



**BEFORE THE  
COMPETITION COMMISSION OF PAKISTAN  
IN THE MATTER OF**

**SHOW CAUSE NOTICE ISSUED TO  
PAKISTAN VANASPATI MANUFACTURERS ASSOCIATION  
(PVMA)**

**(FILE NO. 1(15)/PVMA-ISB/C&TA/CCP/2011)**

Dates of hearing:

June 21, 2011  
June 22, 2011

Present:

Ms. Rahat Kaunain Hassan  
**Chairperson**

Mr. Abdul Ghaffar  
**Member**

On behalf of:

Pakistan Vanaspati Manufacturer's  
Association:

Mr. Umer Islam Khan, Secretary General

Afzal & Afzal, Advocates &  
Corporate Counsels

Malik Qamar Afzal,  
Advocate Supreme Court

Ms. Zainab Effandi, Advocate High Court  
Mr. Nabeel Rehman, Advocate  
Ms. Rehana Zaman

## **ORDER**

1. Through this order the Competition Commission of Pakistan (the “Commission”) shall dispose off the proceedings initiated under Section 30 of the Competition Act, 2010 (the “Act”) vide Show Cause Notice No. 04/2011 dated April 27, 2011 against Pakistan Vanaspati Manufacturers Association (PVMA). The principal issue in this case is whether PVMA has taken any decision to fix the price of ghee and cooking oil and has entered into an arrangement with transporters to fix the rates of transportation of edible oil in contravention of Section 4 (2) (a) of the Act and whether PVMA designated for invoice verification is discriminating between manufacturing units and commercial importers by charging two different rates in contravention of Section 3(3)(b) of the Act.

### **I. UNDERTAKINGS**

2. PVMA is a representative association of all ghee and cooking oil manufacturers in Pakistan and is registered under the Trade Organizations Ordinance, 2007. PVMA is an undertaking<sup>1</sup> by virtue of being an association of undertakings as per the definition given in Section 2(1)(q) of the Act.
3. All member mills of PVMA whether be sole proprietor, partnership or companies are engaged in the business of manufacturing and marketing ghee and cooking oil. Hence all of them fall under the definition of undertaking as given in Section 2(1)(q) of the Act.

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<sup>1</sup> Undertaking “means any natural or legal person, governmental 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 of services and shall include an association of undertakings.”

## II. BACKGROUND

4. The Commission had carried out a study in the sector of ghee and cooking oil (hereinafter referred to as the “Sector Study Report”) which stated some of the vulnerabilities which may have object or effect to prevent, restrict or distort competition in the sector. It was indicated in the Sector Study Report that manufacturers, acting in a collective manner, do not fully synchronize their prices with the changes in the input prices and act independent of market forces and influence market price e.g. when international prices of palm oil drop significantly, manufacturers do not transfer the advantage of a reduced price to the end consumer.
5. Following the observations in the Sector Study Report, prices of ghee and cooking oil were also closely watched which revealed that within a short period of 4 months (starting from December 2010 to February 2011) price hiked four times in a parallel manner in different categories and brands of ghee/cooking oil. From different media reports it was also noticed that the price increase is often referred to a collective decision of all manufacturers or PVMA as their association, resulting in simultaneous increase in price.
6. The Commission was apprised through a working paper regarding suspected anti-competitive activities of ghee/cooking oil manufacturers and their association i.e. PVMA which, *prima facie*, indicated collusive activity in respect of pricing and production in the ghee/cooking oil industry in violation of Section 4 of the Act. Upon examining the information placed before it, the Commission deemed it appropriate to search and inspect the offices of PVMA. Accordingly, two teams of officers were authorized by the Commission exercising powers granted to it under Section 34 of the Act to search and inspect the offices of PVMA in Islamabad and Karachi in order to collect any evidence regarding the suspected violations of section 4 of the Act. The officers conducted the search on 17 February 2011 and impounded valuable data/material and documents from the offices of PVMA.

7. Documents impounded during the course of search and inspection required detailed scrutiny. Therefore, the Commission decided to initiate a formal enquiry under Section 37(1) of the Act and pursuant to the powers contained in Section 28(2) of the Act, the Commission appointed Ms. Shaista Bano Gilani, Director and Ms. Nadia Nabi, Joint Director as Enquiry Officers (hereinafter collectively the 'Enquiry Committee') to conduct an enquiry as to whether there is any collusion/cartelization in the ghee/cooking oil sector, thereby violating Section 4 and any other provision of the Act, and to prepare a detailed Enquiry Report under Section 37 of the Act.
8. The Enquiry Committee submitted their Enquiry Report on April 25, 2011 which concluded that there is, *prima facie*, evidence of violation of Section 3 & 4 of the Act by PVMA. The Enquiry Report recommended that proceedings under Section 30 of the Act be initiated against PVMA.
9. PVMA was issued a Show Cause Notice under Section 30 of the Act on April 27, 2011 directing it to submit written reply within fifteen days of the notice and to appear before the Commission for arguments.

#### **Allegations in the Enquiry Report and Show Cause Notice**

10. The Enquiry Report and the Show Cause Notice broadly state that :
  - a. PVMA appears to have taken collective decision on behalf of its member mills and facilitated the collusion amongst its members to set the price. PVMA appears to have played a lead role to negotiate price with the government when in the wake of decline in international price of edible oils government urged the manufacturers to rationalize the price hike in local market. Impounded material from PVMA offices indicate that the costing was done by PVMA on behalf of its member mills to fix the price which was thereafter circulated to all PVMA members, *prima facie*, in violation of Section 4(1) read with Section 4(2) (a) of the Act.

- b. PVMA appears to have entered into negotiations with edible oil transporters' associations namely; All Pakistan Oil Tankers Owners Association (APOTOA) and Edible Oil Carriage Contractors Association (EOCCA) and National Logistic Cell (NLC) and decided the transport rates for its member mills. Such arrangements/agreements between PVMA and APOTOA, EOCCA and NLC to fix the transport rates for PVMA units, *prima facie*, prevents and restricts competition between the members of a transporters association *inter se* and also distorts competition between members of different transporters associations and NLC in violation of Section 4(1) and Section 4(2)(a), in particular, of the Act.
- c. PVMA has been designated by the Customs authorities as a sole service provider for invoice verification of its members and commercial importers. PVMA is charging different rates from its members and commercial importers for the same service of invoice verification, *prima facie*, in violation of Section 3(3)(b) of the Act which prohibits price discrimination by charging different prices for the same services from different customers in the absence of objective justification that may justify different prices.

11. The abovementioned findings were based on information/evidence recovered from PVMA's offices including; minutes of PVMA's meetings, minutes of meeting held at Ministry of Industries, PVMA's letters and circulars to its members, correspondence between PVMA and oil tankers owners associations and NLC and minutes of meeting held at Member (Customs), Camp Office, Customs House, KYC.

#### **Reply to Show Cause Notice**

12. PVMA's reply to Show Cause Notice was received on 04 June 2011. Salient features of reply are reproduced as under:

Preliminary Objections:

- a. *CCP has relied on News Paper which is a secondary source. The only authentic primary source is PRAL (Pakistan Revenue Automation Limited).*
- b. *CCP is not a sector specialist. Whereas PVMA is a sector specialist association who administer all issues for the members which are involved in manufacturing ghee and cooking oil. The Enquiry Report should have been re-examined from a sector specialist before issuing Show Cause Notice.*
- c. *Relevant market is not segmented into three categories of premier, middle and popular. Whether it is small or large manufacturer, all of them have to maintain a minimum standard for manufacturing set by Pakistan Standard Quality Control Authority (PSQCA).*

On Merits:

- d. *CCP has exceeded its jurisdiction. Rule 45(2) of the Competition (General Enforcement) Regulations 2007 requires that CCP can issue Show Cause Notice to an association only when more than 20 members of an association are suspected in collusion.*
- e. *In an article published in the Daily Times dated 07-01-2011 it was categorically stated that there are four leading firms in the oil and ghee industry. If there is any suspected cartelization among industries, it would allegedly be between competitors' oil and ghee undertakings as opposed to an association of undertakings encouraging it. In view of the article published, only four firms have been pointed out which is far less than 20 members, a requisite to serve the PVMA with a Show Cause Notice.*
- f. *A decision of an association is not prohibited under Article 81 EC Treaty if it contributes to improve production or restrictions imposed by such decision are indispensable. In reference to the case of *Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten (Raad van de Balies van de Europese Gemeenschap intervenient)*(Case [C-309/99](#)) [2002] 1 All ER (EC) 193, Ghee sector has inherent restrictions and these are inbuilt restrictions. Continuity of supply is to be made possible in the public interest and as such the steps taken for the public interest are to be considered in leniency.*
- g. *PVMA's members are all over Pakistan and the difference in the prices in various places can be attributed to different factors:*
  - *Blending ratios of soft and hard oils. For the convenience of the Commission, it is imperative to elaborate soft and hard oils. Hard oil consists of RDB Palm oil whereas soft oils consist of rapeseeds, sunflower, canola, cottonseeds, etc.*

- *Availability of soft and hard oil in the market*
  - *International market of soft and hard oils*
  - *In case of shortage of gas shortage, the manufacturing member units have to shift to the alternative namely furnace oil. Furnace oil is three times more expensive than gas*
  - *Transportation costs, riots and strikes, load shedding*
  - *Labour pay scales.*
- h. The production of manufacturing oil and ghee is heavily dependent on import of palm oil. As aforementioned, out of 100% of material, 75% of it is imported in shape of a raw material, 25% oil is produced from local crop. Therefore, the Association's relevant geographic market is not Pakistan. PVMA does not market the product; it's an association for the manufacturing the commodity however it does not play any role in marketing it. Therefore, definition of relevant market does not apply to PVMA.*
- i. PVMA has relied on articles published in Newspapers to emphasize that increase in price is beyond control of any one. It is mainly dependent on abnormal increase in international price of imported edible oil, increase in C&F price of imported edible oil, import duties and taxes and devaluation of pak rupee.*
- j. Middleman or chain of supply that carries the commodities forward have market power to influence price and exploit purchasing capacity of the consumers.*
- k. PVMA is a body to facilitate the working of its own members and in no way challenges or interferes into the market of other businesses. Agreements which fulfils the following criteria do not fall under the prohibition of Article 81:*
- *Cooperation between non-competitors*
  - *Cooperation between competing companies that cannot independently carry out the project or activity covered by the cooperation.*
  - *Cooperation concerning an activity which does not influence the relevant parameters of competition.*
- l. US courts do not apply the per se rule where there is no past precedent of holding a practice to be illegal. There are plausible arguments that a practice enhances overall efficiency and makes markets more competitive. From EC law and US law it appears that PVMA has entered into horizontal collaboration via cooperation with non-competitors by guiding and introducing them to the market therefore it is exempt from competition law.*
- m. PVMA had a meeting with EOCCA led by Deputy Commission, Malir and Army authorities on 19-02-2001. The minutes of coordination conference covered the following:*

- *Rates of transportation*
  - *Registration of six vehicles in the name of Hafeez Iqbal Oil and Ghee Industries (Pvt.) to collect its oil at the rate of two tankers per day*
  - *The mill owners have the right to select the contractor of their own choice*
  - *Queuing system*
- n. *EOCC and APOTOA (transporters associations) have been disregarding the decision made in coordination conference mentioned above and pressurizing PVMA and its members to accept their own terms by firing shots and stoning the tankers. Finally, PVMA entered into an agreement with NLC for transportation of edible oil to break the monopoly of transporters associations, which in fact has enhanced the competition between all the concerned transporters.*
- o. *European courts in assessing the compatibility of an agreement have held in number of cases that the Article 81 provides for two stage examination; firstly object of the agreement must be a restriction of competition; secondly accounts should be taken of the actual conditions in which they produce effects, in particular, economic and legal context in which the agreement was concluded. Reliance placed on the case of O2 (Germany) GmbH & Co v European Commission (Case T-328/03)[2006] All ER (D) 13, Case 22/71 Béguelin Import [1971] ECR 949 and Case C-399/93 Oude Littikhuis and Others [1995] ECR I-4515)*
- p. *Keeping in mind the EU law, few observations are made:*
- *There is no written agreement between any larger undertakings.*
  - *Intention of parties to restrict competition must be taken into account.*
  - *In the absence of any agreement it is necessary to show that competition has been affected.*
  - *PVMA is totally reliant on transportation services. The pro-competitive factor is the objective to provide consumers with a commodity that is literally used in every house hold. The so-called anti-competitive factor is that PVMA is willing to achieve the pro-competitive factor at any cost even if it meant succumbing to the EOCCA and APOTOA's undue pressure.*
- q. *There are two main reasons for price discrimination by charging commercial importers Rs.10/metric ton and Rs. 4 to PVMA members:*
- *Commercial importers sell their imported material to the member units, thereby member units end up paying twice; first to customs authorities for declared value via invoice and secondly when they have to purchase material additional/extra from the commercial importers.*



- *Member units are also paying Rs.50,000 per year as subscription fee.*

*In view of above it is justified and logical to charge a different rate to commercial importers for invoice verification.*

13. Hearings in the matter were conducted on 22 and 23 June 2011. PVMA was heard at length and ample opportunity was afforded to it to submit its arguments. In addition to the written submissions made above, legal representative of PVMA summed up his assertions in following four arguments:

- a. Whether or not an Association of industrial concerns is in a position to create anti-competitive agreements?
- b. Whether or not the Association comprising of small, medium and large stakeholders can decisively make business decisions as each member has its own stake according to its own interests. For instance, any importer of 1000/metric tons may adopt the queue system but the importer of 100/metric tons cannot afford to do so. Therefore, the Association of undertakings is not in a position to implement business decisions and as such cannot enter into any such like agreements.
- c. An Association of undertakings is only a representative and recommendatory body with directory role and it carries no mandatory authority.
- d. Whether or not any settlement reached by the Association of undertakings if violated carries any penal consequences. If it does, whether or not it carries any statutory backing? The answer is No. Hence, the PVMA is only a recommendatory authority.

### **III.ISSUES**

14. In view of the written submissions and arguments made by the parties the following issues need to be addressed:

- a. Whether there has been any violation of Regulation 45(2) of the Competition (General Enforcement) Regulations, 2007?
- b. Whether a decision of an association with respect to price fixing notwithstanding its recommendatory/advisory nature and its implementation by the members constitutes violation under Section 4 of the Act?
- c. Whether the arrangement entered into by PVMA with respect to fixing rate of transportation is in violation of Section 4 of the Act?
- d. Whether PVMA in discharging the services of invoice verification is discriminating between its customers by charging two different rates for the same service in contravention of Section 3(3)(b) of the Act?

### **IV.ANALYSIS**

**Issue No. 1:** Whether there has been any violation of Regulation 45(2) of the Competition Commission (General Enforcement) Regulations, 2007?

15. PVMA raised a preliminary objection that the Commission has exceeded or wrongly exercised its jurisdiction. The Competition Commission (General Enforcement) Regulations 2007 Rule 45(2) (hereinafter the “Enforcement Regulations”) specifically states that the Commission cannot serve notice to an association of undertaking with less than 20 members suspected in collusion or cartelization. The Commission has

failed to find 20 members of PVMA suspected in cartelization, therefore, the Commission acted out of its jurisdiction by serving PVMA with a Show Cause Notice.

16. Legal representative of PVMA was adamant that word “require” under the Regulation 45(2) calls for determination by the Commission that at least 20 members of an association are involved in a collusive activity before a Show Cause Notice can be issued. The legal representative of PVMA admitted that there is no case law or legal authority to support his assertion and that requirement of at least 20 members is his own interpretation.
17. We have examined the written submission of PVMA on its interpretation of Regulation 45(2) of the Enforcement Regulations and also the arguments made by its legal representative during hearing. In this regard, for ease of reference, Regulation 45 is reproduced as below:

**45. Association of undertakings:-** (1) Where a regulation requires the Commission to give notice of any matter to an association of undertakings, the Commission shall give notice to the director, secretary, manager or other similar officer of the association on its behalf.

(2) Where a regulation requires the Commission to give notice of any matter to each of more than 20 members of an association of undertakings, the Commission may, instead of giving such notice to any such member, give such notice to the director, secretary, manager or other similar officer of the association on that member’s behalf; provided that individual notice shall be given to the member who has made an application.

18. Sub-regulations (1) and (2) of Regulation 45 of the Enforcement Regulations provide mode of serving notice to an association and also where members of an association are required to be served with a notice by the Commission. Sub-regulation (1) specifically deals with the notice to be served to an association of undertakings and states that when a notice is required to be served to an association it will be given to its any of office bearers. On the other hand Sub-regulation (2) deals with the notice to be served to members of an association. In that scenario if number of

members to be served with a notice is more than 20 then instead of giving notice to members, it may be given to association.

19. It may be relevant to add that in the instant case a notice was required to be served as envisaged under Regulation 26 of the Enforcement Regulations:

**26. Hearing after submission of Inquiry Report. — (1)**

Upon receipt of inquiry report where the Commission is satisfied that there has been or is likely to be, a contravention of any provision of Chapter II of the Ordinance, the Commission shall:

- (a) give notice of its intention to make such order stating the reasons therefore to such person as may appear to it to be in contravention; and
- (b) give the person an opportunity of being heard on such date as may be specified in the notice and of placing before the Commission facts and material in support of its contention.

Since the Enquiry had been concluded, in terms of its finding, a Show Cause Notice was issued to the association and it was called upon to reply in writing and avail the opportunity of being heard explaining as to why an appropriate order under Clause (a) & (b) of Section 31 and/or penalty for the alleged violation be not imposed under Section 38 of the Act. It is noted that the term person under the Enforcement Regulation includes an 'undertaking' under its Regulation 2(m) and the term undertaking has been defined under the Act itself which includes an association of undertakings in terms of its Section 2 (q).

20. As evident from the wording, Sub-regulation (2) of Regulation 45 envisages an option that where more than 20 members of an association are required to be given a notice, the Commission rather than serving the notice to each of the members may serve such notice to any officer bearer of their association on behalf of such members. In the instant case notice has been issued to association (PVMA) so far and not to the members, therefore, the Regulation 45(2) of the Enforcement Regulation is not

relevant. Moreover, as for the argument that finding of 20 members suspected with cartelization is a 'requisite' before a Show Cause Notice is served to an association. The counsel has failed to support his argument with any credible explanation.

21. We have before us Section 4 of the Act which prohibits decision of an association in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which has the object or effect of preventing, restricting or reducing competition within the relevant market. An association becomes liable for violation of Section 4 if its decision has the object to restrict competition in the relevant market. Adopting the interpretation of legal representative of PVMA of Regulation 45 of the Enforcement Regulation, the Commission will have to exempt association from the Section 4 even if its decision is in sheer violation of the Section 4 unless more than its 20 members are found, involved in any anti-competitive activity.
22. We are of the considered view that there is neither any confusion nor the Commission has wrongly exercised its powers, hence, we find no merit in this submission. Our view is based on the principle of *absoluta sententia expositore non indigent*- plain words need no exposition.

**Issue No. 2:** Whether a decision of an association with respect to price fixing notwithstanding its recommendatory/advisory nature and its implementation by the members constitutes violation under Section 4 of the Act?

23. Major allegation leveled in the Enquiry Report and Show Cause Notice against PVMA is that the association has taken decision to fix the price of ghee and cooking oil on behalf of its members. Before addressing the issue pertaining to the violation of Section 4 of the Act, we would like to define the relevant market.

## **Relevant Market**

24. The Enquiry Report determines relevant market in terms of product market and geographic market<sup>2</sup>. The relevant product market is classified into two categories; “Vanaspati” and “Cooking Oil”. Vanaspati Ghee and cooking oils are used in different forms of cooking including baking, sautéing and deep frying and are used at domestic and commercial level. However, both are different in physical and chemical characteristics. Cooking oil is basically purified fat of plant origin, which is liquid at room temperature. Whereas when process of hydrogenation is applied to vegetable oils and fats, it results in the conversion of liquid vegetable oil to solid or semi-solid fats which has different melting point. Such hydrogenated oil is called “Vanaspati”.
25. Consumers have choice/substitution for cooking oil and ghee depending on preference for nutritional value or fat and cholesterol contents. For that health awareness, dietary habits, life style, increase in per capita income and level of education have major role to play. For example in urban areas due to aforementioned factors, people are shifting to cooking oil but in rural areas ghee is still given preference considering its nutritive value.
26. The cooking oil and ghee industry of Pakistan is generally classified into three broad segments i.e. premier, middle and popular. There is a wide difference of production capacity, price and quality and popularity with national, regional and local brand names. It is generally believed that substitution across segments does not normally happen, however substitution within a segment is commonplace. On the basis of this product

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<sup>2</sup> Section 2(1)(k) “Relevant Market” means the market which shall be determined by the Commission with reference to a product market and a geographic market and product market comprises all those products or services which are regarded as interchangeable or substitutes by the consumer 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.”

substitution, there are three markets i.e. premier, middle and popular which have distinct customer preferences according to price and quality.

27. There are nearly 100 members of PVMA involved in manufacturing and marketing of different brands of ghee and cooking oil all over Pakistan. PVMA units are spread in all the four provinces and Federal Capital. For the sake of convenience the PVMA units have been divided into three zones; South zone comprising of units in Sindh and Balochistan, Central Zone comprising of Punjab, North Zone comprising of Islamabad Capital Territory, Khayber Pakhtunkhwa & Azad Kashmir. Therefore, the relevant geographic market is whole of Pakistan.
28. PVMA raised objection that the production of manufacturing oil and ghee is heavily dependent on import of palm oil. Therefore, the association's relevant geographic market is not Pakistan. PVMA does not market the product. It is an association for the manufacturing units and does not play any role in marketing it. Therefore, definition of relevant market does not apply to PVMA.
29. We would like to clarify here that relevant market comprises substitutable products and the area in which undertakings compete with each. As discussed above relevant product is ghee and cooking oil of three different qualities of premier, middle and popular. Whereas manufacturing mills/units are undertakings competing with each in four provinces of Pakistan. PVMA is the representative body of these undertakings/competitors. Any decision of PVMA in respect of the production, supply, distribution, acquisition or control of relevant product may have effect on competition within the relevant geographic area. Therefore, relevant market defined for the member undertakings is also the relevant market for its association i.e. PVMA. Hence, we believe that Enquiry Report has correctly defined the relevant market in terms of product market and geographic market. As for the ground that PVMA does not market the product or that production of cooking oil and ghee is

heavily dependent on import of palm oil, the counsel has failed to explain the nexus of these arguments with the determination of relevant market.

### **Decision of an Association**

30. During the course of hearing legal representative of PVMA categorically stated that all the extracts taken from the impounded documents, quoted and relied upon in the Enquiry Report are secondary source such as newspaper clippings. These extracts relied upon in the Enquiry Report do not reflect the decision of PVMA as an association and in fact are recommendations/ advice passed on to member mills.
31. We have already held in para 11 above, that findings made in the Enquiry Report were based on minutes of PVMA' meetings, minutes of meeting held at Ministry of Industries, PVMA's letters and circulars to its members, correspondence between PVMA and oil tankers owners associations and NLC and minutes of meeting held at Member (Customs), Camp Office, Customs House, KYC. these included the originals and photocopied documents recovered from the premises of PVMA during search. These documents were listed on an inventory sheet, which was signed and sealed and copy was handed over to the office bearer of PVMA, hence questioning the source of information is not warranted.
32. Whether the extracts taken from the impounded material and relied upon in the Enquiry Report can be termed as decision of PVMA. For that we need to look into the meaning of word decision and also go through the evidence relied upon in the Enquiry report. For the sake of convenience, we would like to reproduce the extracts from the letters, circulars and minutes of meetings of PVMA:

**PVMA's Letter dated September 26, 2008 to all its Members regarding Reduction in Prices of Vegetable Ghee/Cooking Oil:**

3. It was also pointed out by the Ministry that Vegetable Ghee/Cooking Oil is being sold at around Rs. 140/-kg in



market. Responding to which it was clarified by the Chairman, PVMA that as matter of fact the Vegetable Ghee/Cooking Oil is available in the open market at Rs. 120/- per kg.

4. After detailed discussion on this issue and keeping in view the requirement of the Government to reduce the prices significantly, it was decided that all brands manufactured by the PVMA units would reduce their price by Rs. 5/- per kg which would result in bringing down the price of one kg Vegetable Ghee to around Rs. 115/- per kg w.e.f. 1-10-2008.
5. In light of the position explained above, all the PVMA members are accordingly advised to reduce the price of their brands by Rs.5/- per kg.

#### **PVMA Circular dated December 11, 2008 for reduction in Vegetable Ghee prices:**

For resolving this crucial issue, the chairman PVMA, Mr. Abdul Majid Haji Mohammad had detailed negotiations with the advisor to Prime minister and Secretary of the Ministry of Interior after having discussions with PVMA members. A brief regarding the costing of Vanaspati ghee was appropriately prepared by Mr. Abdul Waheed, former Chairman, PVMA, which was communicated to secretary, Ministry of Interior, after concurrence of the Chairman, PVMA. The Government was also conveyed the inability of the PVMA to accept the demand of the Ministry of Interior for reducing the price of vegetable Ghee to Rs. 70/- per kg. Consequently it was decided that the PVMA units would sell the vegetable ghee at a rate of Rs. 86/- per kg (Ex-factory) and the retailers would sell the same at Rs. 90/- per kg to the public.

In light of the position explained above all the PVMA members units are requested to please honor this agreement made between Ministry of Interior and the PVMA on the 8<sup>th</sup> of December, 2008 in the national interest.

#### **Minutes of Executive Committee Meeting held on 15<sup>th</sup> December 2008 in Lahore:**

##### **Agenda Item No. 2**

##### **Para 1**

*The Chairman PVMA Mr. Abdul Majid Haji Mohammad apprised the participants of the meeting regarding the developments just before Eid-ul-Azha which led him to agree with the Federal Government for fixing the price of Vegetable Ghee at Rs. 86/- per kg (Ex-factory) and Rs. 90/- kg*

*by*

*the*

retailers.....  
..... The secretary industries made three phone calls, and finally he desired for fixation of the price of vegetable ghee at Rs. 90/- per kg. Responding to which, the chairman, PVMA told the secretary that PVMA can reduce price to Rs. 95/- per kg. However, subsequently both the secretary Industries and Secretary, Interior asked finally for fixing the price at Rs. 88/- per kg. On the 8<sup>th</sup> of December 2008 the secretary interior again telephoned the chairman PVMA and told that according to their costing the price desired by them i.e. Rs.88/- per kg is still on higher side so, it should be reduced to Rs. 80/-per kg on which the chairman, PVMA vehemently responded that it is totally unacceptable. The Chairman, PVMA also requested Mr. Abdul Waheed, the former Chairman, PVMA for preparing a fresh costing of the production of Vegetable Ghee. The Chairman further added that after lengthy discussion with the concerned higher ups of the Government, it was agreed by the Government and the PVMA to fix a price of Vegetable Ghee at **Rs.86/-** per kg (Ex-Factory) and press release to this effect was also issued by the Ministry of Interior. It was further clarified by the Chairman that the price structure he had agreed with the Government is only valid for 2 weeks and he had made this decision in consultation with the Senior Vic-Chairman, PVMA, MR. Tariq Ullah Sufi and other PVMA members whom he was able to contact during that time.

Para 3

Participating in the discussion, Mian Maqbool-ur-Rehman, Executive Director, M/s United Industries Ltd.....further stated that the decision in fixation of the prices has been done singly in haste and without the concurrence of the Executive Committee of the PVMA. This issue should have been decided after due consultation.

It was also explained by the Mr.Maqbool-ur-Rehman that a uniform price cannot be fixed for all brands of the ghee manufactured by different units are fixed by the units keeping in view the overheads.

Para 15

Mr. Abdul Malik ,Chief Executive M/s Kausar Ghee mills Ltd. questioned that how the prices of vegetable ghee can be same At Karachi and Peshawar as there are many variables in production of ghee at these two stations. He also added that we have intelligently tackled the pressure of the Government.

**Input on Cost of Production of Vegetable Ghee by Costing Committee Members Dated 22<sup>nd</sup> December, 2008:**

In the meeting of Executive Committee of the PVMA held on 15<sup>th</sup> December, 2008 at Hotel Avari, Lahore; fixation of Ex

Factory and Retail Prices of vegetable Ghee manufactured by the PVMA member units was thoroughly discussed in the light of the pros and cons. Almost all the honorable members expressed deep concern on the matter, keeping in view the harsh attitude of Government towards price fixation.

For further action on this issue, with the approval of the Chair, the House constituted a Committee consisting of the following members to firm up costing of the vegetable ghee produced by the PVMA member units.

- i- Mr. Tanveer Hassan.
- ii- Mr. Inam Bari.
- iii- Mian Maqbool-ur-Rehman.
- iv- Sh. Abdul Razzaq.

The above mentioned members are requested to kindly provide their input in this regard to the PVMA secretariat at the earliest, so that a plausible action could be taken with the help of collective wisdom.

A copy of Costing already made under guidance by Mr. Abdul Waheed is enclosed as reference material.

**Government of Pakistan, Ministry of Industries, Minutes of the Meeting on Edible Oil/ Ghee Industry situation/prices held on 15<sup>th</sup> January, 2009:**

The Minister welcomed the participants and briefed them about the objectives of the meeting. He informed the participants that the ministry was being persuaded by the higher forums including ECC of the cabinet for analyzing the domestic prices of cooking oil/ ghee in the wake of decline in international prices of RBD palm Olein and to ensure provision of relief to general public on account of reduction in the price accordingly. He informed that since the general public was aware about the local as well as international price trend of commodities and keeping in view, the government and the industry would have to pass-on the benefit of decrease in prices to the common man. He asked the Secretary, I&P to highlight the edible oil/ ghee situation.

The secretary, I&P apprised the participants that the international price of palm oil had reduced from US\$ 1300/ton to US\$632/ton. He explained that any increase in international prices of palm oil was immediately reflected in the prices of ghee/oil in domestic market; but the decrease in prices was not reflected properly by the manufactures. He informed that during January, 2009 the C&F prices of RBD Palm Olein were recorded at US\$625-640/ton, however the consignments presently arriving in the country were booked earlier and were being assessed by customs authorities at C&F price of US\$ 550, benefit of which was not being based on the consumers. He was further of the view that reduction

*in international prices of edible oil had not been reflected in the domestic prices particularly the prices of premier brands of ghee/ cooking oil have not dropped accordingly.*

*After detailed deliberation it was agreed that:*

- I. Edible oil/ghee manufacturer would decrease the prices of all the brands by 3% on the lines as at Annex-II.*

**PVMA Letter to all PVMA Member Mills dated 15<sup>th</sup> January 2009 regarding Edible Oil/Ghee Industry Situation/Prices:**

*Regarding the costing of Vegetable Ghee/Cooking Oil manufactured by the PVMA's viewpoint was very precisely pleaded by the chairman, and other members especially Mr. Ilyas Ahmed Bilour, Inam Bari and Mr. Arif Qasim. The Federal Minister for Industries and production was also appraised regarding the losses being sustained by the Ghee Manufactures and the difficulties due to short supply/cut off of the electricity and the Sui Gas.*

*After listening to the submissions of PVMA, the Federal Minister for industries assured for all the possible help for protection of this vital industry. However, he desired the PVMA members to reduce the price of their products by 10% on the existing market prices. After long debate and discussion, it was agreed by the PVMA and the ministry of industries and production that the prices of brands of PVMA members would be reduced by 3%. A copy of the list depicting the existing prices and after reduction prepared and circulated by the ministry of industries and production is hereby forwarded for information in this regard.*

33. The abovementioned extracts are abundantly clear to establish the role of PVMA in relation to price fixation of ghee and cooking oil manufactured by its member mills. These extracts also show, beyond doubt, that prices are discussed in the meetings of PVMA and PVMA has also been actively representing business interests of its members as well as conducting negotiations on price of ghee and cooking oil with government on behalf of its members. Once negotiations have reached an amicable settlement and a price is mutually agreed upon by PVMA and government bodies, an announcement is made by PVMA through a circular to all of its member mills informing them the new price.

34. The Commission in its earlier order in the matter of Institute of Chartered Accountants of Pakistan<sup>3</sup> has held that the term ‘decision’ ordinarily means “the settlement of a question”, “formal judgment” or “the act of deciding or pronouncement”. Involvement of PVMA in negotiations with government to decide price of ghee and cooking oil on behalf of its member mills and then announcing the agreed price to all of its members through its circulars clearly falls within the ambit of term “decision of an association”.

#### **Violation of Section 4**

35. Decisions of an association made in respect of the production, supply, distribution of goods which have as their object or effect to prevent, reduce, restrict or distort competition within the relevant market are representative of restrictive practices explicitly prohibited under Section 4 of the Act, reproduced here:

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 their 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 of any goods or the provision of any service.

36. Extract taken from PVMA letter dated December 22, 2008 regarding input cost of production of vegetable ghee by costing committee is ample evidence that PVMA plays active role in costing and then negotiates for pricing based on costing prepared by itself. Letter states that with the approval of the Chair, the House constituted a Committee consisting of

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

Mr. Tanveer Hassan, Mr. Inam Bari, Mian Maqbool-ur-Rehman and Sh. Abdul Razzaq to firm up costing of the vegetable ghee produced by the PVMA member units “so that a plausible action could be taken with the help of collective wisdom” in response to government request to reduce prices.

37. Once costing is prepared by PVMA on behalf of its member mills, PVMA actively negotiates to fix the price around its own costing when government urges to reduce the price. Minutes of Executive Committee, PVMA, Meeting held on 15<sup>th</sup> December 2008 in Lahore reflect the recording of facts by PVMA which show active negotiations of PVMA. In response to Secretary Industries’ request to price vegetable ghee at Rs. 90/- per kg, the chairman, PVMA told the secretary that “PVMA can reduce price to Rs. 95/- per kg.” However, subsequently both the secretary Industries and Secretary Interior requested that according to costing the price is still on higher side so it should be reduced to Rs. 80/-per kg on which the “chairman, PVMA vehemently responded that it is totally unacceptable.”As reflected from the extracts, after lengthy discussion with the concerned higher ups of the Government, “it was agreed by the Government and the PVMA to fix a price of Vegetable Ghee at Rs.86/- per kg (Ex-Factory).” It was further clarified by the Chairman that the “price structure he had agreed with the Government is only valid for 2 weeks and he had made this decision in consultation with the Senior Vice-Chairman, PVMA, MR. Tariq Ullah Sufi and other PVMA members whom he was able to contact during that time.”

38. PVMA circulates its decision taken on behalf of its member mills to fix the price through circulars to all of its members. Extract taken from a circular dated December 11, 2008 explicitly requires member mills to honour the commitments made by PVMA on behalf of its members to government as is apparent from the language of the circular itself that “In light of the position explained above all the PVMA members units are requested to please honor this agreement made between Ministry of Interior and the PVMA on the 8<sup>th</sup> of December, 2008 in the national interest.”

39. We are of the view that it is apparent from the evidence quoted above that PVMA has played a significant role in fixing the price of ghee and cooking oil. Prices were regularly discussed in the meetings of PVMA. Costing was also prepared by PVMA and then active negotiations were made by PVMA with government to fix the price around its own costing. Once price was fixed, it was communicated to all of its members to follow the decision of PVMA. The Commission in number of its orders has already held that it is not the mandate of an association to deliberate on commercial sensitive information and engage into such activities of costing and taking decisions on pricing of commodities manufactured by its members. There is an ample proof that this has happened in the case of PVMA which demonstrates collusive behavior of PVMA in violation of competition principles enshrined in Section 4 of the Act.

40. It is pertinent to point out here that PVMA itself in its written submissions has admitted that its members are all over Pakistan and products manufactured by them vary in price due to various factors. Following is the list factors given by PVMA which attribute to price variation:

- *Blending ratios of soft and hard oils. For the convenience of the Commission, it is imperative to elaborate soft and hard oils. Hard oil consists of RDB Palm oil whereas soft oils consist of rapeseeds, sunflower, canola, cottonseeds, etc.*
- *Availability of soft and hard oil in the market*
- *International market of soft and hard oils*
- *In case of shortage of gas shortage, the manufacturing member units have to shift to the alternative namely furnace oil. Furnace oil is three times more expensive than gas*
- *Transportation costs, riots and strikes, load shedding*
- *Labour pay scales.*

These variation factors negate uniform pricing for all brands and also the argument of inherent /inbuilt restrictions in ghee/cooking oil sector. In our view, the above stated factors should all the more make the market and prices more competitive.

41. We also do not accept PVMA's argument that government fixed the price and PVMA just passed on this information to its member mills. We are aware of the fact that government has engaged association instead of manufacturers to discuss prices which may have repercussions on competition and cannot be condoned. The Commission maintains that government must not provide any patronage to measures that in effect promote and encourage any collusive behaviour in any industry. Fixing of prices, output etc are universally recognized as having most detrimental effects on competition which seriously impact and reduce the benefits that competitive markets deliver for consumers.
42. We must, however, record that we do not see involvement of government in 'price fixation' as has been portrayed by PVMA. The demand on behalf of government for reduction in price, in particular, in wake of decline in prices of edible palm oil/olein used as raw material in manufacturing of ghee/cooking oil seemed legitimate. While the modality i.e. negotiating, in particular, any price with the association is not as per competitive norms. One can not ignore the contextual background as minutes of meeting between Ministry of Industries and PVMA held on January 15, 2009 reveal. Government representative notified *"that the international price of palm oil had reduced from US\$ 1300/ton to US\$632/ton. He explained that any increase in international prices of palm oil was immediately reflected in the prices of ghee/oil in domestic market; but the decrease in prices was not reflected properly by the manufactures. He informed that during January, 2009 the C&F prices of RBD Palm Olein were recorded at US\$625-640/ton, however, the consignments presently arriving in the country were booked earlier and were being assessed by customs authorities at C&F price of US\$ 550, benefit of which was not being passed on the consumers."* We also observe government did not fix the prices rather urged to reduce the prices. In the case where price was suggested by the government, it was based on the costing prepared by PVMA.



43. We find there are some issues that need our attention and suitable directions. We are constrained to hold that role of government as portrayed by PVMA can not entitle them to what is generally known as the ‘State Action Defense’ doctrine in competition law. The Commission in its previous orders, including *PIA Hajj Fare* case,<sup>4</sup> has established the criteria for availing this defense. The relevant portion is reproduced below:

*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:*

*In the E.U., to plead the defense of state compulsion successfully, the party claiming the defense must satisfy the following three points:*

- a) *That the state must have made certain conduct compulsory; mere persuasion is insufficient;*
- b) *That the defense is available only where there is a legal basis for this compulsion; and*
- c) *That there must be no latitude at all for individual choice as to the implementation of the governmental policy. [FN 84]*

44. Nothing has been brought on record by PVMA to establish the above three constituents but on the basis of record, PVMA’s role in causing such price reduction/fixation on a collective basis, negotiating it for a specific time period and advising/recommending all its members implementation of such decisions we hold that PVMA has acted blatantly in violation of Section 4 of the Act.

45. PVMA argued that documents relied upon in the Enquiry Report are part of record for information sharing and PVMA is just a custodian of record. In this regard, we would like to reiterate the Commission’s view as observed in the Pakistan Sugar Mills Association’s provisional order:

*It may not be inaccurate to say that we can state with more certainty what trade associations are not allowed to do rather than what they are allowed to do.*

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<sup>4</sup> <http://www.cc.gov.pk/images/Downloads/PIA%20Hajj%20Fare%20Final%20Order%20-%202020%20November%202009.pdf>

*Trade associations can provide a venue to keep members informed of industry developments, to set standards for products and services, and to improve product quality and safety. Many TAs also publish trade journals and sponsor product and market research. TAs work to enhance the knowledge of their members, providing them with a better understanding of trends and industry conditions, which promote more informed business decisions. However, some of this conduct may also violate norms of competition law depending on the context.*

*Trade associations commonly establish industry standards which can increase efficiency by making products safer and easier to buy, use and replace. Trade associations may also disseminate critical historical market information, such as average prices and sales volumes, thereby making markets more transparent and efficient. However, competitively sensitive information generally should not be exchanged. Nevertheless, information as to past events, including pricing, may be exchanged if sufficiently aggregated so that the recipient cannot discern the pricing (or other information) of individual competitors. Future pricing or other prospective competitive information should never be exchanged<sup>5</sup>.*

#### **Decision in the nature of recommendation/advice**

46. It was also argued that PVMA does not have any statutory backing. Instructions communicated to members are mere recommendatory or advisory in nature. In this regard, we would like to refer to the case of Pakistan Jute Mills Association<sup>6</sup>, wherein the Commission has laid down that a decision of an association falls afoul of Section 4 of the Act whether it be in the nature of rules, recommendations and even co-ordination of an association. Observation of the Bench was based on the EU judgment in the matter of N V IAZ International Belgium, wherein the European Court of Justice, with regard to activities of an association named “anseau” held:

*19. In the first place, anseau observes that there can be no question of an ' ' agreement between undertakings ' ' within the meaning of the above- mentioned provision. Anseau is an association of undertakings which does not itself carry on*

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<sup>5</sup> ABA Section of Antitrust Law, Frequently Asked Antitrust Questions (2004)

<sup>6</sup>[http://www.cc.gov.pk/images/Downloads/pjma\\_order\\_3%20feb\\_2011.pdf](http://www.cc.gov.pk/images/Downloads/pjma_order_3%20feb_2011.pdf), citing NV IAZ International Belgium and others v Commission of the European Communities. C-96/82 IAZ International Belgium NV v Commission [1983] ECR 3369.

*any economic activity. Article 85 (1) of the Treaty is therefore applicable to it only in so far as its member undertakings are legally bound by the agreement. In fact they are not since, under both the agreement and the statutes of anseau, the latter is empowered only to make recommendations.*

*As the court has already held, in its judgments of 15 May 1975 in case 71/74 (frubo (1975) ecr 563) and of 29 October 1980 in joined cases 209 to 215 and 218/78 van landewyck (1980) ecr 3125, Article 85 (1) of the Treaty applies also to associations of undertakings in so far as their own activities or those of the undertakings affiliated to them are calculated to produce the results which it aims to suppress. It is clear particularly from the latter judgment that a recommendation, even if it has no binding effect, cannot escape Article 85 (1) where compliance with the recommendation by the undertakings to which it is addressed has an appreciable influence on competition in the market in question.[Emphasis Added]*

47. Notwithstanding, recommendations of PVMA were actually implemented or not, these clearly fall under the ‘decision of an association’ having an object or effect to restrict, reduce or prevent competition in relevant market which is prohibited under Section 4 of the Act. In any event, PVMA has failed to establish that recommendations of PVMA were only advisory in nature and were never actually acted upon by its members. In fact evidence before us proves it, beyond any doubt, that price decisions taken by PVMA were actually implemented. PVMA agreed and decided to trim down the ghee price from 120 per kg to Rs.98 per kg and then finally at Rs.86 per kg within three months (26<sup>th</sup> September 2008 to 15<sup>th</sup> December 2008). It clearly shows that during these three months member that manufacturing mills/units actually implemented the decisions of PVMA to fix the price.

48. As for ‘price fixing’ the Commission in its earlier order in the case of ICAP<sup>7</sup> referring to the case of Architects Association case relied upon:

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<sup>7</sup> [http://www.cc.gov.pk/images/Downloads/pjma\\_order\\_3%20feb\\_2011.pdf](http://www.cc.gov.pk/images/Downloads/pjma_order_3%20feb_2011.pdf)

*As a preliminary, it is settled case law that the fixing of a price, even one which merely constitutes a target or recommendation, affects competition because it enables all participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be, especially if the provisions on target prices are backed up by the possibility of inspections and penalties.*

*The Court of Justice has also held that, even though fixed prices might not have been observed in practice, the decisions fixing them had the object of restricting competition.*

49. Reliance of PVMA's counsel on the *Wouters and others v Algemene Raad van de Nederlandse Orde van Advocaten (Raad van de Balies van de Europese Gemeenschap interveniend)* (Case [C-309/99](#)) [2002] 1 All ER (EC) 193, seems misconceived. It was argued that "the business of ghee manufacturing has inherent restrictions and those restrictions are necessary for the smooth working of the industry. They are called in-built restrictions. For instance, it is a food manufacturing industry dealing in perishable item. It is a food item being an essential item for everyday usage in households. The continuity of supply is to be made in the public interest and as such the steps taken for the public interest are to be considered in leniency."

50. With respect to Article 81(1), generally the decision of an association of undertakings to restrict the freedom of its members is prohibited. However, in the case of *Wouters* we have reviewed that the restrictive effects upon competition were held not exceeding those necessary for proper regulation of members of the Bar. It was observed that the restriction upon the establishment of multi disciplinary partnerships between barristers and accountants within the Netherlands was reasonable and necessary for the proper regulation of the profession as a whole. The Court found that the steps taken by the Bar helped increase competition and ensured that the legal profession did not become dominated by law-accountancy firms and the situation in the case was very unique and specific. The situation faced in the PVMA case pertains to price fixing through its decisions which can not be termed as helping to increase

competition in any manner what so ever among its members. Hence, we find that the reliance on Wouter has no relevance to this case.

**Issue No. 3:** Whether the arrangement entered into by PVMA with respect to fixing rate of transportation is in violation of Section 4 of the Act?

51. PVMA has entered into agreements/arrangements with oil tanker transporters associations namely; Edible Oil Carriage Contractors Association (EOCCA) & All Pakistan Oil Tankers Owners Association (APOTOA) and also with National Logistic Cell (NLC) to fix rates of transportation of imported edible oil to PVMA member mills from Karachi port across the country at different destinations. Such practice of PVMA of fixing the rate of transportation where on one hand prevents and restricts competition between the members of a transporters association *inter se* it also distorts competition between members of different transporters associations and NLC.

52. PVMA gave number of reasons for entering into such arrangement with EOCCA and APOTOA. Among other justifications, it included that PVMA was compelled to enter into horizontal mutual agreements with EOCCA and APOTOA due to extraordinary circumstances. PVMA had no choice but to agree to terms and conditions imposed by APTOA and EOCCA. Any resistance to their demands has resulted into gunshots fired on the then Chairman, PVMA on 20-11-2001 or stoning the trucks or stopping transportation of edible oil of various members units. To resolve the issues with oil tankers associations PVMA has from time to time sought assistance from the Army Authorities and the Ministry of Industries and Production to intervene and take control of the situation. PVMA has succumbed to their demands in order to resolve matters with these associations. Under these circumstances PVMA has been a victim of cartelization rather than perpetrator.

53. Interestingly, we note that on one hand PVMA is alleging duress for entering into such arrangement with the transporters' association whereas

on the other hand they have cited various precedents arguing economic justifications for entering into such arrangement. We have reviewed the cited case laws and must record that none of these have relevance to the issue pressed. These include:

**a. O2 (Germany) GmbH & Co v European Commission (Case T-328/03)[2006] All ER (D) 13 (May) the Court of First Instance (CFI) stated:**

PVMA has quoted that “in the light of the prohibition laid down in art 81(1) EC, it was necessary to examine the economic and legal context in which the agreement had been concluded, its object, its effects, and whether it affects intra-Community trade, taking into account, in particular, the economic context in which the undertakings operated, the products or services covered by the agreement, and the structure of the market concerned and the actual conditions in which it functioned. The competition in question had to be understood within the actual context in which it would occur in the absence of the agreement in dispute.”

**b. Visa Europe Ltd and another v European Commission [2011] All ER (D) 251 (Apr) 14 April 2011**

PVMA has quoted that, “it is evident from settled case-law that in assessing an agreement, a decision of an association of undertakings or a concerted practice under Article 81(1) EC, account should be taken of the actual conditions in which they produce their effects, in particular the economic and legal context in which the undertakings concerned operate, the nature of the products or services concerned, as well as the real operating conditions and the structure of the market concerned, unless the subject matter is an agreement containing obvious restrictions of competition such as price-fixing, market-sharing or the control of outlets. In the latter case, such restrictions may be weighed against their claimed pro-competitive effects only in the context of Article 81(3) EC, with a view to granting an exemption from the prohibition in Article 81(1) EC.”

The reasons/justification given by PVMA in respect of its arrangement with transporters' association is that it was pressurized by these associations to agree to their rates of transportation. At times supply of edible oil to member units was stopped and also its office bearers were under physical threats. Under these circumstances, PVMA had no other option but to succumb to their demands. However, PVMA has failed to justify its arrangement with transporters' association on the basis of any economic and legal context but are pressing the factual context which needs further verification.

**c. Competition Authority v Beef Industry Development Society Ltd and another** [2009] All ER (EC) 367 Para 39,

PVMA argued that “ECJ in the aforementioned case has held that Article 81 EC thus provides for a *two-stage examination*. An agreement is compatible with the common market if either it does not come under the fundamental prohibition laid down in art 81(1) EC or it does come under that prohibition, but satisfies the conditions in art 81(3) EC. The finding that an agreement has as its object the restriction of competition and thus comes under the fundamental prohibition under art 81(1) EC is not therefore the last word on whether that agreement is compatible with the common market.”

To the contrary the ECJ in this case held that

*“to come within the prohibition laid down in art.81(1) EC, an agreement must have “as [its] object or effect the prevention, restriction or distortion of competition within the Common Market” It has, been settled case law that the alternative nature of that requirement, indicated by the conjunction “or”, leads, first, to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. Where, however, an analysis of the clauses of that agreement does not reveal the effect on competition to be sufficiently deleterious, its consequences should then be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent.”*

We would like to clarify here under EU competition law, an agreement which has object or effect to restrict competition under Article 81(1) can be exempted only if it fulfills the criteria laid down under Article 81(3). From the above para quoted it is clear that the word ‘object’ or ‘effect’ are used in alternative to determine whether an agreement restricts the competition.

It would be useful to add that the term object “does not refer to the subjective intention of the parties, but to the objective meaning and purpose of the agreement.”<sup>8</sup> An agreement deemed to have the ‘object’ of restricting competition (like a price fixing agreement) infringes Article 81(1) without having to establish its effect.<sup>9</sup>

Under the Competition Act there is prohibition to enter into such agreement which have object or effect of restricting or reducing the competition within the relevant market unless exempted under Section 5 and onus of claiming exemption is on the undertaking in terms of Section 9.

#### **d. European Night Services Ltd v Commission [1998] ECR II - 3141**

PVMA has quoted following paragraphs from the judgment:

*“...in a case such as this, where it is accepted that the agreement does not have as its object a restriction of competition, the effects of the agreement should be considered and for it to be caught by the prohibition it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute; the interference with competition may in particular be doubted if the agreement seems really necessary for the penetration of a new area by an undertaking (Société minière et technique at 249-250).*”

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<sup>8</sup> Case T 213/00, CMA CGM-FETTSCA [2003] E.C.R., p. II-913, at 183.

<sup>9</sup> Cases 56&58/64, Establishments Consten SA Grundig-Verkaufs-GmbH V. Commission, [1966] E.C.R. 299 at 342



*"Such a method of analysis, as regards in particular the taking into account of the competition situation that would exist in the absence of the agreement, does not amount to carrying out an assessment of the pro- and anti-competitive effects of the agreement and thus to applying a rule of reason, which the Community judicature has not deemed to have its place under Article 81(1) EC (Case C-235/92 P Montecatini v Commission [1999] ECR I-4539, paragraph 133; M6 and Others v Commission, paragraphs 72 to 77; and Case T-65/98 Van den Bergh Foods v Commission [2002] ECR II-4653, paragraphs 106 and 107).*

*"EC's decision suffers from insufficient analysis, first in that it contains no objective discussion of what the competition situation would have been in the absence of the agreement, which distorts the assessment of the actual and potential effects of the agreement on competition and, second, in that it does not demonstrate, in concrete terms, in the context of the relevant emerging market, that the provisions of the agreement on roaming have restrictive effects on competition, but is confined, in this respect, to a petitio principii and to broad and general statements."*  
[Paragraph 11.]

In our view, facts of the case are clearly distinguishable from PVMA case. Undertakings involved in the above case lodged a request for the agreements entered among them for passenger rail services through the Channel Tunnel to be exempted from the application of the rules on competition. The matter involved a unique and specialized market and the agreements entered into among the undertakings were also highly technical. As per the judgment of ECJ, the European Commission failed to carry out sufficient analysis of the market. The issue before us is an allegation leveled against PVMA for contravention of Section 4 of the Act and not an exemption application filed to seek exemption under Section 5 of the Act. The issue will be decided as per the facts available on record and submissions made by PVMA.

**54.** However, keeping in view the facts and documents placed before us and allegations made against transporters' associations, we are of the considered view that no determination with respect to this issue can be made unless all parties concerned are probed on this account. Subject to such enquiry, if any adverse finding is given in terms of, *prima facie*,

violation under the Act, the Commission may then proceed in accordance with law against parties concerned.

**Issue No. 3:** Whether PVMA in discharging the services of invoice verification is discriminating between its customers by charging two different rates for the same service in contravention of Section 3(3)(b) of the Act?

55. Under the Act, abuse of dominance is prohibited under Section 3 which is reproduced in relevant context as under:

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

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

(b) price discrimination by charging different prices for the same services from different customers in the absence of objective justification that may justify different prices.

56. PVMA has been designated by the Customs Authorities to verify the invoices of palm oil, CPO, palm olein, other edible oils imported from Malaysia, Indonesia and other countries of the world. Without getting into the debate of the legality of such designation of duty by the Customs Authority, we will restrict ourselves to the competition aspect of such practice i.e. charging of different rates for the service rendered.

57. Following is an excerpt from minutes of meeting held at Member (Customs), Camp Office, Customs House, KYC, whereby a resolution was passed to give effect to invoice verification by PVMA:

**Minutes of Meeting with the Office Bearers of Pakistan Vanaspati Manufacturers' Association held on January 22, 2000 in the Member (Customs), Camp Office, Customs House, KYC: Annex C1**

*It was decided that Reuters prices prevailing on the date of contract shall be the basis of Valuation for assessments purposes, the association assured necessary assistance in obtaining the Reuters prices. The association also agreed to verify the invoices in respect of imports made by its members. The same will be applicable to commercial importers as well.*

58. The rationale offered behind the verification of invoices is to discourage suspected under-invoicing and remove the difficulties thereby helping the revenue collectors to compute duty/taxes and other levies to the maximum benefit of national exchequer.
59. PVMA has been designated to extend the service of invoice verification for member mills and also commercial importers to facilitate Customs authorities. Since, PVMA is the sole service provider designated to verify invoices of its members importing edible oil and commercial importers who are not members. PVMA holds a dominant position in the market of invoice verification of edible oil. However, customers in the market are either manufacturers or commercial importers. These customers are paying a cost with respect to same service/transaction. The service entails maintaining a record of letter of indents of the importing units by PVMA. Price mentioned in the letter of indents is counter checked by the Secretary, PVMA on daily basis through the Reuters Source. Currently PVMA is charging two different rates for its invoice verification service; Rs.4/M. Ton to PVMA members and Rs.10/M. Ton to non-PVMA members.
60. Price discrimination is discriminating customers by charging different prices for the same goods/services by a dominant undertaking. More precisely explained in the words of Richard Posnar:

*Price discrimination is a term that economists use to describe the practices of selling the same products to different customers at different prices even though the cost of sale is the same to each of them. More precisely, it is a*

*selling price or prices such that the ration of price to marginal costs is different in different sales [...].<sup>10</sup>*

61. Objective of price discrimination is to capture as much consumer surplus as possible which is achieved through different forms of price discrimination; (i) excluding competitors, or (ii) eliminating competition in the downstream market or (iii) segmenting the market depending on their elasticity of demand. The European Commission sanctions discriminatory pricing practices by applying a test which has following two elements:

- a. The discrimination (dissimilar conditions) must relate to equivalent transactions; and*
- b. This discrimination must put customers at a competitive disadvantage vis-à-vis his competitors.*

Further, it has been held by the EU Commission:

*It is not part of the Commission's duties to assess as such the level of prices charged by an undertaking or to decide which criteria should govern the setting of such prices. On the other hand, where different prices are charged for equivalent transactions, it is appropriate to assess whether such difference are justified by objective factors.<sup>11</sup>*

62. Based on what is available on record, we are convinced that customers of PVMA i.e. commercial importers of edible oil and ghee/cooking manufacturers are on equal footing. The objective justification offered by PVMA which is based on classification of customers on membership and non-membership basis is misplaced. This justification could have been valid where the services provided were originally within the purview of association's scope of activities. Whereas, the services in question are those contracted to PVMA by a third party i.e. Customs Authority. As for the competitive dis-advantage one needs to appreciate that Rs.6 differential per M. ton would inevitably increase the cost of business for the importers who though may pass on the cost to their buyer – are at cost disadvantage.

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<sup>10</sup> Richard Posnar, Antitrust Law, Second Edition, University of Chicago Press, Chicago and London, 2001 at 79-80.

<sup>11</sup> HOV SVZMCN 94/210 (1994) OJ L104/34.

63. PVMA has relied upon the *United Brands v The Commission* [1978] ECR 207 the ECJ (Para 189) wherein it was stated that “*Although it is true . . . that the fact that an undertaking is in a dominant position cannot disentitle it from protecting its own commercial interests if they are attacked, and that such an undertaking must be conceded the right to take such reasonable steps as it deems appropriate to protect its said interests, such behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it.*”

64. We can not disagree with above stated view of the ECJ, in fact it strengthens and supports our view that such commercial interest and behaviour of a dominant undertaking can not be approved if its actual purpose is leading to an abuse of dominant position.

65. In this case of discrimination before us, the mere fact that classification was done on the basis of the members and non-members of the PVMA in itself shows that this was not an objective justification or legitimate commercial interest for applying different prices for the services rendered which are the same and PVMA was acting in its capacity as a sole service provider for invoice verification and not in its capacity as an association to facilitate only its member undertakings. Therefore PVMA failed to apply an objective criterion while charging two different rates to its members and commercial importers importing the same product i.e. edible oil.

66. PVMA has also quoted *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd.* [2011] All ER (D) 116 (Jan). Upon review we must draw the attention that the Court of appeal dismissed the appeal and held that “the present is a case where a dominant undertaking discriminated in the prices it offered to different customers, without objective justification, quoting higher prices to another undertaking which the dominant undertaking could be supposed to have regarded as an actual or potential competitor who was a threat... In such a case, it does not seem to me that it is necessary to establish how real the competitive threat posed by ECSL to EWS was before finding that EWS’ conduct amounted to an

abuse of its dominant position and therefore an infringement of article 82 and the Chapter II prohibition.” To us it is not clear how the finding in the aforementioned case supports PVMA’s stance.

67. We do not find merit in the argument that PVMA’s excessive charge is justifiable as it facilitates commercial importers for their invoice/price verification and helps them avoid waiting for long hours enabling them to pay all costs and obtaining clearance. The service rendered to the members is on equivalent footing and price of rendering such services should not, therefore, be discriminatory. We hereby hold that disparity of rates charged by PVMA from members and commercial importers importing the same product, is in contravention of Section 3(3)(b) of the Act.

### **Penalty/Remedy**

68. In view of the foregoing, taking all the facts and circumstances into account and in order to deter the undertaking from engaging in anti-competitive practices and to reflect the seriousness of the infringement i.e. price fixing, for the contravention of Section 4 of the Act, we hereby impose a penalty of PKR 50 million which PVMA is liable to deposit within 30 days of issuance of this Order. PVMA is further reprimanded not to indulge in any anti-competitive practice in future,

69. However, as for the violation of Section 3(3)(b) of the Act, we are hereby directing PVMA to cease the practice of charging discriminatory rates forthwith and to implement similar rates/charges/fee for invoice verification from manufacturers/members and commercial importers/non-members. PVMA is further directed to report compliance within a period of 30 days of issuance of this Order. Failure to comply with this direction shall make PVMA liable for a penalty in the sum of PKR 1 million for each day default.

70. In summing up, we would like to reiterate the role of trade associations as observed in the Poultry Association case<sup>12</sup> that trade associations can play an important role in the development of the sector they represent. However, associations must also be extremely careful about what sort of activities may violate competition law. Discussion, deliberation and decisions regarding purely business concerns like current and future pricing, production and marketing are anti-competitive and should be avoided at all costs by the associations. Associations have a responsibility to ensure that their forum is not used a platform for collusive activities. The rule of thumb is not to allow discussion, deliberations or sharing of sensitive commercial information that may allow members, who are competitors, to co-ordinate business policy. Ensuring that every, or even one, member has a profitable business is not the job of an association.

(RAHAT KAUNAIN HASSAN)  
CHAIRPERSON

(ABDUL GHAFAR)  
MEMBER

**Islamabad, the June 30<sup>th</sup>, 2011.**

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<sup>12</sup> [http://www.cc.gov.pk/images/Downloads/ppa\\_order\\_16\\_august\\_2010.pdf](http://www.cc.gov.pk/images/Downloads/ppa_order_16_august_2010.pdf)