BEFORE THE
COMPETITION COMMISSION OF PAKISTAN
IN THE MATTER OF
SHOW CAUSE NOTICE ISSUED TO PHARMA BUREAU

(FILE NO. 68/PB/C&TA/CCP/2016)

Dates of Hearing:	November 17, 2016 April 27, 2017 May 25, 2017 September 21, 2017 February 12, 2019
Commission:	Ms. Vadiyya Khalil **Chairperson** Dr. Muhammad Saleem **Member** Dr. Shahzad Ansar **Member**
Present:	Noman A. Farooqi *Chief Prosecutor General* Assisted by Aish K. Khan
M/s. Pharma Bureau	Ms. Ayesha Tammy Haq, *Executive Director, Pharma Bureau* **Raja Muhammad Akram & Co.** Mr. Salman Akram Raja, *Advocate Supreme Court* Malik Ghulam Sabir, *Advocate* Shakeel Mughal, *Advocate*
Drug Regulatory Authority of Pakistan (DRAP)	Mr. Amanullah, *Director Pricing* Mr. Abdul Ghaffar Deputy Director Pricing Mr. Asad Ishaq, *Assistant Director, Pricing*

ORDER

1. This order shall dispose of the proceedings arising out of Show Cause Notice No. 35/2016 dated 13 October 2016 (the "**SCN**"), issued under Section 30 of the Competition Act, 2010 (the "**Act**"), to the Pharma Bureau of the Overseas Investors Chamber of Commerce and Industry, Karachi (the "**Pharma Bureau**"), by the Competition Commission of Pakistan (the "**Commission**"), for *prima facie* violation of Section 4 of the Act.

FACTUAL BACKGROUND

2. The Pharma Bureau, registered under the Companies Ordinance, 1984 (Now Company Act, 2017) is an association of undertakings within the meanings of Section 2(1)(q) of the Act. The association is the representative body of more than 20 multinational pharmaceutical companies (hereinafter, "**MPCs**" or "**Member Undertakings**") engaged, *inter alia,* in the business of manufacturing, distributing and/or marketing of various drugs/pharmaceutical products for therapeutic uses across Pakistan.

3. In early 2016, multiple news reports surfaced in leading newspapers *such as* "Dawn," "The News," "The Pakistan State Times," "Express Tribune," and the website "www.medicalnewspk.com", highlighting and alleging that a number of MPCs have increased prices of a range of medicines up to 300% at the behest of the Pharma Bureau or otherwise. After an initial probe, the Commission, on 22 April 2016 took *suo motu* notice of the unprecedented price hike of various therapeutic medicines. An enquiry committee (the "**Enquiry Committee**") was authorized to conduct an enquiry into the actual/possible/suspected/alleged violations of the Act by the Pharma Bureau and its Member Undertakings.

4. In view of the foregoing, the Commission, pursuant to Section 34 of the Act, also authorized an inspection of the premises under the use of the Pharma Bureau located in Karachi on 27 April 2016 as a result of the search and inspection documents/material relevant to Commission's enquiry were impounded.

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5. Subsequent to the inspection, the Enquiry Committee examined the impounded documents, collected information/evidence from various stakeholders including the Drug Regulatory Authority of Pakistan ("**DRAP**"), and prepared an enquiry report on the potentially anticompetitive conduct and practices, specifically under the purview of Section 4 of the Act. The enquiry report dated 17 August 2016 (the "**Enquiry Report**") concluded that the Pharma Bureau and its Member Undertakings were in *prima facie* violation of Section 4 of the Act.

6. Based on the findings of the Enquiry Report, the Commission decided to initiate proceedings under Section 30 of the Act and issued the SCN to the Pharma Bureau containing the alleged violations and directions to submit a written reply within fourteen days and to appear before the Commission to avail the opportunity of being heard. The relevant parts of the SCN are reproduced herein below:

> *"5. Whereas, in terms of the Enquiry Report in general and paragraphs 4.1, 4.2 and 4.3 in particular, Pharma Bureau and its Member Undertakings appear to have been involved in sharing of* ***strategic data*** *and* ***commercially sensitive information,*** *providing* ***continuous updates*** *and comprehensive* ***overview of prices (price levels, increases, percentages), costs, profits, demands,*** *and* ***the industry as a whole, which have been used to deliberate upon and prepare recommendations, suggestions, directions and agreements on increase in prices*** *of various pharmaceutical products by MPCs through the forum of Pharma Bureau in prima facie violation of Section 4 of the Act; and*
>
> *6. Whereas, in terms of the Enquiry Report in general and paragraph 4.4, 4.5 and 4.6, Pharma Bureau and its Member Undertakings appear to have been* ***engaged in demanding across the board increases in prices*** *and* ***operating in a collusive*** *and* ***cooperative manner to influence the pricing policies*** *which prima facie is likely to constitute an infringement of Section 4 of the Act; and*

7. Whereas, in terms of the Enquiry Report in general and paragraph 4.7 it appears that Pharma Bureau and its Member Undertakings have been ***engaged in discussions on prices from time to time and have adopted decisions*** *on multiple occasions, including in early 2016, to implement increase in prices of various pharmaceutical products for therapeutic uses, which prima facie constitutes violations of Section 4 of the Act; and*

8. Whereas, in terms of Enquiry Report in general and paragraphs 7.1 to 7.6, Pharma Bureau and its Member Undertakings, prima facie, have been engaged in anti-competitive practices by agreeing upon and adopting decisions(s) that have the object and/or effect of preventing, restricting and reducing competition within the relevant market in prima facie violation of Section 4 of the Act [...]"

REPLY TO THE SHOW CAUSE NOTICE, WRITTEN SUBMISSIONS AND HEARINGS

7. In response to the SCN, Pharma Bureau, through its legal counsel, submitted its reply, which is summarized as follows:

(a). Contrary to findings of the Enquiry Report on the relevant market, the Counsel contended that the Enquiry Committee has failed to appreciate that different pharmaceutical products constitute distinct relevant markets. For example, the anti-TB products fall in a relevant market distinct from the market for the anti-Hepatitis vaccines. Likewise, vitamins have their own distinct relevant market. The Counsel contended that it is incorrect to conceive of a single relevant market for all categories of drugs/pharmaceutical product. Determining the relevant market is a pre-requisite to proceed with the proper application of competition law principles. Furthermore, the Enquiry Report and the SCN have not identified the products in competition with one another to determine actions on the part

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of the Pharma Bureau, which is the only respondent in the present proceedings, or any individual manufacturer, which have resulted in lowering competition between the competitors in the relevant market identified in the Enquiry Report. Therefore, the market definition "**Essential medicines for multiple therapeutic uses whether prescribed by a medical practitioner or sold over the counter**" adopted in the Enquiry Report is incorrect and various drugs produced by the Member Undertakings of Pharma Bureau fall in different non-substitutable categories and cannot be considered to constitute a single relevant market.

(b). As regards, the communication of strategic data or sharing of commercially sensitive information *inter se* the Pharma Bureau and its Member Undertakings, the Counsel contended that the Enquiry Report has failed to point out a single instance on the part of the Pharma Bureau or its Member Undertakings, disclosing their costing or pricing data to their competitors, among other things. Any recommendation by the Pharma Bureau to DRAP for across the board price increase has been based on publically known facts such as consumer price index, inflation rate, exchange rate and the amount/length of time since the last increase in the price of pharmaceutical products.

(c). As regard, the interaction between the Pharma Bureau and its Member Undertakings and communication of any collective proposal or demand by the Pharma Bureau to DRAP, the Counsel submitted that the principles of competition law do not bar such activities. Placing reliance on the judgment of the U.S. Supreme Court in the case of **Eastern Railroad Presidents Conference et al. v. Noerr Motor Freight Inc., et al., [365 U.S. 127 (1961)]**, the Counsel quoted that:

> *"It has been recognized, at least since the landmark decision of this Court in Standard Oil Co. v. The United States, that the Sherman Act forbids only those trade restraints and monopolization that are created, or attempted, by the act of "individuals or combinations of individuals or corporations." Accordingly, it has been held*

that where a restraint upon trade or monopolization is the result of the valid governmental action, as opposed to private action, no violation of the Act can be made out. These decision rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch so long as the law itself does not violate some provision of the Constitution.
[Furthermore],

We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of "combination(s) ... in restraint of trade," they bear very little if any resemblance to the combinations normally held in violation of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market division agreements, and other similar arrangements."

The Counsel has relied on the aforesaid paragraphs to support his concept of Section 4 of the Act and suggested that where a restraint upon trade or monopolization is the result of the valid governmental action, as opposed to private action, no violation of the Act can be made out.

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(d). As regards, to the sharing of strategic data and commercially sensitive information, the Counsel contended that throughout the period under consideration, DRAP has been seeking stakeholders' comments on the draft drug pricing policy. These stakeholders included Pharma Bureau and its Member Undertakings and Pakistan Pharmaceutical Manufacturers Association. This engagement was mandated by the Honorable Sindh High Court vide its order dated 7 November 2014 in CP No. D5469/2013. Any information sought by the Pharma Bureau from its Member Undertakings was meant to communicate industry-wide consensus to DRAP to formulate the drugs pricing policy. Therefore, any such information stemming from the communication to DRAP do not violate any provision of the law. Referring to the two judgements of the Court of Justice of the European Union (CJEU) in **Dole Food Company Inc. v. European Commission dated 14.03.2013** and **Dole Food Company Inc. v. European Commission dated 19.03.2015** (hereinafter, "**Dole Judgements**"), the Counsel asserted that the Enquiry Report has failed to establish any pattern or frequency of the information exchange or how the suspected information exchange was conducted to facilitate implementation of any anticompetitive activity.

(e). Similarly, placing reliance on the judgement of **Shailesh Kumar v. M/s Tata Chemicals Limited and others dated 16.04.2013** as well as the Commission's order in the matter of Show Cause Notice issued to the **Pakistan Automobile Manufacturers Authorized Dealers Association** reported as **2016 CLC 289**. The Counsel stated that it is internationally accepted that any information or data that is already in the public domain does not fall under the ambit of strategic or commercially sensitive nature. Providing input to DRAP on pricing policy-making processes as well as into the substance of the policy are legitimate activities in the market. Even otherwise, it is stakeholders' right to provide such input, which the Pharma Bureau performed in its capacity as an association of leading overseas manufacturers of pharmaceutical products. The Counsel also contended that any such communication and expression are also protected by the fundamental rights ensured under Articles 17 and 19 of the 1973, Constitution.

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(f). Furthermore, the Counsel submitted that in the late 2015 and early 2016, the Hon'ble Sindh High Court upheld the right of several pharmaceutical companies to increase the prices of their pharmaceutical products to a reasonable level after years of frozen prices. The fact that one favourable Court decision led to another company seeking similar decision is a common occurrence with respect to litigation in which common question of law is involved. Some manufacturers intimated the Pharma Bureau of their intention to approach the court of law whereas some already commenced with litigation aiming to achieve an amicable settlement of serious issues arising out of arbitrary governmental and/or regulatory practices.

8. In addition, the Counsel provided an overview of the drugs regulatory and pricing framework in Pakistan, which may be summarized as follows:

(a). Drugs/pharmaceutical products are divided into "**controlled**" (*via* price control) and "**de-controlled**" categories. Under Section 12 of the Drugs Act 1976 ("**Drugs Act**"), the Federal Government is empowered to fix **Maximum Retail Price (MRP)** at which any drug specified in the notification is to be sold and most of the drugs manufactured by the Member Undertakings of the Pharma Bureau fall within the controlled category.

(b). The Federal government *vide* its notification SRO No. 471(I)/93 dated 12.06.1993 (hereinafter, "**SRO 471**") fixed MRP for the drugs specified therein. Subsequently, the Federal government introduced a price increase mechanism of controlled drugs *vide* SRO No. 1038(I)/1994 dated 16.10.1994 (hereinafter, "**SRO 1038**"), which provided for various factors to be considered in respect of fixation of MRP of drugs. These factors included the share of domestic inputs of local industrial costs of pharmaceutical industry, the share of imported inputs into the total industrial costs of the pharmaceutical industry, an annual inflation rate of Rupee against the US dollar. The Counsel stated that the pricing mechanism adopted in SRO 1038 was applied for several years. Accordingly, the MRPs of various controlled drugs were enhanced until 2001.

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(c). In 2002, the Federal government, in suppression of all its previous notifications fixing MRP of drugs, including the SRO 471 and the SRO 1038, *vide* its notification SRO No. 100(I)/2002 dated 14.02.2002 (hereinafter, the "**SRO 100**") re-fixed the MRP of drugs specified in the schedule therein. However, the new notification did not provide for any factors to be considered (as contained in SRO 1038) and no provision was made for the increase of the MRPs of drugs.

(d). The Counsel submitted that DRAP was established under the Drug Regulatory Authority of Pakistan Act 2012. In 2013, meeting and discussions between the Pharma Bureau, the PPMA and the DRAP, the Federal government, in suppression of the SRO 100, granted an inflationary adjustment of 15 percent on the MRPs of some of the products, *vide* notification SRO No. 1002(I)/2013 dated 27 November 2013 (hereinafter, the "**SRO 1002**"). However, the Federal government, *vide* its notification SRO No. F.11-2/2013-DDC (P) dated 29 November 2013 (hereinafter, "**SRO F.11-2**"), withdrew its earlier SRO 1002 with the effect of bringing MRPs back to the 2001 position wherein they would remain frozen. However, the legality and validity of SRO F.11-2 were challenged, *inter alia*, by the Pharma Bureau through Constitutional Petition **No. D-5469 of 2013** before the Hon'ble Sindh High Court, wherein the Court passed an ad-interim order on 23 December 2013 and suspended the operation of SRO F.11-2 and re-instated the terms of SRO 1002 dated 21 November 2013. Subsequently, the said proceedings were adjourned upon the Court being informed that a drugs pricing policy was underway.

(e). In 2014, the DRAP, *vide* notification No. F.No.9-12/2014-DDC (P) dated 5 March 2015, issued a drug pricing mechanism titled the Drug Pricing Policy (hereinafter, the "**Pricing Policy 2015**"). However, the said policy suffered various shortcomings that led to further litigation during 2015 and 2016.

Referring to the impounded documents made part of the Enquiry Report, the Counsel contended that each of those documents needs to be examined one by one. The Counsel's submissions and conclusions *viz.*, documents contained in Annex-A to Annex-H to the Enquiry Report may be summarized as follows:

(a). Annex-A "**Minutes of the Meeting of Pharma Bureau and its Member Undertakings (MPCs) dated 16.08.2012** (reflecting sharing of strategic data and commercially sensitive information, in particular, pertaining to pricing and market)." The Counsel submitted that the said document contains a set of proposals in response to the proposal contained in the draft Drug Pricing Policy 2012 that had been made available for comments to Pharma Bureau by the Government of Pakistan. The only item dealing with a quantitative issue is the section printed on page 9 of Annexure-A with respect to "Drugs under Selective Decontrol". There is no evidence that the said response was based on a sharing of any internal strategic data or commercially sensitive information. Rather, the threshold suggested by the Pharma Bureau was based on a generalized understanding of purchasing power of a patient, their income level and the effect of inflation on buying power. Furthermore, the proposal at page 12 of Annex-A is simply with respect to the formula to be adopted for the determination of the prices of controlled drugs that are either imported or locally manufactured.

(b). Annex-B "**Letter from Ayesha T Haq to DRAP dated 18.06.2012 captioned "Price Increase of TB Range asking for 40% increase in MRPs of TB Products,**" the Counsel argued that the said letter is simply a communication addressed to the DRAP indicating the factors that have necessitated an increase in the price of TB range products. The factors mentioned were of general incidence and did not constitute any collusive sharing of sensitive information or strategic data. Therefore, the DRAP was requested to grant a price increase in MRPs of TB products in view of Rupee depreciation, increase in the international prices of APIs as well as an increase in the cost of production due to increase in the cost of utilities.

(c). Annex-C "**Minutes of the Pharma Bureau Meeting held dated 16 April 2010 at Sanofi-Aventis, Head Office, Karachi,**" the Counsel submitted that the said meeting discussed human rights case that had been filed in the Hon'ble Supreme Court of Pakistan in which the Pharma Bureau had been asked to respond to the various issues that had been raised before the Hon'ble Court. Furthermore, the said meeting considered inputs for a Reference

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Pricing framework that had been proposed at that time to the Government of Pakistan. Furthermore, a compilation of data regarding gross and net margins on an industry-wide basis for different industries was intended to assist the Government of Pakistan arriving at a rational pricing policy and regime for the pharmaceutical industry. On the contrary, the Counsel submitted that the information that was sought to be communicated was never gathered. Hence the intended communication did not take place.

(d). Annex-D "**Minutes of Pharma Bureau Meeting at the OICCI Council Hall, Karachi dated 24 December 2008,**" the Counsel submitted that language reproduced in the Enquiry Report pertains to an intended assessment of the impact on profits of price increases granted by the government in hardship cases[1] during the year 2008. It was said that information would be gathered from member companies about the percentage impact on total sales. In any case, there is no intent to act in a collusive manner to restrict competition in the market. There is also no evidence of any collusion between any rival producers engaged in a relevant market.

(e). Annex-E "**Letter from Ayesha T Haq to CEO DRAP (Arshad Khan),**" the Counsel submitted that the letter is simply a response/input to a letter of the DRAP dated 10 November 2014. The said letter discusses the draft policy and cost-plus formula proposed for pricing while a market survey regarding the impact of the price increases in hardship cases on sales and profits was proposed. No such survey was in fact carried out.

(f). Annex F "**Letter from Ayesha T Haq [-] Law Associates dated 30 December 2013,**" the Counsel submitted that it was simply a request for opinion addressed to the legal counsel of Pharma Bureau. The precise question raise for a legal opinion was whether with respect to decontrolled product prices in excess of 15% allowed by the DRAP could be affected. There can be no objection to a Trade Association seeking a legal opinion

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[1] Hardship cases refer to those drugs or pharmaceutical products whose prices remained frozen since 2001.

with respect to a question of law of general interests to members. The fact that members of the Pharma Bureau had been petitioning the DRAP for price increases of more than 15% that the DRAP had granted after a period of twelve years was public knowledge. Therefore, reliance on the aforesaid letter is of no significance whatsoever.

(g). Annex-G **"Hand Written Notes on recorded Minutes of Meeting of Pharma Bureau held at Sanofi-Aventis, Karachi dated 25 March 2009,"** the Counsel submitted that the handwritten notes regarding input to be provided to the government about across the board price increases for different products whose prices had remained frozen for a signiifcant length of time. Hence, the said document does not constitute any collusive activity on the part of the member of the Pharma Bureau.

(h). Annex-H **"Minutes of the Pharma Bureau Meeting dated 26 December 2007,"** the Counsel submitted that the minutes reflect the efforts of the Pharma Bureau to provide factual inputs to the Government of Pakistan to assist in the formulation of the pricing policy. The document simply states the contents of a presentation that was to be made before the Secretary Health, Government of Pakistan on 27 December 2007 by a delegation of Pharma Bureau.

10. Referring to the paragraphs 4.2 and 4.3, the Counsel contended that it was wrongly concluded that since at least 2007, the Pharma Bureau and its Member Undertakings have been involved in constant sharing of strategic data and commercially sensitive information, especially with reference to costs, profits, and demand in the pharmaceutical industry. Furthermore, no information pertaining to cost, profits and demand have been aggregated to arrive at a consensus for an increase in the price of various pharmaceutical products. According to the Counsel, the making of recommendations to the government/DRAP in response to proposed industry-wide increases or even otherwise keeping in view the common elements effecting costs (such as inflation and currency depreciation) does not constitute a violation of Section 4 of the Act.

11. The Counsel's submissions *viz.*, documents contained in Annex-I to Annex-T to the Enquiry Report may be summarized as follows:

(a). Annex-I "**Letter by Pharma Bureau to NHSRC regarding Draft Drug Pricing Policy dated 02 March 2015** (wherein Pharma Bureau has commented on the policy and recommended various ranges of increases in price of various scheduled and non-scheduled drugs)," the Counsel argued that the letter by the Pharma Bureau contains information from regional jurisdictions relevant factors and draws attention to various publically known facts such CPI. General proposals were made about the factors to be considered in formulating the Drug Pricing Policy and awarding price increases. The said letter does not evidence any action that could diminish competition in any relevant market.

(b). Annex-J "**Minutes of the Members Meeting of the Pharma Bureau held on 15 July 2014 at OICCI, Karachi** (wherein Pharma Bureau and its Member Undertakings have decided to force DRAP to make them part of the pricing policy)," the Counsel argued that the said minutes raise general concerns about the manner in which the drug pricing policy was formulated, without inclusion of the Pharma Bureau or the PPMA.

(c). Annex-K "**Minutes of the Meeting of Pharma Bureau dated 30 April 2014** (wherein Pharma Bureau member undertakings agreed to adopt a common policy with regards to pricing policy)," the Counsel submitted that the said minutes reflect the discussion of a general issue without evidence of any action that could be said to diminish competition in a relevant market. Rather, the extract reproduced simply says that the industry should push the government to formulate the transparent pricing policy and the efforts undertaken during 2013 in this regard to be continued.

(d). Annex-L "**Comments by Pharma Bureau on Draft Pricing Policy dated 14 November 2014,**" the Counsel submitted that the draft pricing policy was then being considered by the government and presents certain proposals. The said document is unsigned and prepared by some member of the staff of the

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Pharma Bureau. Also, it does not contain anything which could be termed as an agreement or a decision in violation of Section 4 of the Act.

(e). Annex-M "**Letter addressed to CEO DRAP by Ayesha T Haq dated 06 May 2013** (wherein Pharma Bureau has communicated price rise of up to 25% on behalf of its members)," the Counsel submitted that it refers to the meeting of the DRAP Policy Board to which the Pharma Bureau has been invited as well as other meetings. Furthermore, the letter points to various factors meriting an across the board increase in the prices of pharmaceutical products. A minimum price increase of 25% was sought not because of any sharing of strategic data or commercially sensitive information, but only because nearly 70% of the products had not been given any increase since 2001. Consequently, given depreciation and inflation, an increase of at least 25% was considered justified.

(f). Annex-N "**Letter by Pharma Bureau to Ministry of Industries & Services dated 30 August 2012** (discussing pricing policy and Pharma Bureau member undertakings agreement on a range of increase in prices of across the board)," the Counsel submitted that the letter seeks to raise general issue of concern to the Pharmaceutical industry and there is nothing that could be taken to lower competition in the relevant market. In addition, the said letter recalls that during the meeting a suggestion were made to a 15% to 20% increase in pharmaceutical prices pending the formulation of a comprehensive pricing policy to provide some relief to the financially squeezed manufacturers.

(g). Annex-O "**Minutes of the Pharma Bureau Meeting dated 31 July 2012 at OICCI Karachi** (The meeting suggests Pharma Bureau and its member undertakings consensus to lobby in respect of formula for pricing of drugs)," the Counsel submitted that the said minutes discuss a draft pricing policy prepared by the government that has been circulated amongst the members. The minutes as reproduced in the Enquiry Report simply state that a formula for pricing to be incorporated in the drug pricing policy would be discussed with the Secretary NHRSC and the Cost Accountant. Nothing in these

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minutes could be categorized as evidence of sharing of strategic data or commercially sensitive information of any sort.

(h). Annex-P "**Minutes of Pharma Bureau Meeting dated 01 March 2010 in the Conference Room of Sanofi-Aventis, Karachi,**" the Counsel submitted that the extract reproduced in the Enquiry Report, and presumed to be found offensive, simply states what had happened in the meeting of the Pricing Policy Board of the government held on 22 February 2010. It was recalled that while the industry had recommended an 8% increase in the price of decontrolled drugs, the government was considering a cap of 7%.

(i). Annex-Q "**Minutes of Pharma Bureau Meeting dated 30 December 2009 in the Conference Room of OICCI Karachi,**" the Counsel submitted that the document is titled as "Update on Pricing Policy Board Meeting on 15 September 2009" is simply a summary of the proceedings of the meeting of the pricing policy board of the government held on 15 September 2009.

(j). Annex-R "**Minutes of Pharma Bureau Meeting dated 10 July 2009 at Sanofi-Aventis Head Office Karachi,**" according to the Counsel is the minutes of the meeting of the Pharma Bureau held on 10 July 2009. The extract reproduced simply reiterate the fact that during an interaction with the government the serious concern caused by the absence of a pricing policy to the government.

(k). Annex-S "**One of the several emails by Pharma Bureau to Otsuka Pakistan Private Limited and other member undertakings (MPCs),**" according to the Counsel is simply an invoice for the payment of the subscription amount for the membership of the Pharma Bureau.

(l). Annex-T "**One of the emails by Pharma Bureau to Chiesi Pakistan Private Limited and other member undertakings (MPCs),**" the Counsel stated that it is an invoice issued by the Pharma Bureau to one of its members seeking a contribution towards payment of legal fees incurred by the Pharma Bureau. The said invoice refers to the percentage share of sale turnover as

reported by the publication produced by M/s IMS, a well-known international audit company.

12. Further elaborating on the nature and substance of the alleged information sharing and agreements between the Pharma Bureau and its Member Undertakings, the Counsel argued that a recommendation for across the board increase in prices were made by the Pharma Bureau in view of the fact that pharmaceutical prices had not been increased in Pakistan since 2001. Consequently, it was essential for an across the board price increase based on the impact of factors applicable to all manufacturers *such as* general inflation and currency depreciation. Making recommendation by way of input to assist in carrying out the regulatory functions does not constitute a violation of the Act in any manner. Furthermore, the conclusion on the exchange of commercially sensitive information contained in paragraph 4.3 of the Enquiry Report is baseless as none of the documents directly or indirectly adduces any evidence or attempt on the part of the participants to monitor and achieve anticompetitive coordination. As regards, to the analysis contained in paragraph 4.6 that the Pharma Bureau has collected costs and sales data of its Member Undertakings and produced statistics on the relevant market which were used to influence government policies and that such activities extended beyond the legitimate bounds of a trade association is flawed. The Counsel asserted that no data pertaining to costs and sales of member undertakings was collected by the Pharma Bureau apart from the data available in the public domain such as inflation rate, currency depreciation, and other publically known prices. According to the Counsel, the fact is that various inputs and recommendations provided by the Pharma Bureau were consistently overlooked by the government.

13. The Counsel's submissions *viz.*, documents contained in Annex-U to Annex-EE to the Enquiry Report may be summarized as follows:

(a). Annex-U "**Pharma Bureau's Letter to DRAP regarding Drug Pricing Policy dated 06 April 2015,**" according to the Counsel the said letter simply provides input about various regional and local regulatory practices pertaining to price fixing of drugs/pharmaceutical products. The Counsel also submitted that the recommendation made as regards to the drug pricing policy in the light of various factors were accepted by DRAP in a meeting

held on 4 February 2015. Therefore, such communication with DRAP is not barred.

(b). Annex-V "**Pricing (Pharma Bureau's Internal Memo) [undated],**" the Counsel argued that the memo merely contains some notes taken by some staff member of the Pharma Bureau. The point noted in the Enquiry Report concerning the need for price increases of medicines that have become unviable to produce and may not be accessible to patients, simply reflect a factual noting by some staff members of the Pharma Bureau. The notes as regarding the failure of the government to abide by the assurance given by it in pursuance to the pricing policy that was notified in March 2015 are also unexceptionable.

(c). Annex-W "**Handwritten Notes on Papers bearing the Stamp of OICCI of whom Pharma Bureau is a sub-committee in what appears to be period immediately preceding the recent price increases by multi-national pharmaceutical companies,**" the Counsel contended that the said annexure contains handwritten notes maintained by the staff of the Pharma Bureau. The reproduction in the Enquiry Report from the said handwritten notes has juxtaposed various items and placed them out of context. This private noting by the Pharma Bureau's staff member does not constitute any agreement or arrangement between the Member Undertakings.

(d). During the arguments before the Commission, the representative of DRAP pointed to said handwritten notes which state, inter alia, "Nadeem; challenge the policy then raise prices". According to the Counsel, the said note simply records a comment made by some attendee at a meeting that individual manufacturers should not increase prices without having obtained a court order in legal proceedings challenging the policy in force at the time. The Counsel maintained these comments simply reflect the correct course of action to be followed in CP No. 1290/2015.

(e). The Counsel contended that the fact that various members of the Pharma Bureau were aware of the ongoing litigation before the court was considering filing individual cases based on orders obtained by others in the cases filed

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earlier constitute no violation of any provision of the Act. Such discussion of the ground on which various acts or omissions on the part of the Government/Regulator may be challenged does not attract the provisions of the Act. Consequently, the note pertaining to Legal Heads meeting of 10 September 2015 is no evidence of any act that can be said to reduce any aspect of competition between the competitors in the relevant market. While the rest of the noting reflect, concern expressed by various individuals regarding arbitrary price fixation by the Government/Regulator. Alternative price fixation proposals were considered with a view to discuss the matter with the Regulator.

(f). Annex-X "**Standby Statement by Ayesha T Haq captioned 'Increase in the prices of registered medicines under 'Hardship' cases submitted to [DRAP] during 2013-15 and inflationary price adjustment on medicines classified as decontrolled (non-scheduled),**" the Counsel submitted that the said statement was only meant to explain the developments within the pharmaceutical sector to the public at large, were the need for such an explanation to arise. Hence, the said statement is wrongly characterized as a decision allotted by the Pharma Bureau and its Member Undertakings. The said statement was in fact never required to be used, although it was based on a correct assessment of the facts. In support of its contentions, the Counsel submitted that the Executive Director of the Pharma Bureau prepared the statement based on publically known facts of court orders permitting price increases in December 2015 and January 2016 that the manufacturers had been granted by the Court.

(g). Annex-Y "**Request by Pharma Bureau to DRAP for across the Board Price Increase dated 16 August 2012,**" the Counsel submitted that the said document appears to be an extract from a summary prepared for engaging with DRAP. It is, however, not known whether the said documents were used for any purpose whatsoever.

(h). Annex-Z "**Pricing Policy Vision (Internal Memo) [undated],**" the Counsel submitted that the said annex appears to be a set of discussions points prepared by some unidentified person. The fact that the proposed demand

included the demand that an across the board price increase of 25% be granted to all drugs that have not had their prices adjusted since 2001 based on depreciation and inflation, which constitutes neither collusive price fixation nor any sharing of strategic data or commercially sensitive information.

(i). Annex-AA "**Minutes of the Meeting of Pharma Bureau dated 23 January 2013,**" the Counsel submitted that the said meeting considered the fact that the Drug Regulatory Authority was not interested in a pricing policy but only wished to grant price increases on a case to case basis on the grounds of hardship. Various ways of presenting the proposals of the Pharma Bureau were considered.

(j). Annex-BB "**Minutes of the Meeting of Pharma Bureau dated 06 June 2012,**" the Counsel submitted that the said minute recorded suggestions that were made for urging a rational price increase and a price policy. The said minutes reflect a normal and reasonable desire on the part of a trade association to engage with its regulator.

(k). Annex-CC "**Presentation by Pharma Bureau and OICCI dated 23 January 2013**," the Counsel stated that various presentation slides reproduced in the Enquiry Report discussing a three-pronged reflect a strategy to deal with the issue of pricing and the draft Drug Pricing Policy 2012. The Counsel contended that drawing up of a strategy in order to carry out advocacy is an entirely legitimate function of the trade association.

(l). Annex-DD "**Pharma Bureau's Letter to Ministry of Industries & Services dated 30.08.2012,**" according to the Counsel it is a letter addressed to the Secretary, Ministry of Industries and Services raising general issues of concerns including the need for a 15% to 20% across the board immediate price increases as was the need of a substantial number of manufacturers.

(m). Annex-EE "**Briefing on the 9th Drug Pricing Committee meeting dated 24 February 2010,**" the said minutes, according to the Counsel, simply

record the developments that had taken place in the meeting of the Drug Pricing Committee (DPC) on 24 February 2010.

14. While concluding the arguments, the Counsel stated that the conclusions drawn in the Enquiry Report alleging allocation of decisions on price increases under the auspices of the Pharma Bureau during 2013 and 2015/2016 are incorrect and baseless. There existed no decision or arrangement between the Pharma Bureau and its Member Undertakings or even amongst the Member Undertakings concerning price increases. The Counsel reiterated that many pharmaceutical manufacturers increased prices in February 2016 in light of court orders issued in the aforesaid petitions or otherwise filed by the companies. The fact is that once a single manufacturer had obtained interim relief from the Hon'ble Sindh High Courts, other would follow the suit seeking similar relief. Thus, it was as a result of the set interim orders issued by the Court that one could view the actual price increase in the market after the stock in printed price had been disposed of.

15. It is noted that since the initiation of the proceedings, the Commission had also requested the Ministry of Health (the "**MoH**") to appoint DRAP's representative(s) to assist the Commission during the course of the hearings. The MoH appointed two officers of the DRAP in this regard. In response to the question posed by the Bench in light of the above submissions by the Counsel representing the Pharma Bureau, the DRAP representatives submitted that the factual position, in this case, may be divided into (i) conduct of the Pharma Bureau and its Member Undertakings during the formulation of pricing policy and (ii) conduct of the Pharma Bureau and its Member Undertakings after the formulation of pricing policy.

16. Whilst speaking of the duration in which the pricing policy was being framed, the Pharma Bureau was extended the status of an observer on behalf of its Member Undertakings. It was submitted that the Pharma Bureau had proposed different thresholds of increased prices and different formulas to price drugs, however, without providing any basis or economic rationale for the same. After due deliberation with the stakeholders, the pricing policy came into force in August 2015.

17. Post-policy, *vide* its letter(s) dated **19 October 2015**[2] titled "Reduction of Maximum Retail Price of drugs Under Drug Pricing Policy-2015," referring to para 6 of the policy, the DRAP wrote to individual companies for reduction in maximum retail price of the Originator Brands of drugs listed in the schedule to the policy. Following the identification of the name of the molecule (drug), originator brand and dosage form for all strengths, the DRAP has notified the company(s) as under:

> *"3. Notice is hereby given that why the maximum retail price of your above-listed drugs should not be reduced @10% as 1st-year reduction under the above said provision.*
>
> *4. Your comments shall be given due consideration. However, if no response is received by 2nd November 2015, it will be deemed that you have no comments against the proposed reduction and MRPs will be reduced without any further notice."*

18. In response to the above letter, the Pharma Bureau, *vide* its letter dated 22 October 2015, wrote that the paragraph 13(6) of the policy provides for price reduction and notification of increase under hardship cases to take place simultaneously, which is reproduced as under:

> *"(6) MRP reduction under paras 4&6 of this Policy and notification of increase under hardship cases for the first time shall take place simultaneously not later than nine (09) months from the date of notification of this Policy except for orphan drugs as identified by the Committee on orphan drugs constituted by the Policy Board."*

19. Furthermore, the Pharma Bureau wrote that under the policy, unless the guidelines for disposal of hardship cases have been issued and the same have been reviewed and decided there can be no price cut. We, therefore, seek your confirmation that guidelines have been issued and that all pending hardship cases have been reviewed and decided and will be simultaneously dealt with the price reduction as per paragraph 13(6) of the policy.

20. In addition, the Pharma Bureau wrote that no decisions are being taken on hardship cases, many of which have been pending for years making the products facing

[2] A sample of which addressed to "M/s Pfizer Pakistan Limited, Karachi" has been provided by the DRAP.

hardship more unviable which only works to the disadvantage of patients in Pakistan. Further, the matter is *sub-judice* as parts of the policy have been challenged in the Sindh High Court[3].

21. Subsequently, *vide* its letter titled "Reduction of Maximum Retail Prices of drugs under Drugs Pricing Policy 2015" dated 9 November 2015, addressed to the Pharma Bureau, DRAP wrote:

> *"2. It is to inform that hardship cases and reduction shall be dealt with according to the Policy and the Policy Board of the Authority has already formulated guidelines vide mechanism for processing of hardship cases. Accordingly, your member companies should submit comments on the reduction of MRPs of Originator Brands by 13 November 2015 so that hardship cases and reduction is processes/decided within the stipulated time frame."*
>
> *On 11 November 2015, the Pharma Bureau replied to the DRAP. The relevant extracts of the said letter are reproduced hereunder:*
>
> *"You have in your letter stated that the hardship cases and reduction in prices will be dealt with in accordance with guidelines formulated by the policy board. Despite repeated requests for the same we have never been provided with these guidelines. We have also contacted our member companies who have confirmed that they were not aware of and have not been provided with a copy of such guidelines*
>
> *[...]*
> *The Drug Pricing Policy 2015 states that a transparent mechanism is to be devised for hardship cases and that these cases are to be processed on priority and first come first serve bases, no later than 9 months from the date of the notification of the Policy, i.e. December 5, 2015. Given the current environment, we cannot believe that the approximately 1400 hardship cases will be resolved in the next 24*

[3] Noted that the pharmaceutical companies to whom the letter were originally addressed also replied along the similar lines.

days. At approximately 58 cases a day, including the weekends, we are extremely concerned as to whether there can due to application of mind to every case. It is thus quite clear, that the mechanism is far from transparent and that the cases have not been processed on priority.

Paragraph 13(6) of the DPP further states that reduction of MRP's and notification of increase of hardship cases for the first time are to take place simultaneously. Therefore, until hardship increase are given there can be no notification of reduction of any MRP.

Please provide us with a copy of the guidelines formulated by the Policy Board at your earliest."

22. Based on the DRAP's comments and communication reproduced in paras 16 to 20 above, in his written arguments, the Counsel pointed out that the letter dated 11 November 2015 addressed by the Pharma Bureau exactly states that:

"Our member companies have also informed us that they have already communicated with you and submitted their respective comments in respect of this matter. It would thus be proper for you reply them in their individual capacity."

23. The Counsel asserted that the language does not evidence any improper behaviour on the part of the Pharma Bureau or any of its members. Therefore it would appear that the DRAP's representative made a submission under the misconception that the law prohibits any interaction whatsoever between a Trade Association and its members. This is clearly not the intent of the law and a communication of such sort in not unusual.

ISSUES AND ANALYSIS

24. On careful review of the Enquiry Report, the SCN and the submissions made by the Respondents and the Learned Chief Prosecutor General, the substantive issue in the instant matter is as follows:

VSC HD

Whether Pharma Bureau has violated Section.4 of the Act?

25. This issue will be dissected by highlighting several sub issues that diverge from this main issue. For this purpose, we deem is appropriate to refer to the provision of Section 4 (1) of the Act, which is reproduced herein below:

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

A. <u>STATUS OF PHARMA BUREAU AS 'ASSOCIATION OF UNDERTAKINGS'</u>:

26. The first step in determining the violation of Section 4 of the Act, is to reach a conclusion viz., the status of the entity against whom the violation of the Act is alleged. So the first step in the instant matter is whether ***'Pharma Bureau'*** is an undertaking or an ***'association of undertaking'***. The term 'undertaking' is defined under Section 2 (1)(q) of the Act in the following terms:

> *"Any natural or legal persons, the 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."*

27. The key ingredient to determine whether an entity falls within the above-mentioned definition, it is essential to determine whether the said entity is in any way engaged in the production, supply, distribution of goods or provision or control of services, regardless of the legal status, formal structure or the way it is financed. In this regard we are in agreement with the findings of the Commission in one of its earlier order i.e. **<u>Order dated 15th December 2017 in the matter of Show Cause Notice issued to M/s Utility Stores Corporation of Pakistan (Private) Limited</u>** reported as

2018 CLD 292. This section also allows association of undertakings to fall within its ambit. In the light of paragraph 2.5 of the Enquiry Report, Associations widely operate as trade associations, with wide ranging functions, Such as, "…. *promoting ethical standards, arranging trade and exhibitions, and benchmarking to enhance industry's efficiency for public benefit….*". Though such associations usually operate to enhance competition within the industry, and in certain instances correspondence or collusion of some sort could possibly infringe Section 4 of the Act.

28. We also would like to refer to one of our earlier orders i.e. **Order dated 10 April 2015 in the matter of Show Cause Notice Issued to Pakistan Automobile Manufacturers Authorized Dealers Association (PAMADA) & its member undertakings**, reported as **2016 CLD 289**, wherein while defining the association of undertaking, the Commission observed as follows:

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

29. For the purposes of this order reference is drawn from the Enquiry Report to determine the status of Pharma Bureau as an association of undertaking. The relevant paragraph 2.5(a) of the Enquiry report is reproduced herein below:

> ***"Pharma Bureau*** *founded in 1988, is a representative body/ association of MPCs engaged in the business of production, distribution, and marketing of essential medicines in Pakistan. Pharma Bureau is part of the Oversees Investors' Chamber of Commerce and*

*Industry (**OICCI**). According to OICCI's Annual Report of 2015, there are presently 20 companies who are members of Pharma Bureau, which account for 44% of the total pharmaceutical industry in Pakistan. Thus, for the purpose of this Enquiry Report, Pharma Bureau, as an "association of undertakings" and its member undertakings (MPCs) squarely fall within the meaning and scope of Section 2(1)(q) of the Act."*

30. The MPC's mentioned below are mainly involved in marketing, manufacturing and supply of pharmaceutical products, vaccines and diagnostic tools of distinct sorts, as they fall within the scope of an "*undertaking*" as defined in Section 2(1)(q) of the Act:

I. Abbot Laboratories (Pakistan) Limited
II. Braun Pakistan (Private)Limited
III. Barrett Hodgeon Pakistan (Private) Limited
IV. Bayer Pakistan (Private) Limited
V. Chiesi Pharmaceuticals (Private) Limited
VI. Eli Lilly Pakistan (Private) Limited
VII. GlaxoSmithKline Pakistan Limited
VIII. ICI Pakistan limited
IX. Johnson & Johnson Pakistan (Private) limited
X. Lundbeck Pakistan (Private) limited
XI. Merck (Private)Limited
XII. Novartis Pharma (Pakistan) Limited
XIII. Novo Nordisk Pakistan Limited
XIV. OBS Pakistan (Private) Limited
XV. Otsuka Pakistan limited
XVI. Parazelsus Pakistan (Private) Limited
XVII. Pfizer Pakistan limited
XVIII. Pharmatec Pakistan (Private) Limited
XIX. Reckitt Benckiser Pakistan Limited
XX. Roche Pakistan Limited
XXI. Sonofi-Aventis Pakistan Limited

31. The Respondents in their submissions have not disputed this very determination and analysis viz., status of Pharma Bureau as an *'association of undertakings'*. Hence, in terms of Qanun -e –Shahadat Order, 1984, precisely, under Article 113. Fact admitted need not be proved. The finding that Pharma Bureau is an association of an undertakings remains undisputed and the Respondents do not confront this finding in their submissions. Foregoing in view, we are of the considered opinion that Pharma Bureau falls clearly under the *de jure* definition of *'association of undertakings'* and hence, is an undertaking in terms of Section 2 (1)(q) of the Act.

B. <u>RELEVANT MARKET</u>:

32. Before analyzing the conduct of the Pharma Bureau i.e. the actions thereof have the object or effect of preventing, restricting or reducing competition within the relevant market, we deem it appropriate to determine the 'relevant market' in the instant matter. It is also important in the instant matter as Pharma Bureau has categorically raised various objections on the determination of relevant market in the Enquiry Report.

33. The term "relevant market" has two ingredients, relevant product market, and relevant geographic market, which are defined under Section 2 (1)(k) of the Act as:

> *[...] 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 conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those areas."*

34. Although each component of relevant market is defined within the Enquiry Report, however, it requires further deliberation; as Pharma Bureau has raised objections thereto. A relevant product market comprises of all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices, and their intended use. The Enquiry Report concluded that, the relevant product market can be narrowed down to the market for

manufacturing, distribution and sale of essential medicines for multiple therapeutic uses whether prescribed by a medical practitioner or sold over the counter. The element of substitutability is vital when it comes to defining the relevant product market, based on characteristics, price and intended use by the consumer. Pharma Bureau has exhaustively contented this very determination in the Enquiry Report. As mentioned above in the submissions, the Learned Counsel for the Respondents has argued that there has been a failure on part of the Enquiry Committee as they have failed to distinguish that each pharmaceutical product has a distinct relevant market. The element of substitutability lacks in the conclusion and as a pre-requisite to establish an infringement of competition law rules. An example could be that, blood pressure related medicines are not interchangeable with antibiotics. They do not possess the same characteristics nor the intended use for both these medicines cater an equivalent purpose.

35. Before proceeding further we deem it appropriate to refer to earlier Orders i.e. **In the matter of show cause notice issued to M/s Wateen Telecom Limited**, reported as **2019 CLD 188** and, **Show Cause Notice issued to NFC Employees Co-Operative Housing Society Ltd**., reported as **2019 CLD 164**. In the former while dealing with ambiguity regarding determination of relevant product market, held as following;

> *21. The Commission in the instant proceedings is also of the considered view that there exists no justifiable reason to distinguish between the markets for ATV and DTV services, both forming an integral part of pay TV services as a whole. The Commission is also fortified in its view that DTV is merely a further development of ATV technology and therefore neither of them constitute a separate relevant product market from a competition point view.*
>
> *22. Moreover, in terms of market players, all pay TV operators build up the relevant market of "pay TV services". Therefore, the provision of packages of TV programmers to final users by operators of satellite FTTH/ IPTV digital platforms as well as analogue based cable operators or analogue TV providers through HFC, are all classified as the same relevant market for the provision of pay TV services as consumers are provided with a very similar service for the sane*

intended use (regardless of the applied technology) with a slight variation in price, quality and characteristics.

36. In the latter Order the former was endorsed. The converging point closing a relevant product market is that the consumers are provided with a very similar service for the same intended use, though there could be minute differences in price and characteristics. The above referred precedent of the Commission contains a detailed analysis based on the concept of demand side substitution i.e. consumer's perspective. To attach coherence to the instant matter considering the submissions of the Pharma Bureau, it would be unreasonable to impose an invariable justification for pharmaceutical products of all types. In the analysis of the price increase in the Enquiry report on Paragraph 6.2, according to the record shared by DRAP, 15 registered MPC's with Pharma Bureau had increased their prices until the month July 2016. Considering the impact of price increase on different therapeutic drugs each category will be discussed separately.

(a). **Medicines for the treatment of cough and cold**: For the medicine of cough and cold, the increase in MRPs is ranging between 15% and 105%. The MPC's that are involved in this price hike were GSK, Sanofi, Abbot, Pfizer, Merck and Bayer. The medicines for cough and cold namely, Actified P. Elixir, Tixylix cough syrup, Actified DM, Cofcol Elixir, Corex-D,Cosome,Cosome-E are substitutable based on their intended use and conform to the demand side substitution requirement hence, contrary to the findings of the Enquiry Report, hence, we are of the opinion that this is relevant product market of its own.

(b). **Medicine for the treatment of Fever and pain:** For the medicine of fever and pain, the increase in MRPs is ranging between 5.78% and 200%. The MPC's that are involved in this price hike were GSK, Pfizer and Reckitt. The medicines for fever and pain namely, Panadol CF Tabs, Disprol Tab, Disprin Tab and Ponstan Forte are substitutable based on their intended use and conform to the demand side substitution requirement, hence, contrary to the findings of the Enquiry Report, we are of the opinion that this is relevant product market of its own.

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(c). **Medicine for the treatment of Malaria fever:** For the medicine of malaria fever, the increase in MRPs is ranging between 15% and 44.90%. The MPC's that are involved in this price hike were Sanofi, Pfizer, Bayer and Novartis. The medicines for malaria fever namely, Basquin, Resochin, Nivaquin and Exafal are substitutable based on their intended use and conform to the demand side substitution requirement hence, contrary to the findings of the Enquiry Report, we are of the opinion that this is relevant product market of its own.

(d). **Medicine for the treatment of Skin infection/minor cuts:** For the medicine of skin infection/ minor cuts, the increase in MRPs is ranging between 21.49% and 109.81%. The MPC's that are involved in this price hike were GSK, Pfizer and Bayer. The medicines for skin infection/minor cuts namely, Advantan cream, Nerison cream, Travogin cream, Skinoren cream are substitutable based on their intended use and conform to the demand side substitution requirement hence, contrary to the findings of the Enquiry Report, we are of the opinion that this is relevant product market of its own.

(e). **Medicine for the treatment of Heartburn and ulcer:** For the medicine of heartburn and ulcer, the increase in MRPs is ranging between 7.37% and 47.06%. The MPC's that are involved in this price hike were Pfizer and Reckitt. The medicines for heartburn and ulcer namely, Mucaine and Gaviscon are substitutable based on their intended use and conform to the demand side substitution requirement hence, contrary to the findings of the Enquiry Report, we are of the opinion that this is relevant product market of its own.

(f). **Multi-vitamins:** For multi-vitamins, the increase in MRPs is ranging between 21.06% and 122.38%. The MPC's that are involved in this price hike were AGP, Wyeth, Novartis, Abbott and Merck. Multivitamins namely, Neurobion, Polybion, Mosegor, Bejectal are mainly substitutable based on their intended use and conform to the demand side substitution requirement hence, contrary to the findings of the Enquiry Report, we are of the opinion that this is relevant product market of its own.

(g). **Medicine for treatment of gastrointestinal pain:** The increase in MRPs is ranging between 30% and 216.25%. The MPC's that are involved in this price

hike were Sanofi and Merck. The medicines for gastrointestinal pain namely, Buscopan and No-Spa Tabs are substitutable based on their intended use and conform to the demand side substitution requirement hence, contrary to the findings of the Enquiry Report, we are of the opinion that this is relevant product market of its own.

(h). **Antibiotics:** The increase in MRPs is ranging between 13.04% and 51.72%. The MPC's that are involved in this price hike were GSK, Wyeth and Abbott. Antibiotics namely, Septran, Pebrin, Augmentin, Klaricid are substitutable based on their intended use and conform to the demand side substitution requirement hence this is relevant product market of its own.

(i). **Medicine for the treatment of Diabetes:** The increase in MRPs is ranging between 15% and 254%. The MPC's that are involved in this price hike were Sanofi, Merck, Abbott, Novartis and Eli Lilly. Diabetic medicines namely, Daonil, Glucophage, Galvus and Humulin are substitutable based on their intended use and conform to the demand side substitution requirement hence, contrary to the findings of the Enquiry Report, we are of the opinion that this is a relevant product market of its own.

(j). **Medicines for gynecological treatment:** The increase in MRPs is ranging between 21% to 172%. The MPC's that are involved in this price hike were Abbott and Bayer. The medicines used for gynecological purposes namely, Duphaston and Provion are substitutable based on their intended use and conform to the demand side substitution requirement hence this is relevant product market of its own.

37. This entire discussion intersects at the very point that, the distinct nature or intended use of each type of pharmaceutical product constitutes its own relevant product market. Therefore, the medicines for cough and cold operate separately from pharmaceutical products for malaria fever resulting a total of "10" relevant product markets, contrary to "1" relevant market as determined under the Enquiry Report for the purposes of the instant matter. Despite, reaching the conclusion that there are distinct relevant market *vis-à-vis* the products, we cannot ignore the fact that there is a possibility of restriction of competition in the distinct markets, unless it is proved otherwise.

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38. To address the relevant geographic market the pertinent section, paragraph 3.5 from the Enquiry reproduced below for reference;

> *3.5 Since the medicines falling under various pharmaceutical product markets delineated above are being sold throughout Pakistan and being manufactured, distributed and marketed under sufficiently homogenous conditions of competition and regulated by the same regulatory framework, for the purposes of this Enquiry Report the relevant geographic market consists of the whole of Pakistan.*

39. The most significant element that requires further explanation is what constitutes homogenous conditions for competition? Inference can be drawn from Article 18 of the Constitution of Islamic Republic of Pakistan, 1973 (the '**Constitution**') that gives every citizen the right to freedom of trade, business and profession. For ease of reference, the provision in its relevant parts is reproduced herein below:

> ***18. Freedom of trade;*** *business or profession. -Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business:*
>
> *Provided that nothing in this Article shall prevent-*
>
> *(a) the regulation of any trade or profession by a licensing system; or*
> *(b) the regulation of trade, commerce or industry in the interest of free competition therein; or*
> *(c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.*

The conclusion derived from the definition of relevant geographic market and Article 18, with regards to homogenous conditions could be summed up as follows:

(i). *What are the rules and regulations that apply within a territory?*

(ii). *Are there any regulators operating in the said territory, if yes, is it the same law which is application for regulatory purposes or not?*

(iii). *What are the applicable tariffs and custom duties that apply?*

40. To respond to these set of questions is quite straightforward and rather settled. The pharmaceutical industry which includes local pharmaceutical manufacturers, as well as MPCs, is regulated by DRAP established under the Drug Regulatory Authority of Pakistan Act 2012, to provide for effective coordination and enforcement of the Drugs Act 1976 and to bring harmony in interprovincial trade and commerce of drugs and therapeutic products. DRAP is responsible for the regulation of the manufacture, import, export, storage, distribution, and sale of pharmaceutical products in Pakistan. This Act extends to the whole of Pakistan and the business relating to pharmaceutical products is not a provincial subject as the laws are implemented uniformly by DRAP in every part of the country. Hence, with reference to the relevant geographic market, we agree with the conclusion of Enquiry Report that the relevant geographic market in this case, extends to the whole of Pakistan.

C. WHETHER ANY STRATEGIC DATA OR COMMERCIALLY SENSITIVE INFORMATION WAS EXCHANGED BETWEEN PHARMA BUREAU OR ITS MEMBER UNDERTAKINGS?

41. In order to address this issue the findings in the Enquiry Report and Pharma Bureau's submissions will be discussed as to determine whether any strategic data or commercially sensitive information was exchanged between Pharma Bureau or its member undertakings. In this regard, we would first like to refer to the observations in the Enquiry Report, which for ease of reference is reproduced herein below:

> *4.6 ... Documents impounded at Pharma Bureau premises reflect that the association has organized numerous meetings of its member undertakings (MPCs) to discuss prices, thereby facilitating collusive practices, which prima facie are anticompetitive under Section 4 of the Act. It also collected costs and sales data of its member undertakings and produced statistics on the relevant market which it then used to influence governmental pricing policies that extended beyond the*

legitimate bounds of acceptable trade association activities including communication with the government. It is pertinent to mention that Pharma Bureau is regularly remunerated for these services by its member undertakings.

42. It has been argued by the Counsel for Pharma Bureau that any recommendation by the Pharma Bureau to DRAP for across the board price increase has been based on publically known facts such as consumer price index, inflation rate, exchange rate and the amount/length of time since the last increase in the price of pharmaceutical products. It was also argued by the Counsel for Pharma Bureau that any information or data that is already in the public domain does not fall under the ambit of strategic or commercially sensitive nature. Providing input to DRAP on pricing policy by an association are legitimate activities in the market. Furthermore, any such communication and expression are also protected by the fundamental rights ensured under Articles 17 and 19 of the 1973, Constitution.

43. Referring to the two judgements of the Court of Justice of the European Union (CJEU) in **Dole Food Company Inc. v. European Commission** dated 14.03.2013 and **Dole Food Company Inc. v. European Commission** dated 19.03.2015 (hereinafter, "**Dole Judgements**"), it has been contended by the Counsel for Pharma that Enquiry Report has failed to establish any pattern or frequency of the information exchange or how the suspected information exchange was conducted to facilitate implementation of any anticompetitive activity.

44. To reach a conclusion as to Pharma Bureau's contentions the following section would highlight the Dole Judgments followed by the evidence in the Enquiry Report befitting to conclude the issue regarding exchange of strategic data or commercially sensitive information.

45. In the light of Pharma Bureau's submission for rejecting the findings of the Enquiry Report viz., sharing of strategic information, we have thoroughly reviewed the Dole Judgements. According to the Dole Judgment, undertakings engaged in bilateral pre-pricing communications pertaining to price setting factors including, discussions on the factors relevant to the setting of quotation prices for the forthcoming weeks, discussion and disclosure of information regarding price trends. The exchange of such bilateral

information enabled the undertakings to monitor individual pricing decisions, stemming from this coordination and agreements, such coordination removes uncertainty within the market and promotes a set market trend that is anti-competitive. Briefly visiting the background facts of the Dole Judgments, the EU Commission found that certain banana importers engaged in bilateral pre-pricing during which they discussed banana price-setting factors and certain price trends relevant to the setting of their weekly quotation prices for the forthcoming week. According to EU Commission's infringement decision, the purpose of those bilateral pre-pricing communications was to reduce uncertainty as to the conduct of the undertakings concerned and therefore amounted to a concerted practice with the object of restricting competition in breach of Article 101 Treaty on the Functioning of European Union (hereinafter the '**TFEU**'). The ECJ's Judgment: after recalling that certain types of coordination between undertakings, in particular on the price, quantity or quality of goods and services, reveal a sufficient degree of harm to competition which may be considered '*per se*' infringements of competition law – without a need to examine their effects despite no direct connection between the concerted practice and consumer prices.

46. The European Court of Justice confirmed that the pre-pricing communications in question made it possible to reduce uncertainty for each of the participants as to the foreseeable conduct of competitors, and had the object of creating conditions of competition that did not correspond to the normal conditions of competition on the market, giving rise to a concerted practice infringing by object the prohibition of article 101 (1) TFEU). In accordance with the judgment in **T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van bestuur van de Nederlandse Mededingingsautoriteit, [2009] ECR 0000** the Court states that an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object. One key point of this judgment lies in the Court's confirmation that the category of restrictions of competition by object includes those related to exchanges of sensitive business information which is relevant to the issue under discussion. The European Court of Justice in Dole Judgments laid down certain

factors (the '**Dole Test**') regarding exchange of information that trigger anti-competitive outcomes, which are as follows:

a) *If it reduces or removes the degree of uncertainty as to the operation of market in question resulting in restriction of competition.*

b) *The timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded a pursuing an anti-competitive object.*

c) *A concerted practice must have an anti-competitive object even though there is no connection between that practice and consumer prices. The aim of competition law rules is not only restricted to the welfare of consumer or competitors but also plays an integral part to encourage for a smooth functioning of the market.*

d) *Subject to proof to the contrary, 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 in the market.*

47. We, now would proceed to analyze the evidence available on the record, based on the Dole Test, in order to reach to a conclusion viz., the exchange of commercially sensitive information by the member undertakings of Pharma Bureau.

48. The Enquiry Report concludes that **Annex "A":** Minutes of the meeting of Pharma Bureau and its MPCs dated 16th August 2012, reflects exchange of strategic data and commercially sensitive information, pertaining to pricing and market. The contents of documents are reproduced herein below:

"(1) All those drugs whose Maximum Retail Price (MRP) is below the threshold prices listed below, be exempted from price control:

Threshold: *These are very outdated thresholds, new values suggested*
Rs. 2.00 per Tablet/Capsule **(Rs.3.50)**
Rs.2.00 per one gram of cream, ointment, and gel **(Rs.3.50)**

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Rs.2.00 per 5ml of syrup/suspension or drops **(Rs.3.50)** Rs.4.00 per sachet or specialized dosage form **(Rs.3.50)** Rs.10.00 per injection **(Rs.20.00)**
Rs.10.00 per piece of medical device **(Rs.20.00)**

It is proposed that the prices of decontrolled drugs may be revised by up to 70% of the CPI with a limit of 10% in a calendar year. Companies would have to submit price lists to the Pricing Section, Drug Regulatory Agency of Pakistan on 1st January of each calendar year."

49. It has been argued by the Counsel for Pharma Bureau that the said documents contains recommendations/proposals requested by the Government of Pakistan in response to the Draft Drug Policy 2012. There was no exchange of strategic or internal information rather, matters such as inflation and issues regarding purchasing power of a patient were highlighted. A simple formula for determination of price for imported and locally manufactured drugs was shared.

50. Another document which has been highlighted by the Enquiry Report is the **Annex "B":** Letter from Ayesha T Haq to DRAP dated 18.06.2012 captioned "Price Increase of TB Range asking for 40% increase in MRPs of TB Products". The contents thereof are reproduced herein below:

"Our member companies, including Pfizer and Novartis, manufacture a Anti-TB range of products in different combinations and strengths according to the need and requirement of doctors and patients as well as in line with WHO guidelines. Local production of these [...] products has become economically unviable due to following reasons:

(i). Rupee depreciation versus USD
(ii). Increase in international prices of all APIs
(iii). Significant increase in cost of production due to increase in utility cost

Continuing production of these [...] products has become extremely challenging at current level of authorized prices. We therefore request

you to kindly grant 40% increase in MRPs of TB products, so that these quality manufacturers are able to continue uninterrupted supply of these important medicines."

51. The Counsel for Pharma Bureau has argued that the aforementioned document was a mere communication requesting DRAP to increase price of TB range products based on inflation, rupee depreciation and increase in production costs.

52. Another document relied upon by Enquiry Committee is **Annex "C":** Minutes of the Pharma Bureau Meeting held dated 16 April 2010 at Sanofi-Aventis Head Office, Karachi, the contents whereof are:

"Mr. Wajid informed the members that PB is in the process of validation of the data by the member companies. It was agreed that the data point would be of January 2010. It was decided to do a comparison of gross margin and net margin with other industries. Mr. Burney has offered to speak to BMA and Invest Corp, and Mr. Jooma will speak for IJI for the data."

53. The Counsel for Pharma Bureau has argued that in the said meeting human rights case that had been filed in the Hon'ble Supreme Court of Pakistan were discussed. Also, there was deliberation over pricing framework provided to the Government of Pakistan.

54. **Annex "D"**: Minutes of Pharma Bureau Meeting at the OICCI Council Hall, Karachi dated 24 December 2008, is also relied upon by the Enquiry Committee, the contents whereof are:

"It was agreed that Pharma Bureau would do an assessment of the impact on profits following increase in hardship cases over the past several PAC meetings in 2008. Mr. Riaz Hussain will write to the member companies asking for number of SKUs on which the increase was given and the % impact on total sales."

The Counsel for Pharma Bureau has argued that there is no intent to act in a collusive manner and there is no evidence of collusion between competitors within the relevant

market. The context of the extract reproduced above is an assessment of the impact on profits of price increase generated by the Government in hardship cases.

56. Another evidence is **Annex "E" :** Letter from Ayesha T Haq to CEO-DRAP (Arshad Khan)

> *"We have examined the draft policy and state for record that we do not agree with the concept and practicability of cost plus formula. "Opting for a cost-plus pricing mechanism is not practical as it involves setting of the prices of each product individually. The DRAP does not have the capacity to do so."*

57. The Counsel for Pharma Bureau has argued that the letter is simply a response to a letter of DRAP dated 10 November 2014. The content of the letter includes comments on draft pricing policy and cost plus formula proposed for pricing along with a survey regarding the impact of price increase in hardship cases, this survey was not carried out.

58. Enquiry Report has also discussed **Annex "F":** Letter from Ayesha T Haq to Pharma Bureau's Counsel dated 30 December 2013 (On behalf of Pharma Bureau and its member undertakings (MPCs), Ayesha T Haq writes relating to the price increase of 15% notified by the DRA through SRO 1002(1)/13)). The factual part of the letter indicating intention of the parties is reproduced below:

> *"You will appreciate that in many cases the DRA notified increase of 15% after a period of 12 years is insufficient and many of our members are keen to increase the prices of these products (which are legally decontrolled by more than 15 %")*

59. The Counsel for Pharma Bureau has argued that this was simply a request for opinion addressed to the legal Counsel of Pharma Bureau. A trade union could seek legal opinion pertaining to questions of law over actions of DRAP regarding increase in price of decontrolled drugs. The information was within public knowledge and hence not commercially sensitive.

60. Another evidence relied upon by the Enquiry Committee is the **Annex "G":** Hand Written Notes on the recorded Minutes of Meeting of Pharma Bureau held at Sanofi-Aventis, Karachi dated 25 March 2009, the important aspects are reproduced herein below:

> *"PB suggests 25% for products before 2002, 18% before 2007 and 7.5% after 2007."*

61. The Counsel for Pharma Bureau has argued that this document does not constitute as collusive conduct. As these were handwritten notes written to provide input to the government regarding across the board price increase. That too in response to the invitation by DRAP.

62. Another document which has been relied upon by Pharma Bureau is **Annex "H"**: Minutes of the Pharma Bureau meeting dated 26 December 2007, the contents whereof are reproduced herein below:

> *"Mr. Burney informed the members that a working team comprising of Adil Zaman, Erum Rahim, and Riaz Hussain guided by the Task Force members put together recommendations for pricing formula. He gave highlights of the presentation that the Pharma Bureau delegation will make to the Secretary Health on December 27, 2007. The presentation covered topics such as*
>
> - *SRO 1038*
> - *Annual adjustments based on CPI*
> - *Threshold Based*
> - Progressive de-control of selected categories
> - *Recommendations for fixation of prices of NCEs Hardship cases. The members took active part in the discussions and gave their views on the topics. In the end, the members agreed with the presentation and the strategy behind it."*

The Counsel for Pharma Bureau has argued that the aforesaid minutes reflect efforts of Pharma Bureau to provide factual inputs to the Government to assist in the formation of the pricing policy/formula. The documents contain content of a presentation that was

due to be made before the Secretary health, Government of Pakistan on 27 December 2007. It cannot be termed as a 'commercially sensitive' information or 'collusion'.

64. After going through the entire evidence available on the record, and reviewing the submissions made by Pharma Bureau, we are of the considered view that none of the documents/evidence reflect as understanding between undertakings to determine pricing pattern. Most of the evidence contain recommendations by Pharma Bureau in response to requests made by DRAP on pricing of pharmaceutical products. No unsolicited information was provided or discussed. Letter contained in Annex "F" is a request for legal opinion based on information available to the general public on issues such as inflation is inadequate.

65. As opposed to the Dole Test the information going out of Pharma Bureau is in the form of proposals made to DRAP or the Government. As a forum that represents welfare of its members, an exchange of information with the Government / Regulator in the shape of proposals cannot be termed as a tool to eradicate uncertainty from the market. In light of the 1st and 2nd ingredient of the Dole Test the nature of the exchange of information does not carry an anti-competitive object because, all the information passed on DRAP or any minutes of meetings recorded was merely for the purposes of providing information, stance or market trends to DRAP for a policy that would concern the entire pharmaceutical industry.

66. Hence, after thorough deliberation on every aspect of evidence and submissions of the Pharma Bureau, the information relied upon by the Enquiry Committee in the Enquiry Report, we are of the considered opinion that the no commercially sensitive or strategic information was shared using the platform of Pharma Bureau. Further, in terms of 'Dole Test' the information available in the evidence relied upon by the Enquiry Committee and the Enquiry Report does not constitute as strategic data or commercially sensitive information. The information exchange appears to have been used to prepare recommendations, suggestions, direction and agreements on increase in prices of various pharmaceutical through the medium of the Pharma Bureau that too on the desire and insistence of the regulator operating within the relevant market i.e. DRAP.

WHETHER THERE WAS COLLUSION AMONGST THE UNDERTAKINGS RESULTING IN PARALLEL PRICING:

67. To implicate in determination of the final issue. It is necessary to unfold the concept of price parallelism. Price parallelism means the tendency in an Oligopoly market for suppliers to charge identical prices. Parallel prices may come about because suppliers, recognizing their Mutual Interdependence, desire to avoid price competition, which reduces their profits, or they may come about because of deliberate Collusion between suppliers to 'fix prices' that maximize their joint profits.

68. Conscious parallelism is a term used in competition law to describe pricing strategies among competitors in an Oligopoly that occurs without an actual agreement between the players. Instead, one competitor will take the lead in raising or lowering prices, whereas, the others will then follow suit, raising or lowering their prices by the same amount, with the understanding that greater profits result. This practice can be harmful to consumers who, if the market power of the firm is used, can be forced to pay monopoly prices for goods that should be selling for only a little more than the cost of production. Nevertheless, it is very hard to prosecute because it may occur without any collusion between the competitors. Courts have held that no violation of the antitrust laws occurs where firms independently raise or lower prices, but that a violation can be shown when "plus factors" occur, such as firms being motivated to collude and taking actions against their own economic interests.

69. However, there are times when despite, parallel pricing indicating collusive behavior promoting cartelization the Courts decided otherwise and refrained from identifying such pattern as anti-competitive. The term plus factors refers to economic circumstantial evidence of collusion above and beyond the parallel movement of prices by firms in an industry. Plus, factors are the economic criteria that can assist with the diagnosis of collusion. In this regard, we deem it appropriate to refer to the judgement of U.S. Court of Appeal 3rd Circuit dated 14.09.2017 titled **"Valspar Corporation and Valspar Sourcing, Inc. v. E.I. Du Pont De Nemours and Company, (873 F.3d 185)"**. In the said appeal an alleged conspiracy to fix prices in the titanium dioxide industry in violation of Section 1 of the Sherman Act was under review. Appellant Valspar, a purchaser of titanium dioxide, claimed Appellee DuPont conspired with other titanium dioxide suppliers to fix prices. Valspar argued that the price-fixing agreement was made manifest primarily by thirty-one parallel price increase announcements issued by the suppliers. DuPont countered that the parallel pricing was

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not the product of an agreement, but rather the natural consequence of the marketplace. Specifically, DuPont posited that because the market for titanium dioxide is an oligopoly, the price movement was caused by "conscious parallelism"—an economic theory that explains oligopolists will naturally follow a competitor's price increase in the hopes that each firm's profits will increase. The District Court agreed with DuPont and granted its motion for summary judgment.

70. Another judgment, which we would like to refer is the U.S. Court of Appeals, Third Circuit judgment dated 12.01.1999, **Re: Baby food Antitrust litigation, (166 F.3d 112),** wherein the supermarket chains, and other direct purchasers of baby food brought antitrust action against baby food manufacturers, alleging conspiracy to fix, raise, and maintain wholesale prices and price levels of baby food. The Court of Appeals held that:

> *"Price-fixing, we have been instructed by the Supreme Court, "includes more than the mere establishment of uniform prices." Socony-Vacuum, 310 U.S. at 222, 60 S.Ct. 811. The circumstantial evidence addressed by plaintiffs, though voluminous, lacks the essential substance to find a conspiracy. There is no evidence of record showing reciprocal exchange of information by any executive of the defendants with price-fixing authority. Despite exhaustive and prolonged discovery, no evidence has been produced showing that, during the alleged 17-year conspiratorial period, any executive of any of the defendants with price fixing authority communicated with executives of the other defendants, either by writing, telephone or meeting. Whatever information sales representatives culled from the trade or from each other amounted to no more than an accumulation of sporadic market snippets, not an organized, concerted exchange of information among company executives or their authorized agents.*
>
> *The evidence of conscious parallelism to prove tacit collusion falls far short of being probative proof of concerted action. The market here is nationwide for the two largest defendants and considerably smaller for Nestle/Ralston; their varied products are in the hundreds. Allowances and discounts to specific customers and in specific areas are pervasive,*

even varying at times between the same customers and with the quantities purchased and the areas served. There is no evidence that in such a diffuse and frenetic discount market there was any mechanism in place to detect conspirator cheating. Without such a mechanism, no conspiracy, if it existed, could long endure.

Because Gerber, Heinz and either Nestle or Ralston collectively controlled 98% of the baby food industry nationwide, and during a prolonged period of time when wholesale food prices generally were escalating, they were an especially inviting target to attack under the Sherman Act for price-fixing. However, there is positive and unequivocal evidence that the defendants engaged in unilateral, aggressive competition limited only by budgetary considerations, cash, and market conditions.

We are cognizant that the baby food industry is highly concentrated with only three companies controlling the nationwide manufacture and distribution of their baby food products. We realize that such a scenario could facilitate explicit or tacit price-fixing. We also are aware that during the period spanned by the alleged conspiracy, wholesale food prices in the nation generally escalated; this upward movement could provide cover for non-competitive pricing practices. Furthermore, the baby food industry carries the crucial responsibility for providing much of the nutrition for almost all of the infants nationwide, an obligation that emphasizes the necessity for total compliance under the Sherman Act. As a court, however, we have the duty to examine the record carefully and decide the case fairly on the law and not on mere conjecture, ambiguous circumstantial evidence, and suspicion. The plaintiffs have not produced any evidence of an explicit agreement to fix prices and preserve market share. Drawing all inferences in their favour, they have failed to produce sufficient circumstantial evidence to prove concerted collusion that tends to exclude the possibility of independent action. See Monsanto, 465 U.S. at 768, 104 S.Ct. 1464.

Accordingly, the judgment of the district will be affirmed."

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71. In the EU, there is significant case law on this area. In the judgement dated 14.07.1972, **Imperial Chemical Industries Ltd v. Commission of the European Communities Case 48/69**, reported as **ECR 1972 Page 00619**. It was held therein that by its very nature, a concerted practice does not have all the element of a contract but may *inter alia* arise out of coordination, which becomes apparent from the behavior of the participants. Although parallel behavior may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of the competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market.

72. Building upon the case law mentioned, this issue could be concluded that despite there was a simultaneous increase in prices but this was a result of tedious attempts by the MPCs to increase prices that were frozen since 2001. The prices were increased not to avoid price competition but to cope with the existing economic challenges such as, inflation and rupee depreciation. An increase in such circumstances was justified as there was imbalance between production/manufacturing cost and selling costs, yielding minimal or no profits to the MPCs. As mentioned in preceding paragraphs, the price increase was not made to maximize joint profits. The evidence extracted from the premises of Pharma Bureau and later relied on in the Enquiry Report has been studied enough to deduce that there was no exchange of strategic data or commercially sensitive information which could lead to coherence amongst the price pattern of the MPCs, operating under the forum of Pharma Bureau.

73. Looking at the Valspar judgment, parallel prices increase is not proportionate to a price fixing conspiracy. The absence of the secret ingredient known as the "plus factors" i.e. any other additional evidence establishing the exchange of information *inter se* the Pharma Bureau Members *vis-à-vis* the pricing is not available in the instant matter. Pharma Bureau as a forum representing interests of numerous MPCs was engaged in talks with a regulator while they were in the process to prepare a pricing policy that was a matter of concern for all the parties involved. In the light of the **Baby Food judgment**, exchange of information does not amount to a violation, such a conduct does not amount to conscious parallelism. The price increase was a result of conscious economic factors prevailing and not as a planned strategy involving exchange of trade secrets.

Internationally parallel behavior in itself is not identified as concerted behavior, though it possesses fine evidentiary value in determining collusion and cartelization, however, the same must be complemented by some additional evidence which are termed by the Courts 'Plus Factors'. In the instant matter, due to the lack of substantial evidence indicating price parallelism, or collusion, we are constrained to conclude that Pharma Bureau has not violated the provisions of Section 4 of the Act.

CONCLUSION

74. Based on the above deliberations, we are of the considered view that Pharma Bureau cannot be held to have violated Section 4 of the Act by taking any decision which has the object or effect of preventing, restricting or reducing competition within the relevant market. However, we deem it appropriate to refer to one of our earlier order i.e. **Order dated 10 April 2015 in the matter of Show Cause Notice Issued to Pakistan Automobile Manufacturers Authorized Dealers Association (PAMADA) & its member undertakings**, reported as **2016 CLD 289**, wherein following guiding principles were laid down:

> *"85. The recent decision of the ECJ in the matter of **Dole Food Company, Inc. Vs. European Commission**[4], sheds further light on such practices. The Court stated that:*
>
> > *"[..] an exchange of information which is capable of removing uncertainty between participants as regards the timing, extent and details of the modifications to be adopted by the undertakings concerned in their conduct on the market must be regarded as pursuing an anticompetitive object."*
>
> *86. The decision sets a precedent for information exchange to be an infringement by object and serves as a cautionary tale for all undertakings involved in any such practices. We find it pertinent to point out the scope of this decision to emphasize the demanding approach preferred by other*

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

jurisdictions, one which we are inclined to agree with. The Court has further elucidated and provided that:

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

87. *To conclude therefore, we must stress repeatedly the importance of undertakings and associations remaining vigilant as to the threat of potential collusion and other anti-competitive practices. This view has previously been summarized by the Commission in its* **Order in the matter of Show Cause Notice Issued to M/s. Pakistan Poultry Association,** (the **'Poultry Order'**)[5] *wherein it was stated that:*

> *"We believe that trade associations can play an important role in the development of the sector they represent. The Commission has already observed in its ICAP final order that the most important aim of association is to develop consensus amongst its members regarding public policies that affect the sector. Associations also engage in activities that increase awareness of standards and technologies in the industry. At other times, associations may also serve as a platform to share useful information about the sector such as historical pricing data. Such activities are beneficial since they promote competition and competitiveness. However, associations must also be extremely careful about what sort of activities may violate competition law. Discussion, deliberation and decisions regarding purely business concerns like current and future pricing, production and marketing are anti-competitive*

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[5] Available at http://www.cc.gov.pk/images/Downloads/ppa_order_16_august_2010.pdf

and should be avoided at all costs by the associations. Associations have a responsibility to ensure that their forum is not used a platform for collusive activities. The rule of thumb is not to allow discussion, deliberations or sharing of sensitive commercial information that may allow members, who are competitors, to co-ordinate business policy. Ensuring that every, or even one, member has a profitable business is not the job of an association."

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

76. In light of the above determinations, we do not find merit in the SCN issued to Pharma Bureau. Accordingly, the SCN is hereby set aside and disposed of.

(Vadiyya Khalil)	(Dr. Muhammad Saleem)	(Dr. Shahzad Ansar)
Chairperson	*Member*	*Member*

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ISLAMABAD THE 6th DAY OF AUGUST 2019