BEFORE THE
APPELLATE BENCH
COMPETITION COMMISSION OF PAKISTAN
IN THE MATTER OF

APPEALS FILED BY PAKISTAN BANKS ASSOCIATION AND OTHERS
No. 4(1)/Reg/Banks/CCP/2008

Appeal Nos. 1-10/2008

Dates of hearings:	March 19, 2009 February 19, 2009 January 23, 2009 January 06, 2009 November 11, 2008
Present:	Mr. Khalid A. Mirza Chairman Dr. Joseph Wilson Member
Present for Pakistan Banks Association and others:	Mr. Muneeb Akhtar, Advocate Mr. Masood Raza Mr. Nasim Bhatti

O R D E R

1. Pakistan Banks Association, Allied Bank Limited, Atlas Bank Limited, Habib Bank Limited, Muslim Commercial Bank, Saudi Pak Bank Limited and United Bank Limited (hereinafter the "Appellants") preferred an appeal against the Order by a Single Member Bench of the Commission dated April 10, 2008 (hereinafter "Impugned Order") holding that the Appellants have violated of Section 4(1) of the Competition Ordinance, 2007 (hereinafter "the Ordinance").

A. Background

2. The Competition Commission of Pakistan (hereinafter the "Commission") took *suo moto* notice of the advertisement by Pakistan Banking Association (hereinafter the "Appellants") on November 5, 2007 wherein the general public was informed that all banks had decided to introduce an Enhanced Saving Account (hereinafter the 'ESA'), under the auspices of the Appellants, which would, *inter alia*, automatically convert PLS accounts with an average balance of Rs. 20,000 to the ESA, offer a 4 % interest rate for deposits of less than Rs. 20,000, and impose a Rs. 50 service charge on deposits having a balance of less than Rs. 5,000. The Commission issued Show Cause Notices, among others, to the Appellants on December 24, 2007 for violating, prima facie, Section 4(1) read with Section 4(2) (a), (c) and (f) of the Ordinance.

3. A Single Member Bench of the Commission heard the matter and issued the Impugned Order dated April 10, 2008 holding the Appellants in violation of Section 4(1), and imposing a penalty of Rs. 30 million on PBA and Rs. 25 million on each of the 7 banks mentioned in Paragraph 1 above.

4. The Appellants on May 13, 2008 filed a writ petition in the Sindh High Court and obtained a stay order dated 27.05.2008 against the Impugned Order, which was held infructuous by the Honourable Supreme Court vide its order dated October

23, 2008. Subsequently, the application for stay before the Sindh High Court was disposed off on November 17, 2008 in terms of the order passed by the Honourable Supreme Court. Thereinafter, the Appellants filed an appeal against the Impugned Order before the Commission under Section 41 of the Ordinance on November 18, 2008.

B. Grounds of Appeal

5. The Appellants raise the following grounds in their appeal:

   (i) That the Commission took *suo moto* notice in the matter and issued a show cause notice under Section 30 without following the mandatory procedure laid out in Section 37. Section 37(1) limits the suo moto power of the Commission only to conduct enquiries. Section 37(4) stipulates that if at the conclusion of the enquiry, the Commission is of the opinion that the public interest warrants initiating proceedings under Section 30, it shall only then initiate proceedings. Section 30 allows the Commission to make an Order under Section 31 only when it is *satisfied* that there has been or is likely to be a contravention of the Ordinance. The only manner in which the Commission may achieve satisfaction is by conducting an enquiry. Hence, since the enquiry has not been undertaken, the instant case and the Impugned Order is a void of force.

   (ii) That the Commission has failed to make the mandatory determination of the “relevant market” in respect of which the Appellants are allegedly in breach of Section 4(1). Section 4(1) prohibits any agreement or decision that has the object or effect of preventing, restricting or reducing competition within the “relevant market”. Since the relevant market has not been determined, as mandated by Section 4(1), the Impugned Order suffers from want of jurisdiction.

(iii) That the banking sector is not within the jurisdiction of the Commission. The ESA was introduced under the guidance and at the behest of the State Bank of Pakistan. According to Section 46B of the State Bank of Pakistan Act, 1956 (hereinafter the "State Bank Act"), no governmental or quasi-governmental body or agency can directly and indirectly issue any directives to any banking company which are inconsistent with the policies, regulations and directives issued by the State Bank. Furthermore, the non-obstante clause of Section 54A of the State Bank Act overrides the provision of the Ordinance. Therefore, the Impugned Order is without effect.

(iv) That the Impugned Order has wrongly interpreted Section 4(2) of the Ordinance as a deeming provision that makes any agreement described therein as per se illegal. There is no mention of the word 'deem' in the said section, a word that is well understood to create legal fiction. The word 'deem' has been used extensively in the Ordinance otherwise, however the legislators have deliberately chosen not to use the word "deem" to create any legal fiction in Section 4(2). Therefore, the Single Member Bench has wrongly applied Section 4(2) in the present case.

(v) That the Single Member Bench has wrong applied the per se illegal doctrine in the Impugned Order. The Impugned Order relies on outdated American and European case law to hold that there are only two approaches to judicially deal with prohibited agreements. According to this view, certain agreements are 'per se illegal' i.e., agreements which do not merit any consideration by the courts while other are assessed under the 'rule of reason' approach i.e., they are examined after weighing all the circumstances of the case. Both EU and American case law has moved away from the approach and now consider per se illegal and rule of reason approach to be two ends of a

continuum. Since it is an accepted position of the Commission that the Ordinance is based on up-to-date law, the Single Member Bench has erred in applying the outdated approach in this case.

(vi) That the Impugned Order incorrectly concludes that the Appellants' decisions 'clearly fixes the price with regard to provision of banking service in respect of ESA: the purchase price being fixed at 4%'. The Impugned Order also incorrectly concludes that 'the real intent [of the decision was] to cap the interest payable by the members in a competitive environment and provide comfort to members that there would not be any competition in attracting deposit of small depositors.' The Impugned Order does not take into consideration the fact that the 4% rate of profit specified for the ESA was a minimum rate which would be increased by individual banks not a maximum rate.

(vii) That the Impugned Order has wrongly identified the Appellants as a cartel by ignoring the distinction between a sellers' and a buyers' cartel. If at all the Appellants were a cartel, it was a buyer's cartel since the 4% rate of profit offered under the ESA has to be paid to the depositors by the banks and not the other way around *i.e.*, the banks act as purchasers since they are paying profit to the depositors. According to principles of economics, a buyers' cartel aims to reduce price i.e. set a maximum price the cartel would be willing to pay to buy a product or service. In this instance, the alleged cartel of buyers (banks) has set a minimum price to be paid to the buyer's (depositors). Since setting a maximum price is crucial for a buyers' cartel, and this has not been done in this case, the Impugned Order has erroneously identified the Appellants as a cartel.

(viii) That the Impugned Order wrongly dismissed the Appellants' assertion that even if there was a technical breach of Section 4 of the Ordinance, it was not in public interest to issue a show cause notice. Section 37(4) of the Ordinance mandates that proceedings under Section 30 can only be invoked once the Commission is satisfied, independently of the breach, that it would be in public interest to do so. The ESA offers a rate of profit much higher than what was being offered on average before. This translates into higher profits for small depositors who would greatly benefit from this action. Hence, the overwhelming public interest in this case would have been to not proceed under Section 30 of the Ordinance. Thus the Commission did not apply its mind independently of the alleged breach and therefore the proceedings were null and void.

C. Issues

6. The grounds of appeal as submitted by the Appellants can be categorized into four main issues.

   (i) **Procedural Aspects**: whether the Commission followed the proper procedure as enshrined in Sections 37 and 30 of the Ordinance for issuing a show cause notice and the Impugned Order?

   (ii) **Regulated Conduct**: whether the State Bank Act ousts the jurisdiction of the Commission in matters pertaining to the banking sector?

   (iii) **Application of Section 4** of the Ordinance: whether the Single Member Bench applied Section 4 after satisfying all the necessary elements required, in the case at hand?

   (iv) **Public Interest**: whether the initiation of proceedings under Section 30 by the Commission in the instant case was in 'public interest' as used in Section 37(4) of the Ordinance?

Procedural Aspects: whether the Commission followed the proper procedure as enshrined in Sections 37 and 30 of the Ordinance for issuing a show cause notice and the Impugned Order?

7. The Appellants contend that the Commission does not have the suo moto power to issue a show cause notice under Section 30 of the Ordinance without following the mandatory procedure of conducting an enquiry laid out in Section 37 of the Ordinance. The Appellants explain that the suo moto powers of the Commission are restricted to the act of conducting enquiries under Section 37(1) of the Ordinance. In addition, it was contended that Section 37(4) states that after the conclusion of the enquiry, if the Commission is of the opinion that it is in public interest, it shall initiate Section 30 proceedings. The Appellants go on to state that Section 30 says that where the Commission is *satisfied* that that there has been or is likely to be a contravention of any provision of chapter two of the Ordinance, it may make an Order under Section 31 of the Ordinance. The Appellants contend that the only manner in which the Commission attains 'satisfaction' is by conducting an inquiry. Since no inquiry has been conducted in the matter before the Commission, and the Commission has no power to initiate Section 30 proceedings on its own, the entire proceedings in this matter, including the Impugned Order, are a nullity and should be set aside. In this connection the Appellants cite Moulana Atta ur Rehman v. Sardar Umar Farooq and others PLD 2008 SC 663, 672 as precedent.

8. It may be useful to reproduce the relevant sections of the Ordinance below for ease of reference.

> **Section 30. Proceedings in cases of contravention** – (1) Where the Commission is satisfied that there has been or is likely to be, a contraction of any provision of Chapter II, it may make one or more of such orders specified in Section 31 as it may deem appropriate. The Commission may also impose a penalty at rates prescribed in Section 38, in all cases of contravention of the provisions of Chapter II.

> (2) Before making an order under sub section (1), the Commission shall
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> (a) give notice of its intention to make such order stating the reasons therefore to such undertakings as may appear to it to be in contravention; and
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> (b) give the undertaking an opportunity of being heard on such state as may be specified in the notice and of placing before the Commission facts and material in support of its contention:
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> …
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> **Section 37. Enquiries and Studies** – (1) The Commission may on its own, and shall upon a reference made to it by the Federal Government, conduct enquiries into any matter relevant to the purposes of this Ordinance.
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> (2) Where the Commission receives from an undertaking or a registered association of consumers a complaint in writing of such acts as appear to constitute a contravention of the provisions of Chapter II, it shall, unless it is of opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by prima facie evidence, conduct and enquiry into the matter to which the complaint relates.
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> …
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> (4) If upon the conclusion of an inquiry under sub-section (1) or subsection (2), the Commission is of opinion that the findings are such that it is necessary in the public interest so to do, it shall initiate proceedings under Section 30.

9. We do not agree with the interpretation of Sections 37 and 30 as constructed by the Appellants. While the *suo moto* power under Section 37 deals with conducting enquires, it is by no means a pre-requisite for initiating proceedings under section 30. Had the intention of the legislature be to have mandatory enquiry in every case before initiating proceedings under Section 30, as contended by the Appellants, plain language could easily have been provided to reflect this intention. For instance, Section 30 could have read like as follows:

> **Section 30. Proceedings in cases of contravention** – (1) Where the Commission is satisfied, <u>after conducting enquiry under section 37</u>, that there has been or is likely to be, a contraction of any provision of Chapter II . . .

10. The Appellants are suggesting that we read the underlined words inserted above in Section 30 when the legislature has not put them there. While the Commission can be satisfied on basis of an enquiry conducted under Section 37, enquiry under

Section is not the only manner in which the satisfaction of the Commission is achieved. There is nothing in the Ordinance which prevents the Commission from relying and proceeding on other sources of information, such as media reports, published advertisement, studies conducted by reputable firms or other materials on record for its satisfaction. Therefore, whatever the source of the information may be, the basis for satisfaction vis-à-vis a *prima facie* case is not a particular form of enquiry or study, but the availability of credible and reliable information about an existing or likely contravention of the Ordinance. Even in the scheme of the Ordinance, an enquiry does not precede initiation of proceedings.

11. In light of the above, it is clear that the Commission was under no obligation to conduct an enquiry into the matter that was before the Single Member Bench. We see no reason to place fetters on the lawful powers of the Commission. The openly published advertisement by the Appellants was sufficient to satisfy the Commission that there is a likely contravention of any provision contained in Chapter II of the Ordinance.

Regulated Conduct: whether the State Bank Act ousts the jurisdiction of the Commission in matters pertaining to the banking sector?

12. At the outset, regarding the jurisdiction of Competition Commission in relation to the banking industry, it is an accepted fact that agreements or concerted practices relating to interest rates, charges and similar parameters of competition fall within the purview of a competition agency.[1] The Appellants argued regulated conduct defense, that is, that ESA was launched at the behest and guidance of the State Bank of Pakistan and in light of Section 46B of the State Bank Act, all directives by government bodies inconsistent with the policies, regulations, and directives of the State Bank are void. The Appellants placed reliance, to support its regulated conduct defence, on the U.S. Supreme Court's judgment in *Credit Suisse Securities (USA) LLC v. Billing and other* 127 S. Ct. 2383 (2007), in which the

[1] Case COMP/36.571/D-1: Austrian Banks- Lombard Club

Court found an implied antitrust immunity for Initial Public Offering (IPO) underwriting practices that were within the jurisdiction of and regulated by the SEC. The Appellants further argued that the non-obstante clause in Section 54A of the State Bank Act overrides the provisions of the Competition Ordinance.

13. We must note here that the record presented to us shows that, in order to achieve the objective of getting banks to raise rates of return to depositors and narrow interest rate spreads, the State Bank chose to interact with the banking industry as a whole, *i.e.*, on a collective basis, through the Pakistan Banks Association (**PBA**). Regulatory institutions are not only expected to be role models of compliance with the letter and spirit of the law but also are expected to require and encourage compliance with the law by the regulated. SBP, instead of using its regulatory imperative to issue appropriate directives to any or all banks as it is entitled to do, took the tendentious route of encouraging banks to use the platform of their trade association, which resulted in collusive behaviour with respect to the subject banking services. Even otherwise, we feel that State Bank should perhaps have been cognizant of the injury to the economy that flows from impeding the ordinary give-and-take that is integral to the market mechanism. We would like to caution SBP that while dealing with banks on a collective basis through their trade association, it has the obligation to guard against the violations of Section 4.

14. Coming to the arguments raised by the Appellants, we first address the application of non-obstante clause embodied in Section 54A of the State Bank Act. It shall be noted that the Competition Ordinance also has a non-obstante clause as embodied in Section 57. The Commission has interpreted the application of Section 57 of the Competition Ordinance in its Order in the matter of Karachi Stock Exchange, and Others (File No. 1/Dir(Inv) KSE/CCP/08) as follows:

> 59. . . . Section 57 states that "the provision of this Ordinance shall have the effect notwithstanding anything to the contrary contained in any other law for the time being in force." However, it is quite possible that a subsequent legislation establishing a regulatory regime over an area of commercial activity may also have an overriding clause similar to Section

> 57. Would that mean that the Competition Ordinance will be displaced? The reply is in negative, for “the general sense of the phrase ‘for the time being’ is that of time indefinite, and refers to indefinite state of facts which will arise in future and which may vary from time to time.”[FN 83] Thus, notwithstanding the overriding clause, a valid piece of legislation incompatible or repugnant to the provisions of the Competition Ordinance may be enacted. In such a situation, the Commission may ascertain how other jurisdictions have resolved the conflict between competition law and other regulatory laws. Here, the conflict resolution standards of “state compulsion” defense or “grant of implied immunity” adopted in the E.U. and U.S. respectively, are instructive and persuasive.
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> [FN 83] *Devkumarsinghji Kusturchandji* v *State of Madhya Pradesh and others*, AIR 1967 MP 268 at para 11 citing *Ellison* v. *Thomas*, (1862) 31 LJ Ch 867.

15. From above, and in light of Section 57, the non-obstante clause of State Bank Act cannot override the application of Competition Ordinance. Where two Acts and/or Ordinances have a non-obstante clause each, and both of them place conflicting regulatory commands over an area of commercial activity, as in the instant case, the Commission has found the criteria for conflict resolution applied by the courts in the E.U. and U.S. persuasive. The Commission has discussed these standards in its in its Order in the matter of Karachi Stock Exchange, and others (File No. 1/Dir(Inv) KSE/CCP/08) as follows:

> 60. In the E.U., to plead the defense of state compulsion successfully, the party claiming the defense must satisfy the following three points:
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> 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]
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> [FN 84] Richard Whish, COMPETITION LAW, (Oxford Uni. Press, 5th ed., 2005) at p. 129.
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> 61. The position in the United States is as follows:
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> “[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]

[FN 85] Parker C. Folse, III, *Antitrust and Regulated Industries: A Critique and Proposal for Reform of the Implied Immunity Doctrine,* 57 Tex. L. Rev. 751 at 767 (1979) citing: *City of Lafayette v. Louisiana Power & Light Co*., 435 U.S. 389, 398 (1978); *Gordon v. New York Stock Exch*., 422 U.S. 659, 682 (1975); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963); *Silver v. New York Stock Exch*., 373 U.S. 341, 357 (1963). *See Gordon v. New York Stock Exch.,* 422 U.S. 659, 682 (1975); *Pan Am. World Airways, Inc. v. United States*, 371 U.S. 296, 305 (1963).

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]

[FN 86] *Credit Suisse Securities v. Glen Billing et al.,* 127 S.Ct. 2383 (2007).

[FN 87] *Gordon v. New York Stock Exchange, Inc*., 422 U.S. 659 at 682 (1975); citing the following cases: *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-351, 83 S.Ct. 1715, 1734-1735, 10 L.Ed.2d 915 (1963). *See also Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S., at 126, 94 S.Ct., at 389; *Hughes Tool Co. v. Trans World Airlines, Inc*., 409 U.S. 363, 385-389, 93 S.Ct. 647, 659-662, 34 L.Ed.2d 577 (1973); *Carnation Co. v. Pacific Conference*, 383 U.S. 213, 217-218, 86 S.Ct. 781, 784-785, 15 L.Ed.2d 709 (1966); *Silver v. New York Stock Exchange*, 373 U.S., at 357-358, 83 S.Ct. at 1257-1258;*United States v. Borden Co*., 308 U.S. 188, 198-199, 60 S.Ct. 182, 188-189, 84 L.Ed. 181 (1939); *United States v. National Assn. of Securities Dealers,* 422 U.S. 694, at 719-720, 729-730, 95 S.Ct. 2427, 2443, 2447-2448, 45 L.Ed.2d 486

[FN 88] *Credit Suisse Securities v. Glen Billing et al*., 127 S.Ct. 2383 (2007). Citing *Gordon v. New York Stock Exchange, Inc*., 422 U.S. 659 (1975); *United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975).

16. The Appellants adduced *Credit Suisse* for the application of implied antitrust immunity. If we apply the four-pronged test used by the Court in *Credit Suisse,* we note that the ESA fails to meet the test. In the instant case, while there is existence of a regulatory authority *i.e.,* the State Bank of Pakistan, it did not exercise its authority by mandating the implementation of ESA; as admitted by the Appellants ESA was launched only at the guidance and behest of the State Bank. The Appellants in their written submission noted at paragraph 9 (at page 5) "furthermore, it was not obligatory on the members to offer this product, and many of them did not do so either because they are already offering a product that was similar in nature to (or even better than) the ESA, or because for various other reasons (including technical constraints), the member concerned felt unable or unwilling to offer the product." Had the State Bank required compulsory implementation of the ESA, it should have issued a directive, as it did earlier at various occasions. If the conduct in question is not regulated by the regulatory authority, as in the present case, the need to assess resulting risks and possible conflict (points iii & iv) become redundant. Thus, the mere fact that ESA was launched at the behest and guidance of the State Bank is not sufficient to show that the Appellants were acting under conflicting regulatory commands.

17. Analyzing the Court decision in Credit Suisse, Professors Areeda and Hovenkamp noted:

> In the last thirty years the Supreme Court has become much more critical of agency regulation, and much less inclined to see it as a panacea for all the difficulties of the traditional court system. There appears to be no more room for any notion that antitrust will be ousted simply because regulation is "pervasive," thus yielding all disputes over competition policy in the industry to the agency. At the same time, the immunity grant in *Credit Suisse* is broad. The explanation is that while the Court is more skeptical about agency regulation that it was in the 1970s, its skepticism about the use of antitrust litigation is even greater.

18. We may for the satisfaction of the Appellants wish to state that the rationale for grant of implied antitrust immunity in *Credit Suisse* has no relevance in our competition regime given its current state of development.

Application of Section 4 of the Ordinance: whether the Single Member Bench applied Section 4 after satisfying all the necessary elements required, in the case at hand?

19. There is list of arguments that pertains to the improper application of Section 4 by the Single Member Bench, which is as follows:
    (i) That the Single Member Bench declared the list of agreements mentioned in Section 4(2) as deemed to be illegal *per se*.
    (ii) That the Single Member Bench did not determine the "relevant market" as required by Section 4(1);
    (iii) That the Single Member Bench wrongly relied on the dichotomous – *per se* and "rule of reason" analysis for ascertaining prohibited agreement.

20. The first issue raised by the Appellants regarding the application of Section 4 is that the Single Member Bench may have wrongly applied the *per se* illegal doctrine. The Appellants argue that the list is merely an example of agreements which might contravene Section 4(1) but are not deemed *per se* illegal agreements. In support of this contention, the Appellants asserted that the while the word deem has been used ten times in the Ordinance, it has not been used in Section 4(2), thereby indicating that the legislator clearly did not want to deem these agreements as *per se* illegal.

21. Section 4(2) provides a non-exhaustive list of agreements which have the "object" or "effect" of preventing, restricting and reducing competition. Some agreements, such as naked price fixing agreement among competitors, as is the case in the instant proceedings, are condemned as *per se* illegal. Other agreements that

impose ancillary restraints need to be assessed whether pro-competitive benefits outweigh anti-competitive effects. The depth of inquiry required to assess the effects of the agreements varies on case to case basis. Thus, to the extent of the facts before the Single Member Bench, he was right in declaring the agreement as *per se* illegal based on the nature of the agreement; thus deeming the 'object' as anti-competitive. The Appellants have failed to appreciate the context in using the word 'deemed'. A mere reading of Paragraphs 47 and 48 of the Impugned Order will clarify the context.

22. The second objection by the Appellants as to the application of Section 4 is that the failure of Single Member Bench to define the relevant market as required under Section 4(1) of the Ordinance is fatal to the Impugned Order. Section 4(1) is reproduced below for ease of reference.

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

23. The Single Member Bench, in its Impugned Order at Paragraph 50, reproduced below, relied on Court of First Instance's decision in <u>Volkswagen AG vs. Commission of European Communities,</u> wherein the Court stated that where an agreement has the "object" of preventing, restricting or distorting competition there is no need to take account of the actual effects of the agreement – for which defining relevant market is essential.

> 50. In <u>Volkswagen AG vs Commission of European Communities</u> July 06, 2000 the European Court of the first instance observed:
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> "It is settled case-law that for the purpose of the application of Article 85(1) there is no need to take account of the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-

> competitive object of the conduct in question is proved (see Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299, 342, and Case C-219/95 P Ferriere Nord v Commission [1997] ECR I-4411, paragraphs 12 to 14)"

24. The Appellants in their written submission in Para P (of the Grounds) stated as follows:

> It is submitted that reference to the American case law is misconceived, since admittedly, section 4 is based on Article 81(ex Article 85) of the EU Treaty, and the European Courts have not as such adopted the *per se* rule. The European Courts focus less on the legal nature of the agreement concerned, and more on the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned. It is submitted that this is the correct approach to section 4.

25. However, during the hearing the Appellants took a different stance. In their written summary of arguments, dated March 17, 2009, made during the course of hearings the Appellants on paragraph 11 at page 4, made reference to Paragraph 204 of the Volkswagen case, and then concluded:

> In the present case the language of section 4 of the 2007 Ordinance is clear and is, in this respect, markedly different from the provisions of Article 85 [current Article 81] of the EU Treaty. The EU Jurisprudence does not therefore in the present case provide any guidance, and the failure to determine the "relevant market" in the present case was fatal.

26. We have not seen anyone blowing hot and cold so openly and blatantly. The Appellants contend that "the reference to American Case is misconceived" and then relied on it. And on the other hand, first submitted that following EU jurisprudence "is the correct approach to section 4" and then stated that it does not "in the present case provide any guidance." While we do not want to delve further on this professional anomaly, we, independent of EU and U.S. jurisprudence are of the view, that if the agreement has the object of preventing, restricting or reducing competition, there is no need to assess its anticompetitive

effects, for which ordinarily relevant market is defined. Accordingly, in the given facts not defining the relevant market is not material. We therefore hold that the Single Member Bench rightly chose not to address the question of the relevant market, as this was not necessary based on the facts of the case before him.

27. The third objection of the Appellants was that the Single Member Bench wrongly relied on the dichotomous – *per se* and "rule of reason" analysis for ascertaining prohibited agreement. In support of its argument the Appellants adduced US case law to describe the progress in US jurisprudence that has taken the courts there away from the dichotomous approach to a more nuanced and flexible approach in assessing agreements in restraint of trade. While the Appellants refer to Broadcast Music v. Columbia Broadcasting System as well as California Dental Association v. Federal Trade Commission, he relies mainly on PolyGram Holding v. Federal Trade Commission 416 F.3d 29) to document the developments in the analysis of prohibited agreements.

28. The relevant portion from the *Polygram* case is reproduced below:

> The Supreme Court's approach to evaluating a § 1 claim has gone through a transition over the last twenty-five years, from a dichotomous categorical approach to a more nuanced and case-specific inquiry. In 1978, just before the transition began, the Court summarized its doctrine as follows: There are ... two complimentary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality — they are "illegal per se." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts particular to the business, the history of the restraint, and the reasons why it was imposed. *Nat'l Soc'y of Prof'l Eng'rs v. FTC*, 435 U.S. 679, 692 (1978). (Emphasis supplied).
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> …
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> Since *Professional Engineers* the Supreme Court has steadily moved away from the dichotomous approach — under which every restraint of trade is either unlawful *per se,* and hence not susceptible to a pro-competitive justification, or subject to full-blown rule-of-reason analysis — toward one in which the extent of the inquiry is tailored to the suspect conduct in each particular case. For instance, the Court did not hold unlawful *per se* an agreement limiting the number of football games each participating college could sell to television, which agreement was challenged in *NCAA v. Board of Regents*, 468 U.S. 85, 100 (1984)

(recognizing but declining to apply doctrine that "[h]orizontal price-fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal *per se*' approach"); or the refusal of an organization of dentists to provide x-rays to dental insurers, which was at issue in *IFD*, 476 U.S. at 458 ("Although this Court has in the past stated that group boycotts are unlawful *per se*, we decline to resolve this case by forcing the Federation's policy into the 'boycott' pigeonhole and invoking the *per se* rule") (citations omitted). *Compare*, *e.g.*, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (price-fixing *per se* unlawful); and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (group boycott *per se* unlawful).

At the same time, however, in *NCAA* and *IFD* the Court did not insist upon the elaborate market analysis ordinarily required under the rule of reason to prove the defendant had market power and the restraint it imposed had an anticompetitive effect. *See NCAA*, 468 U.S. at 109–10 (rule of reason analysis unnecessary in light of district court's finding price and output not responsive to demand); *IFD*, 476 U.S. at 459 ("While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement"). The Court instead adopted an intermediate inquiry, since dubbed the "quick look," to evaluate horizontal restraints of trade. *See, e.g.*, Areeda & Hovenkamp, *Antitrust Law*, ¶ 1911a.

It would be somewhat misleading, however, to say the "quick look" is just a new category of analysis intermediate in complexity between "*per se*" condemnation and full-blown "rule of reason" treatment, for that would suggest the Court has moved from a dichotomy to a trichotomy, when in fact it has backed away from any reliance upon fixed categories and toward a continuum. The Court said as much in *California Dental Association v. FTC*:

The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like "*per se*," "quick look," and "rule of reason" tend to make them appear. We have recognized, for example, that there is often no bright line separating *per se* from Rule of Reason analysis, since considerable inquiry into market conditions may be required before the application of any so-called "*per-se*" condemnation is justified. 526 U.S. 756, 779 (1999).

Rather than focusing upon the category to which a particular restraint should be assigned, therefore, the Court emphasized the basic point that under § 1 the essential inquiry is "whether ... the challenged restraint enhances competition." *Id*. at 779–80 (quoting *NCAA*, 468 U.S. at 104). In order to make that determination, a court must make "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint," *id*. at 781, which in some cases may not require a full-blown market analysis.

The Court continued:

> The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principle tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason analyses in case after case reach identical conclusions. *Id*.; c*f. United States v. Microsoft*, 253 F.3d 34, 84 (D.C. Cir. 2001) (declining to condemn *per se* tying arrangements involving platform software products because there was "no close parallel in prior antitrust cases" and "simplistic application of per se tying rules carries a serious risk of harm").

29. In view of the account given by the U.S. Court of Appeals in *PolyGram*, the Appellants are contending that the Single Member Bench erred in applying the *per se* illegal doctrine on the facts of the case before it. The Appellants have contended that the Single Member Bench had taken an outdated view by condemning the horizontal restraint in this case as *per se* illegal.

    The Appellants seem to have taken a simplistic view of the courts deliberation and have missed the point that the Court in *PolyGram* was trying to make. The issue in *PolyGram* was whether an agreement between PolyGram Holding and Warner Communication to suspend marketing and discounting of two concert albums of the same group that competed with each other was *per se* illegal as determined by the U.S. Federal Trade Commission. The court correctly held that since 1978, the courts in the U.S. have started to analyze restraints within a continuum rather than to box them in just two categories. The court, however, did not rule out the possibility that a restraint could not be held *per se* illegal.

30. The facts in the case before the Single Member Bench can be clearly distinguished from that of the case which was before the Court in *PolyGram*. In *PolyGram*, the restraint under question was that of an agreement between two companies in a joint venture which barred advertisement and discounting of a particular recording. In the case before the Single Member Bench, the restraint was a naked horizontal price fixing agreement between almost all of the competitors in the banking industry. Horizontal naked price fixing is still *per se*

illegal, even within the continuum approach, as clearly mentioned by the court in *PolyGram*. The rationale for this is based on constant economic analysis and the experience of competition agencies and court all over the world where it has been seen countless times that horizontal naked price fixing agreements "impede the ordinary give and take of the market place" and_ have no pro-competitive effects. Hence, while we agree that when an agreement under question is a novel one and is not clearly identifiable as a *per se* violation, the 'quick look' or even full rule of reason approach should be employed; however, the facts in the instant case did not merit the same.

31. Nevertheless, assuming that the quick look approach was indeed warranted, in our view such approach was adopted even by the Single Member in passing the Impugned Order. For instance, the deliberations, *inter alia,* in Paragraphs 42, 43, 44 of the Impugned Order prior to reaching the inference in Paragraph 45 and addressing of Appellants' arguments in Paragraph 46 clearly reflect the application of 'quick look' approach. Under quick look approach the Appellants "must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm" to use the language of the Court in *PolyGram.*

32. The Appellants maintained that the interest rate, which was fixed as a minimum, was much higher than the average prevailing interest rate offered by the majority of banks, and would enable small depositors to get a better rate of return on their deposits as compared to before the introduction of the ESA. The Appellants contend that the banks were doing this in the best interest of the small depositors despite having to pay more as a result of introducing this scheme. The ESA, since it offered a higher rate of interest than the prevailing one, would encourage small depositors to save therefore benefiting the country's economy as well in the long term.

33. Neither was the Single Member nor we are convinced by the pro-consumer argument adduced by the Appellants. On first sight it seems that the rationale has merit, perusal of the scheme elements show that rather than providing any benefits, the scheme will be taxing on the small depositors. While advocating that the small deposit holders will receive more returns, the Appellants failed to mention that the ESA also charges Rs. 50 per month on all deposit accounts, whose average monthly balance falls below Rs. 5000. Using the figures given in the Statistical Bulletin prepared by the State Bank, it appears that as of June 2007, there were 11,318,020 accounts in the country with a balance of Rs. 20,000 or less, and therefore, potentially ESA accounts. Out of these, 5,798,441 accounts had balances less than Rs. 5000. The amount of service charges that could be conceivably earned by the banks, therefore, works out to be Rs. 3,479,064,600. On the other hand, even if it is assumed that 4% interest is paid out to all small deposit holders (the same bulletin shows that the total amount in accounts with balances of Rs. 20,000/- or less was Rs. 76,066,000,000), the total annual interest thus payable works out to be Rs. 3,042,640,000. It follows that the banks by introducing the ESA would, on 2007 statistics, make a profit of around Rs. 436,424,600 without as much as investing a single penny into business activities. Quite interestingly, the amount that is raised by service charges comes out to be 4.5% of the total amount on which the interest rate of 4% has to be paid. Even if this last fact is merely coincidental, which we doubt, and which shows how the price fixed would have been brought about, it goes on to rebut completely the pro-competitive pro-consumer argument of the Appellants – by this scheme, depositors would, in all, loose around Rs. 436 million on their deposits each year, based on 2007 figures – money that would not go into investment activities that benefit the country.

In this connection, we also find that the potential effect of ESA on a bank's profitability as constructed by the Single Member Bench in Paragraph 42 of the Impugned Order (which has not been meaningfully rebutted by the Appellants) is quite reasonable and persuasive. This is reproduced below:

> '…This decision clearly fixes the price with regard to provision of banking service in respect of ESA: the purchase price being fixed at 4%. Furthermore, the decision fixes the manner or means of providing services by imposing automatic conversion of PLS account (with average balances up to Rs. 20,000/-), and fixing Rs. 50 as deduction charges per month in case the average balance falls below Rs. 5,000/-. Regarding charges of Rs.50/- per month on balances below Rs.5,000/-, PBA submitted that "the SBP in terms of their circular have restricted banks not to charge more than Rs. 50/- as administrative expenses on PLS accounts, therefore, it is at the discretion of the banks whether to charge the said amount or not charge any amount". I am at a loss to understand why the PBA seeks refuge under SBP's circular. PBA did not give any flexibility to its members. I have also noted that the PBA announced a charge of Rs.50/- p.m. i.e. Rs.600/- p.a. on balance below Rs. 5,000/- which works out to be 12% per annum (or 24% on the average balance of Rs.2,500/-); whereas the ESA scheme requires a member bank to itself pay 4% to the depositor. Interestingly, if on a very simplistic basis, it is assumed that only 25% of the ESA accounts have balances below Rs. 5,000/-, then the service charges of 12% per annum recovered from these accounts would equal the 4% paid on the remaining 75% of ESA funds'.

34. The scheme essentially seems like a good way to use money of extremely low depositors to pay for the so called benevolent and selfless increase in interest rate payable to the small depositors under the scheme --the banks' version of a perverse Robin Hood, one in the lucrative business of taking from the poor to give back to the poor. Prior to the ESA, many banks did not charge any service charge on balances less than Rs. 5000. These depositors constitute approximately 51% of the total small depositors. It goes without saying that at the very least a majority of the small deposit holders are worse off than before. Therefore, the logic behind the Appellants argument fails.

35. What remains to be seen in the series of application of Section 4 arguments is whether the Single Member Bench erroneously recognized the Appellants as a sellers' cartel. The Appellants insists that the interest rate set by it was a minimum interest payable to the small deposit holders. They contend that since interest is payable to the depositors, the banks are buyers not sellers and according to principles of economics, cartels of buyers tend to set maximum prices, not minimums. Therefore, the Appellants were not a cartel.

36. In their written submission at paragraph 7 (on page 4), the Appellants note that ". . . the State Bank wished for the banks ***to offer*** another and more attractive ***product,*** again focusing on small depositors, under the name of enhanced saving account (ESA)." At paragraph 9 on page 5, they wrote, "[t]hat thereafter, *work proceeded on creating a new product* that would address at least of the issues noted above. That new product was the ESA." Anyone who ***creates new product and offer*** to others cannot be termed as buyers. Thus, we outrightly reject the Appellants assertion that they were buyers and not sellers.

37. While it is true that banks were to pay interest rate to depositors, this outlook of banks is an incomplete picture. The correct way to look at a bank is as a service provider which offers its various products and services to the account holders by keeping their money safe and by using it prudentially to finance various business and trade activities to make profits for themselves as well as the deposit holders. Moreover, they offer facilities such as money transfers, ATM's, credit cards etc. which constitutes the overall package of services. Hence, in the first instance, banks need to offer an image and certain standard of service to attract people to deposit their money with them. This activity establishes the banking sector as a seller and thus the interest rate set by the Appellants is clearly a component of a product they are wishing to sell to the depositors in return for their money. Even by itself, the keeping of deposits is a fiduciary service for which banks needs to be recompensed, *i.e.*, it is a service which banks sell. It follows that the interest rate

set by the Appellants was a minimum price they were willing to accept for keeping deposits, something that is consistent with the principles of economics.

38. If it was assumed for a moment that the banks were buyers, the interest rate being offered would still act as a minimum. To begin with the advertisement that was published by the Appellants did not mention whether the 4% interest was minimum or maximum. It was only later submitted by the Appellants that the interest rate was a minimum and that banks were permitted to give higher rates. Despite this submission, the only instances of banks giving a higher rate were of banks that were already giving more than 4% interest before the ESA was introduced. Even if the interest rate set by the Appellants was a minimum, it is a known phenomenon that when minimum rate is set by competitors, everyone tends to gather around that rate which makes it the maximum at which any individual competitor would operate within the cartel.

39. The Appellants urged that the Appellate Bench to consider the dissent opinion in the case of *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982).

> In *Maricopa* the Supreme Court, by a 4 to 3 vote, held that an agreement among doctors to limit the fees they charged for services performed for insured patients was illegal per se, in part because the agreement might be "a masquerade for an agreement to fix uniform prices, or it may in the future take on that character." *Id.* at 348, 102 S.Ct. at 2475.

The Appellants draw our attention to the following portion of the dissent opinion:

> The medical care plan condemned by the Court today is a comparatively new method of providing insured medical services at predetermined maximum costs. It involves no coercion. Medical insurance companies, physicians, and patients alike are free to participate or not as they choose. On its face, the plan seems to be in the public interest.
>
> The respondents' contention that the "consumers" of medical services are benefited substantially by the plan is given short shrift.
>
> . . . we consider the foundation arrangement as one that "impose[s] a meaningful limit on physicians' charges," that "enables the insurance carriers to limit and to calculate more efficiently the risks they underwrite," and that "therefore serves as an effective cost-containment

mechanism that has saved patients and insurers millions of dollars." .... The question is whether we should condemn this arrangement forthwith under the Sherman Act, a law designed to *benefit* consumers.

It is settled law that once an arrangement has been labeled as "price fixing" it is to be condemned *per se*. But it is equally well settled that this characterization is not to be applied as a talisman to every arrangement that involves a literal fixing of prices. Many lawful contracts, mergers, and partnerships fix prices. But our cases require a more discerning approach. The inquiry in an antitrust case is not simply one of "determining whether two or more potential competitors have literally 'fixed' a 'price.' ... [Rather], it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label '*per se* price fixing.' That will often, but not always, be a simple matter." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9, 99 S.Ct. 1551, 1557, 60 L.Ed.2d 1 (1979).

Before characterizing an arrangement as a *per se* price-fixing agreement meriting condemnation, a court should determine whether it is a " 'naked restrain[t] of trade with no purpose except stifling of competition.' " *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972), quoting *White Motor Co. v. United States*, 372 U.S. 253, 263, 83 S.Ct. 696, 702, 9 L.Ed.2d 738 (1963). See also *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1977). Such a determination is necessary because "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than ... upon formalistic line drawing." *Id.*, at 58-59, 97 S.Ct., at 2561-2562. As part of this inquiry, a court must determine whether the procompetitive economies that the arrangement purportedly makes possible are substantial and realizable in the absence of such an agreement.

For example, in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978), we held unlawful as a *per se* violation an engineering association's canon of ethics that prohibited competitive bidding by its members. After the parties had "compiled a voluminous discovery and trial record,"*id.*, at 685, 98 S.Ct., at 1362, we carefully considered-rather than rejected out of hand-the engineers' "affirmative defense" of their agreement: that competitive bidding would tempt engineers to do inferior work that would threaten public health and safety. *Id.*, at 693, 98 S.Ct., at 1366. We refused to accept this defense because its merits "confirm[ed] rather than refut[ed] the anticompetitive purpose and effect of [the] agreement." *Ibid.* The analysis incident to the "price fixing" characterization found no substantial procompetitive efficiencies. See also *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 646, n. 8, and 649-650,100 S.Ct. 1925, 1927, n. 8, and 1928-1929,64 L.Ed.2d 580 (1980) (challenged arrangement condemned because it lacked "a procompetitive justification" and had "no apparent potentially redeeming

value").

In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., supra*, there *was* minimum price fixing in the most "literal sense." *Id.*, at 8, 99 S.Ct., at 1556. We nevertheless agreed, unanimously,[FN7] that an arrangement by which copyright clearinghouses sold performance rights to their entire libraries on a blanket rather than individual basis did not warrant condemnation on a *per se* basis. Individual licensing would have allowed competition between copyright owners. But we reasoned that licensing on a blanket basis yielded substantial efficiencies that otherwise could not be realized. See *id.*, at 20-21, 99 S.Ct., at 1562-1563. Indeed, the blanket license was itself "to some extent, a different product." *Id.*, at 22, 99 S.Ct., at 1563.[FN8]

> FN7. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S., at 25, 99 S.Ct., at 1565 (Stevens, J., dissenting in part) ("The Court holds that ASCAP's blanket license is not a species of price fixing categorically forbidden by the Sherman Act. I agree with that holding").

> FN8. Cf. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54, 97 S.Ct. 2549, 2559, 53 L.Ed.2d 568 (1977) (identifying achievement of efficiencies as "redeeming virtue" in decision sustaining an agreement against *per se* challenge); L. Sullivan, Law of Antitrust § 74, p. 200 (1977) (*per se* characterization inappropriate if price agreement achieves great economies of scale and thereby improves economic performance); *id.*, § 66, p. 180 (higher burden might reasonably be placed on plaintiff where agreement may involve efficiencies).

In sum, the fact that a foundation-sponsored health insurance plan *literally* involves the setting of ceiling prices among competing physicians does not, of itself, justify condemning the plan as *per se* illegal. Only if it is clear from the record that the agreement among physicians is "so plainly anticompetitive that no elaborate study of [its effects] is needed to establish [its] illegality" may a court properly make a *per se* judgment. *National Society of Professional Engineers v. United States, supra*, at 692, 98 S.Ct., at 1365. And, as our cases demonstrate, the *per se* label should not be assigned without carefully considering substantial benefits and procompetitive justifications. This is especially true when the agreement under attack is novel, as in this case. See *Broadcast Music, supra*, at 9-10, 99 S.Ct., at 1556-1557; *United States v. Topco Associates, Inc., supra*, at 607-608, 92 S.Ct., at 1133 ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violations").

The Court acknowledges that the *per se* ban against price fixing is not to be invoked every time potential competitors *literally* fix prices. *Ante*, at 2479-2480. One also would have expected it to acknowledge that *per se*

> characterization is inappropriate if the challenged agreement or plan achieves for the public procompetitive benefits that otherwise are not attainable. The Court does not do this. And neither does it provide alternative criteria by which the *per se* characterization is to be determined. It is content simply to brand this type of plan as "price fixing" and describe the agreement in *Broadcast Music*-which also literally involved the fixing of prices-as "fundamentally different." *Ante*, at 2479.
>
> . . .
> I believe the Court's action today loses sight of the basic purposes of the Sherman Act. As we have noted, the antitrust laws are a "consumer welfare prescription." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343, 99 S.Ct. 2326, 2333, 60 L.Ed.2d 931 (1979). In its rush to condemn a novel plan about which it knows very little, the Court suggests that this end is achieved only by invalidating activities that *may* have some potential for harm. But the little that the record does show about the effect of the plan suggests that it is a means of providing medical services that in fact benefits rather than injures persons who need them.

40. The Appellants "submitted that the foregoing observations, made in the context of a sellers' cartel setting a *maximum* price, apply equally to the analogous and parallel case of a *buyers'* cartel setting a *minimum* price, which is the alleged situation of the Appellants." (Appellants' written submission dated March 28, 2009, paragraph 54).

41. We have discussed at paragraphs 36 and 37 above that the banks are not buyers but sellers. We found Judge Richard Posner's, of the U.S. Court of Appeals (7th Circuit), analysis in support of *Maricopa* majority decision, in *Vogel v. American Society of Appraisers*, *et al.*, 744 F.2d 598 at 604 (1984), convincing. The relevant portion of the decision is reproduced here:

> All this leaves out of account, however, the possibility that the *Maricopa* decision signals an expansion of the traditional per se rule against price fixing beyond agreements likely to reduce competition. Commentators have wondered how an agreement by sellers to limit the amount they will charge their customers-the agreement in *Maricopa*-can reduce competition.
>
>> See Easterbrook, *Maximum Price Fixing,* 48 U.Chi.L.Rev. 886 (1981); Harrison, *Price Fixing, the Professions, and Ancillary Restraints: Coping with Maricopa County,* 1982 U.Ill.L.Rev. 925, 936-44; Liebeler, *1983 Economic Review of Antitrust*

> *Developments: The Distinction Between Price and Nonprice Distribution Restrictions,* 31 UCLA L.Rev. 384, 397-98 (1983).

> But the price ceiling in Maricopa may have been intended as a target or even a floor-a concern heightened by the fact that 85 to 95 percent of the county's doctors were charging at or above the ceiling. See 457 U.S. at 341 n. 10, 102 S.Ct. at 2471 n. 10. <u>A group of sellers is unlikely to fix a maximum price that will not return them a comfortable profit; and having done so they may be disinclined to charge a lower price even if it would cover their costs plus a reasonable profit, if not as comfortable a one. Furthermore, sellers who exchange the kind of price and cost information that is necessary to fix a ceiling may find they have done all that is necessary to fix a floor as well; that is, the process of agreeing on the ceiling may foster supracompetitive pricing, whether tacit or explicit.</u> Maybe therefore Maricopa is to be explained as a case where a cartel-facilitating practice, analogous to banning secret price cutting, was condemned. (Emphasis supplied).

42. Concurring with the reasoning of Judge Posner, we are convinced that a group of sellers (banks) is unlikely to fix a minimum fee that will not return them a comfortable profit (see analysis done at paragraph 33 above); and having done so they may be disinclined to offer a higher rate of return even if it would cover their costs plus a reasonable profit. Furthermore, sellers who exchange the kind of price and cost information that is necessary to fix a floor may find they have done all that is necessary to fix a ceiling as well; that is, the process of agreeing on the floor may foster infra-competitive rate of return, whether tacit or explicit. Much has been emphasized on the aspect of minimum price-fixing by the banks while the advertisement is silent about it. However we must add that fixing of price, be it maximum or minimum, in itself eliminates one form of competition and between the two, minimum price-fixing has been condemned far more strongly in other competition regimes. Even if it is so, a cartel is a cartel and is prohibited for all. Moreover, entering into the agreement of fixing price is not only admitted but also advertised. Therefore, such distinction does not serve any meaningful purpose keeping in view the scope of section 4 of the Ordinance.

Public Interest: whether the initiation of proceedings under Section 30 by the Commission in the instant case was in 'public interest' the term as used in Section 37(4) of the Ordinance?

43. We now attend to the last submission made by the Appellants *i.e.*, that according to Section 37 of the Ordinance, even if ESA was a product of a collusive behavior, it was in the public interest not to proceed against the Appellants. We do not agree with such assertion of the Appellants. First, proceedings initiated under Section 30 other than on a complaint or a reference by the Federal Government is not dependent on fulfilling the requirements of Section 37(4). However, even if it is assumed that somehow Section 37(4) did apply, the meaning of public interest would have to be searched within the context of the Ordinance. The Commission in its recent decision in the matter of Karachi Stock Exchange and others has held:

> . . .It is an established rule of statutory interpretation that "where a word is used in an Act which is capable of various shades of meaning, the particular meaning to be attached must be arrived at by reference to the scheme of the Act." Lord Cave, in *Brown v. National Provident Institution* held:
>
> > [I]n choosing between two competing constructions, each of them possible, it is not irrelevant to consider that one of them is consistent with the obvious purpose of the Act, while the other would render the statute capricious or abortive.
>
> The words "public interest" when read with the obvious purpose of the Competition Ordinance would mean nothing else but ensuring competitive markets.

44. It is therefore clear that competing public interest arguments raised by the Appellants would not hold ground in front of the public interest definition established by statutory interpretation backed by precedent. Even if it is assumed for the sake of argument that a competing public interest argument could have been considered by the Commission, the Appellants have failed to provide any valid public interest to allow this naked collusive activity to go unchecked. As

mentioned earlier, the welfare of the depositors' argument has already been discussed and dismissed on merit.

45. Prior to addressing the issue of limitation we deemed it appropriate to deal with all other issues on merit in the interest of justice. However, the issue of limitation is significant considering the facts of the case and also because it has received considerable attention during the course of hearing of this appeal. As a matter of record, the Impugned Order was passed on 10.4.2008 and by virtue of Rule 5 (1) (a) of the Competition Commission (Appeal) Rules, 2007 ('the Appeal Rules') it can be presumed that the Impugned Order was received by the Appellants on 17.4.2008 (as the Order was issued on 14th April, 2008). Upon receipt of the Impugned Order, the time for filing an appeal under the Ordinance started running from 18.04.2008. Instead of filing an appeal under the Ordinance, the Appellants preferred a Constitutional Petition No. 938-D/2008 before the Sindh High Court, which resulted in a stay order dated 27.05.2008. The Commission challenged the stay order before the Honourable Supreme Court of Pakistan through C.P.L.A 715/2008. The Honourable Supreme Court was pleased to state in its Order dated 23.10.2008 that in view of the Commission's undertaking not to recover fines, penalties (if imposed) from the Appellants (till eventual disposal of the matter by Supreme Court) the stay order dated 27.05.2008 had become infructuous. In line with this observation by the Honourable Supreme Court, the Sindh High Court on 17.11.2008 vacated the stay granted vide Order dated 27.05.2008. It is pertinent to point out that for all intents and purposes the stay order had become infructuous on 23rd October, 2008 and the stay application remained to be disposed off in terms of the Supreme Court Order as a matter of procedure.

46. Against the given facts we will address the grounds raised by the counsel for the Appellant; primarily these are:

(i). The instant Appeals have been filed upon the direction of the Sindh High Court.

(ii). Time spent by the party in judicial relief before another forum is excluded for the purposes of limitation.

(iii). Delay, if any, was not intentional. Furthermore, proceedings at the Sindh High Court were initiated in good faith and the petition raised many important questions of law and fact.

47. It is important to refer to Section 29(2)(a)&(b) of the Limitation Act, 1908 whereunder, it is provided that for the purposes of determining the limitation period prescribed for any appeal by any special or local law the provisions contained in Section 4, Section 9 to 18 and Section 22 of the Limitation Act shall apply (if not expressly excluded by such law). Furthermore, it provides that the remaining provisions of the Limitation Act shall not apply to such special law.

48. We would now refer to Section 14 & 15 of the Limitation Act. Section 14 applies to cases where the Petitioner has been prosecuting with due diligence another civil proceeding in a court which from defect of jurisdiction, or other cause of a like nature, is unable to entertain it. The Appellants stance throughout has been that for proper interpretation of the Competition Ordinance, 2007 and for determination of constitutional vires the Honourable High Court is the appropriate forum. Defect in jurisdiction or other cause of like nature has never been mentioned. Therefore, the principle of Section 14 of the Limitation Act in our view would not apply. Also, the Appellants have shown nothing to establish that they were prosecuting the matter with 'due diligence'. Nonetheless, if the time spent from the date of filing of writ petition i.e. May 13, 2008 till the date it was rendered infructuous by the Honourable Supreme Court i.e. October 23, 2008 is excluded, this appeal still stands barred by limitation, having been filed after 49

days, which puts a further burden on the Appellant to explain each day's delay, which they have failed to discharge. Section 15 of the Limitation Act, in our opinion, is perhaps more relevant. The said provision requires exclusion of time in computing the period of limitation during which proceedings are suspended. The application of this principle will clearly establish that the limitation period lapsed prior to grant of stay by the Honourable Sindh High Court (the Impugned Order was received on April 17, 2008 and the limitation period starts from April 18, 2008 and the stay was granted on May 27, 2008 - a total of 39 days). Furthermore, after the stay becoming infructuous by the Order of the Honourable Supreme Court a further lapse of 24 days and a total of 63 days period has expired. Hence, the appeals again remain time-barred. Clearly the Appellants have no case on merits as well as for the condonation of delay with respect to limitation.

49. After having heard the Appellants and after due deliberation on all issues in the interest of justice we have reached the conclusion that the appeals are liable to be dismissed.

50. The Impugned Order is hereby upheld.

(KHALID A. MIRZA)
Chairman

(DR. JOSEPH WILSON)
Member

ISLAMABAD, THE 10TH OF JUNE, 2009