



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

IN THE MATTER OF

(File No. 05/Dir(M & TA)/Hajj/CCP/09)

Date of hearings: 10th June 2009

Present: 2nd September 2009
Dr. Joseph Wilson
Member

Maleha Mimi Bangash
Member

Present for Pakistan International Airlines: Mr. Suhail Mahmud, General Manager (Legal Services)
Mr. Irshad Ghani, General Manager (International Affairs)

ORDER

I. Issues

1. The issues in this case are:
 - i) whether the increase in Hajj fares by Pakistan International Airline (PIA) for the year 2008 amounted to an unreasonable increase in price under Section 3(1) read with Section 3(3)(a) of the Competition Ordinance, 2007 (the “Ordinance”);
 - ii) whether the fare charged on pilgrims traveling on short duration scheduled flights amounts to unjustifiable price discrimination between pilgrims and regular passengers under Section 3(1) read with Section 3(3)(b) of the Ordinance; and
 - iii) Whether the fixation of price by mutual consultation between PIA and Saudi Arabian Airlines (SV) constitutes a violation of Section 4(1) read with Section 4(2)(a) of the Ordinance.

2. For the reasons recorded below, we affirm the first two issues and refute the third.

II. Factual Background

3. PIA was incorporated under Pakistan International Airlines Corporation Ordinance 1955; the ordinance was subsequently replaced by the Pakistan International Airlines Corporation Act, 1956. The Government of Pakistan is the largest shareholder having around 89.93 % of the total shares.¹ The rest are publicly traded on all the stock exchanges of Pakistan.

4. PIA’s main business is to provide domestic and international passenger and cargo air transport services. Apart from operating on domestic routes, PIA also serves

¹ PIA Annual Report 2007

- international routes to around 30 destinations.² As a body corporate engaged in the provision of goods and services, PIA is an undertaking in terms of Section 1(p) of the Ordinance.
5. Saudi Arabian Airlines (SV) is a state-owned company of the Kingdom of Saudi Arabia with an office and commercial presence in Pakistan. It is an undertaking in terms of Section 1(p) of the Ordinance.
 6. The Competition Commission of Pakistan (the ‘Commission’) took notice of the media reports that PIA was charging exorbitant Hajj fares and thereupon wrote a letter on 27 November 2008, to PIA to determine the facts. The letter, *inter alia*, asked PIA about the fare details for Hajj flights for the last two years, the cost break-down of fares, details of non-Hajj fares, competing airlines and specification of planes used in Hajj operations. A similar letter bearing the same date was dispatched to SV.
 7. On 28 November 2008, the Commission also wrote to the Ministry of Defense (MoD) asking for copies of all the relevant agreements and other documents related to Hajj. Reminders were sent to all three parties on 12 December 2008.
 8. The MoD replied on 18 December 2008 enclosing the Hajj Agreement 2008 (the “Hajj Agreement”) between PIA and SV and informed the Commission that Ministry of Religious Affairs (MORA) should be contacted for further details as the latter formulate the Hajj policy.
 9. PIA replied through letter dated 5 December 2008 which was received by the Commission on 19 December 2008. In its letter, PIA provided details of Hajj operations and fares for the past two years. It claimed that for the government Hajj program, and:

² Civil Aviation Report

As per Ministry of Religious Affairs, Government of Pakistan's requirements, PIA operates Hajj flights to Saudi Arabia and due to restrictions from Saudi Civil Aviation, PIA cannot carry passengers from Saudi Arabia to Pakistan; consequently Hajj flights are operated from KSA to Pakistan without load in Pre-Hajj Operation. In the Post Hajj Period, PIA similarly operates its Hajj flights with no load to Saudi Arabia to carry returning Pakistani Hajjis. This process involves 4 legs of operation during which 2 legs are empty resulting in operational cost.³

10. SV replied through a letter dated 18 December 2008 signed by its Country Manager, which was received the next day by the Commission, wherein it was stated that "as the fares for **Hajj fares were mutually agreed upon with the National Carrier of Pakistan International Airlines**, you may kindly redirect your enquiry to PIA for any further information required."⁴ (*Emphasis supplied*).
11. SV again wrote a letter on 20 January 2009 through its Legal Advisor, which was received on 26 January 2009, stating that as the state airline of Saudi Arabia, SV had the exclusive right to operate Hajj operation in Pakistan along with PIA. SV further stated that fares and other operational requirements are always finalized by mutual harmonization and meetings between PIA and SV.
12. The Commission wrote a letter to MORA on December 29 2008 and again on January 14 2009 asking for relevant information about the Hajj operations. MORA replied on 3 February 2009 enclosing the Hajj Policy 2009.
13. The Commission asked further information from PIA on 10 February 2009 and 12 March 2009 to which PIA replied on 25 February 2009 and 25 March 2009 respectively. In the 25 March 2009 letter, PIA stated that :

Government regulated Hajj fares are applicable on Hajj flights whereas 'Short Duration' Hajj fares are applied on special Extra Sections/Schedules flights. The demand for seats for Short Duration Hajj increases in the last ten days of Pre-Hajj period and for that period PIA deploys the required capacity to Jeddah by

³ Para 3 of PIA's letter dated December 5, 2008.

⁴ Saudi Arabian Airlines letter dated 18 December 2008, signed by Wadhah Aladhadh, Country Manager Pakistan.

slashing many flights from its high yield hard currency routes to ensure that our clientele is not deprived of the opportunity to perform the holy pilgrimage.⁵

14. Pursuant to section 37(2) of the Ordinance, the Commission appointed Shaista Bano, Joint Director, as Inquiry Officer who submitted the inquiry report in the matter on 30 April 2009. The relevant portion of the inquiry report summarizing its findings is reproduced below:

49. PIA *prima facie* is in a dominant position in the relevant market in terms of Section 2(1)(e) of the Ordinance.
50. The explanation provided by PIA for unreasonably increasing the Hajj fare by more than 80% as compared to the preceding year is violation of Section 3(1) read with Section 3(3) (a) of the Ordinance.
51. There is no objective justification on part of PIA for price discrimination by charging exorbitantly high air fares to Hajjis for short duration Hajj while taking them via routine commercial flights of PIA. This appears to be a *prima facie* violation of Section 3(1) read with Section 3(3)(b) of the Ordinance.
52. The act of PIA and SA of mutually agreeing on the price of provision of Hajj flight/travelling services has the effect of preventing, restricting or reducing competition within the relevant market and *prima facie* violates the provisions of Section 4(1) read with Section 4(2)(a) of the Ordinance.

15. The Commission issued a show cause notice to PIA on 5 May 2009. The relevant portions of the show cause notice are reproduced below for ease of reference:

4. **WHEREAS**, in terms of Inquiry Report, the Undertaking *prima facie* has been found to hold a dominant position in the relevant market in terms of Section 2(1) (e) of the Ordinance *inter alia* by having the exclusive right to operate special chartered flights from points in Pakistan to Medina and points in Pakistan to Jeddah and vice versa during the Hajj Season.
6. **WHEREAS**, in terms of Inquiry Report, the Undertaking has *prima facie* abused its dominant position by *unreasonably increasing* Hajj air fares by more than 80% during Hajj Season 2008 from Rs.38,500 to Rs.70,000 for South Region and from Rs.46,200 to Rs.85,000 for North Region as compared to Hajj fares in preceding years (2006 and 2007) thereby attracting violation of Section 3(3)(a) of the Ordinance.

⁵ Para 2 of PIA letter dated March 25, 2009.

8. **WHEREAS**, in terms of Inquiry Report, there is, *prima facie*, a violation of Section 3(1) read with Section (3)(3)(b) of the Ordinance as the Undertaking charged an exorbitantly high air fare of Rs.120,000 from the Hajjis who opted for a short duration Hajj and these Hajjis were taken via scheduled commercial flights of PIA to Jeddah.
9. **WHEREAS**, in view of the response received from SA, it appears that the Undertaking and SA fixed the price of provision of Hajj Services based on a mutual agreement/arrangement and this has the effect of preventing, restricting or reducing competition within the relevant market and *prima facie* appears to violate Section 4(1) read with Section 4(2)(a) of the Ordinance.

Reply by PIA to Show Cause Notice

16. PIA replied to the show cause in writing on 5 June 2009 as follows:

2. It is stated that the Air Services between Pakistan and Saudi Arabia are operated under the Bilateral Air Services Agreement signed between the Government of the Pakistan and the Government of Saudi Arabia.
3. The Air Services Agreement signed on 3rd December, 1972, allows each country to designate one airline for the purpose of operating the air services between the two countries. PK and SV both have equal rights to operate schedule services or extra sections on equal basis. In fact SV has an edge as it can operate all 30 frequencies to Jeddah, whereas PK can operate only 14. Therefore, it is incorrect suggest that PIA has monopoly on the route and has a dominant position.
4. The Hajj fares are fixed by the Ministry of Religious Affairs and not by PIA. The fares were circulated by Ministry of Religious Affairs through their Hajj Policy 2008 dated 4th August, 2008, copy thereof is enclosed herewith for your kind perusal.
5. In this respect, the meeting between PK and SV was held in Jeddah on 10th September, 2008. Minutes of the Meeting are enclosed herewith, however, for your convenience Para-3 reads as under:
6. PIA Management explained that the Government of Pakistan has announce Hajj air-fare rate in PKR as under:

STATION	FARE (PKR)
KHI	70,000
LHE	85,000
ISB	85,000
PEW	85,000
UET	70,000
MUX	85,000
LYP	85,000
SKZ	85,000

7. It is clear from the above description, PK had advised SV of the fares announced by the Government of Pakistan. Since the meeting was held after announcing of fares, it is incorrect to say that PK fixed fares in collaboration with SV.
8. The Hajj fares are fixed by the Ministry of Religious Affairs and by PIA. PIA cannot be held responsible for increase of fare for Hajj 2008, nor can it be said that PIA fixed Hajj Fares in collaboration with SV.
9. As far as issue of high fare for short duration Hajj is concerned, it is hereby explained that airlines operate with commercial objectives. For carriage of each short term Hajj, PIA had to lose two regular round trip passengers asking for seats on the dates that these Hajjis traveled out of Pakistan and back to Pakistan. Each short term Hajji was provided confirmed booking according to his/her choice by losing the opportunity to sell two round trip tickets to two passengers waiting to travel on those high demand dates that short term Hajji wanted to travel on.
10. It is further explained that PIA was not the only Airline carrying such short term Hajjis. Out of a total of 24647, PIA carried only 9077 short term Hajjis that is only 37 percent of the total traffic. If PIA had a dominant the monopolistic role, it should have carried a major portion of this traffic. PIA was in competition with other airlines and others carried 67% of this business.
11. The pricing of Hajj fare 2008 was influenced by the turbulent fuel prices which touched an all time peak of USD 145/bbl in July 2008. Through Fuel hedging mechanism the fuel price was locked in at HSD 120/bbl for Hajj operation 2008.
12. The increase in aeronautical charges, cost maintenance, exchange variation and inflation also attributed to the cost of operation the Hajj flights. However, in our opinion, we need not base our argument on detailed analysis but on the basis of denial of being in dominant position or having fixed prices.
17. The first hearing in the matter was held on 10 June 2009. During the proceedings PIA, *inter alia*, took the plea the Hajj fares were regulated by MORA and PIA only followed the instructions of MORA. PIA promised to provide the Commission with some further documents including copy of the bilateral air agreement between Pakistan and Saudi Arabia and minutes of the meeting held between PIA and MORA.
18. The Commission wrote to PIA on 15 June 2009 reminding the latter to send the promised documents. In their reply dated 19 June 2009, PIA provided the

documents except for the minutes of meeting between MORA and itself and stated that such minutes did not exist.

19. The Commission set 27 August 2009 as a date of second hearing which was re-fixed for 2 September 2009 on the request of PIA received on 26 August 2009.

20. The Commission wrote to MORA and then issued summons for documents relevant to Hajj operations 2009, including any minutes of meeting between PIA and itself, under Section 33 of the Ordinance. In compliance, MORA submitted the documents on 2 September 2009 which included minutes of meetings held between PIA and MORA, stating that it was PIA which informed the latter about the fares to be charged for Hajj.

III. Analysis

21. The issues, as stated in paragraph 1 above, in this case are:

- i) whether the increase in Hajj fares by Pakistan International Airline (PIA) for the year 2008 amounted to an unreasonable increase in price under Section 3(1) read with Section 3(3)(a) of the Competition Ordinance, 2007 (the “Ordinance”);
- ii) whether the fare charged on pilgrims traveling on short duration scheduled flights amounts to unjustifiable price discrimination between pilgrims and regular passengers under Section 3(1) read with Section 3(3)(b) of the Ordinance; and
- iii) whether the fixation of price by mutual consultation between PIA and Saudi Arabian Airlines (SV) constitutes a violation of Section 4(1) read with Section 4(2)(a) of the Ordinance.

22. Section 3 of the Ordinance, in relevant part, is reproduced below for the ease of reference.

3. Abuse of dominant position – (1) No person shall abuse dominant position.

3(2) An abuse of dominant position shall be deemed to have been brought about, maintained or continued, if it consists of practices which prevent, restrict, reduce or distort competition in the relevant market.

3 (3) The expression “practices” referred to in sub-section (2) shall include, but are not limited to :-

(a) limiting production, sales and unreasonable increases in price or other unfair trading conditions;

(b) Price discrimination by charging different prices for the same goods or services from different customers in the absence of objective justifications that may justify different prices;

Relevant Market

23. The relevant product market in this case is the scheduled and chartered air transportation services provided during the hajj season to intending pilgrims from points in Pakistan directly to points in Saudi Arabia. According to the Bilateral Air Services Agreement between the governments of Saudi Arabia and Pakistan 1972 (the “Bilateral Agreement”) only one designated carrier of each country can fly to the other country. The designated airlines are PIA and Saudi Arabian Airlines (SV). The relevant product market may be classified into two sub-markets, *i.e.*, those of regular scheduled flights for travel by pilgrims to and from within 30 days; and flights chartered to transport pilgrims within 40 day duration. Though indirect flights, that is, those transporting passengers from Pakistan to Saudi Arabia through airline’s hub in third country may provide substitutable services, but they are not part of the relevant market when it comes to Hajj pilgrims. Due to time considerations and the large number of people involved, air travel is the only feasible method of traveling to Saudi Arabia for the pilgrimage from Pakistan.

Dominance

24. PIA in its submissions has admitted that it enjoys dominant position in the relevant market. Moreover, under the Bilateral Agreement and the Hajj Agreement between PIA and SA, both PIA and SV have divided the relevant market equally between them. Hence, on account of this alone, PIA has a fifty percent market share which satisfies the presumptive test of dominance laid out in Section 2(1)(e) of the Ordinance.
25. Two separate allegations of abuse of dominance have been made against PIA. The first pertains to price discrimination between regular passengers who fly on scheduled flights between destinations in Pakistan and Saudi Arabia, and pilgrims availing the short term package and travel by the scheduled flights.

Whether the increase in Hajj fares by Pakistan International Airline (PIA) for the year 2008 amounted to an unreasonable increase in price: Excessive Pricing

26. Unreasonable prices mean prices in excess of the competitive prices. Section 3(3)(a) of the Ordinance specifically prohibits unreasonable increase in price or other unfair trading conditions by the dominant firm. Unreasonable price or higher price or excessive price has been condemned by European Court of Justice in its *United Brands* ruling⁶ (hereinafter the “ECJ”) under the basic objection that the monopolist is using his monopoly position “to reap benefits that he would not have reaped if there has been normal and sufficiently effective competition”. The ECJ held that a price is deemed excessive when “it has no reasonable relation to the economic value of the product supplied.”⁷
27. To find out whether the price is excessive the ECJ adopted two-stage test.⁸ First, both the price and the cost are compared to determine the profit margin achieved

⁶ *United Brands Company and United Brands Continental BV v. Commission*, 27/76 [1978] ECR-207

⁷ *Supra note 1* at §250. See also §251 (“This excess could, *inter alia*, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin”).

⁸ Damien Geradin, *The necessary limits to the control of “excessive” prices by competition authorities – A view from Europe*.

by the dominant firm. If that profit margin is found to be excessive, then the dominant firm's pricing policy is investigated in order to determine whether the price is unfair. While the first limb of the United Brands test focuses on a price-cost comparison to determine the excessiveness of a price, the second limb of the test suggests the need to benchmark prices.

28. The case-law indicates that dominant firms will be sanctioned when their profit margin is exorbitant.⁹ Coming to the second part of the test, different bench marks have been identified by the ECJ. In *British Leyland*¹⁰, the court undertook a comparison between the historical prices of the dominant firm and considered as a result that they were abusive as increase in fees was not justified by an increase in costs. Same is the case here. PIA increased its Hajj fares in the Hajj season of 2008 by more than 80% as compared to the preceding year and charged an unreasonably high fare of up to Rs.120,000/- from the Hajjis who opted for a short duration Hajj, thereby charging more than 100%. A comparison of Hajj air fares charged by PIA¹¹ over the last three years to the Hajjis under Regular Hajj Scheme is given below:

⁹ E. Pijnhacker Hordijk, "Excessive Pricing under EC Competition Law ; An Update in the Light of 'Dutch Developments'", in Barry E. Hawk (ed.) *Fordham Corporate Law Institute*, (2002), 463 at p.474. See also J. Temple Lang et R. O'Donoghue, "The Concept of an Exclusionary Abuse under Article 82 EC", *GCLC Research Papers on Article 82*, July 2005, mimeo who explain at p.39 that Article 82 EC "[...] arguably applies only in cases where there are significant barriers to entry that cannot be overcome by investments in anticipation of monopoly rents". Available online at <http://gclc.coleurop.be>, source *supra* note 2

¹⁰ *British Leyland Public Limited Company v. Commission*, 226/84 [1986] ECR-3263

¹¹ Letters dated December 5th, 2008 & February 25th, 2009 by PIA

Year	2006	2007	%age Increase from 2006 to 2007	2008	%age Increase from 2007 to 2008
Hajj Fare (PKR)					
South	35,000	38,500	10.00 %	70,000	81.82%
North	42,000	46,200	10.00%	85,000	83.98%

Following breakdown of cost per Hajji to PIA was provided by PIA.

Year	2006	2007	%age Increase from 06 to 07	2008	%age Increase from 07 to 08
Cost per Hajji (PKR)					
Fuel	18,930	26,803	41.59	45,023	67.98
Other Operational Costs (incl. lease)	19,497	24,019	23.19	26,332	9.63
Special arrangements	1,116	1,268	13.62	1,225	-3.39
Royalty	1,219	1,244	2.05	1,400	12.54
Total Direct Cost	40,762	53,334	30.84	73,980	38.71
Indirect Cost	5,313	5,933	11.67	10,514	77.21
Total Cost	46,075	59,267	28.63	84,494	42.57

29. While PIA in its reply dated June 5 2009 maintains it hedged fuel at 120 dollars a barrel it has not provided any documentation in support of its contention. We are therefore constrained to revert back to prices notified by OGRA which clearly indicate that the fuel prices during Hajj season 2008 were very similar to those during Hajj season 2007 or at times even less.

Date	2 Nov 07	2 Dec 07	1 Jan 08	1 May 08	1 Jun 08	1 Jul 08	1 Aug 08	1 Sept 08	1 Oct 08	1 Nov 08	1 Dec 08	1 Jan 09	1 Feb 09
For Domestic Airlines	44.13	50.89	48.85	67.33	84.90	82.10	86.11	75.32	69.01	50.90	42.54	35.89	35.62
For Foreign Airlines: commercial flights	38.37	44.25	42.48	58.55	73.83	70.78	74.23	64.95	59.49	43.88	36.67	30.94	30.71
For Foreign Airlines: cargo & technical flights	38.37	44.25	42.48	58.55	73.83	70.78	74.23	64.95	59.49	43.88	36.67	30.94	30.71

30. Therefore the cost table provided by PIA, which is reproduced above, is denied due to lack of evidence on part of PIA.

31. It follows that an increase in fuel costs could not have accounted for such a huge increase in the direct cost of hajj flights. PIA increased airfare for Hajj from 80% to more than 100% depending on the duration of Hajj Packages which does not stand justified with the increase in the cost during that period. Therefore, PIA has abused its dominant position by charging an unreasonable Hajj Airfare in contravention of section 3(3) (a) of the Ordinance.

Whether the fare charged on pilgrims traveling on short duration scheduled flights amounts to unjustifiable price discrimination between pilgrims and regular passengers

32. Price discrimination is “a term that economists use to describe the practice of selling the same product to different customers at different prices even though the cost of sale is the same to each of them. More precisely, it is selling at a price or

prices such that the ratio of price to marginal costs is different in different sales.”¹²

33. As per its submissions, PIA charged between Rs. 41,500 to Rs. 46,250 for a round trip economy class in 2008 from non-Hajj passengers while it charged between Rs. 100,000 to Rs. 120,000 on the same routes from Hajj passengers. Therefore, from its own submissions, PIA admits that it charges higher fares from Hajj passengers as compared to non-Hajj passengers. This exercise creates two distinct groups of customer i.e., Pilgrim and Non-Pilgrims with different price sensitivities, with both attracting a different price for the same service. Since the flights in question are scheduled flights, it can be safely assumed that the cost of service, *i.e.*, provision of scheduled air transport remains the same regardless of which type of customer sits in the plane. Hence, the charging of different fares from passengers based on their pilgrim status amounts to price discrimination which is a *prima facie* violation of Section 3(1) of the Ordinance.
34. The question is whether this discrimination based on the pilgrim status of the passenger is justified. PIA has presented two completely different justifications for this discrimination at the inquiry and judicial stages respectively. During the inquiry stage PIA submitted in its letter dated March 25, 2009 that it charges higher fares on short duration pilgrims since demand for seats increases in the last ten days of pre-hajj operation and PIA has to transfer capacity from other high yield hard currency routes to cater to the demand. However, in response to the show cause dated June 5, 2009 and during the subsequent hearings, PIA justified this higher fare for pilgrims by stating that for each pilgrim passenger the former has to turn down two regular round trip passengers wanting to avail travel in the same dates. Therefore, PIA loses the opportunity to sell two round tickets each time it books a pilgrim.

¹² Richard Posner, *Antitrust Law*, Second Edition, University of Chicago Press, Chicago and London, 2001 at 79-80.

35. We will deal with both the assertions made by PIA. PIA in its initial plea is essentially asserting that it has to cancel flights from profitable routes in order to deploy planes and staff to the short term hajj operations. Hence in order to make up for the loss, it has to charge higher on the other route. There are many points to consider here. First, a logical outcome of accepting this argument would be that, in general, Pakistan to Saudi Arabia routes are not profitable ones, or at the very least not as profitable as the other “unspecified” routes. This would be hard to believe given that PIA itself admits in its second plea that Pakistan to Saudi Arabia is a high demand route. This, combined with the fact that PIA has an agreement based dominance on the Pakistan-Saudi direct routes that keeps other airlines out, it would be rational to assume that the former charges higher fares than it would in the face of competition even under non-Hajj conditions. In such circumstances, it would be highly unlikely that this route is any less profitable than others.
36. Second, in order to prove such a contention PIA was required to produce the accounting exercise that took place before shifting the resources from other routes to Hajj routes, clearly showing that the proposed higher fares for the latter were required to offset the loss incurred by not availing other more profitable former routes. No such exercise was ever shown to the Bench during hearings. In fact, no such exercise was ever mentioned.
37. The second plea taken by PIA is that it has to turn down two regular passengers in order to accommodate one pilgrim passenger during Hajj season. First, this Bench does not see how this could be a relevant consideration. PIA operates a high demand route even during normal circumstances and must have priced the fare at a level that indicates the acceptable market price. Even during normal days, there could theoretically be people who want to travel on a particular date but are unable to do so since the flight is fully booked. Does PIA also charge extra to passengers on those flights? We think in the negative. Therefore, it is beyond our comprehension why PIA asserts that booking pilgrims on a scheduled flight

causes a loss of revenue. If there are three people wanting to fly but just one seat, two people would have been left out under all circumstances, pilgrims or not. There is no justification to create a separate class of passengers based on their pilgrim status and charge them extra as compared to a non-pilgrim on the same flight. For all intents and purposes, pilgrims traveling through scheduled flights during Hajj season are nothing but regular passengers of PIA.

38. Second, PIA has failed to provide any statistical data which supports the assertion that two regular people fail to get a seat in lieu of any pilgrim that travels. Absent this data, and given the discussion above, it is extremely hard to give any meaningful consideration to this contention of PIA.

Regulated Conduct Defense

39. PIA submitted that since the Ministry of Religious Affairs (MORA) regulated the Hajj Fares and it cannot be held liable for any anticompetitive behavior. PIA is essentially invoking what is known as the regulated conduct or state compulsion defense for its actions. The Commission has in two previous decisions – *KSE Price Floor and Pakistan Banking Association Price Fixing* - deliberated and ruled on this issue setting out the requisite tests that needs to be passed in order to qualify for immunity from competition law in case of a regulated conduct assertion. We will apply the same standards in the case before us today.

40. There are essentially two tests as laid out in the EU and the US. For ease of reference the requisite tests are reproduced below from the KSE Price Floor Order:

60. In the E.U., to plead the defense of state compulsion successfully, the party claiming the defense must satisfy the following three points:
- i. That the state must have made certain conduct compulsory: mere persuasion is insufficient;
 - ii. That the defense is available only where there is a legal basis for this compulsion; and
 - iii. That there must be no latitude at all for individual choice as to the implementation of the governmental policy. [FN 84]

61. The position in the United States is as follows:

“[W]hen Congress by subsequent legislation establishes a regulatory regime over an area of commercial activity, the antitrust laws will not be displaced unless it appears that the antitrust and regulatory provisions are plainly repugnant”; and “[r]epeal is to be regarded as implied only if necessary to make the [regulatory act] work, and even then only to the minimum extent necessary.” The Court has also professed an unwillingness to grant immunity "absent an unequivocally declared congressional purpose to do so." [FN 85]

62. The standard for repealing antitrust laws by implication, in the U.S., is “clear incompatibility” [FN 86] or “plain repugnancy between the antitrust and regulatory provisions.” [FN 87] In order to ascertain sufficient incompatibility to warrant an implication of preclusion, the Courts have frequently employed the following four point test:

- i. the existence of regulatory authority under the securities law to supervise the activities in question;
- ii. evidence that the responsible regulatory entities exercise that authority;
- iii. a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct; and
- iv. the possible conflict affected practices that lie squarely within an area of financial market activity that securities law seeks to regulate. [FN 88]

Footnotes omitted.

41. Using the EU test, we would have to see if PIA’s actions were a state compulsion.

Documents on record, including Minutes of Meeting between PIA and MORA indicate a position to the contrary. While PIA maintained during the proceedings that MORA fixed the prices, the latter has denied this contention and has submitted before the Bench that MORA only sets the price as submitted by PIA, or at best, after negotiation with PIA. In such a situation MORA involvement can only be characterized as state compulsion. Therefore, PIA’s actions fail the first prong of the test.

42. Even if we assume for argument sake that PIA was under compulsion, there is no legal basis for PIA to have done so. Nothing on the record indicates that PIA is

bound under law to adhere to directives or policies made by MORA. Therefore, PIA's actions also fail the second prong of the test.

43. In such a situation going to the third prong of the test is hardly relevant. PIA's action would meet the same fate under US based test laid by the Commission. MORA cannot be said to be a regulatory authority under law to direct the working of PIA in matters of Hajj Fares. Neither does MORA claim to exercise such authority, as per its own submissions before the Bench. As with the EU case, there is no need to proceed further since PIA's action do not even meet the first part of the test.

44. It is clear that PIA's actions were not a state compulsion neither a regulated conduct that would enable it to enjoy immunity from the application of the Ordinance. Thus, from the foregoing discussion, we hold that PIA has violated Section 3(1) of the Ordinance on both counts of 3(3)(a) and 3(3)(b).

Whether the fixation of price by mutual consultation between PIA and Saudi Arabian Airlines (SV) constitutes a violation of Section 4(1) read with Section 4(2)(a) of the Ordinance.

45. Section 4 of the Ordinance, in relevant part, is reproduced below for the ease of reference.

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 of this Ordinance.

(2) Such agreements include, but are not limited to-

(a) fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale or distribution or any goods or the provision of any service;

46. Section 2(p) of the Ordinance defines undertaking as follows:

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

47. PIA and SV apparent fixed rates under the Bilateral Agreement. The relevant Article of the Bilateral Agreement is reproduced below.

ARTICLE VIII

1. The tariffs to be charged by the airline of one Contracting Party for carriage to or from the territory of the other Contracting party shall be established at reasonable levels due regard being paid to all relevant factors including cost of operation, reasonable profit, and the tariffs of other airlines.

2. The tariffs referred to in paragraph (1) of this Article shall, if possible, be agreed by the designated airlines concerned of both Contracting Parties, in consultation with other airlines operating over the whole or part of the route, and such agreement shall, where possible, be reached through the rate fixing machinery of an international organization or body appointed for that purpose and recognized by the Contracting Parties. (Emphasis supplied)

48. Since PIA and SV have fixed prices under the behest of their respective governments, which are not “undertaking” in terms of section 2(p) of the Ordinance, we hold that the charge of price fixing under section 4 of the Ordinance has not been made out.

IV. Penalty

49. On the count of unreasonable increase in Hajj airfare during the year 2008, as compared to Hajj season 2007 *i.e.*, from Rs.38, 500 to Rs.70, 000 for the South and from Rs.46, 200 to Rs.85, 000 for North, and thereby, abusing its dominant position, a token penalty of Rupees ten million is imposed on PIA. A lenient view is taken in line with the Commission’s stance of promoting good business practices in the market rather than penalizing undertakings.

50. On the count of discrimination between Hajji passengers and regular passengers on scheduled flights, PIA is directed to work out an amount of refund to be paid back to the Hajjis based on the difference of fare between regular passengers and Hajjis, within two month from the date of this order, who flied through PIA during Hajj season 2008 for performing a short duration Hajj. PIA shall also work out a mechanism to identify such Hajjis and ensure that refund is made to all of them. A compliance report in this regard shall be submitted to the Commission by no later than four months from the date of this Order.

51. It is so ordered.

(DR. JOSEPH WILSON)
Member

(MALEEHA MIMI BANGASH)
Member

ISLAMABAD THE 20TH OF NOVEMBER 2009.