# BEFORE THE
# APPELLATE BENCH
# COMPETITION COMMISSION OF PAKISTAN

**Appeals filed by**
**M/s. Takaful Pakistan Ltd (Appeal No 16/2010)**
**(File No. 4(16)/Reg./TAAP/CCP/2010)**
**&**
**M/s. Travel Agents Association of Pakistan (Appeal No 17/2010)**
**(File No. 4(17)/Reg./TAAP/CCP/2010)**

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| Dates of hearing: | March 26, 2010<br>May 25, 2010<br>June 3, 2010 |
| Bench Members: | Mr. Khalid A. Mirza<br>**Chairman**<br><br>Ms. Rahat Kaunain Hassan<br>**Member (Legal/OFT)** |
| Present for:<br>**M/s. Takaful Pakistan Ltd** | 1). Mr. Ashraf Ali Siddiqui, DGM & Head of Operations<br><br>2). Mr. Khurram Rasheed, Advocate<br>M/s. Surridge & Beecheno, Advocates<br><br>3). Mr. Muhammad Umar, Company Secretary |
| **M/s. Travel Agents Association of Pakistan (TAAP)** | 1). Mr. Atir Aqeel Ansari<br><br>2). Mr. Aziz Nishtar, Advocate<br>M/s. Nishtar & Zafar, Advocates & Legal Consultants<br><br>3). Mr. Hanif Rinch, (Vice Chairman Region 4) |

# ORDER

1. These Appeals were filed on 01.03.2010 against the Order dated 29.01.2010 passed by a single Member in the Show Cause Notices No. 56 & 57 of 2009 (herein after referred to as the 'Impugned Order'). It has been held in the Impugned Order that Takaful Pakistan Limited (herein after referred to as the 'TPL') tied-in (distinct products of) insurance coverage for travel agents' default liability towards International Air Transport Association (herein after referred to as the 'IATA') with travel and health/accident insurance for passengers and thereby abused its dominant position in the relevant market in violation of section 3 of the Competition Ordinance, 2010 ('the Ordinance'). Furthermore, the Impugned Order held that TPL and Travel Agents Association of Pakistan (herein after referred to as the 'TAAP') entered into a prohibited agreement which violated section 4 (1) of the Ordinance in terms of sections 4 (2) (a) and 4 (2) (g) of the Ordinance. Lastly, Impugned Order also held TPL and TAAP in violation of section 10 of the Ordinance for engaging in deceptive marketing.

## FACTUAL BACKGROUND

### UNDERTAKINGS

2. TPL is a company registered with the Securities and Exchange Commission of Pakistan (hereinafter "SECP") under Insurance Ordinance, 2000 to transact Non-life /General Takaful business. TPL is an undertaking as defined in clause (p) of section 2(1) of the Competition Ordinance, 2010 (hereinafter "the Ordinance").

3. TAAP is a trade association registered with the Ministry of Commerce, Government of Pakistan under the Trade Organizations Act 2007. TAAP is an undertaking as defined in clause (p) of section 2(1) of the Ordinance.

4. All travel agents accredited with IATA in Pakistan are required to settle their sales with their respective airlines through Billing Settlement Plan (herein after referred to as the "BSP") which was introduced by IATA in Pakistan in 2006. BSP is a system designed by IATA to facilitate and simplify the selling, reporting and remitting procedures of travel agents and improves cash flow for BSP Airlines. BSP serves as a central clearing-house through which data and funds flow between travel agents and airlines instead of every agent having an individual relationship with each airline.

5. Until September 2008, IATA accepted collective guarantees from banks on behalf of travel agents in Pakistan against liability coverage of the fortnightly settlement of accounts of their airline passenger tickets sales. These collective bank guarantees were backed by assurance to the respective banks by TAAP and a group of travel agents, known as "Polani Group." TAAP and Polani Group in turn used to require collaterals as security from their respective travel agents members on whose behalf they arranged the guarantees.

6. On 30 July 2008, the Executive Council of IATA in Pakistan held a meeting and announced that effective 1 October 2008, IATA-BSP will only accept individual guarantees from travel agents towards their ticket sales. It was also decided to accept guarantees from other insurance companies in addition to bank guarantees, provided that these insurance companies meet IATA's eligibility criteria.

7. TAAP being the representative association of the travel agents was aware of the fact that majority of its members will not be able to arrange individual guarantee because of high cash margin and collateral conditions. In its annual general

meeting held in January 2008, TAAP formed a committee to explore the insurance cover opportunities to meet the requirement of IATA-BSP management. Thereafter, TPL and TAAP entered into a contract on September 10, 2008 (hereinafter "TAAP Agreement-I") to provide liability coverage to travel agents.

8. The TAAP Agreement-I provided for the individual guarantee (defined as "Guarantee" in the Agreement) to meet the financial security requirements of the IATA after introduction of the BSP in Pakistan in connection with liability coverage of each travel agent towards his other principal airlines for the settlement of sales.

9. The TAAP Agreement-I also provided for an ancillary but bundled product "a bouquet" in the form of health and travel accident coverage for passengers (defined as "Passenger Takaful Cover" in the Agreement). This cover protects passengers against certain travel-related risks, including medical insurance during the period covered by insurance in the following manner:

    (i) Personal Accident (death or disability) upto PKR 300,000
    (ii) Loss of Baggage upto PKR 25,000
    (iii) Loss of Travel Documents upto PKR 10,000

10. The two products provided under the TAAP Agreement-I *i.e.*, Guarantee and Passenger Takaful Cover are collectively termed as the "Takaful Scheme" in the Agreement. It was superseded by another agreement between TAAP and TPL dated 11 March, 2009 (hereinafter "TAAP Agreement-II") due to the practical experience of the two parties regarding the financial products which were the subject matter of TAAP Agreement-I as well as the directives of TPL's Shariah Board. Under TAAP Agreement-II the provision of health and accident coverage for the clients of the participating travel agents assumed the central place and the agents' liability coverage was only offered in consideration of the goodwill and trust reposed by the participating member agents of TAAP in TPL and their adoption and marketing of TPL's Takaful products.

11. A meeting was called on 16 October, 2008, inviting Country representative of IATA, Chairman TAAP, Dy. GM Agency Affairs PIAC, and others to address the impact of the Takaful Scheme. In the aforesaid meeting, TAAP was advised to seek opinion of the Commission to avoid subsequent adverse consequences. However, TAAP never approached the Commission to seek the opinion of the latter on the Takaful Scheme.

12. Exercising its powers under section 37 of the Ordinance read with Regulation 16 of Competition (General Enforcement) Regulations, 2007, the Commission proceeded with the inquiry. An inquiry committee comprising of Ms. Nadia Nabi and Ms. Safia Alam, Joint Directors, was constituted to inquire into the matter.

13. TAAP was asked to provide a copy of the TAAP Agreement-I and any other comments it may have on the Scheme. A reply was submitted by Nishtar and Zafar (Advocates and Consultants) on behalf of TAAP on 20 November, 2008 along with the TAAP Agreement-I executed between TAAP and TPL. Submissions made by TAAP are summarised as under:

> ***a.*** *The Takaful Scheme is not a default insurance scheme as envisaged in earlier letters and meeting of CAA, in fact it is a combination of three types of insurance:*
>
> > *i. Insurance coverage for the participating travel agents' contractual liability towards their principal (airline) through IATA;*
> >
> > *ii. Passenger travel health coverage; and*
> >
> > *iii. Passenger travel accident coverage outside the aeroplane fuselage. Travel accident inside the airplane fuselage is covered by the airline itself under the Warsaw Convention in case of international journey.*
>
> ***b.*** *This is the first liability insurance coverage scheme in Pakistan, which is one of a kind in the world as well.*

***c.*** *That IATA under BSP discontinued the acceptance of existing collective guarantee plan and asked accredited travel agents to furnish individual guarantee from eligible financial institutions.*

***d.*** *TAAP aware of the situation that majority would not individually meet the margin and collateral requirements of banks, made an arrangement with TPL for a customized product to provide liability insurance cover and also medical and accident cover for passengers.*

***e.*** *The Takaful Scheme is an addition to the existing products available to travel agents. Therefore, competition has not been compromised in any way. Conversely, the market has become more competitive. The travel agents are free to seek liability cover from TPL or from more than a dozen banks already providing the guarantee which is fully acceptable to IATA.*

***f.*** *In addition to the agents' liability coverage, a passenger could opt for health insurance cover and accidental cover throughout their travel. Other "much inferior" products covering only health and travel accident cover of the passenger were being sold for Rs 2,500 or more. But after introduction of the TPL product, the improved competition has now forced the existing providers of those insurance cover to reduce their prices drastically to match the TPL product prices.*

14. The Enquiry Officer, in order to have a comprehensive understanding of the Takaful Scheme sought comments of the Civil Aviation Authority (hereinafter the CAA) which were received *vide* its letter of 12 February 2009. The CAA raised the following concerns, namely:

***a.*** *All the travel agents participating in the Takaful Scheme would have to sell the said insurance policy at a fixed price.*

***b.*** *There would be an incentive for a travel agent to refuse sale of a ticket to a customer unwilling or refusing to pay the cost of insurance in favour of the one willing to pay the same, particularly in a high demand and low supply situation.*

***c.*** *The choice of purchasing a ticket directly from an airline office will generally not be available to travel agents in small cities and towns.*

***d.*** *The number of travel agents and ability to purchase online air ticket in small cities and town would also be limited. Uneducated class of air*

*travellers on domestic and international routes may thus be vulnerable to exploitation.*

15. The SECP, being the regulator of insurance companies, was also invited to comment on the Takaful Scheme. The SECP sent its comments vide letter dated 20 March 2009 and raised a serious concern on the very legality of the Takaful Scheme. It maintained that the arrangement of takaful cover and charging of contribution without the consent of the passenger defies the basic requirement of insurable interest under the insurance contract.

16. The Enquiry Officers also conducted a survey of travel agents within Islamabad on 10 & 12 February 2009 to ascertain whether the "Notice for Travelers" informing customers about the Passenger Takaful Cover, as assured by TAAP, has been visibly displayed at the sale points of travel agents participating in the Takaful Scheme. No such Notice was found in any of the sale point of travel agents by the Inquiry Officers. On inquiring about the mode of charging the premium from customers, it was learnt that the premium amount is included under the heading of service charges and there was no separate Passenger Takaful Cover handed over to customers (passengers), they are not even informed about the said takaful premium or takaful cover. It was also confirmed that premium is being charged as a matter of course and not at the option of the passenger.

17. TPL was sent a letter on 6 February 2009, seeking its comments on the Takaful Scheme in respect of issues which emerged upon examination of the TAAP Agreement-I as well as from the survey. TPL, in its submissions received on 27 February 2009, referred to a new agreement that revoked and replaced the TAAP Agreement-I. However, TPL did not provide a copy of the new Agreement, instead told the Inquiry Officers to obtain the copy from TAAP.

18. Legal representative of TAAP, Mr. Aziz Nishtar, was contacted to inquire about the new agreement referred to in the written submissions of TPL in its letter of

27 February 2009. Mr. Aziz Nishtar categorically denied the existence of new agreement or any ongoing negotiations for the new agreement. He also confirmed that TAAP Agreement-I is the only agreement signed between the Undertakings regarding Takaful Scheme and sent a copy of the TAAP Agreement-I through facsimile for clarification.

19. After examining the TAAP Agreement-I, written submissions filed by the Undertakings and comments of other concerned regulatory bodies, the Inquiry Officers completed the inquiry by submitting the Inquiry Report on 30 April 2009. The Inquiry Report concluded that Takaful Scheme is, *prima facie*, a trade restrictive agreement between TAAP and TPL violating sections 4(2)(a) and4(2)(g); the conduct of TAAP amounts to abuse of dominance in violation of section 3 (3)(c), (d) of the Ordinance. And the Agreement also appears to constitute deceptive marketing practices by TPL as well as TAAP in contravention of section 10 (2)(a), (b) of the Ordinance and that it is necessary in the public interest to initiate proceedings against TAAP and TPL under section 30 of the Ordinance.

20. Based on the recommendations made in the Inquiry Report, the Commission initiated proceedings under section 30 of the Ordinance and issued Show Cause Notices to both Undertakings on 6 May 2009.

21. TPL replied to the Show Cause Notice, through its counsel Aziz Nishtar, under a cover letter dated 24 May 2009. The response confirmed that the participating members of TAAP accepted the cover under TAAP Agreement-II on their own, willingly and without any pressure or coercion only because they felt it was a good marketing tool for them to increase their clientele by offering them worldwide health and accident coverage that even meets the requirements for Schengen countries.

22. A hearing was held by the Commission in the matter on May 27, 2009 when certain information/documents were asked to be submitted to the Commission and were duly submitted vide TPL's letter dated June 22, 2009.

23. The Commission passed an Order dated January 29, 2010 against TPL which has been appealed. At the second date of hearing of these Appeals the Impugned Order was suspended by this Bench.

**GROUNDS OF APPEAL AND ISSUES:**

24. The Appellants have raised various grounds challenging the legality of the Impugned Order. However the material grounds are mentioned while addressing the issues that emerge from these appeals and the findings in the Impugned Order.

**(i) Whether the Impugned Order correctly held that Civil Aviation Authority's (CAA) reference to the Commission can be seen as a reference on behalf of the Federal Government for the purposes of section 37 of the Ordinance? What consequences follow from the status of such "reference"?**

**(ii) Whether TPL enjoyed a dominant position in the relevant market and the same was abused through tie in of two distinct products?**

**(iii) Whether the Appellants entered into a prohibited agreement which resulted in a violation of section 4(1) in terms of section 4(2)(g) of the Ordinance; and whether such agreements resulted in horizontal price fixing in violation of section 4(1) in terms of section 4(2)(a) of the Ordinance?**

**(iv) Whether the Appellants engaged in deceptive marketing in violation of section 10 (1) and 10 (2) (b) of the Ordinance?**

**(v) Whether the penalties imposed by the Impugned Order were excessive and are therefore liable to be set aside?**

**Issue (i):**

**Whether Civil Aviation Authority's (CAA) reference to the Commission can be seen as a reference on behalf of the Federal Government for the purposes of section 37 of the Ordinance? What consequences follow from the status of such "reference"?**

25. It has been argued by the Counsel for TPL that the Learned Member, in the impugned Order, states at Para 31 that the Ordinance, the General Clause Act 1897 or the CAA Ordinance, 1982 do not define the term 'Federal Government'. Consequently, the Learned Member chose to place reliance on the ordinary usage of the term 'Federal Government'. It is clear that the Learned Member inferred that since the CAA Board, in which vests the general direction and administration of CAA, is composed of government servants reporting ultimately to the Federal Government then somehow this seems to erode the legal distinction between the Federal Government and CAA.

26. The counsel for TPL pointed out that out by the counsel that Chapter III of Part III of the Constitution of Islamic Republic of Pakistan, 1973 ('the Constitution') lays out the constituent elements of the Federal Government. These include the President, Prime Minister, Ministers, related advisors and the Attorney General. Statutory bodies such as CAA find no mention in this part of the Constitution. Nothing in the Constitution envisages a conflation of identities of Federal statutory bodies with the Federal Government. It was further argued that the letter can not be termed as a reference in terms of Section 37 of the Ordinance or Regulations 16 to 18 of Competition (General Enforcement) Regulations, 2007. The counsel further asserted that the very foundation of the proceedings are defective under the law, the proceedings themselves cannot stand in the eyes of law as they are *void ab initio* and amount to nothing more than a nullity.

27. We will deal with this issue summarily as in our view it is not material whether such letter from CAA could be treated as reference by the Federal Government, if the Commission otherwise had powers to initiate the enquiry. Under the

Pakistan Civil Aviation Authority Ordinance, 1982 (PCAA Ordinance) it is quite clearly provided in terms of Section 3(2) that CAA is a body corporate set up by the Federal Government and such body corporate is a legal person independent of the Federal Government. In essence, there is a legally recognized distinction between the Federal Government and statutory bodies such as CAA. However, there can be a possibility where the Federal Government pursuant to Article 99 of the Constitution read with the Rules of Business may delegate such Authority to act for and on its behalf. In the present case, in the absence of any such authority being delegated to CAA on record, it is difficult to assume and deem CAA akin to the Federal Government. However, as for TPL/ Appellant's ground that for this reason alone, foundation of the subject proceedings is defective and void *ab initio;* we find the same without merit. Under Section 37 enquiry can indeed be initiated upon a reference being filed by the Federal Government or a private complaint; equally important is the fact that nothing bars the Commission to take notice on its own, of matters which appear to be of concern to the Commission. In fact, the Commission is expressly empowered to do so under Section 37(1) of the Ordinance. Accordingly, we are of the view that upon the matter being brought the Commission's notice by CAA the Commission was well within its powers under the Ordinance to conduct the enquiry and subsequently initiate proceedings under Section 30.

**Issue (ii):**

**Whether TPL enjoyed a dominant position in the relevant market and the same was abused through tie in of two distinct products?**

28. The Appellant/TPL has made a number of submissions with regard to the relevant market. Most importantly, it has been submitted by TPL that the Learned Member erred by not properly defining the relevant product market and subsequently the relevant market correctly in the Impugned Order. TPL has argued that the Impugned Order carries definitions of and/or references to relevant market at three different places; namely at Paras 37, 42 and 62 respectively.

29. Upon an examination of the Impugned Order, it is clear that the relevant market was first determined by the Learned Member at Para 37 where he states: '*the relevant product market, in the instant case, is the guarantee of default insurance offered by different financial institutions, banks, general insurance companies and takaful companies to airlines on behalf of travel agents*'. In Para-62 of the Impugned Order it has been observed that: "*The relevant product market being the guarantee or default insurance/takaful for IATA accredited travel agents, the market thus comprises travel agents who are IATA accredited and are required to furnish individual guarantee as per the requirement of IATA-BSP management. During the course of hearing both TPL and TAAP confirmed that the total number of IATA accredited travel agents in the country is around 520. This means that travel agents who are participating in the Takaful Scheme constitute 61% of the total IATA accredited travel agents in the country. These 320 participating travel agents further sell tickets to non-IATA travel agents, which are sold along with the travel insurance. Collective volume of tickets sold with travel insurance by the participating travel agents and non-IATA travel agents who purchase tickets from the participating travel agents constitute a non-insubstantial number of tickets sold with TPL travel insurance and thereby substantially foreclose competition in the market of tied product i.e., travel insurance*."

30. In this regard, TPL's counsel has raised the objection that the '520 TAAP agents' were utterly irrelevant for the purposes of the relevant market as defined in Para-37 of the Impugned Order. This is so because market related to guarantees offered to airlines on behalf of travel agents. Furthermore, it was matter of record that there are over 4000 non TAAP travel agents operating in Pakistan. It was stated that even the number of TAAP travel agents was 736 instead of 520. In addition there were Passenger Sales Agents and General Sales Agents selling directly to the airline. The participating agents according to the counsel accounted for just 5% of this market. We find merit in the counsel's

argument to the extent that mere number of agents participating in the scheme alone without referring to the volume of the business that these agents actually generated for the Appellant in the relevant time period (i.e. seven months) could not determine the true market share.

31. At Para 42 the Impugned Order focuses on the concept of market power by virtue of a distinctive product. The result is that the Impugned Order seems to argue that by virtue of a distinctive product (i.e. default insurance) and the premium placed on its uniqueness, TPL enjoyed dominance. Perhaps the Learned Member intended to point out that even if the market share of the undertaking in the relevant product market is small, because of its distinctive product the undertaking enjoys dominance. As stated in para 40 of the Impugned Order *"The product (default insurance) offered by TPL is unique as it does not require large amount of cash or other security as collateral from the travel agents, which banks and other insurance companies in the relevant market would require. The inability of travel agents to pay large cash margin and collaterals required by other financial institutions for individual guarantees coupled with the paucity to time available at TAAP's disposal contributes to the market power TPL. Instead, TPL would collect premium from agents on the basis of tickets sold. Thus, TPL derive its dominant position by the uniqueness of the product is offered.*

32. TPL's counsel's thrust of the argument was that the uniqueness of the product may only be argued to arise if the product is seen as not just the guarantee but the guarantee taken together with health and travel insurance. Accordingly, TPL's stance was that the 'product' then was 'all three rolled in one' and this enabled the Appellant to not require exorbitant cash margins or collaterals.

33. We are of the considered view that the crucial issue which requires determination is whether the default guarantee and health and travel insurance are to be treated as one integrated product or these are to be treated as two

distinct products. While examining this issue we would like to refer to the *Jefferson Parish case* where the Supreme Court of the United States in 1984 found tying illegal; although the facts were quite different, the four steps test that was laid down is of relevance. The four steps test provided "*1). the tying and tied goods are two separate products; 2). The defendant has market power in the tying product market; 3). The defendant affords consumers no choice but to purchase the tied product from it; and 4). The tying arrangement forecloses a substantial volume of commerce.*" The test laid down is more or less similar to the one relied upon by the single member in the Bahria order and in the Impugned Order and the judgment is in fact referred to in the Impugned Order.

34. It is interesting to point out that in the *Jefferson Parish case* the court as a threshold element for unlawful tying arrangement established that there should be significant market power in the tying product market and that such power should be of the 'degree or the kind' that enables the sellers of the tying product to 'force' customers to purchase the tied product. Furthermore, in determining whether there are two distinct products unlawfully tied the court required proof that "*there is sufficient demand for the purchase of the tied product separate from the tying product to identify a distinct product market in which it is efficient to offer the two separately.*"

35. While there is no cavil to the proposition that 'default guarantee' and 'health and travel insurance' could easily be two distinct products and each has a distinct relevant market, what needs to be appreciated is whether the way they are structured under the subject agreement, the products are capable of being separated on a stand alone basis. The Appellants maintain that the unique aspect was simply because what the Appellant was offering; it was not just the guarantee but also the health and travel insurance as it is this feature of the product that, as per the Appellant, made it unique 'guarantee as a product in itself was never a possibility'. The need for the two being clubbed has been

addressed by the Appellants and finds mention in para-54 of the Impugned Order:

> "*The real reason for tying these two distinct products becomes evident from TPLs letter dated 5 November, 2008 written to the SECP. The second paragraph on page 3 of the letter states:*
>
> > *When we [TPL] approached the international ReTakaful market with this proposal, most of them declined initially on the plea that travel agents default coverage had not been a profitable line of business historically. However, Munich Re Re Takaful subsequently came up with the suggestion that they may consider our request provided this coverage is bunched with some substantial business as bouquet.*
>
> *The third para on page 4 of the letter reads:*
>
> > *As a result of all these efforts, we jointly came up with the unique package whereby the travel agents were to be benefited by way of our Takaful coverage for their contractual liability to the airlines on account of credit passage sales, that was acceptable to IATA; the passengers were to be offered an ideal options to obtain a very sophisticated Takaful protection by way of international travel health and accident coverage extended world-wide, Takaful Pakistan was to benefit from a significant volume of business most of which was hitherto not even within the domain of the contemporary insurance market, Munich Re ReTakaful was to similarly benefit from a large volume of business emanating from a low insurance penetration country like Pakistan and IATA was to have their comfort from the instant availability of default liability coverage.*"

36. While referring to the above the Learned Single Member observed the following in para 60 of the Impugned Order:

> "*I find the above arrangement clearly anomalous and lopsided. For each international ticket issued, TPL would issue a corresponding travel insurance, which in the majority of cases is not passed on to passengers, and yet the travel agent would pay a premium for travel insurance on behalf of its customers. It is more than obvious that TPL was able to force TAAP to accept this arrangement, which TAAP would not have accepted under competitive market conditions.*"

37. We do not find ourselves in accord with the Learned Single Member's view/finding as expressed in para 60 of the Impugned Order. As for the question of TAAP being forced by TPL into any such arrangements, the background providing the need for entering into the Agreement is pertinent. On 30 July 2008, IATA announced that effective 1 October 2008, BSP would only accept individual guarantees from travel agents towards their ticket sales. It was also decided to accept guarantees from insurance companies in addition to bank guarantees provided that the insurance guarantees met IATA's relevant eligibility criteria. TAAP entered into a contract with the Appellant on 10.09.2008 ("TAAP Agreement-I") and subsequently modified TAAP Agreement II on 11.03.2009. The counsel for TPL pointed out that the recital to the TAAP Agreement-I clearly shows that it was TAAP not the Appellant who was desirous of arranging the individual guarantee and who sought to introduce appropriate medical and travel Takaful coverage for the passengers buying air tickets from participating members. TAAPs letter of 20.01.2008 further sheds light on the aspect of force/coercion wherein it states that "*consequently, with the help of different financial and legal professionals the TAAP was able to convince (the Appellant) to develop customized product to provide liability insurance cover and to cover the passengers' medical and accident cover, which resulted into the product that many of (TAAP's) members are now using.*"

38. In our view, TPL in the given facts and circumstances did not force TAAP to accept the clubbed arrangement under the Agreement. Although, from the record it is very clear that for each international ticket issued, TPL had to issue corresponding travel insurance in order to reduce its risk aspect. The travel agent had the option to pass on or not to pass the charges for such cover to its passengers, or to offer insurance from a different provider, the Agreements envisage the option for the passengers to opt or not to opt for the insurance cover. Importantly, it needs to be appreciated that the agreement expressly provides that the travel agents as members of TAAP were not in any manner bound under the agreement to avail the default guarantee cover and the health

travel insurance from TPL. The Impugned Order does not address as to how it would have been efficient to offer the two products separately or whether separation of the two products was even viable. Moreover, the arrangement under the Agreement was apparently working out to the benefit of all parties concerned with no imposition of onerous cost or obligation - be it the member of TAAP or the passenger/consumer. In the absence of any empirical evidence to the contrary the element of 'abuse' in this case, in our considered view is not made out - even if dominance in the relevant market is to be presumed as determined in the Impugned Order.

39. Even if it were assumed that there were two separate products we do not find any analysis of how the purported tying has prevented, restricted, reduced or distorted competition in the tied product market. No data has been furnished in the Impugned Order nor does it carry any analysis with an evidentiary weight significant enough to justify a finding against the Appellants in the instant case. TAAP has also submitted before us that since the passing of the Impugned Order, the product has been discontinued. This, of course, had the effect of taking away the advantage of liability cover that was available to travel agents at a much lower cost. The cost differences between the liability coverage cost before and after the introduction of this product are quoted to be significant. This Bench has been informed that before the introduction of this product, each travel agent had to pay an amount close to Rs. 140,000/- as guarantee cover for liability insurance. After the introduction of this innovative product, this cost came down to Rs. 1000/- which if true, is quite remarkable and in our considered view speaks of the innovative quality of the product. Low costs may encourage more entrants to the market and/or trigger similar competitive innovative products; we do not see, on the basis of the evidence available on record, how this product had effect(s) adverse to competition.

40. In view of the above, there appears to be a rational commercial justification for TPL and TAAP to introduce an innovative product aimed at facilitating the

member travel agents of TAAP as well as TPL. Moreover, in our considered view no tie-in case is made out as it is not evident how purchasing of one good was made conditional on the purchase of another good between TAAP and TPL. Hence in our view no violation of Section 3 of the Ordinance was committed on part of the Appellant.

**Issue (iii):**

**Whether the Appellants entered into a prohibited agreement which resulted in a violation of section 4(1) in terms of section 4(2)(g) of the Ordinance; and whether such agreements resulted in horizontal price fixing in violation of section 4(1) in terms of section 4(2)(a) of the Ordinance?**

41. The Impugned Order gives a finding of violation of section 4(1) in terms of section 4(2)(a) &(g) of the Ordinance. We shall deal with the latter first (i.e. S4(2)(g)). This ruling is based on the finding that conclusion of the contracts in the instant case was made subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

42. The Impugned Order draws a link with the finding related to tie-in under section 3 of the Ordinance and based on the evidence related to that claim makes a finding against the Appellants for violation of section 4(1) in terms of section 4 (2)(g) of the Ordinance.

43. However, it is important to clarify here the link between sections 3 and 4 of the Ordinance. These are similar in their essence to the erstwhile Articles 81 and 82 in the European jurisdiction which relate to competition. This link between the sections relating to abuse of dominant position and prohibited agreements was clarified by the ECJ in *Hoffmann-La Roche [1979] 3 CMLR 211*. As *Jones and Sufrin* articulate in their seminal treatise *EC Competition Law, 3rd Edition, OUP, at page 343*: '*Articles 81 and 82 are not mutually exclusive. In Hoffmann the ECJ confirmed that both articles may apply to the same contractual*

*arrangements. When dealing with an exclusive requirements contract concluded by a dominant undertaking the Commission was therefore at liberty to proceed under either Article 81 or Article 82. The ECJ held:*

> *'..the question might be asked whether the conduct in question does not fall within Article 81 of the Treaty and possibly within its Para 3 thereof. However, the fact that agreements of this kind might fall within Article 81 and within Para 3 thereof does not preclude the application of Article 82 since this latter article is expressly aimed in fact at situations which clearly originate in contractual relations so that in such cases the Commission is entitled, taking into account the nature of the reciprocal undertaking entered unto and to the competitive position of the various contracting parities on the market or markets in which they operate to proceed on the basis of Article 81 or Article 82'.*

44. Therefore although there is a link between sections 3 and 4 and the same conduct might fall foul of both. Since in this case in our considered view no violation of section 3 exists which was also made basis for violation of section 4 (1) in terms of section 4 (2) (g) in the Impugned Order, consequently it shall suffice to state that no case for a violation of section 4(1) in terms of section 4(2)(g) is made out.

45. The Impugned Order also makes a finding of price-fixing and of a violation section 4(1) in terms of section 4 (2) (a) of the Ordinance. In terms of the Impugned Order this price fixing takes place between travel agents and restricts competition by object. In our considered view the rationale of this finding of price fixing is expressed at Para 72 of the Impugned Order where it states that: 'Though the agreement between TPL and TAPP is vertical in nature, the effect it has on the travel and medical insurance market is horizontal. Travel agents ought to be competing against each other. Under the TPL/TAAP agreement, all participating travel agents started to offer travel and medical insurance from TPL and that too for free in most instances. This amounts to price fixing'.

46. Appellants have contested this finding on a number of grounds. Firstly, it has been argued that if the product is being offered for free, as held by the Learned Member, then this does not amount to price-fixing. It has been submitted before us that offering something for free does not amount to fixing a price-element and does not result in price-fixing. *A fortiori,* it has been submitted that each travel agent was free to assign the benefits of travel insurance to customers at any price and there was no price-fixing regarding travel and health insurance being offered to the customers. This fact has been accepted in the Impugned Order at Para 71 and 72.

47. Without going into the argument whether offering a product for free amounts to price-fixing or not, we feel that the issue can be addressed in another way. Since the Impugned Order accepts the fact that the agents offered the health and travel accident coverage to their customers as a marketing tool and remained free to assign those benefits to the customers at any given price. This clearly shows that the agreements were not designed to facilitate price-fixing when travel agents offered insurance to their customers. The next question is, did the agents actually engage in price-fixing when offering insurance to their agents? The fact that most agents might have offered this insurance cover for free, by and of itself, does not result in price-fixing. An agreement is a pre-requisite for a finding of price-fixing. This agreement as defined under the Ordinance can exist by virtue of an arrangement, understanding or practice and does not have to be legally enforceable. However, credible evidence regarding this has to exist. There is no evidence available on the record that we, in our considered view, deem credible and relevant enough to establish a finding of price-fixing among travel agents. Indeed, even if we assume that most travel agents offer this service for free the Impugned Order contradicts itself at Para 80 by stating that it is inconceivable that the cost of Rs. 600/- paid by a travel agent on each international travel ticket is not passed on to the customer in some way. Now, either this purported agreement for price-fixing would offer this insurance for

free or it would not, but which of the two the Impugned Order relies on is not clear.

48. Equally important is the fact that we have clarified that since the structure of the agreement between TAAP and TPL does not envisage price-fixing, the only way in which this could have resulted was through implementation by members of TAAP. The Impugned Order in effect makes a finding regarding price fixing by member travel agents without providing them an opportunity of hearing.

49. Since member travel agents of TAAP remained free to offer the insurance with or without a charge and there is no credible or relevant evidence of these members entering into an agreement to engage in price-fixing, we are, therefore, not in agreement with the findings of the Impugned Order regarding violations of section 4 (1) in terms of both section 4 (2) (a) and 4 (2) (g).

**Issue (iv):**

**Whether the Appellants engaged in deceptive marketing in violation of section 10 (1) and 10 (2) (b) of the Ordinance?**

50. Impugned Order also imposes fines on TAAP and TPL for violations of section 10 of the Ordinance. As the finding regarding each is based on a distinct set of facts we will consider the case of each separately.

51. The Impugned Order's finding of a violation of section 10 by TAAP relies on and is based on the following:

- TAAP members (travel agents) pay a contribution to TPL for being able to provide travel and health insurance to the passengers/customers. TAAP had assured CAA that the information regarding availability of this insurance would be displayed at a visible place at all sale points of travel agents participating in the Takaful Scheme.

- When Inquiry Officers paid visits to the premises of IATA accredited TAAP member travel agents in the area of Islamabad they did not find any notice- displayed conspicuously at the sale points of travel agents participating in the Takaful Scheme- informing customers about the Passenger Takaful Cover that was assured by TAAP to the CAA. In the absence of any such notice, passengers remain unaware of their right to ask for medical and travel insurance Certificate.
- Since Rs. 600 is the cost borne by the travel agents for obtaining this travel and health insurance, it is inconceivable that this cost is not in some way passed on to the customer as part of his ticket price and the travel agents thus attract section 10 (2) (b) by distributing information pertaining to tickets which lack a reasonable basis related to its price.
- At the second date of hearing of these Appeals the Impugned Order was suspended by this Bench.

52. TAAP's representatives, including its counsel, have disputed the above conclusion and the subsequent imposition of fine by submitting before us that the Impugned Order does not follow the statutory requirement under section 24-A of the General Clauses Act, 1897 of stating reasons for passing of an Order. Section 30 (5) of the Ordinance that imposes a concurrent burden of stating reasons for passing an Order has also been stressed. This argument has been linked with TAAP's submission that the Impugned Order does not list details of the travel agents who are described in the Order as omitting to conspicuously display notices regarding the availability of travel and health insurance. TAAP has firstly denied such an omission on the part of its members and in the alternate, has stressed that even if there are certain members, who are in derogation of the requirement to display a notice then that fact should not be held against the association. Equally important, they have submitted, is the fact that the omission by a few (which is denied in the first place) should not be used to render an entire scheme ineffective. Furthermore, it has been submitted that any such omission on the part of travel agents does not attract section 10 of the Ordinance as it does not lead to distribution of false information or restrict competition in any way.

53. After a careful consideration of the above arguments, we will now elaborate on the considered conclusions we have reached. Firstly, it is important to clarify

that any violation of section 10 or its sub-sections does not have to be linked to a restriction of competition. Section 10 relates to deceptive marketing which focuses on consumer welfare and preventing harm to that ideal. Its application is not predicated on a link with the effect on competition.

54. It is also important to point out that if deceptive marketing has taken place in the present instance then it is irrelevant whether actions/omissions of the few are focused on or not; since the focus and purpose here is not whether the actions of the majority prevail or not but whether or not there is consumer harm. However, we are equally cognizant of the fact that no concrete evidence has been provided as to which travel agents engage in deceptive marketing by omitting to display the relevant notice regarding availability of travel and health insurance. Even if there are travel agents who do that then they should have been issued notices regarding a prime facie violation of section 10 (2) and should have been provided an opportunity of hearing. The actions of certain members of TAAP cannot be attributed to the association in the absence of evidence directly implicating the association. On a considered view we feel there is inadequate evidence available on record to meet the requirement of stating reasons under section 24-A of the General Clauses Act, 1897 as well as section 30 (5) of the Ordinance. It is also pertinent to point out that whereas the Impugned Order at one point refers to price fixing and the travel and health insurance being offered for free by most agents it later refers to the inconceivability of the same. This logical inconsistency convolutes matters and undermines the basis on which a violation of the law has been adjudicated to have been committed.

55. On the basis of the above we hereby hold that there is insufficient evidence available on record to maintain a finding of violation of section 10 (2) of the Ordinance by TAAP.

56. Without prejudice to the above, relevant offices of this Commission remain free to issue notices to any individual agents who are suspected of engaging in

deceptive marketing practices and are prima facie violating the Ordinance, in particular section 10.

57. Next we turn to the question whether TPL engaged in deceptive marketing or not and whether it subsequently violated section 10 (2) (b) of the Ordinance as held in the Impugned Order.

58. The Impugned Order states at Para 83 that Article 2.3 of TAAP-I and Article 2.1 of TAAP-II specifically mention that the Passenger Takaful Cover is optional meaning thereby that it can be purchased by any willing customer. TPL's letter dated 27.02.2009 has also been referred to which states:

> '*We, TPL, do have a provision within our travel scheme whereby any passenger may also opt for such coverage whether as an extension to the standard benefits or on a stand alone basis. In such cases, the travel agents collect the contribution (premium) amount from the passenger on behalf of TPL'*.

59. The Impugned Order, while recounting facts, states that "Amaan" Travel Takaful Coverage is the travel insurance policy to be issued with the ticket when travel insurance package is purchased by a customer. Preamble of this policy states that the member of the policy shall be the participant of the Takaful Fund and being member of the Fund he is acknowledged as a beneficiary. The Impugned Order helpfully reproduces the relevant extracts of the "Amaan" Travel Takaful Coverage Certificate as under:

> *This document may be called Participant's Membership Document (PMD) (hereinafter referred to interchangeably as "contract" or "policy") as defined in the Takaful Rules, 2005.*
>
> ***Preamble:*** *This is to acknowledge that applicant (hereinafter called the Participant) as more fully described in the schedule hereto;*
>
> *i. Is accepted as a member of the Participants" Takaful fund (hereinafter called the Fund) operated by Takaful Pakistan Limited (hereinafter called the Company)*

ii. *Being a member of the Fund, he/she is acknowledged as a beneficiary under the attached indemnity Policy of the Fund, and of the benefits declared by the fund time to time under this policy, in accordance with the Waqf rules governing the Fund.*

iii. *Subject to the participant continuing as a member of the Fund and complying with his/her undertaking under his/her declaration in the proposal form, he/she is indemnified by the Fund as one of its beneficiaries against the perils/events described, in the manner and to the extent as stated hereunder.*

60. Keeping in view the above the Impugned Order relies on the following rationale for holding TPL to have committed a violation section 10 (2) (b) of the Ordinance:

> *A bare reading of Amaan Travel Takaful Coverage suggests that the passengers/customers paying for their travel insurance are the members and the beneficiaries of the Participants Takaful Fund. Therefore, by being the beneficiaries they are entitled to the surplus of the Participants Takaful Fund. On the other hand the TAAP Agreement-I and the TAAP Agreement-II define the Participants Takaful Fund as a fund maintained by the TPL to deposit contributions to be paid by the travel agents. However, there is no provision in the TAAP Agreement-I and the TAAP Agreement-II, which provides for customers/passengers' Participants Takaful Fund when they opt to pay for the Passenger Takaful Cover.*

61. The rationale is summed up at the end of Para 84 where the Learned Member holds:

> *Depriving passengers/customers from their lawful right of becoming beneficiary of Participants Takaful Fund when they have actually opted for the Passenger Takaful Cover and made payment for it amounts to deception as to the character of the products purchased by them in violation of section 10(2)(b) of the Ordinance.*

62. TPL has of course attacked the rationale as well as the conclusion reached in the Impugned Order. TPL has argued before us that since there is no contract between the consumers and the TPL, the only contract being with TAAP as Policyholders, albeit with the consumers being the ultimate beneficiary, the consumers cannot themselves be made entitled to the funds lying in the Participant Takaful Fund. It has been submitted that TPL at all relevant times

acted with the bona fide understanding that it was acting in compliance of the law and this, it has been argued, is also clear from a bare reading of Clause 5.3 of th TAAP-II which expressly allows a passenger to opt for a top-up which would be a direct contract between the Appellant and the passenger in question. TPL has also placed reliance on the Takaful Rules, 2005 under which it is only the 'Participant' who may participate in and benefit from the surplus fund. TPL has also clarified that 'Participant' is defined in the relevant agreements (TAAP-I and TAAP-II) to be the participating travel agents.

63. The above issue whether TPL engaged in deceptive marketing or not turns on who is treated as a member and subsequently the Participant of the Takaful Fund. No doubt, TAAP-I and TAAP-II agreements define 'Participants' as participating travel agents. Nevertheless, relying on the definition of 'Participant' under the Takaful Rules - regardless of what TPL and TAAP have argued or consider to be the law– we note section 2 (1) (i) of the Takaful Rules, 2005 which states: ***participant*** *includes, where Takaful policy has been assigned, the assignee for the time being and, where he is entitled as against the participant Takaful Fund to the benefits of the policy, the legal heirs of a deceased participant.*

64. To our minds it is clear from the above that the travel insurance policy is assigned by the travel agents to the passengers and hence they would be covered under the surplus fund as beneficiaries. Indeed, counsel for TAAP submitted before us repeatedly in oral arguments that the travel insurance is assigned by the agent to the passenger. Paradoxically, however, even though TPL and TAAP might lose their claim that the term 'Participant' is limited to travel agents, they cannot be held responsible for deceptive marketing if the insurance certificate gives the impression that passengers are covered by the fund and if this is supported by Takaful Rules, 2005. A final and binding construction of the Takaful Rules, 2005 though is not within our domain and we shall defer to the wisdom of the Securities and Exchange Commission of Pakistan in this regard.

We hope and trust that the SECP will clarify this issue at the earliest for the benefit of stakeholders as well as in the interest of consumer welfare. To our mind on the basis of facts available on the record as such no such representation has been made either by TAAP or by TPL to the passengers which could be held as false or misleading in terms of section 10 of the Ordinance.

65. In view of the above, the ruling of the Impugned Order to the extent that it held TPL and TAAP in violation of section 10 of the Ordinance is not found tenable.

66. As no violation of sections 3, 4 and/or 10 or any of their relevant sub-sections is made out. We do not deem it relevant to delve into the reasoning for imposition of the penalty or its adequacy in the Impugned Order (i.e. issue-v) which is no more of consequence.

67. The Appeals are accepted in terms of this order.

**KHALID A. MIRZA**
Chairman

**RAHAT KAUNAIN HASSAN**
Member (Legal)

**Islamabad the July 23, 2010**