSMA and its Member Undertaking participating in the 2019 and 2010 USC Tenders respectively took a collective decision/indulged in a collective bargaining practice to fix and divide the quantity of sale among themselves which is thereby violation of Section 4(1) read with Section 4 (2) (c) of the Act ?*

71. There are two tenders floated by Utility Stores Corporation (USC) in respect of which violation of Section 4 read with Section 4(2) (c) of the 2010 Act is alleged. One tender is of 20-3-2010 for 100,000 MT of refined sugar (2010 Tender) and the other of 23-4-2019 for 20,000 MT of refined sugar (2019 Tender). Each is examined below.

### **2010 Tender:**

72. The first tender is dated 20-3-2010 for 100,000 tons of sugar. The evidence relied upon in the ER are three letters, all from the Secretary General of the PSMA to the Managing Director of USC dated 26-3-2010 and 29-3-2010. A draft letter dated 24-3-2010 in which request to distribute the tender quantity among 21 member Undertakings is made. A letter of 26-3-2010 which, without mentioning the specific sugar mills (Member Undertakings) concerned, it is requested that USC “give an opportunity to the participating mills to match the lowest established rate and then equitably distribute quantity among the sugar mills”. The letter of 29-3-2010 is stated to be “further to” the letter of 26-3-2010 and again, without listing the sugar mills (Member Undertakings), reiterates the request in the previous letter and request USC that all parties that have participated in the 20-3-2010 be allowed to share the total quantity to be supplied.

73. With regard to the 2010 Tender, first, the contention of the sugar mills in Group 3 that the Commission cannot take cognizance of the 2010 Tender in a Show Cause Notice issued under the Competition Act, 2010 (2010 Act) as it pertains to a period prior to the date of promulgation of the 2010 Act requires consideration. In this context, we concur the opinion expressed in supra para 240 above and our analysis of the facts in this issue is discussed in paras below.

74. At the outset, it is observed that there does not appear to be sufficient evidence on record to conclusively hold, on the basis of the three letters from PSMA to USC dated 24-3-2010, 26-3-2010 and 29-3-2010, that PSMA or Member Undertakings have contravened



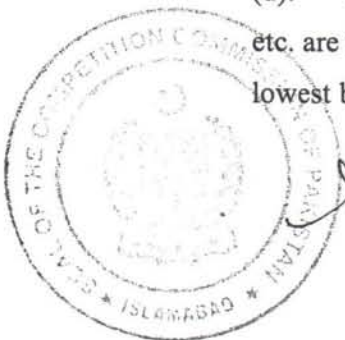
Section 4(1) of the 2010 act read with Section 4(2)(c) thereof. Section 4(2)(c) of the 2010 Act declares the following to be a “prohibited agreement” for the purposes of Section 4(1) “fixing or settling the quantity of production, distribution or sale with regard to any goods or the manner or means of providing services”. In this context, whilst considering the documents relied upon in the ER, it is observed that:

(a). The three letters relied upon in the ER do not demonstrate any concerted practice, decision or agreement by the Member Undertakings to “fix the quantity” to be supplied as prohibited by Section 4(2)(c) on part of the mills participating in the tender under the auspices of PSMA, as discussed below:

(b). The letters are written by PSMA (Punjab Zone). Neither of the two letters list any Member Undertakings which have come to any collective decision or agreement to “fix quantities”. The letter dated 24-3-2010 is unsigned, unnumbered and not on PSMA letterhead (unlike the subsequent two letters) and so it is not established whether this letter was actually signed and issued. The language of the letter of 26-3-2010 suggests that the draft of 24-3-2010 may not have been issued, as its opening sentence makes no reference to any earlier letter on the subject, as has been done in the letter of 29-3-2010. The document of 24-3-2010, therefore, appears to be a draft and there is no evidence that it was actually issued.

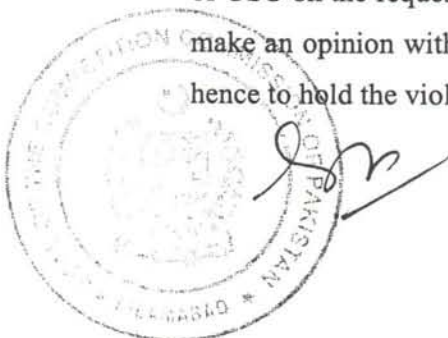
(c) Through the other two letters, PSMA has requested USC to “give an opportunity to the participating mills to match the lowest established rate and then equitably distribute quantity among the sugar mills”. Hence neither the names of mills nor quantity is fixed at this stage as evident from language of the letter hence no collective decision by PSMA or member mills at this stage was present. In assessing contravention of Section 4(2)(c) of the 2010 Act, the action in question must also have the object or effect of preventing, restricting or reducing competition within the relevant market. It is not denied that, with regard to the 2010 Tender, the lowest price was indeed identified through a transparent and competitive bidding process. The ER notes in paragraph 112 that it did not make out any finding of *prima facie* collective refusal to supply. Also, there is no allegation or evidence of bid rigging against PSMA or the Member Undertakings.

(d). The ER also notes that “USC tenders for commodities such as sugar and pulses etc. are for large quantities to be supplied all over Pakistan. It usually happens that the lowest bidder cannot supply the entire quantity so USC, gives an opportunity to other



participating bidders to match the price of the lowest bidder.” The key stage at which competition is to take place is the bidding process as a result of which the lowest price is identified. The ‘competition’ in this context is, therefore, with respect to “price” which, the record shows, was quoted on a per MT basis. The quantity, therefore, is less relevant than the “price” in this particular context. There is no difference in quality as all bidders were required to offer product compliant with PSQCA standard and it is a homogenous product with no brand differentiation. The object of the purchaser, in this case USC, was obviously to obtain the lowest price possible. This was achieved through a competitive bidding process and there was no anticompetitive practice in the competitive bidding process which yielded the lowest price. It was only after the lowest price had been identified that PSMA requested, without listing specific Member Undertakings, that USC “give an opportunity to the participating mills to match the lowest established rate and then equitably distribute quantity among the sugar mills”. So, the request is to match the “lowest established price”, which is not an anticompetitive interference. The request to distribute the quantity “equitably” between all participants at the lowest price already established does not, in our view, amount to “fixing the quantity of sale” in such manner that it has the object or effect of preventing, restricting or reducing competition within the relevant market in terms of Section 4(1) read with Section 4(2)(c) of the 2010 Act as competition was principally on price, apparently quoted in terms of Rupees per MT, which has already duly taken place. The fact that USC itself has on other occasions permitted suppliers to distribute quantity of commodity to be supplied post-bidding, by matching the lowest price identified in a bidding process, also indicates that the key stage of ‘competition’ is at the bidding stage and that competition is with respect to the per MT price offered as opposed to quantities also. Further ER has not tried to collect evidence from USC in order to assess the factual position as if tender was allocated to few, then how others were accommodated later on? Further, name and quantities offered, allotted and supplied by the mills could also have been obtained.

75. In these circumstances, it is our opinion that the EC needed to collect further evidence to ascertain how the actual allotment of tender quantities took place and what was the response of USC on the request of PSMA to equitably allot the tender quantity. This was necessary to make an opinion with respect to the ‘object’ or ‘effect’ of the communication by PSMA and hence to hold the violation in affirmative or otherwise.



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**2019 Tender:**

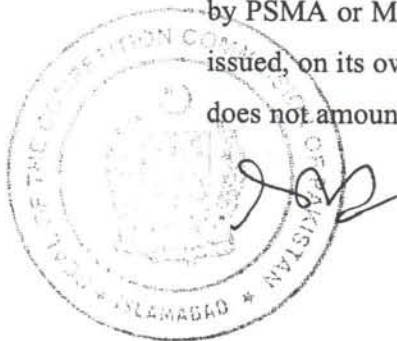
76. The 2019 Tender was for 20,000 MT of refined sugar. The ER notes that ultimately only 8,000 MT was supplied by mills out of the 20,000 MT by USC.

77. The evidence relied upon in respect of the 2019 Tender includes notice of a meeting of PSMA (Punjab Zone) for 19-4-2019 in which one agenda item is “utility store tenders”. The other document is a letter dated 25-4-2019 (retrieved from the computer of a PSMA) addressed to the Chairman of USC in which with reference to the tender opened on 23-4-2019, it is stated that the 15 Member Undertakings mentioned therein are “pleased to match the lowest price of Rs. 63/kg”. In this letter, one of the Member Undertakings have also indicated willingness to increase the quantity and another has made its offer subject to settlement of previous payment issues.

78. First, it is not proven conclusively from the record that the letter of 25-4-2019 was actually signed and issued or whether the same is a draft as it was retrieved from the computer of a PSMA official. However, the ER has not verified issuance thereof or receipt by USC. Second, as discussed in relation to the 2010 Tender, the main point and stage of competition is price. In this case quoted on Rs./k.g. basis. As in the case of the 2010 Tender, it is observed that the competition on price had already taken place prior to the letter in question. The request in the letter of 25-4-2021 is in respect of 15,000 MT and not the entire 20,000 MT and ultimately only 8,000 MT was actually delivered by four Member Undertakings according to the ER.

79. Additionally, as contended by Respondents the background to the 2019 Tender is apparent from the minutes of the meeting of SAB on 15-4-2019 in which the Chairman of SAB had urged the PSMA representatives to provide sugar “at reduced rates through Utility Stores Corporation (USCs) across the country in the holy month of Ramzan”.

80. Whilst there is no direct evidence that USC itself asked for the 20,000 MT quantity to be split between the Member Undertakings, for the reasons given above in relation to the 2010 Tender, no contravention of Section 4(1) read with Section 4(2)(c) of the 2010 Act is made out by PSMA or Member Undertakings as the letter of 25-4-2019, even if assumed to have been issued, on its own or read with the Notice of meeting of PSMA Punjab Zone (for 19-4-2019), does not amount to “fixing the quantity of sale” in such manner that it has the object or effect



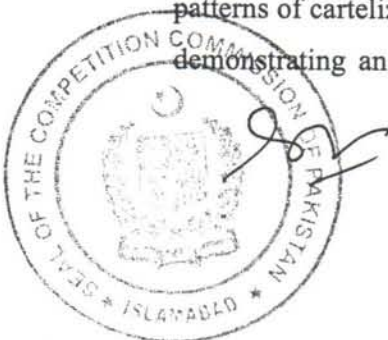
of preventing, restricting or reducing competition within the relevant market in terms of Section 4(1) read with Section 4(2)(c) of the 2010 Act as competition was principally on price, quoted in terms of Rupees per kg., which has already duly taken place. Even otherwise, such action does not appear to fall within the language and scope of Section 4(1) read with Section 4(2)(c) of the 2010 Act. Therefore, contravention, as alleged, in respect of the 2019 Tender is also not established.

## CONCLUSION AND DECISION

81. In light of the foregoing, we hold the following with respect to the Issues I to V discussed above:

- a). With respect to issue Issues I and IV, we set aside the SCN and ER to this extent and remand the matter for *de novo* inquiry which shall, inter alia, address the following issues:
  - i). A detailed analysis of the price discovery mechanism in sugar industry, keeping in view the regulatory framework and cyclic nature of production.
  - ii). Inclusion of the role of market intermediaries and detailed analysis of their possible role in market manipulation through 'Forward Contract & Satta'.
  - iii). Inclusion of Sindh and KPK mills for investigation into the possibility of existence of collusive behavior with respect to sharing of sensitive commercial information.
  - iv). Verification/corroboration of the information and evidence provided in the ER to confirm its credibility.
  - v). With respect to Issues II & III, we set aside the SCN and ER to the extent of these issues.
- b). With respect to Issue V, we set aside the SCN and ER to this extent and remand the matter related to 2010 Tender for *de novo* inquiry which shall, inter alia, address the observations given above in para 75 above.

82. Before parting, we would like to give our observations on some aspects that have been highlighted during the proceedings before the Commission in this matter. When we compare this matter with the previous inquiries and key orders of the Commission, we clearly see that patterns of cartelization and the manner in which it occurs has undergone significant changes, demonstrating an ever-increasing level of sophistication by economic actors as they have

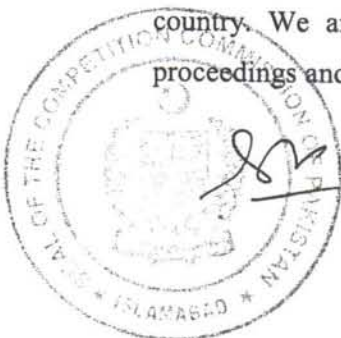


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become more aware of Pakistan's competition legal framework and the reputational and financial risks they face because of its enforcement. Today, the probability of acquiring evidence of cartelization in physical form is remote, as methods of communication that establish and monitor adherence to prohibited agreements have shifted to a virtual environment spanning the globe, assessment of which is a challenge in itself, coupled with the paucity of accurate data collection, compilation, and analysis at the Federal and Provincial levels.

83. In the context of market of essential commodities in general and sugar in particular, where market dynamics shift rapidly, it is our view that the government needs to develop an 'independent' mechanism for policy making with respect to commodities. This mechanism should necessarily involve all important stakeholders, and, more importantly, should also include independent sector experts as well. Our opinion is based on the observations made in various inquiries and orders of the Commission in case of essential commodities such as wheat/flour, sugar, poultry, milk, and pulses, among others. We have observed that the absence of an independent, timely, and accurate information-gathering framework to provide necessary quantitative support in the government's price controls mechanisms for essential commodities has resulted in policy making based on questionable sources of information. Instead, policy decisions that affect the lives of all citizens are taken largely relying on the questionable input received directly from the relevant industry associations/groups of suppliers, wholesalers, or retailers who have a vested interest. The government lacks the means of cross-checking this information due to capacity constraints. Also, the risk of collusion substantially increases during the process of providing information to the government's price control mechanisms as it allows competitors to align their responses for their sole benefit. In extreme cases, these associations can become so powerful as the sole provider of information to the government mechanism that they ensure that policies developed are favourable to help them achieve their ends, failing which they start blackmailing government for their own interests and demands, becoming sectoral mafias, that raise prices of essential commodities and affect the lives of the population.

84. We strongly believe that it is extremely necessary to establish the Commission as an institution with credible processes and a focus on considering the viewpoint of key experts and acquiring and analysing different sources of data that are now becoming more available in the country. We are hopeful that our opinion today will lead to improvements in enquiry proceedings and make them more transparent and credible.





85. Proper analytical processes and procedures must be in place in the Commission to empower it to free the economy from the harmful impact of cartelization, mafias, and vested interest and act as a safeguard for the public against anticompetitive practices. We believe that only work done using transparent and credible processes in place can enable the Commission to achieve its objectives of improving the role of competition in the economy.



(Shaista Bano Gilani)  
*Member*



(Bushra Naz Malik)  
*Member*



ISLAMABAD THE 12<sup>th</sup> DAY OF AUGUST 2021

## COMMISSION'S VIEW

All four Members of the Commission are unanimous in their view and have arrived at unqualified consensus on background facts, formulation of issues, determination of preliminary/technical objections, the determination of the relevant market and the spill-over effect, and the determination of Issue VI (Ceasing of Sugarcane Crushing) as addressed in the opinion of Ms. Rahat Kaunain Hassan, Chairperson and Mr. Mujtaba Ahmad Lodhi, Member dated 6 August 2021 (the “**First Opinion**”). However, two Members, Ms. Shaista Bano and Ms. Bushra Naz Malik, have recorded a different opinion dated 12 August, 2021 (at pages 135-173) (the “**Second Opinion**”) from the First Opinion, on Issue I (Sharing of Sensitive Commercial Stock Information), Issue II (Collective Decision to Export), Issue III (Effect of Collective Decision of Export on Price), Issue IV (Zonal Divisions in Punjab to Coordinate Sales) and Issue V (Collective Bargaining Practice in USC Tenders), therefore, the Commission is faced with a deadlock situation on the determination of the aforesaid Issues within the contemplation of the Act.

Remaining fully cognisant of my duties (including fiduciary duties) in the discharge of the functions of the Commission in my capacity as the Chair of the Bench hearing this matter as well as in my capacity as the Chairperson of the Commission, I am of the considered view that the deadlock arising within the contemplation of the Act needs to be resolved. Hence, guided by the spirit of Section 24, sub-sections (1), (5) & (6) read with Section 28(1) of the Act and also having duly considered the overall purpose and intent of the Act; attending public policy framework and considerations; the general public interest that the Act seeks to protect and enforce; that procedural technicalities cannot thwart the administration of affairs entrusted to the Commission and in the interest of justice, I hereby exercise, in due and faithful discharge of the functions of the Commission, my second and casting vote envisaged and entrusted to me under the Act in favour of the First Opinion, thereby breaking the deadlock in relation to the aforesaid Issues. Accordingly, the First Opinion constitutes the Order of the Commission on all matters expressed therein.



(Rahat Kaunain Hassan)

Chairperson

13-08-2021