BEFORE THE

APPELLATE BENCH

COMPETITION COMMISSION OF PAKISTAN

In re-Institute of Chartered Accountants of Pakistan
(Appeal No.11/2008)

Bench Members	Mr. Khalid A. Mirza Chairman
	Ms. Rahat Kaunain Hassan Member (Legal)
Date of hearing:	18-12-2008 & 15-01-2009
Present:	1. Syed Shabbar Zaidi, Member Council ICAP
	2. Asad Ali Shah, President
	3. Mr. Ali Almani, Advocate from Fazle Ghani Khan & Co

O R D E R

1. This Appeal was filed on December 07, 2008 against the Order dated December 4, 2008 passed by a single Member in the Show Cause Notice No.1 of 2008 (herein after referred to as the '**Impugned Order**'). It has been held in the Impugned Order that the fixing of minimum hourly charge out rate and the

minimum fee for audit engagements by the Council of the Institute of Chartered Accountants of Pakistan ('**ICAP'** hereinafter referred to as the **"Appellant")** laid out in ATR 14 violates Section 4(1) of the Competition Ordinance 2007 (the '**Ordinance'**). The Appellant was directed under the Impugned Order to inform its members through a circular regarding withdrawal of ATR-14 from the Members' Handbook, Volume-II, Part-II Section (c) and further to publish notice of withdrawal in two newspapers, one English and one of Urdu, nationwide circulation before December 19, 2008 failing which a penalty in sum of Rs.300,000 per day of infringement were to be recovered from the Appellant under Section 40 of the Ordinance.

2. The Appellant also filed an application for interim relief along with the Appeal, praying to suspend the operation of the Impugned Order until the issuance of final order in the subject Appeal. This Appellate Bench granted interim relief by suspending operation of paragraphs 35,36 and 38 of the Impugned Order *inter-alia* on the ground that it is in public interest that the matter be finally settled by the Commission and allowing any penalty to incur prior to the final decision of the Commission does not appear to serve the interest of justice in the particular facts of this case.

3. Hearings in the subject proceedings were held on December 18, 2008 and January 15, 2009, the Appellant has also submitted written arguments. During the hearings, the case was mainly argued by Syed Shabbar Zaidi, Member Council ICAP and Syed Asad Ali Shah, President of ICAP.

4. Briefly, as per the submissions of the Appellant the Appeal is preferred on the following facts and grounds:

(1) The Appellant (ICAP) is an autonomous statutory body established under the Chartered Accountant Ordinance, 1961 (X of 1961) (the "**CA Ordinance**") to regulate the profession of accountancy in Pakistan. It is non commercial entity and in accordance with its mandate the Appellant is required to maintain and enforce ethical and professional standard in the field of accountancy.

(2) The Appellant has taken pro-active role in investigating and penalizing those Members found guilty of professional misconduct. According to Clause 11 of Part-I of Schedule-I to the CA Ordinance, a chartered accountant is found guilty of professional misconduct, if he:

> *(11) accepts a position as auditor previously held by some other chartered accountants in such conditions as to constitute undercutting.*

(3) The Appellant pursuant to its powers under Section 27(2)(kk) of the CA Ordinance to prescribe directives to its Members on professional matters issued ATR-14, aiming to curb the invidious practice of undercutting and to enforce Clause 11 mentioned above. ATR-14 sets out a Schedule of minimum hourly charge out rates and minimum fee (the "**Minimum Fee**") for statutory audits to be conducted under Section 254 of Companies Ordinance, 1984. ATR-14 is not applicable to the audits beyond the mandatory audit.

(4) The Minimum Fee was initially only recommendatory in nature but given lack of impact on practice of undercutting, it was decided by the Appellant to make minimum fee mandatory in April, 2003. It has been in place since 1987. No complaints have been received from the public or any government functionary against fixing of Minimum Fee even though the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970 was in force.

(5) The Minimum Fee in ATR-14 were revised recently in August, 2008 vide Circular No.09/2008 dated August 13, 2008. This Minimum Fee represents a best estimate of carrying out an audit of different sized entities in ATR-14 while maintaining an acceptable level of professional competence. Therefore, ATR-14 is being launched only in public interest to improve the quality of auditing services. The Quality Control Review Programme and ATR-14 are supposed to compliment each other. The Appellant believes that it has resulted in a significant improvement in the quality of the audit profession in Pakistan.

(6) The Minimum Fee structure far from inhibiting competition, increases the choices available for consumers and gives them confidence that if and when they engage an auditing firm they will receive quality service by preventing firms from charging a fee which will not cover the cost of the work required. Small medium sized firms have particularly appreciated the measure as it protects their interest by preventing undercutting.

(7) More importantly, while it may be settled law that an arrangement labeled as "price-fixing" is to be condemned per se, it is equally well settled that the label of "price-fixing" is not to be applied to every arrangement involving a literal fixing of prices.

(8) Before characterizing an agreement as "price-fixing" a court must determine whether the agreement constitutes "a naked restraint of trade with no purpose except stifling trade." Such an inquiry is essential because "departure from the rule of the reason standard must be based upon demonstrable economic effect rather than…upon formalistic line drawing."

(9) The arrangement in question involves a horizontal agreement between members of a profession and "concerns an industry where the judiciary has little anti-trust experience". Therefore, the Respondent Member was required to conduct a more extensive and wide-ranging inquiry into the economic effects and actual impact of ATR-14 on relevant market and the accountancy of profession before condemning it as illegal per se.

(10) In Paragraph 14 and 15 of the Impugned Order, the Learned Respondent Member has mistakenly relied on the judgment of the United States Supreme Court in ***Goldfarb v. Virginia Stat Bar (421.U.S.733 (1984)),*** holding that the facts of that case are identical to the case at hand. The judgment of United States Supreme Court in the National Society of ***Professional Engineers case (435 US 679)*** wherein court held that an agreement by members of society prohibiting the submission of competitive bids constituted unlawful price fixing under the Sherman Act, is also distinguishable from the case at hand. Drawing and analogy with the case concerning the Land Surveyors Act by the Supreme Court of British Colombia is also misplaced as it is entirely unrelated. The judgment of European Court of Justice has not been considered wherein the final point of the decision of ECJ is that:

> *"where a market is highly heterogeneous and characterized by a high degree of internal competition,….collective dominance would be found in the absence of structural links."*

(11) Minimum Fee is prescribed keeping in view the amount of work involved in auditing. If the size of company is smaller (measured by turnover) Minimum Fee is correspondingly lower. Various exceptions are also provided for, such as charitable organizations or companies whose business operation may be suffering. ATR-14 tailored to ensure that all audits are of a high quality and it is applicable to Companies listed in the circular i.e. "listed companies ESEs, MSEs and SSEs."

(12) There are a number of countries within the European Union where countries continue to have fixed or minimum price in a variety of professions, in particular, there are fixed prices in accountancy/audit profession in Greece and Portugal.

(13) To import jurisprudence from developed economies 'wholesale' and apply it to the conditions of Pakistan is inappropriate and likely to impact its economic climate. The Ordinance is distinguishable from the Sherman Antitrust Act and Article 81 of the Treat of Rome. Application of such principles must be tailored to specific needs of businesses and consumers in Pakistan.

(14) ATR-14 does not fall within the purview of Section 4 of the Ordinance because the Appellant is not an "association of undertakings" nor is ATR-14 a prohibited agreement. For ATR 14 to be void it needs to have the 'object and effect of reducing competition'. Competition jurisprudence today looks to 'effects' and the rule of reason hence an analysis on the anti competitive effects of ATR 14 should have been carried out which the Impugned Order omits.

(15) The constitutionality of the Competition Ordinance 2007 is *ultra vires* of the Constitution of Pakistan 1973, and beyond the legislative power of the Federation being outside the scope of the Federal Legislative List and the Concurrent Legislative List. (Not pressed in hearings as the Commission is not the competent forum to adjudicate on this aspect).

(16) ATR-14 was unanimously approved by the Council of ICAP (one-fourth of who are government representatives) with the object of improving the quality of service of the profession. The object of introducing the regulation, therefore, was not to reduce competition.

(17) There is no evidence to suggest that ATR-14 has reduced competition in any manner. In fact, the effects have been the exact opposite. By way of availability of reasonable fees accountants practicing in various sizes of firms and individuals can compete with each other, without worrying that larger firms will seek to undercut them. The Learned Member, however, did not consider the positive and pro-competition effects of ATR-14.

5. In view of the above, the Appellant has prayed for setting aside of the Impugned Order and to declare that ATR-14, as amended by the Appellant through Circular No.9/2008 dated August 13, 2008, has been lawfully issued in accordance with Section 27(2)(kk) of the CA Ordinance and does not come under the mischief of Section 4. The Appellant has also prayed for any other relief as may be warranted in the circumstances.

6. For disposal of this Appeal, the issues that emerge in the given facts and circumstances are as follows:

   (1) Whether the Appellant is an 'undertaking' as defined under clause (p) of sub-section (1) of Section 2 of the Ordinance or an 'association of undertakings';

   (2) Whether ATR-14 is a decision, or an agreement for the purposes of subsection (1) of Section 4 of the Ordinance;

   (3) Whether the minimum fee schedule as per ATR-14 can be termed as 'price fixing';

   (4) Whether in determining a violation of Section 4(1) of the Ordinance, the 'object' and 'effect' both have to be taken into account.

   (5) Whether it is appropriate for the Commission to place reliance on the jurisprudence of foreign jurisdictions having developed economies such as USA and EU.

7. We now proceed to examine the issues in seriatim as follows:

   Whether the Appellant is an 'undertaking' as defined under clause (p) of sub-section (1) of Section 2 of the Ordinance or an 'association of undertakings';

8. The Appellant has emphasized that it is an undertaking as defined in the Ordinance and in no way an 'association of undertakings'. It was submitted that

the Impugned Order treats the Appellant as an undertaking (not as an association) and the Appellant has not entered into any agreement as an undertaking. It is stated that the language of Section 4(1) of the Ordinance makes it clear that this Section only applies to either (i) agreements amongst undertakings or associations of undertakings, or (ii) decisions by associations of undertakings. According to the Appellant the ATR-14 does not fall under either of the categories. It is argued that as per the definition clause of the Ordinance, the Appellant is not an association of undertakings. An association of undertakings would, for instance, be a voluntary association of professionals, manufacturers, distributors or others. The Appellant, therefore, does not fall within the category of association. Hence, Section 4 (1) does not apply to Appellant.

9. It was asserted that the ATR-14 is not an agreement or a practice, for which an undertaking can be held liable but rather a directive. An agreement as defined in Pakistani law can include a practice or an arrangement but not a decision and there is a distinction between a decision and an agreement. It was submitted that an agreement must by definition be at least between two distinct parties. While clarifying how the Appellant is not an association, it was asserted that it is a regulatory body set up by statute. It was also highlighted that the Council which made the decision regarding ATR-14 does not operate for its members nor is it accountable to them. In an association, the General Body is supreme but in this case the Council acts completely independent of the General Assembly which is not a characteristic of an association. It was also stated that none of the decisions

of the Council in the past have been made upon recommendation by the Members; this, in itself, reflects that the Appellant is not acting as an association of its Members.

10. Briefly put, as we understand, Appellant's stance is that since ATR-14 is a decision by the Appellant and the nature of Appellant's status is that of an undertaking, and not an association, the decision of an undertaking, i.e. ATR-14, does not fall within the purview of Section 4(1) of the Ordinance. Appellants have also taken the plea that the single Member in his Impugned Order has treated ATR-14 as an agreement by declaring it void in terms of sub-section (3) of Section 4 of the Ordinance.

11. Section 4 in its relevant part reads as under:

> 1. ***Prohibited agreements:-*** *(1) No undertaking or association of undertakings shall enter into an agreement or, in case of an association of undertakings, shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5 of this Act.*
> *(2) Such agreements include but are not limited to-*
> *(a) fixing the purchase or selling price or imposing any other restrictive trading conditions with regards to the sale or distribution of any good or the provision of any service;*
> (3) *Any agreement entered into in contravention of the provision in sub-section (1) shall be void.*

12. Section 4(1) prohibits an undertaking to enter into agreement in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing

competition within the relevant market unless exempted under section 5 of this Ordinance. The definition of the term 'undertaking' as per Section 2(1)(p) reads as follows:

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

As is evident, the definition of the term '*undertaking'* includes '*association, association of undertakings or a regulatory authority or other entity*', therefore, in our considered opinion the prohibition on entering into such an agreement would extend to all such entities falling within the purview of the 'undertaking'.

13. The prohibition on taking a decision in respect of the production, supply, distribution, acquisition and control of goods or the provision of services, which has the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under Section 5 of this Ordinance is restricted only to an 'association of undertakings' thus excluding other undertakings which are not associations. The term 'association' is not defined under the Ordinance. Under sub-section (2) of Section 2 of the Ordinance the words and expressions not defined in the Ordinance shall have the same meaning as assigned under the Companies Ordinance, 1984. Since the Companies Ordinance also does not define this term, the plain and ordinary dictionary meaning of 'association' may be reverted to. In this regard, it may be useful to

refer to Black's law dictionary 7th edition where under the term 'association' is assigned the following meanings.

a) The process of mentally collecting ideas, memories, or sensations.
b) A gathering of people for a common purpose; the persons so joined.
c) An unincorporated business organization that is not a legal entity separate from the persons who compose it.

- If an association has sufficient corporate attributes, such as centralized management, continuity of existence, and limited liability, it may be classified and taxed as a corporation. – Also termed unincorporated association; voluntary association. (emphasis added)

The term professional association is defined as follows:

a) A group of professionals organized to practice their profession together, though not necessarily in corporate or partnership from.
b) A group of professionals organized for education, social activity, or lobbying, such as a bar association.

an association of practitioners of a given profession (http://www.thefreedictionary.com/professional+association) (emphasis added)

a body of persons engaged in the same profession, formed usually to control entry into the profession, maintain standards, and represents the profession in discussions with other bodies.
[English Collins Dictionary] (http://dictionary.reverso.net/english) (Emphasis added)

The Appellant's website www.icap.gov.pk states at the out set, as follows:

*The Institute of Chartered Accountants of Pakistan is a professional body of Chartered Accountants in Pakistan, and represents accountants employed in public practice, business and industry, and the public and private sectors. (*emphasis added*)*

14. Under the Chartered Accountants Ordinance, 1961 (the "**CA Ordinance**") the preamble reads as follows:

*"**To make provision for the regulation of the professional accountants**. WHEREAS it is expedient to make provision for the regulation of the profession of accountants: and for that purpose to establish an Institute of Chartered Accountants."*

15. The stand taken by the Appellant is that an association of undertakings would, for instance, be a voluntary association of professionals, manufacturers, distributors or others, whereas the Appellant is a statutory regulatory body. However, on behalf of the Appellant, while it was not denied that even a regulatory body could at times act as an association, it was emphasized that the Appellant is by no means an association.

16. In ***Wouters v Algemene Raad van de Nederlands Orde van Advocaten (C309/99) (ECJ) European Court of Justice 19 February, 2002***, relied upon by the Appellant on a different point, we note some interesting observations in this regard:

> "*registered members of the bar in Netherlands carry an economic activity and are therefore undertakings…it appears that a professional organization such as the Bar of the Netherlands must be regarded as an association of undertakings within the meaning of Article 85(1) of the Treaty…*"

17. Regarding the question, in ***Wouters,*** whether the regulation that was passed (concerning the regulation of the profession) was exempt from competition law because the Bar also had a public policy role, the court specifically stated that when adopting such a regulation, a professional body is "*neither fulfilling a social function based on the principle of solidarity…it acts as a regulatory body of a profession, the practice of which constitutes an economic activity.*"

18. In the ***Architects' Association EU Commission's Decision of 24 June, 2004***:

> *"[T]he fact that under the Act of 26 June 1963 establishing an Architects' Association the Association has the task of drawing up a code of ethics and ensuring that it is complied with cannot take this professional organization outside the scope of Article 81 of the Treaty.*
>
> *The public-law status of a national body such as the Association does not preclude the application of Article 81 of the Treaty. According to the Court, the legal framework within which agreements are made and decisions are taken and the classification given to that framework by the various national legal systems are irrelevant as far as the applicability of the Community rules on competition is concerned."* (Emphasis added)

19. Similarly, there is no dispute that the Appellant acts as a regulatory body of a profession, the practice of which constitutes an economic activity. As per Appellant's own website, it is a body of Chartered Accountants in Pakistan and represents accountants employed in public practice, business and industry, and the public and private sectors. Its objective *inter alia,* is to maintain professional standards and to promote professional values and ethics. Even *"a public law status of a national body"* such as enjoyed by the Appellant does not, in our view, precludes the application of Section 4 of the Ordinance. As manifest from the quoted definitions and the cited case law, the voluntary aspect or the regulatory status is not material in regarding an entity as an 'association'. While the above may suffice to conclude that the Appellant qualifies both to be an 'undertaking' (as discussed in paragraph-12 above) and an 'association' of undertakings, we feel it would, nonetheless, be helpful to trace the history and antecedents of the Appellant in order to appreciate the true nature of the organization, its objectives and role vis-à-vis the accountancy profession.

20. From the information available in the public domain, we note that the accountancy profession, as we know it today, began to take shape alongside introduction of the concept of limited liability in the Sub-continent. Statutory audits were introduced with the promulgation of the Companies Acts in 1850 and 1857. During 1882 to 1913, it was not necessary for an auditor to be a qualified accountant and companies used to employ lawyers as their auditors. The profession started becoming distinct in the early part of the 20th century. The Government of India formed, the 'Indian Accountancy Board' to advise the government on the conduct and development of this profession. To this end, Auditors Certificate Rules were prescribed in 1932, seeking to regulate the accountancy profession. After the establishment of Pakistan, these Rules were adopted in the interim and in 1950 a new set of Auditors' Rules (primarily based on the earlier Rules) was published for regulating the profession in Pakistan. The concept of Registered Accountant was in place, whereby a person had to meet eligibility criteria (practical training and theoretical knowledge) in order to place his name in the register maintained by the Ministry of Commerce and to use the designation of Registered Accountant. It was the Companies Act that allowed only Registered Accountants to act as auditors of public companies.

21. In 1952, Registered Accountants formed a private body known as the Pakistan Institute of Accountants to look after their own interests and to take up with the Ministry of Commerce matters affecting the profession. Its growing importance is

reflected in the fact that in June 1959, the Department of Accountancy was setup in the Ministry of Commerce with the office of Controller of Accountancy instituted to deal with the profession. Around this time, an advisory body called the 'Council of Accountancy' was also setup (under the Auditors Certificate Rules, 1950) which recommended establishment of the Institute of Chartered Accountants in Pakistan. The Department of Accountancy assisted by the Pakistan Institute of Accountants and its members prepared the draft CA Ordinance which was promulgated on 3rd March, 1961.

22. The historical background of the Appellant (as also a perusal of relevant provisions of the CA Ordinance) shows that the Appellant essentially continues to retain the ethos of its origins as a voluntary association that engages in self-regulation and can take action against its members alone. As noted above, the Pakistan Institute of Accountants, the precursor of ICAP, was established as a private body to look after interests of the profession and to take up with the Ministry of Commerce matters affecting the profession. While its form, constitution of council, or mode of operation may have changed; its inherent voluntary nature remains intact (in terms of the CA Ordinance) and its core purpose (i.e. furtherance of the interest of the accountancy profession) remains the same.

23. Also, the mere fact that out of 16 Members of the Council, four (4) are nominees of the Federal Government (including such as Chairman SECP, Chairman FBR

and Secretary Finance) would not, in our view, change the character of the organization. Moreover, out of 16 members, only four fall in this category, whereas the Council's decisions are by majority. Therefore, technically speaking, this cannot have any impact even if all such Members vote against the decision. In this regard, reference may also be made to Bureau National ***Interprofessionel du Cognac (BNIC) v Clair (123/83) (ECJ) European Court of Justice (1985).*** In this case the French government chose to extend the agreement which fixed the minimum price but even then the Court found this practice to be a violation of Article 85. (Art. 85 is now Art. 81 and corresponds to Section 4 of the Ordinance). It was held that the fact that restrictive agreements made between traders in the framework of a semi-public or public law body does not affect the application of Article 85 of the Treaty of Rome, 1957, nor does the fact that the persons signing the agreement were appointed by a Minister. The fact that a Ministerial decree makes the agreement obligatory on all persons operating in that economic sector, whether or not they are parties to the agreement, does not prevent the application of Article 85(1) Treaty of Rome 1957.

24. The Appellant also emphasized the fact that its Council's decision is final and that the general body has no powers to override such decisions. In our considered view, it is for an association to decide as to how it establishes itself and how its affairs are to be run and what mandate it gives to the governing body; structural forms do not have any bearing on the issue at hand. Also, with regard to the submission that the Council has never taken a decision upon the recommendation of the general body, it was inquired by the Bench whether any such

recommendations were even made to the Council in the past and the Appellant's response was in the negative. Therefore, no inference can be drawn on this premise that council has never taken a decision upon recommendation of the general body when no such recommendation has ever been made in the past.

25. Insofar as membership of the Appellant is concerned, we note that this continues to and remain protected through Companies Law, previously under the Companies Act and now under the Companies Ordinance, 1984 whereunder (e.g. under Section 254), a person is disqualified to be appointed as an auditor in the case of a public company or a private company which is a subsidiary of a public company unless he is a Chartered Accountant within the meaning of the CA Ordinance. Under the CA Ordinance, Chartered Accountant means a person who is member of the Institute i.e. the Appellant.

26. In view of the foregoing, we do not have any of doubt that the Appellant must be regarded as an association of undertakings within the meaning of Section 4(1) of the Ordinance and the fact that an association itself falls within the purview of the definition of an undertaking the Appellant would also qualify to be termed as an undertaking. The contentions of the Appellant in this connection are obviously untenable.

27. We now proceed to address the second issue:

Whether ATR-14 is a decision, or an agreement for the purposes of subsection (1) of Section 4 of the Ordinance ;

28. For ease of reference we are reproducing the revised ATR-14 in its relevant parts as under:

"AUDITING ATR-14
(Revised-2008)
MINIMUM HOURLY CHARGE OUT RATES AND MINIMUM FEE FOR AUDIT ENGAGEMENTS

1. The audit engagements carry immense responsibility and which has increased manifold in recent years. To meet the expectations of various stakeholders, stringent regulatory requirements and ever increasing demand to increase the level of due care, the members need to perform the audit exercising very high degree of "professional competence." Such work is also required to be properly documented to support the opinion expressed by the auditors.

2. The Council of the Institute of Chartered Accountants of Pakistan (ICAP) has recently issued a notification making it mandatory, for the firms doing audit of listed and public sector entities, to observe from 1 July 2009 ISQC 1, Quality Control for Firms that Perform Audits and Reviews of Historical Financial Information and Other Assurance and Related Services Engagements, issued by IFAC and has also notified, ISA 220 Quality Control for Audits of Historical Financial Information, ISA 230 Audit Documentation etc. These standards require extensive documentation of audit procedures and recruitment of qualified staff. Furthermore, the minimum stipend rate for audit trainees have also significantly increased. Hence, the cost to perform audit by the firms has significantly increased to ensure that quality control procedures are adequately complied with by the firms.

3. The Council of the ICAP periodically reviews and prescribes minimum hourly rates, which it considers reasonable and compatible with the increase in the cost to complete the engagements and quality of professional standards to be observed by the practicing members of the Institute. The current minimum chargeable rates as prescribed by the Council of the Institute are shown below:

	Rupees Per man-hour
Partner	*7,500*
Qualified Support Staff:	
Above 8 years	*5,000*
4 to 8 years	*4,000*
Below 4 years	*3,000*
Supervisor	*2,000*
Senior	*1,000*
Semi-Senior	*750*
Junior	*500*

4. The level of fee is to be mutually agreed between the auditor and his client, which largely depends upon the volume of work involved and estimated time to be incurred on the audit engagement. ***The Council whilst recognizing this principle is however, of the view that there has to be a minimum threshold of audit fee. To achieve the desired objective, the following minimum audit fee is prescribed (which may be increased by consent having regard to specific circumstances of an audit engagement).***

Schedule of Minimum Audit Fee:

Type of entity	***Minimum Fee***
Listed companies	
Turnover up to 500 million	*250,000*
Turnover over 500 million up to 1 billion	*300,000*
Turnover over 1 billion up to 5 billion	*500,000*
Turnover above 5 billion	*1,000,000*
Economically Significant Entities	
Turnover up to 1 billion	*250,000*
Turnover over 1 billion up to 5 billion	*400,000*
Turnover above 5 billion	*800,000*
Medium Sized Entities	*125,000*
Small Sized Entities	*75,000*

5. Minimum Audit Fee in Certain Circumstances *For audit engagements of clients in the pre-incorporation / preoperation stages or in case of sickness of the project or closed operations or discontinuation of business, the prescribed minimum audit fee chargeable by the practicing members shall be as under:*

	Listed Companies/ ESEs	***MSEs***	***SSEs***
Minimum audit fee	*Rs.75,000*	*Rs.50,000*	*Rs. 30,000*

The exception in paragraph 4(ii) above shall apply mutatis mutandis to the above paragraph 5.

6. The minimum audit fee prescribed in paragraph 4 and 5 above is exclusive of the below mentioned additional services to be rendered by a statutory auditor under the Code of Corporate Governance and for any other certifications and the professional fee for such services shall be charged separately by mutual consent.

- ***Attend the Audit Committee Meetings of clients***
- ***Issue a Review Report on Statement of Compliance with Best Practices of Corporate Governance.***
- ***Issue Review Report on half – yearly financial statements***

- ***Special certification required by regulators over and above normal scope of audit***

7. The minimum audit fee determined in accordance with this ATR shall not be less than the present audit fee of an existing client.

8. In case of joint audits, fee may be shared among the auditors as may be mutually agreed between them.

9. The fee may be reviewed annually to cover inflationary effects in costs.

10. The hourly rates and fee are exclusive of traveling and hotel expenses, out of pocket expenses and other incidental costs which would be reimbursable to auditors at actual.

11. In case of a religious or charitable institution or a company "not for profit", the practicing members may undertake to do the audit on a token fee or on an honorary basis.

12. At the time of quality control review, the reviewer will ensure the compliance of this ATR.

This Directive supersedes ATR-14 (Revised) issued pursuant to the Council's decision of 30 March, 2007 and would apply to all audit appointments made after August 31, 2008.

(197th meeting of the Council held on July 25, 2008)
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29. The word 'decision' is not a defined term and is ordinarily attributed the following meanings: '*the settlement of a question', 'formal judgment', 'the act of deciding or pronouncement*'. The term 'agreement' is defined in clause (b) of sub-section 1 of Section 2, which reads as follows:

> *"agreement <u>includes</u> any <u>arrangement, understanding or practices</u>, whether or not it is in writing or intended to be legally enforceable"* .

30. In this regard, we refer to the Commission's decision in the banking matter by the single Member of the Commission in the matter of Show Cause Notice dated 24 December 2007 whereunder, the terms 'understanding', 'arrangement' and 'practice' have been ascribed the following meanings:

'understanding' means an agreement, of an implied or tacit nature,

'arrangement' means 'the act or process of arranging', the manner in which a thing is arranged or something arranged,

'practice' connotes repetition of certain events.

31. There is no doubt that the scope of the term 'agreement' as defined under the Ordinance is very wide. We must state that in the instant case whether the revised ATR-14 is characterized as a 'decision' or an 'agreement' it would fundamentally remain and fall in the prohibited category so far as it has the object or effect of preventing, restricting or reducing competition within the relevant market in terms of Section 4(1) of the Ordinance.

32. It is an established rule that in construing a document, one has to read it as a whole and not by picking and choosing a particular paragraph or portion thereof - one has to look at its substance and not its form or title. A document is not to be read and interpreted divorced from its context. Now, viewing ATR-14 in its entirety leads one to conclude not only that ATR-14 is a decision taken by the Appellant but also it reflects an arrangement to put in place a minimum fee structure. Such an arrangement is given effect by virtue of the binding legal status that ATR-14 holds for the Appellant and its Members. In holding and treating such an arrangement as an agreement, one must bear in mind that the concept of an 'agreement' under the Ordinance is not akin to the Law of Contract. The term 'agreement' as conceived under the Ordinance 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 Ordinance. When this section is read with the definition of 'agreement' in the Ordinance, 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. Keeping the scope of the term 'agreement' in mind, ATR-14 indeed is an arrangement and an understanding by and between the Appellant and its Members. ATR-14 constitutes the 'understanding, arrangement and practice' which the Members of the Appellant had no option but to adopt and hence have entered into this 'agreement' amongst themselves and with the Appellant.

33. The 'decision', as it were, is reflected essentially in paragraph-4 ATR-14 which reads that "***The Council whilst recognizing this principle is however, of the view that there has to be a minimum threshold of audit fee. To achieve the desired objective, the following minimum audit fee is prescribed (which may be increased by consent having regard to specific circumstances of an audit engagement).***" Similarly, paragraphs **6,7&10** also mirror the pronouncement/decision of the Appellant.

34. The implementation of ATR-14 is ensured by the following:

> ***"12. At the time of quality control review, the reviewer will ensure the compliance of this ATR.***
>
> ***This Directive supersedes ATR-14 (Revised) issued pursuant to the Council's decision of 30 March, 2007 and would apply to all audit appointments made after August 31, 2008."***

35. Furthermore, it is relevant to mention that the ATR-14 was incorporated in Section 240.2 of the Code of Ethics for Chartered Accountants which states as under:-

> *"240.2 Chartered accountants in practice shall comply with ATR-14, Minimum Hourly Charge Out Rates and Minimum Fee for Audit Engagements."*

36. The Code of Ethics was issued as a directive of the Appellant's Council and any violation of the provisions of the Code comes within the mischief of Part 4 of Schedule 1 of the CA Ordinance. Importantly, this part of the Code deals with the question of professional misconduct by Members of the Appellant. It is pertinent to mention that Section 20A of the CA Ordinance refers to Schedule-I in the matter of determining professional misconduct.

37. Admittedly, the Appellant has powers under Section 27(2)(kk) of the CA Ordinance to issue directives to its Members with respect to professional matters and the Appellant issued ATR-14 circular No.9/2008 dated August 13, 2008 the last paragraph of which reads as follows:

> "*We also wish to draw the attention of the members that compliance with the directives issued or pronouncements made by the Council or any of its Standing Committees is not only the responsibility of members in practice, the members in service are also required to comply with the Council's directives or pronouncements so as not to fall within the mischief of Part 4 of Schedule I to the Chartered Accountants Ordinance, 1961.*" (emphasis added)

38. In this regard, attention is drawn to Clause 3 of Part 4 of Schedule I of the CA Ordinance reads as under:-

A member of the Institute, whether in practice or not, shall be deemed to be guilty of professional misconduct, if he-

(4) *does not supply the information called for by the Institute or does not comply with the requirements asked to be complied with or does not* ***comply with any of the directives issued or pronouncements made by the Council or any of its Standing Committees;*** (emphasis added)

39. The foregoing gives the background for the use of the word 'directive' in ATR-14 and also explains what the decision of the Council is and how it is implemented as a binding arrangement/understanding between the Appellant and its Members.

40. The question whether such an arrangement or practice was entered into voluntarily or involuntarily by the Members of the Appellant is not relevant. Perhaps, it was for this reason that penalty has only been imposed in the Impugned Order on the Appellant and not on any of its Members. The prohibition under Section 4 of the Ordinance pertains to all agreements whether these are: legally enforceable or not, with or without consideration or entered voluntarily or involuntarily, such understanding, arrangement or practice cannot be exempted on any of such grounds.

41. The third issue pertains to price fixing element in ATR-14:

Whether the minimum fee schedule as per ATR-14 can be termed as 'price fixing';

42. The Appellant's stance has been that the minimum fee in the ATR-14 represents a best estimate of the minimum cost of incurred in carrying out an audit of the different sized entities. The thrust of the argument is that it has targeted to ensure

quality and avoid undercutting amongst the Members. It is also been emphasized that the prescribed minimum fee level is not burdensome but at a level which enables auditing firms to ensure quality by retaining sufficient staff. It has even been stated that such minimum fee structure "*far from inhibiting competition, increases the choices available to consumers and gives them confidence that … they will receive quality service*"

43. We feel it is somewhat dubious for the Appellant to urge that fixing minimum fee levels ensures quality and prevents undercutting. The nexus between quality and a minimum fee structure has not been demonstrated by the Appellant. When asked, the Appellant could not provide any reason why poor quality of audits could not co-exist with a minimum fee structure nor how an improvement in audit quality necessarily follows the stipulation of minimum audit fees. Even less convincing is the avoidance of undercutting through fixing minimum fees. While it is axiomatic that the fee cannot be reduced below the minimum fee prescribed, any fee above the minimum fee can be undercut as far down as the minimum fee level. Thus, hypothetically, if the minimum fee for a particular audit assignment is Rs.250,000 and the fee actually being charged in Rs.400,000, other auditors can undercut by quoting fees between Rs.250,000 to Rs.400,000 – there is clearly an undercutting margin of Rs.150, 000 (i.e. Rs.400,000 -250,000) in this case.

44. It has been argued that before characterizing an agreement as "price-fixing", a court must determine whether the agreement constitutes "a naked restrain[t] of

trade with no purpose except stifling trade." Reliance has been placed on ***Broadcast Music, Inc. vs CBS, Inc. 441 U.S. (1/1979).*** In making such an inquiry, a court is also required to determine whether the pro competitive effects of the arrangement would be possible without such restraint.

45. At the out set, we would like to point out that the cited case of ***Broadcast Music*** is quite distinct from the one we are dealing with at present. The issue in ***Broadcast*** case was not fixing of minimum fee or price; rather it related to blanket licenses. The reason that the court delved into rule of reason evaluation of blanket licenses was because blanket licenses had not properly been investigated under anti-trust laws before. This issue and inter play between the Copyright Act, Antitrust laws and Performing Rights in the Music Industries were unique and, as such, had not been dealt with before. Hence, the court felt that to term blanket licensing as *per se* illegal without fully analyzing their benefits would be incorrect. It was observed that blanket licenses have economic benefits as is shown by the fact that even Congress in the Copyright Act had chosen to employ blanket licenses. Although, the price aspect for the blanket licenses fixed by ASCAP and BMI (who issued licenses) was discussed in the case (as a peripheral matter), it was observed that this did not restrict or infringe consumer choice as users had the option to opt for per programme license or to deal directly with the Copyright owner. The licensee did not face any legal, practical, conspiratorial impediment to obtain individual licenses. On the contrary, in the instant case, the issue admittedly pertains to a 'minimum price fixing' arrangement.

46. The Appellant has challenged the reliance placed in the Impugned Order on the judgment of the United States Supreme Court in ***Goldfarb v. Virginia Stat Bar (421 U.S.773 (1984))*.** Briefly, the facts of the case are that the petitioner tried unsuccessfully to find a lawyer to perform a title examination for less than the fee prescribed in the minimum fee schedule by the Virginia County Bar Association. It was alleged that fee schedule and the enforcement mechanism as applied to fee for legal services relating to real estate transactions constituted price fixing in violation of the Sherman Act. The Supreme Court held that the fee schedule and its enforcement mechanism constituted price fixing in that the schedule operated as a fixed rigid price floor. Based on the facts, the Court held that the respondents' activities constitute a classic illustration of price fixing, as is also pointed out in the Impugned Order: "*Moreover, in terms of restraining competition and harming consumers like petitioners the price-fixing activities found here are unusually damaging* … [because] … *consumers could not turn to alternative sources for the necessary service.*"

47. The Appellant has attempted to distinguish ***Goldfarb*** on three grounds firstly, it is stated that unlike the County Bar Association, the ICAP council is not an association; secondly, unlike the Appellant, the minimum fee imposed in Goldfarb was based on value of property involved regardless of the quantum of work required. It has been asserted that ATR-14 prescribes minimum fee, keeping in view amount of work that is required in conducting an audit and so the minimum fees scale varies according to the size of firm; and lastly, it is stated that

the minimum fee in Goldfarb was applicable on all title searches while ATR-14 is not applicable in some circumstances such as non statutory audits, and the statutory audits covered are only there relating to companies indicated in the circular i.e. listed companies, ESEs, MSEs and SSEs not of every single corporate entity.

48. As for the first peculiarity, we have already dealt in great detail how the Appellant squarely falls within the purview of an 'association' as well as an 'undertaking'. The question of reasonableness or rationality as to how the 'price fixing' formula is arrived at, is irrelevant. The Court in ***Goldfarb*** did not find the minimum fee schedule imposed by the county bar on lawyers as anticompetitive because it was unreasonable or because it over charged the consumers. The question of reasonableness in restrictions of such nature is not relevant. What is to be seen is whether such fixing of price has any competitive virtue. In ***Goldfarb*** the County Bar argued that the fee schedule was merely advisory and its enforcement mechanism did not constitute price fixing. The court observed that the record revealed a situation quite different from what would occur under a purely advisory fee.

> "*Here a fixed, rigid price floor arose from respondents' activities: every lawyer who responded to petitioners' inquiries adhered to the fee schedule, and no lawyer asked for additional information in order to set an individualized fee. The price information disseminated did not concern past standards. Cf. Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588, 45,S.Ct.586,69 L.Ed. 1104 (1925), but rather minimum fees to be charged in future transactions, and those minimum rates were increased over time. The fee schedule was enforced through the prospective professional discipline from the State Bar, and the desire of attorneys to comply with announced professional norms, see generally*

> *American Column Co., supra, at 411, S.Ct. at 121; the motivation to conform was reinforced by the assurance that other lawyers would not compete by underbidding. This is not merely a case of an agreement that may be inferred from an exchange of price information, United States v. Container Corp., 393 U.S. 333,337, 89 S.Ct. 510,512,21 L.Ed.2d 526 (1969), for here a naked agreement was clearly shown, and the effect on prices is plain*"

49. We are also not able to appreciate the purported difference that ATR-14 has restricted application unlike ***Goldfarb*** where minimum fee was applicable to all title searches. The fact of the matter is, ATR-14 applies to all statutory audits and affects a very large number of audit engagements. The contents of the ATR-14 manifestly illustrate that while there may be classification in terms of the companies and their turnover for the fee prescribed, there is no consumer choice available with respect to fee for audit vis-à-vis that particular category.

50. Paragraph-15 of the Impugned Order draws the similarities between *Goldfarb* and the present case as follows:

> *"15.The facts in Goldfarb case are identical to the case at hand:*
>
> *a) Only a member of the Virginia Stat Bar could legally examined the title; similarly, audit services for Economically Significant Entities (ESEs), Medium Sized Entities (MSEs), Small Sized Entities (SSEs) and Listed Companies can only be performed by certified chartered accountants who are members of ICAP.*
> *b) The fees were based on the value of the property involved rather than on the quantum of work to be performed, similar to ATR-14 which prescribes fees based on the turnover of the company being audited rather than the quantum of work that needs to be performed.*
> *c) The violation of prescribed minimum fee schedule was considered as misconduct; similarly failure to comply with the directive of ICAP is considered professional misconduct.*
> *d) Attorneys were practicing law under the restraint of the fee schedule; similar in the instant case, accountants are providing*

their professional services under the restraint of the directive by ICAP."

51. In our considered view, we find the similarities drawn with ***Goldfarb*** in the Impugned Order far more substantial and convincing than the differences attempted to be drawn by the Appellant.

52. In our considered opinion, upon examination of the contents of paragraphs **3,4,5&10** of ATR-14, it is abundantly clear that these relate to fixing a minimum fee scale for auditors – i.e. '*a naked restraint'* since its implementation is ensured through paragraph 12 and also by the fact that non-compliance with this fee scale would tantamount to professional misconduct.

53. It is pertinent to add that in the hearing before the single Member, the Appellant did not refer to any jurisdiction where price fixing is prevalent in the accountancy profession. However, in its Appeal, reference to a 'Report on Competition in Professional Services' published by the European Commission has been cited. The Report provides that there are some countries in the EU where minimum price fixing is in place for auditors and accountants such as Italy and fixed prices in Greece and Portugal. However, the Appellant has omitted to mention that the Report not only condemns such practices, it categorically states that "*Fixed prices or minimum prices are the regulatory instruments that are likely to have the most detrimental effects on competition, eradicating or seriously reducing the benefits that competitive markets deliver for consumers*".

54. The Appellant, in its written argument, has stated that the Member in the Impugned Order has not considered the judgment of European Court of Justice in the case of *Wouters*. It seems that either the Appellant could not comprehend the point laid down in *Wouters* or else has deliberately attempted to mislead and confuse the Bench by quoting the excerpt in isolation. The purported final point of the decision of 'ECJ' emphasized by the Appellant is: "*where a market is highly heterogenous and characterized by a high degree of internal competition …. Collective dominance would be found in the absence of structural link.*" This observation was made in *Wouters* with reference to the application of Article 86 (now Art 82) which deals with the abuse of dominant position the near – equivalent of which is Section 3 of the Ordinance. Also, the controversy in *Wouters* relates to a regulation adopted by the Netherlands Bar Association on joint professional activity regarding partnerships between lawyers and other practitioners. Under this regulation, certain professionals (such as notaries, tax consultants and patent agents) were allowed to integrate their activities with those of lawyers, while accountants were prevented from entering partnerships with lawyers. Therefore, it had nothing to do with the issue of price fixing. Hence, Appellant's reliance on *Wouters* appears wholly irrelevant.

55. The fourth issue is regarding application of the *per se* rule vis-à-vis price fixing.

Whether in determining a violation of Section 4(1) of the Ordinance the 'object' and 'effect' both have to be taken into account.

56. The Appellant's position is that the arrangement in question involves a horizontal agreement between members of a profession and "concerns an industry where the judiciary has little antitrust experience." Therefore, it is argued that the Respondent Member was required to conduct a more extensive and wide-ranging inquiry into the economic effects and actual impact of ATR-14 on the relevant market and the accountancy profession before condemning it as illegal per se.

57. In this regard, in ***Arizona vs Maricopa*** the court held:

> "*we are equally un-persuaded by the argument that we should not apply the per se rule in this case because the judiciary has little antitrust experience in the health care industry … whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike … The argument that the per se rule must be re-justified for every industry that has not been subject to significant antitrust litigation ignores the rationale for per se rules, which in part is to avoid … the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable - an inquiry so often wholly fruitless when undertaken.*" (Emphasis added)

58. The issue in Supra *Arizona* was whether the Sherman Act prohibits competing doctors in the scheme from adopting, revising and agreeing to use a maximum fee schedule in the implementation of insurance plans. Importantly, the court observed: a). price-fixing agreements could not escape per se condemnation on the ground that they were horizontal and fixed maximum prices; b). fact that professionals, were parties to price-fixing agreements, did not save them from

invalidity, nor did fact that judiciary has little antitrust experience in health care industry; c). the court also condemned any inquiry into whether the prices being fixed were reasonable or not. The court found such inquiry as useless in the face of per se invalidation. It also dismissed any public policy justifications.

59. Price fixing arrangement by professionals for instance engineers or doctors has been examined extensively in cases such as ***Professional Engineers, Arizona v Maricopa (457 US 332 (1982))*** **and** ***United States v. Topco Inc. 1972*** and courts have equivocally declared them to be per se illegal irrespective of what pro competitive justifications are offered. We do not find any force in the argument that the single Member of the Commission failed to mention that the decision in Supra *Arizona* was highly contested and was only carried by a slim majority of 4 to 3. In our view, the Appellant seems to be knit picking. Whether a judgment is unanimous, or by a heavy/slim majority – the resultant effect is the same - for all intents and purposes, principles laid down have the effect of law for the jurisdiction in question.

60. Notwithstanding the settled principle clearly enunciated in the above judgments that further inquiry and looking into the effects in agreements of such nature is neither needed nor to be looked at; it would be incorrect, in all fairness to state that the arguments of the Appellant with respect to the justifications offered were not taken into consideration by the single Member or that the application of *per se* rule has been mechanical or upon 'formalistic line drawing'. It would be helpful

to go through the observations made by the single Member in the Impugned Order:

> *"18.Related to argument of undercutting (or competitive bidding) was the argument to ensure quality of auditing in the public interest, as charging of extremely low fees is likely to adversely effect the quality of auditing. These two arguments were addressed by the U.S. Supreme Court in the National Society of Professional Engineers case.*
>
> > *Price is the "central nervous system of the economy," and an agreement that "interfere[s] with the setting of price by free market forces" is illegal on its face. In this case we are presented with an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer. While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. It operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers. As the District Court found, the ban "impedes the ordinary give and take of the market place," and substantially deprives the customer of "the ability to utilize and compare prices in selecting engineering services." On its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act.*
>
> *21. Note 2 to paragraph 4 of ATR-14, by strictly mandating the application of Minimum Fees impedes with the ordinary give and take of the market place, and substantially deprives the companies of the ability to make choices based on prices from among the audit firms. This in my view violates Section 4(1) of Ordinance and need to be condemned under Section 4(3) of the Ordinance.*
>
> *24. ICAP enforce International Standard on Auditing (ISA) 220, Quality Control for Audits of Historical Financial Information, and ISA 230 Audit Documentation, etc. ICAP will be enforcing ISQC 1 (International Standards on Quality Control) with effect from July 1st 2009. ISQC 1 will "establish standards and provide guidance regarding a firm's responsibility for quality control of audits and other assurance and related services engagements," and will apply to sole practitioners as well.*

25. *It appears from above that ICAP has sufficient quality control mechanisms in place. The representatives were asked to give the rationale for putting in the additional layer of quality control through Minimum Fees particularly in the case of audit of listed companies where only firms with Satisfactory QCR Rating can undertake the audit. The representatives were unable to provide any satisfactory reply to it. I fail to understand how minimum fees can add in assuring quality of the audit firms, who have undergone a rigorous quality control check and were granted Satisfactory QCR Rating by Quality Assurance Board. It seems that either there is an inherent distrust in the integrity of the auditors or the objective is to restrict competition by placing Minimum Fees.*

26. *When asked, if there are precedents from other jurisdictions wherein association of auditors have prescribed minimum fees, the representatives were also unable to provide any. If other countries can "reasonably expect professional persons . . . when discharging their professional duties to act professionally [, which] must include, almost by definition, a refusal to do cut-rate work for cut-rate prices," why cannot we do the same in Pakistan? In fact, the Minimum Fee does not prevent unscrupulous auditors from offering poor-quality services, and it may even protect them by guaranteeing them a minimum fee.*

27. *The European Commission in its decision date 24 June 2004, involving minimum fee set by Belgian Architects' Association noted:*

> *In any event, the [European] Commission takes the view that the establishment of a (recommended) minimum fee scale cannot be considered as necessary in order to ensure the proper practice of the architect's profession. The Association asserts that the scale may be useful in that it can act as a guideline for replies to questions from parties to the contract or from a court of law. The Commission considers that information on prices can be provided in other ways. For example, the publication of information collected by independent parties (such as consumer organisations) concerning prices generally applied, or information based on a survey, can constitute a more reliable yardstick for consumers and lead to fewer distortions of competition. The Association further claims that the scale is useful because extremely low fees may be an indication of practices that are manifestly illegal. The Commission would point out that the Association is not automatically informed of the fees demanded by architects, that extremely low fees are not in themselves sufficient proof of illegal practices, and that other elements have to be taken into account, which means that the Association can continue to perform its supervisory function without a fee scale. In addition, the scale does not prevent unscrupulous architects from offering poor-quality services, and it may even protect them by guaranteeing them a minimum fee. Furthermore, the scale may discourage architects from working in a cost efficient manner, reducing prices, improving quality or innovating. For this reason, therefore, the decision establishing the*

scale cannot be excluded from the scope of the prohibition in Article 81(1). (Emphasis added).

34. *Finally, ICAP maintained that ATR-14 is in place since 1987 and no complaints were filed by public or government functionaries. It may be mentioned here that while ATR-14 is in place since 1987, the minimum fees were only recommendatory in nature till April 2003. It was only after 2003 that minimum fees become mandatory. In the Belgian Architects' Association Case mentioned in Para 27 above, the minimum fee scale was in force since 12 July 1967, and caught the attention of the European Commission in 2002, after 35 years of its existence, when it was revised again. The European Commission imposed a fine of € 100,000.00 keeping in view the 36 years of infringement. (The minimum fee scale stayed in existence till 21 November 2003, when the EC Commission held it void under Article 81(1)). The notion of gaining legality through "prescription" is not applicable here.*

35. *In light of the above discussion, it is evident that ATR-14 violates Section 4(1) of the Competition Ordinance and is therefore void under Section 4(3) of the Ordinance.*

61. Furthermore, it was also observed in Supra ***Architects' Association*** decision that:

> *"As a preliminary, it is settled case law that the fixing of a price, even one which merely constitutes a target or recommendation, affects competition because it enables all participants to predict with a reasonable degree of certainly what the pricing policy pursued by their competitors will be, especially if the provisions on target prices are backed up by the possibility of inspections and penalties.*
>
> *The Court of Justice has also held that, even though fixed prices might not have been observed in practice, the decisions fixing them had the object of restricting competition.*

62. Regarding ATR-14 being in place since 1987 and that no complaints were ever filed by public and government functionaries; it has been rightly pointed by the single Member that the notion of gaining legality through "prescription" is not applicable here. In the Architects' case, the minimum fee scale was in force since 12 July, 1967, and caught the attention of the European Commission in 2002,

after 35 years of its existence, when it was revised again. The European Commission imposed a fine of € 100,000.00 keeping in view the 36 years of infringement. (The minimum fee scale stayed in existence till 21 November 2003, when the EC Commission held it void under Article 81(1)).

63. The Appellant has also in its written arguments relied upon ***United States v, Topco Association Inc., 405 US 596 (1972)*** in maintaining that: "*before characterizing an agreement as "price-fixing" a court must determine whether the agreement constitutes "a naked restrain[t] of trade with no purpose except stifling trade.*" We fail to appreciate Appellant's reason for reliance on this case as in no manner it supports the Appellant's stance. On the contrary, it strengthens to establish the position that price fixing is a *per se* violation. ***Topco*** dealt with the horizontal arrangement among competitors to divide and allocate territory amongst themselves. The Court found that the horizontal restraints such as the one carried out by the ***Topco*** was a *per se* violation of Section 1 and it also went on to note that *price fixing was also a per se violation of the Sherman Act.* The Court dismissed ***Topco's*** argument that its territorial allocations aimed to promote competition.

64. It would also be interesting to draw attention to EC Competition Commission's Guidelines on the applicability of Article 81 (which deals with the prohibited Agreements) of the EC Treaty to horizontal cooperation agreements in paragraph-25 which reads as under:

> "*25.Another category of agreements can be assessed from the outset as normally falling under Article 81(1). This concerns cooperation agreements that have the object to restrict competition by means of the price fixing, output limitation or sharing of markets or customers. These restrictions are considered to be the most harmful, because they directly interfere with the outcome of the competitive process. Price fixing and output limitation directly lead to customers paying higher prices or not receiving the desired quantities. The sharing of markets or customers reduces the choice available to customers and therefore also leads to higher prices or reduced output.* ***It can therefore be presumed that these restrictions have negative market effects. They are therefore almost always prohibited.***" (emphasis added)

65. We find ourselves in agreement with what has been stated in the above cited cases and for reasons detailed hereunder uphold the application of the *per se* rule to decisions/agreements of such nature i.e. price fixing.

66. The Appellant has argued that Section 4 is applicable to a particular agreement or decision only if the object and effect of such a decision is noncompetitive. We find no merit in this argument as the express words of the provision (Section 4(1)) contradict such interpretation. No reason has been given as to why the word 'or' between the word 'object' and 'effect' is to be read conjunctively. However, it will be useful to clarify that in the US *per se* rule and the rule of reason are applied to see whether the 'object' or 'effect' of an agreement is anticompetitive respectively. Whereas, in EU certain decisions/agreements owing to its nature are classified in the category of having anticompetitive 'object' i.e. without the need to examine the effects of such decisions/agreements, the same are termed and treated as having anticompetitive objects. It must, however, be borne in the mind that those falling in such *per se* category or categorized as having object of restricting competition are deemed to have anticompetitive effects.

67. Whatever economic justification particularly, price fixing arrangement may offer to have, the established jurisprudence on this issue does not envisage an inquiry into its reasonableness, be it in the EU or the US. All such decisions/agreements are prohibited because the aim and result of every price fixing agreement, if effective, is elimination of one form of competition. It involves power to control market forces and to fix the prices, be it reasonable or unreasonable - the reasonable price of today may become the unreasonable price of tomorrow. It is for this reason that "*the anticompetitive potential inherent in all price fixing agreements justifies their 'facial invalidation'*." (***SC. US Arizona and Maricopa's case***)

68. Furthermore, it is not understood as to how ATR-14 promotes competition and ensures quality service. Even, when the Appellant was specifically asked as to what are the parameters or indicators of service quality improvement; the Appellant was not able to demonstrate any link between the fee scale and an improvement in the quality of auditing services. We are of the view that prescribing a minimum fee scale may discourage auditors from working in a cost efficient manner and reducing their fees/prices. A scale that imposes or recommends a minimum fee is unlikely to protect consumers against excessive fees. The fees indicated are minimum and the auditors remain free to demand higher fee. We are also not convinced that the scale of fee reflects the proportion to the value and quantum of work involved as admittedly there is no way of ensuring the same. We fully appreciate the rationale followed in ***Belgian***

Architects Association case that the minimum fee scale may discourage auditors from working in a cost efficient manner, reducing prices, improving quality or innovating.

69. In view of what is stated above, the decision and the arrangement under ATR-14 is in violation of Section 4(1) and in view of Section 4(3) is void. Regarding the Appellant's assertion that it is authorized to issue such directives under clause (kk) of sub-section (2) of Section 27 of the CA Ordinance, it would suffice to note that any such directive has to remain subject to law. Under Section 57 of the Competition Ordinance, 2007 the Ordinance has been given overriding effect - notwithstanding anything to the contrary contained in any other law.

70. Moving on the last issue, relating to reliance on precedents from developed jurisdictions:

> ***Whether it is appropriate for the Commission to place reliance on the jurisprudence of foreign jurisdictions having developed economies such as USA and EU?***

71. Regarding the concern whether EU or US competition jurisprudence is an appropriate model for Pakistan. It needs to be appreciated that Competition Law pertains to behavioral aspects. Whether we are in EU, US, UK or Pakistan, individual motivations or incentives vis-à-vis anticompetitive practices inherently remain the same. No case has been made out by the Appellant as to why EU or US competition jurisprudence which are the recognized worldwide as the front runners in the area of competition, do not serve as appropriate guideposts for

Pakistan. The Appellant has also raised objections *albeit* without substantiating or providing any rationale as to how the relevant provisions contained in Section 4 of the Ordinance are distinguishable from the Sherman Antitrust Act and Article 81 of the European Treaty. Broadly speaking, for the purposes of this case, the issue pertains to 'price fixing' and the jurisprudence developed so far in this respect has been discussed threadbare to establish that such a decision or agreement is clearly in contravention of Section 4(1) of the Ordinance.

72. We must, however, emphasize that there is no blind following of the precedents from these jurisdictions by the Commission – there is no adjudication without due consideration and appreciation of law and facts. Moreover, while such precedents have a persuasive value, it must be recognized that the Commission is fully empowered to adopt, evolve or indigenize these principles keeping in view the exigencies of the situation at hand.

73. In view of the foregoing, fixing of minimum fee through ATR-14 on part of the Appellant is held violative of Section 4(1) of the Competition Ordinance, 2007. Consequently, such an arrangement between the Appellant and its Members is also held to be void in terms of sub-section (3) of Section 4 of the Ordinance. However, Appellant is directed to withdraw ATR-14 from the Members' Handbook Volume-II Par-II Section (c), no later than 15 days from the date of the issuance of this Order and barred from prescribing or enforcing minimum fee or fixing of fee for audit engagements in any manner whatsoever with immediate

effect. While the single Member adjudicating the matter at the original stage had taken a lenient view the fine imposed being related to non-compliance with the directive to withdraw ATR-14, the Appellant's continued insistence on maintaining ATR-14 without any justification at all leads us to conclude that a token fine is called for. Collusive price fixing is a serious violation in all modern competition regimes that should not be left unpunished unless there are cogent reasons to do so. We, therefore, impose a fine of Rs.1 million on the Appellant. In addition the Appellant will pay a fine of Rs.300,000 per day of infringement commencing from 15 days from the date of issuance of this order, in the event of non-compliance with the directives given herein above.

In view of the above, the Appeal is hereby dismissed.

KHALID A. MIRZA
(CHAIRMAN)

RAHAT KAUNAIN HASSAN
(MEMBER)

Islamabad the March 11, 2009