BEFORE THE COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF

Show Cause Notice dated April 10, 2008 for Violation of Section 3 of the Competition Ordinance, 2007

M/S KARACHI STOCK EXCHANGE (Guarantee) LIMITED

(File No. 12/ISE/Sec.3/CCP/2007)

Dates of hearing:		August 25th 2008, January 5th 2009 and January 23rd 2009
Present:		Mr. Khalid A. Mirza (Chairman) Dr. Joseph Wilson Member Ms. Maleeha Mimi Bangash Member
On behalf of Islamabad Stock Exchange:	(1) (2)	Mr. Aftab Choudhry, Managing Director Mr. Azid Nafees, Advocate Supreme Court
Karachi Stock Exchange:	(1) (2)	Mr. Adnan Afridi, Managing Director Mr. Muneeb Akhtar, Advocate Supreme Court
Lahore Stock Exchange:	(1) (2) (3)	Mr. Salman Akram Raja, Advocate Supreme Court Mr. Waqqas Mir, Barrister-at-Law Mr. Asif Baig Mirza of ABM Securities (Pvt.) Ltd.

O R D E R

1. Islamabad Stock Exchange (Guarantee) Limited (hereinafter "ISE") filed a complaint on November 12, 2007 (hereinafter "the Complaint") with the Competition Commission of Pakistan (hereinafter "the Commission") against Karachi Stock Exchange (Guarantee) Limited (hereinafter "KSE") under Section 30 of the Competition Ordinance, 2007 (hereinafter "the Ordinance") alleging violation of Section 3 of the Ordinance by the KSE, i.e., abusing its dominant position by refusing to (deal) share its trading platform. Subsequent to the Complaint by ISE, the Lahore Stock Exchange (Guarantee) Limited ('LSE') also became a party to the proceedings, as well as a group of investors of ISE, upon their application, joined as Interveners under Regulation 27 of the Competition (General Enforcement) Regulations, 2007. At issue is whether refusal by the KSE to share its trading platform with ISE and LSE amounts to an abuse of dominant position under the Ordinance.

FACTUAL BACKGROUND

A. Undertakings

2. Islamabad Stock Exchange was incorporated under the Companies Ordinance, 1984 (XLVII of 1984) on October 25, 1989 and it became operational on August 10, 1992. ISE is an Undertaking as defined in clause (p) of Section 2(1) of the Ordinance.

3. Karachi Stock Exchange (Guarantee) Limited was incorporated under the Indian Companies' Act VII of 1913 (as applicable to Pakistan) on March 10, 1949 as a company limited by guarantee, and is a registered stock exchange under the Securities and Exchange Commission Ordinance, 1969 (hereinafter "KSE"). KSE was established "to conduct, regulate and control the trade or business of buying, selling and dealings in shares, scrips, Participation Term Certificates, Modarba certificates, Stocks, Bonds, Debentures, Debenture stock, Government papers, Loans, and any other instruments and securities of like nature including but not limited to Special National Fund Bonds, Bearer National Fund Bonds, Foreign Exchange Bearer Certificates and documents of similar nature issued by the Government of Pakistan or any agency authorised by the Government of Pakistan." KSE is an Undertaking as defined in clause (p) of Section 2(1) of the Ordinance.

4. Lahore Stock Exchange (Guarantee) Limited was incorporated under the Companies Ordinance, 1984 (XLVII of 1984) in October 1970, and is also registered under the Securities and Exchange Ordinance, 1969. LSE is an Undertaking as defined in clause (p) of Section 2(1) of the Ordinance.

COMPLAINT, SHOW CAUSE, REPLIES, AND REJOINDERS

5. The points raised by ISE in its Complaint of November 12, 2007 are reproduced here below:

(i) There are three stock exchanges in Pakistan i.e., KSE, ISE and LSE. A total of 654 companies are registered on KSE, 516 on LSE and 247 on ISE, however, the securities listed on all the three exchanges i.e. the commonly listed securities constitute 90% of the trading volume of listed securities in Pakistan. These stock exchanges constitute a "relevant market" both geographically and product-wise.

(ii) Approximately 87% of the trading volume of commonly listed securities takes place on the KSE while the combined share of ISE & LSE is only 13%. Thus KSE holds a dominant position in the relevant market.

(iii) It was stated that the basic principle of the securities market is that the "investor must be assured that they are participants in a system which maximizes the opportunity for the most willing seller to meet the most wiling buyer but, in practice, this principle is not applicable in Pakistan."

(iv) It was alleged in the Complaint that the KSE and its members, in practice, ensure that access to the best price for a particular security, which is mostly available at the KSE only, is not available to other exchanges, including ISE, thus depriving investors coming through members of such exchanges of an equal opportunity of having a fair and non-discriminatory access to quotation displayed at the KSE and thus an opportunity to match such offers quoted at the KSE.

(v) According to the ISE, the bids and offers of investors entered into trading systems of one exchange cannot be matched with those entered at another exchange, even if the security being traded is listed at both exchanges and for that reason, ISE members have to route many orders of their clients (investors) through the members of the KSE, resulting in large scale trading not being regulated by either of the exchanges. Moreover, the complaint alleged that investors at the ISE have to pay higher out-of-pocket brokerage costs.

(vi) The complaint stated that since the bulk of trading volume takes place at the KSE, the financial institutions in search of good prices also place their orders at the KSE, hence, producing more liquidity that results in [the] application of dissimilar conditions to equivalent transactions thereby placing the investors on other exchanges at a disadvantage.

(vii) It was also stated in the complaint that abuse of dominance by the KSE is occasioned due to absence of a system of centralized market enabling access of all market centers to a national pool of liquidity for the best execution of investors' orders. If the investors gain access to "best

price", it would serve in the larger public interest in terms of growth of the security market and enhancement of competition among sellers and purchasers.

6. Upon receipt of the Complaint, the Commission initiated an inquiry under section 37 (2) of the Ordinance by appointing an Inquiry Officer. The Inquiry Officer with its letter dated December 12, 2007 invited views of the KSE on the matter. The KSE requested through its letter dated December 24, 2007 for extension in time for the submission of "proper and detailed" reply, which was acceded to and the time for filing the comments was extended until January 15, 2008.

7. Being mindful of the fact that the complaint and the allegations raised therein relate to and affect the interests of all three stock exchanges of the country, the Inquiry Officer also invited the comments of the LSE vide letter dated December 19, 2007.

8. KSE filed its comments on the Complaint on January 12, 2008. A summary of the comments filed by KSE is provided below:

(i) KSE alleged that the hidden agenda of the so called complaint is only to, in effect, enable the members of ISE to trade on the KSE without being the members of the latter exchange and thus gain free of cost benefits and advantages which they are not in any manner entitled. It is well known that membership of the KSE costs several crore rupees enabling its members to benefit from the heavily invested infrastructure, and without such membership, a person can not be registered with Securities and Exchange Commission of Pakistan (hereinafter "SECP") as a broker having permission to trade on the said exchange.

(ii) KSE disputed that the three stock exchanges i.e. KSE, LSE and ISE, taken together, constitute the "relevant market" for the purposes of the Ordinance. In fact each of these stock exchanges is itself a distinct

market as per the definition of stock exchange given in section 2(m) of the Securities and Exchange Commission Ordinance, 1969 (hereinafter the "SEC Ordinance, 1969") and that to hold the three stock exchanges as constituting one market i.e., relevant market would be contrary to and defeat the purpose of the SEC Ordinance 1969.

(iii) KSE disputed its alleged dominant position in the "relevant market" and denied the same. It submitted that dominant position can only be acquired by an undertaking operating in a market. Whereas KSE is itself a "market" as per the definition of stock exchange given in the SEC Ordinance, 1969. Therefore it is meaningless to speak of something which is itself a "market" as being in the "relevant market."

(iv) KSE denied the allegation leveled in the complaint that basic principle of securities Market i.e. best price is not applicable in Pakistan. KSE stated that it has taken a number of steps in co-ordination with and under the guidance of SECP over the years to ensure that the best price is available to investors in most efficient and liquid form possible. This includes investment of a substantial amount on its computerized KATS system which provides real time trading data to ISE members. Hence, no question arises of KSE not making the best price available to the members of the other exchanges.

(v) KSE stated that any person duly registered with the SECP as broker for or in relation to any particular stock exchange can trade on that exchange and the law allows multiple registrations. However, law bars a member of an exchange to trade on the other exchange without being the member of that other exchange. Therefore, ISE members can not trade themselves on the KSE without becoming its members.

(vi) KSE denied that there is any large scale unregulated trading going on. If ISE members are charging their clients higher than normal brokerage costs, then obviously that is a matter to be taken up by the relevant regulatory authority. It further stated in the context of availability of different prices in different stock exchanges that such practice enables the ISE and LSE members to engage in the well known and recognized practice of arbitrage to their manifest advantage and benefit.

9. The ISE filed a rejoinder to the comments of the KSE on complaint was on February 6, 2008. Submissions made by the ISE in the rejoinder are summarized as under:

(i) ISE reiterated the objectives of the Ordinance emphasizing on the free and fair competition and maintaining and enhancing economic activity as compared to protection of consumers from anti-competitive behaviour pressed by the KSE in its comments on complaint. ISE denied that there has been any fundamental misconception as to object sought to be achieved by the Ordinance on behalf of ISE counsel.

(ii) ISE disputed the argument put forth by KSE that the members of ISE are not consumers and the interests and financial advantages of ISE members are not an issue. Rather it is the interests of general investors which need protection and the interests of investors and brokers are not identical. The ISE argued that the Ordinance does not envisage short term advantages to consumers which result in long term loss by eliminating the competitors. Since members of the ISE and LSE are conducting the same business in the relevant market, they are competitors of KSE members.

(iii) ISE denied that each stock exchange is a separate market in its own right. It submitted that all three exchanges provide for the trading of the same product i.e., securities of the same companies. Although three exchanges are physically apart, there is no barrier or prohibition on trading in the securities.

(iv) ISE stated that KSE has portrayed provisions of SEC Ordinance, 1969 and the Ordinance in a conflicting light. Ordinance is a special legislation and shall prevail over general provisions of SEC Ordinance, 1969. Mere fact that the SEC Ordinance, 1969 has defined the stock exchange as a market place does not necessarily imply that it will not be considered as a constituent in the "relevant market" for the purposes of the Ordinance.

(v) ISE contended that using registration requirements in order to determine that the markets are different and separate and do not constitute relevant market is inappropriate. Instead requirements of certification differ because the stock exchanges are different entities.

(vi) ISE disputed the argument of the KSE that an undertaking is dominant in the market only if it operates in the market. And because KSE itself is a market place, therefore it can not be said that KSE is dominant in the market. ISE submitted that KSE is dominant for three reasons firstly; three stock exchanges collectively constitute relevant market. Secondly; 654, 516 and 247 companies are listed on KSE, LSE and ISE respectively which constitutes 90% of total trading volume of listed securities in

Pakistan. Thirdly; out of 90%, 87% of the market belongs to the KSE. Therefore, aforementioned statistics clearly demonstrate dominant position of the KSE in the relevant market.

(vii) The ISE denied that only members of KSE can trade on KSE. Instead, in terms of section 8 of SEC Ordinance, 1969 persons other than members of the exchange can trade if so prescribed and since unified trading system between ISE and LSE has been approved by SECP, therefore, the contention of the KSE in this respect is misconceived.

(viii) ISE submitted that since KSE attracts the bulk of trading volume which is why most orders are placed at the KSE, hence, producing increased liquidity, which results in application of dissimilar conditions at a disadvantage. Moreover, KSE is allowed to abuse its dominant position as a result of the absence of a system of centralized market enabling access of all market centers to a national pool of liquidity for the universal execution of the investor's orders.

10. LSE filed its comments on the Complaint on January 01, 2008 and on February 21, 2008 filed its comments on the reply by the KSE, which are summarized as under:

(i) LSE supported the argument raised by the ISE that the three stock exchanges constitute the "relevant market" both geographically and product-wise for the purposes of the Ordinance. LSE also argued that KSE occupies the dominant position in the securities market of Pakistan and abuses the dominant position more specifically in violation of Section 3(2) and 3(3) (a), (e), (g) and (h) of the Ordinance.

(ii) LSE supported that the complaint filed by the ISE is in line with the objectives to be sought by the Ordinance which include; to ensure free competition in all spheres of commercial and economic activity and to enhance competition. At present, bids and offers of investors entered into the trading systems of one exchange can not be matched with those entered into at other exchange even if security being traded is listed on both exchanges. For that purpose, members of the ISE and LSE have to route many orders of their clients through the members of the KSE. This also results in higher out of pocket brokerage costs being paid by investors at the LSE and ISE and hence the interests of consumers are adversely affected.

(iii) LSE denied that purpose of the complaint is to enable members of ISE to trade on the KSE without being members of the latter and thus gain free of cost benefits and advantages. In fact, the value of the seat of KSE is on account of the restrictive practices of the KSE excluding access to trading to all except the small group of its members. This is a classic instance of entrenched insiders seeking to appropriate rent by keeping out the competition.

(iv) LSE stated that the pre-eminence of the KSE has very little to do with any peculiar effort on part of its members. With the advance in technology and prevalence of integrated trading there is no reason whatsoever to maintain the competition diminishing barriers to trading platform with a view to enhance competitive efficiency for the investors. The present artificial segmentation of the securities market of Pakistan only serves to distort the national securities market and places investors acting through the members of the ISE and LSE at a disadvantage. This artificially segmented securities market serves to inflict regional discrimination. Consequently the existing segmentation is unjust, arbitrary and violative of the law and the Ordinance in particular.

(v) LSE argued that unified trading system is the only way to allow the market to reveal its full depth permitting all buyers and sellers to interact on an equal footing regardless of their geographical position. The present artificially segmented securities market results in unjustified disparity between KSE on the one hand and LSE and ISE on the other hand. This disparity along with the disparity in availability of Continuous Funding System (CFS) finance results in investors acting through LSE and ISE being placed at disadvantage.

(vi) LSE suggested that the proposal of an integrated trading platform encompassing the three exchanges is consistent with on-going reform of the securities market that has objective to create a nation wide neutral trading environment. For instance, The National Clearing Company of Pakistan provides a nation-wide clearing system for the settlement of the liabilities of the participants of the national securities market. This process of support for the national securities market was sought to be carried forward by the Continuous Funding System-MK-II to provide geographically neutral financing to all investors across the country on an equal footing.

(vii) LSE reiterated that LSE and ISE do not want one exchange but a unified trading floor. It was further argued that there is no bar in

the law to the creation of a unified trading floor along with the three stock exchanges maintaining their separate existence.

(viii) LSE submitted that the fact that the KSE's trading data has been made available on a real time basis to ISE and LSE does not absolve KSE of its other abuses of its dominant position. Further, availability of real time trading data of KSE to LSE and ISE members does not ensure that best price is made available to members of other exchanges.

11. KSE also filed a reply to these aforementioned comments of the LSE on February 2, 2008. Most of the averments made by the KSE referred to its earlier comments on the Complaint dated January 12, 2008, which have been summarized above.

12. Since SECP is the regulator of capital market in the country, the Inquiry Officer also invited comments from the SECP and forwarded the complaint of ISE along with all the relevant correspondence to it. The comments by SECP dated April 3, 2008 are listed below:

(i) Commenting on the concern raised by ISE that orders routed through the KSE members remain un-regulated; SECP expressed the view that *"the orders routed by a member of a stock exchange through a member of another stock exchange are not unregulated"*. SECP also added that in such type of trading initiating broker acts as a client of executing broker who is responsible under the law to keep all required details of the client, collect margins, provide trade execution details to the client etc.

(ii) SECP clarified the stance taken by ISE that it is not mandatory under section 8 of the SEC Ordinance, 1969 to become member to trade on a stock exchange. According to SECP's observation, section 8 was amended to substitute words "otherwise than as may be prescribed" for the words "unless he is a member thereof" in pursuance of the process of demutualization of the stock exchanges which will segregate the right of ownership from the right to trade.

(iii) SECP commented on the disparity in CFS finance mentioned in LSE's comments and gave the reason that such disparity is because of different demand at the respective stock exchanges.

(iv) Referring to approval of SECP to unified trading system in the comments of LSE, SECP stated that unified trading system between ISE and LSE was initiated with the mutual consent of both parties under an agreement and SECP in order to regulate the trading approved their Unified Trading System Regulations.

13. After examining the complaint and all the comments/replies and rejoinder filed by KSE, LSE and ISE and also examining the relevant data on trading of securities the Inquiry Officer completed the inquiry by producing Inquiry Report dated April 07, 2008. The Inquiry Report concluded that there is weight and merit in the ISE complaint and that the behavior of the KSE appears to be in contravention of sub-section (2) of and clause (b), (e), (g) & (h) of sub-section (3) of section 3 of the Ordinance, and recommended that proceeding under Section 30 of the Ordinance may be initiated.

14. Based on the recommendations made in the Enquiry Report, the Commission initiated proceedings under section 30 of the Ordinance and issued a Show Cause Notice to KSE on April 10, 2008. Pertinent paragraphs from the Show Cause Notice are reproduced here below:

> 5. Whereas geographically and product wise, the three stock exchanges in Pakistan i.e., ISE, LSE, KSE constitute relevant market for trading of securities which are listed on all three exchanges (the "relevant market" as in defined in clause (k) of sub-section (1) of section 2 of the Ordinance.
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> 6. Whereas, the commonly listed companies on all the exchanges constitute approximately 90% of the total trading volume of listed securities in Pakistan. Of this 90%, around 87% of the market belong to KSE, whereas, ISE and LSE collectively account for only 13% of the trading volume. Hence, KSE enjoys dominant

position in the relevant market in terms of clause (e) of sub-section (1) of section 2 of the Ordinance; and

7. whereas the investors/customers intending to sell or purchase securities at ISE and LSE do have access to the best available price/bid reflecting at KSE's system/floor, which constitutes an "essential facility", sharing whereof is necessary to make the best price available to all the investors/customers.

11. Whereas, the alleged refusal to deal on the part of KSE is preventing, restricting and distorting competition in the relevant market;

14. Whereas, the Commission is satisfied that such practice on the part of KSE prima facie constitutes violation of Section 3 and falls within the purview of sub-section (2) of Section 3 and clauses (b)(e)(g) (&) (h) of sub-section 3 of Section 3 of the Ordinance.

15. An application was moved on April 15, 2008 by five investors of ISE namely; H.U.Aqil, Riaz Ahmad Butt, Ch Naeem Tariq, Moaaz Sabih and Muhammad Shahzad under Regulation 27 of Competition (General Enforcement) Regulations, 2007 for being impleaded as interveners. Interveners submitted that investors of Karachi are at competitive advantage as compared to investors of ISE which causes unfairness in the market. Interveners relied on the following case laws in support of their submissions:

i. Trade Practices Commission V. Ansett Transport Industries (Operations) Pty. Limited and Others [1978] E.C.C. 340;
ii. R. V Re the Fizzy Drinks Market [2002] E.C.C. 28;
iii. Irish Sugar V. Commission (T-228/97) [1999] E.C.R. II- 2969; and
iv. Unilever Bestfoods (Ireland) Limited V. Commission of the European Communities (Case C-552/03 P) [2006] 5 C.M.L.R. 27.

16. KSE challenged the Show Cause Notice before the High Court of Sindh at Karachi by filing a Petition (C.P. No. 786/2008). The High Court granted a stay

order on May 03, 2008 thereby restraining the Commission from taking any action on the Show Cause Notice against KSE till next date of hearing. The Commission filed a rejoinder in affidavit for vacation of the stay order. The High Court was pleased to pass an order thereby directing KSE to file a reply to the Show Cause Notice and allowing the Commission to adjudicate upon the legal issues raised in the Show Cause Notice. However, the Commission was restrained to pass the final order on the Show Cause Notice.

17. Later on, ISE challenged the stay order dated May 03, 2008 passed by the Hon'ble Sindh High Court before the August Supreme Court of Pakistan vide C.P.L.A Nos. 759 & 760/08. On November 11, 2008, the August Supreme Court directed the Hon'ble Sindh High Court to dispose of the matter expeditiously. The Commission submitted the said order before the Hon'ble Sindh High Court, upon which the Hon'ble Sindh High Court directed KSE to appear before the Commission and allowed the Commission to pass the final order but not to recover the penalty if imposed on the KSE.

18. As per the orders of the Hon'ble Sindh High Court, hearings on the mater were conducted on December 05, 2008, January 05, 2009 and January 23, 2009 to pass the final order.

19. Under the direction of the High Court, KSE submitted a reply to the Show Cause Notice on June 23, 2008. Salient points of the reply filed by the KSE are provided hereunder:

A. Constitutional Issues:

(i). The Ordinance is *ultra vires* the constitution being beyond the legislative competence of the Federation and all the proceeding purportedly initiated or conducted there under are thus without jurisdiction and void *ab initio*.

(ii). Section 41 and 42 of the Ordinance, 2007 are *ultra vires* the Constitution and liable to be struck down. The KSE has no effective appellate remedy or relief against any order that may be passed by the Commission and any proceeding there under will render a mere sham exercise without any lawful basis.

(iii) The Show Cause Notice and Commission's proposed order thereon is a gross violation of the fundamental rights of property and trade of KSE and its members.

(iv) The Commission in its one of earlier orders held that Commission cannot determine any objection to the validity of the law under which it has been created. Therefore, the constitutional issues cannot be decided by the Commission.

B. Legal Issues and Objections:

(i) That bare perusal of the Show Cause Notice and the enquiry report clearly demonstrates that Commission is acting in a highly partisan, biased and unlawful manner and just pushing the agenda of ISE to share the property right of KSE in a forcible and coercive manner.

(ii) Section 3 is applicable only if (a) there is a dominant position and (b) there has been an abuse of dominant position in the relevant market. Dominant position only exists in the relevant market. A determination of relevant market is jurisdictional. The enquiry report concluded that the whole of Pakistan is one geographical market for the trading of securities which therefore comprises the relevant market but this jurisdictional determination is fundamentally incorrect.

(iii) Section 2(m) of the SEC Ordinance,1969 establishes the various stock exchanges as distinct and separate markets, thus the exchanges are the market where the persons come together to trade in securities. It is, therefore, wholly inappropriate to speak of KSE abusing a dominant position because such a position can only be acquired by an undertaking operating in a market.

(iv) The Commission has usurped the powers, functions, authority and jurisdiction of SECP. Section 3(2) of SEC Ordinance, 1969 states that the SECP shall determine the number and places for the establishment of stock exchanges. Likewise Section 5A of the SEC Ordinance, 1969 provides that no person can act as a broker or agent to deal in listed securities without being registered with the SECP in the prescribed manner. Further, Brokers and Agents Registration Rules, 201 establish that a broker certified to trade on a particular exchange must be a member of that exchange. Therefore, by accepting the position put forwarded by the so called complaint of ISE the Commission has effectively obliterated the distinction drawn by the relevant special law itself between different market places for securities requiring separate registration for each market.

(v) The statutory power of the Commission can only be exercised to restore the competition among the three stock exchanges. However, in effect by creating one system for trading of securities, as the Commission proposes to do, would be destroying or substantially reducing competition and monopoly will be created.

C. Reply to Show Cause Notice and Enquiry Report:

(i) A seat of the KSE is by far the most valuable since the turnover is the largest while on the other hand ISE has the least value since the turnover on that exchange is the least. Therefore if, ISE broker gets direct access to the KSE trading platform that would enhance the value of his seat and would enable him to reap the benefits of the more valuable trading rights of KSE, without making the necessary investment. The proceedings launched by the Commission are biased and *mala fide*.

(ii) ISE approached both KSE and LSE with a business proposal to set up a national market system in Pakistan which was strictly a commercial offer. In fact such a system would convert the three stock exchanges into one stock exchange, since the three

separate market places would in effect become one market place and the broker of ISE and LSE would have direct access to its market place therefore such business proposal was not accepted by KSE. However, ISE and LSE both entered into an agreement for unified trading system which has practically merged the two exchanges. Show Cause Notice is nothing but revival, in the garb of an alleged breach of the competition law, of ISE's business proposal for a unified trading system.

(iii) KSE alleged that the enquiry report has been prepared and the partisan, mala fide and unlawful manner. It pointed out that the trading data for only three days (15-17 inclusive) in the month of November 2007 has been examined and the basis of the selection has not been disclosed. Thus, from the very beginning trading data has been selectively chosen and engineered to produce the desired result i.e. to justify the issuance of the Show Cause Notice. Furthermore, the data compiled by the Commission shows trading having taken place on November 17th, which was a Saturday and no trading takes place on any exchange on a Saturday. The inquiry report argued that shares of certain companies (Azgard Nine and TRG Pak) were not traded on the LSE and ISE during the said 3-day period and only on KSE. The Commission failed to notice that the said companies are not listed on ISE and LSE.

(iv) Shares of National Bank of Pakistan have been alleged not to be traded on the ISE and LSE during the said 3-day period. This is completely incorrect and the same is refuted by information available on the official website of the LSE. The same goes for shares of Bank of Punjab which were allegedly not traded on the ISE and LSE on November11, 2007. This too is incorrect and this is established by the information available on the website of the ISE and LSE.

(v) Investors of the securities buy because they expect to sell in the future at a higher price. The existence of more than one stock exchange facilitates this process. If there is only one trading platform, there will invariably be only one price. However, if there are competing market places then the buyer will be able to acquire his desired security in the market where it is cheapest and the seller will be able to sell it in the market where its price is the highest. Each will obtain the price that is best for him. By eliminating the competition between different markets the Commission is reducing the choices available to the actual consumers i.e., investing public.

(vi) The importance of having competing exchanges is underlined especially to avoid the fraud and cheating that may result in case of unified trading system. In the unified trading system it is possible that a broker of ISE may sell the security at a higher price where he himself purchases it at the lower KSE price. Currently this concern is diminished by reason of technological development through the availability of trading data on a real time basis to ISE and LSE.

(vii) SECP has strongly refuted the allegation of ISE that transactions between brokers on the different exchanges are unregulated, yet SECP's categorical position has been disregarded in SCN.

(viii) The reference to the trading platform of KSE being an essential facility is incorrect. The so called trading platform of KSE is nothing other than the KSE market place which is a distinct market in its own right. There are no segments of security market but there is more than one distinct securities market. The matter is deliberately put in a manner with mala fide intent to give cover to the real intention which is to enable the ISE brokers to trade directly on the KSE market without having to become members of the KSE exchange and making the huge investment required for this purpose.

20. The first hearing in the instant matter was held on August 25, 2008. All the concerned parties attended the hearing which lasted for about more than five hours.

(i) During the course of hearing, the counsel for ISE placed reliance on a decision of the US Supreme Court in the case of *Aspen Skiing Company v. Aspen Highlands Skiing Corporation* 472 US 585 (1985) on the subject of refusal to deal. The counsel for KSE sought permission of the Commission to make written submissions on this aspect of the matter and sent written submissions dated January 12, 2009 along with the copies of the following two judgments of the US Supreme Court and a judgment of the US Court of Appeals, primarily arguing the inapplicability of the Aspen Case to the case at hand:

21. Counsel of ISE also filed a memorandum of submissions dated February 19, 2009 to the legal authorities presented by the KSE and provided a copy of an other decision of US Supreme Court [Lorain Journal Co. et al. V. United States 342 US 143 (1951)] in support of the complaint. Decisions of the US superior courts relied upon by the ISE and KSE will be discussed in the later part of this order.

22. While the matter was being heard by the Commission, SECP raised objection in its letter dated January 14, 2009 that allegations made in the complaint by the ISE specifically relate to the functions within the exclusive jurisdiction of the SECP. The Commission in its letter dated January 16, 2009 drew the attention of SECP to the recent proceedings before the superior courts in particular before the Supreme Court where upon the specific query by the Hon'ble Chief Justice of Pakistan in the said matter, no objection to this effect was raised by the SECP. However, the SECP vide another letter dated February 10, 2009 persisted that the matter falls within the jurisdiction of the SECP. These objections have been dealt with under Issue (iii) in the latter part of this Order.

23. Counsel for the LSE filed supplemental written submissions in the Show Cause Notice on February 14, 2009. All the arguments raised in the written submissions reiterate the earlier comments/submissions made by the LSE during the inquiry which have been excerpted above.

24. A reply to these supplemental written submissions was filed by the KSE on March 07, 2009 along with reference text material from Richard Whish, Competition Law, 6th edition (2009). In the interest of brevity we are reproducing the arguments made by KSE in its reply, but have fully considered them in formulating our conclusion.

25. KSE also filed a reply to the submissions made by the interveners on March 11, 2009. Averments in the reply of KSE relate to the issues of "best price", "relevant market" and "dominant position" which contain the same arguments as have been enumerated above in the comments and reply filed by the KSE from time to time.

ISSUES:

26. The material issues that emerge from the submissions made by the parties are as follows:

(i) Whether the Ordinance has lapsed in terms of Article 89 of the Constitution after a period of 120 days or not; and whether the Competition Ordinance is ultra vires the Constitution, and beyond the legislative competence of the Federal legislature?

(ii). Whether the Commission has jurisdiction to take cognizance of the alleged conduct?

(iii). Whether the Commission acted in a partisan manner and with mala fide intention in initiating the proceedings against KSE?

(iv) Whether three stock exchanges constitute 'relevant market' under the Ordinance?

(vi) Whether or not KSE occupies the "dominant position" in the relevant market in terms of Clause (e) of sub-section (1) of Section 2 of the Ordinance, 2007?

(vii) Whether KSE is abusing its dominant position?

27. **ANALYSIS AND FINDINGS:**

ISSUE No. (i):

Whether the Ordinance has lapsed in terms of Article 89 of the Constitution after a period of 120 days; and whether the Competition Ordinance is ultra vires the Constitution, and beyond the legislative competence of the Federal legislature?

28. KSE raised the above objections as to the constitutionality of the Ordinance. These have been dealt with in the earlier order passed by Single Member of the Commission in the matter of Pakistan Banking Association and Others (at Para 39). Placing reliance on **Akhtar Ali Parvez v. Altafur Rehman (PLD 1963 (W.P.) Lahore 390)**, it was held that the Commission is not the proper forum to decide questions as to the constitutionality of the Competition Ordinance, 2007. It was observed that the Commission must proceed on the assumption that its existence is legal and valid until a court of competent jurisdiction decides or directs to the contrary. Subsequently, this was also endorsed in Karachi Stock Exchange, Lahore Stock Exchange and Islamabad Stock Exchange (File No. 1/Dir (Inv) KSE/CCP/08). The learned Member of the Commission seized with the issue in the aforementioned cases, addressed at length the competency of an adjudicatory authority to decide on the question of vires of law under which it has been created. The Learned Member additionally referred to the judgment of the

Full Bench of the Supreme Court of Pakistan in **Pir Sabir Shah v. Shad Muhammad Khan, Member Provincial Assembly N.W.F.P (PLD1995 SC 66)**

29. Moreover, KSE while raising the objection as to the constitutionality of the Competition Ordinance, 2007 and the jurisdiction of the Commission has conceded to the fact that the Commission can not decide on the constitutional issues. On this assertion of KSE and in the light of the earlier order passed by the Commission it is needless to go into details to address the constitutional issues raised in the present matter. However, we have dealt with the issue of property rights of KSE members.

ISSUE No. (ii)

Whether the Commission has jurisdiction to take cognizance of the alleged conduct:

30. In this regard KSE alleged that the Commission has usurped the powers, functions, authority and jurisdiction of SECP. The thrust of these objections is that the SECP is the prime regulator of the capital and securities market and hence the Commission has no jurisdiction to act in the present matter.

31. We have also examined the comments filed by SECP and noted that SECP vide its letter dated April 3, 2008; had not objected in any manner to the initiation of proceedings by the Commission under the Ordinance, 2007. However, at a very late stage, i.e., after conclusion of inquiry, issuance of show cause notice and at

the very final stages of the proceedings, vide its letter dated January 14, 2009 SECP objected to the jurisdiction of the Commission, stating that, the stock exchanges are regulated under SEO 1969 and under SEO 1969 SECP is the regulator. Therefore, according to SECP the matters regarding the demutualization and integration of stock exchanges are to be regulated under the SEO 1969 and by the SECP. Despite this delayed response and objection the Commission considers it proper to deal with the issue.

32. The Commission is, at the very least, surprised by the ambiguity and inconsistency as far as the stance of the SECP is concerned. Whereas the difference in scope of SEO 1969 and the Ordinance, 2007 will be outlined below in detail, we find it pertinent to mention here that no provision in the securities laws of Pakistan covers anti-competitive practices by and among undertakings operating in the securities market. The areas of regulation envisaged by the laws governing SECP and the Commission are completely distinct. The situation is analogous to other federations like the United States where the Federal Trade Commission regulates competition related matters and the Securities and Exchange Commission regulates matters relating to incorporation and regulation of corporations in matters other than competition.

33. The issue of jurisdiction of the Commission against the jurisdiction of the SECP can and will be examined below in light of legal principles governing general and special laws as well as *non-obstante* clauses. However, before delving into such

matters the Commission would like to clarify the issue in a much simpler manner. In our view the issue of jurisdiction can be best understood with reference to which law is *relevant* and applicable to an entity in a given context. By way of an example, consider a corporate entity engaged in the telecom sector; as far as this entity's regulation regarding incorporation, filing of accounts, issuing of prospectus etc is concerned, the relevant law will be the companies legislation and the sector specific regulator (in that case the SECP) will have jurisdiction. In relation to this entity's filing of tax returns the Federal Board of Revenue will be the relevant regulatory body and the relevant law will be the tax code of Pakistan. In relation to its licensing requirements and other related matters, the relevant law will be the licensing legislation in the telecom sector and Pakistan Telecommunication Authority will be the relevant regulator. Similarly, if and when this entity indulges in practices or enters into agreements that allegedly prevents, distorts or reduces competition within the relevant market then the relevant and the applicable law will be the competition related legislation and the concerned enforcement agency will be the Commission. Since the present complaint involves an issue of competition which falls expressly within the purview of the Ordinance, we feel it ought to be abundantly clear that the matter falls squarely within the jurisdiction of the Commission.

34. The role of the SECP clearly is to ensure an orderly securities market and a reduction in systemic risk. However, wherever an undertaking is in a position to influence the relevant market and competition within the relevant market then the

Commission steps in. In our view there is no conflict regarding jurisdiction. An alleged abuse of a dominant position in a relevant market (where the relevant market is to be determined by the Commission) is an area that squarely falls within the exclusive domain of the Commission. Hence the objections of the SECP are misplaced and suffer from a lack of appreciation regarding the different mandates of two independent regulatory bodies.

35. In this regard, the issue of conflict of different laws should and does not arise in the absence of any provision on the competition aspect under review pursuant to the securities and companies legislation. It is the action of the corporate entity that determines which law will be relevant and applicable. However, since parties have spent considerable time in discussing the issue of statutory interpretation in case of alleged conflict of scope of statutes and the question of general and special law, we will in any case be addressing this issue. It is worth mentioning that SEO 1969 does not contain a *non obstante* clause in itself. On the other hand the Securities and Exchange Commission of Pakistan Act, 1997 (the '**SECP Act**') contains a non *obstante clause* which is reproduced below:

> ***45. Act to override other laws.-*** *The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.*

36. The bare reading of the above section makes it quite clear that, incase any provision in any other law is inconsistent with the provisions of SECP Act, the provisions of the SECP Act shall prevail. However, as mentioned above KSE has failed to draw our attention to any provision relating to ensuring competition or to

regulation of anti-competitive conduct under the SECP Act and the SEO, 1969. LSE and ISE drew our attention to the fact that the areas of regulation and enforcement envisaged by the SECP Act and the Ordinance are different. Even SECP in its correspondence did not bring to our attention any provision in the relevant securities legislation which dealt with the issue of competition. The Ordinance applies to competition in all spheres of economic activity and its application to the corporate entities is not excluded merely because the corporate sector (for matters others than competition) has its own regulators.

Even then, at this point it would be relevant to refer to Section 57 of the Ordinance, which reads as under:

> ***57. Ordinance to override other laws:-*** *The provisions of this Ordinance shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force.*

37. The above section makes the intention of the legislature quite clear that, in case of any conflict the provisions of the Ordinance shall prevail over the provisions of any other law in force. In the case of ***Sarwan Singh and another v. Kasturi Lal AIR 1977 SC 267*** it was held that:---

> *"Speaking generally, the object and purpose of a legislation assume greater relevance if the language of law is obscure and ambiguous. But, it must be stated that we have referred to the object of the provisions newly-introduced into the Delhi Rent Act in 1975 not for seeking light from it for resolving in ambiguity, for there is none, but for a different purpose altogether. When two more laws operate in the same field and each contains a non-obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws*

under consideration'.

38. The object and purpose of SECP Act, was generally to provide for a regulator for corporate entities and capital markets. However, the object and purpose of the Ordinance is to make provisions to ensure free competition in all spheres of commercial and economic activity, including but not limited to capital and securities market, to enhance economic efficiency and to protect consumers from anti-competitive behavior. Therefore, upon comparison of the said objects, for the purposes of ensuring free competition, it is our considered view that Ordinance is a special law, and it will prevail over other laws including but not limited to the SECP Act and SEO 1969. The Ordinance is a special enactment, which has provided for special situations, which are not provided in any other law for the time being in force such as 'Abuse of dominant position', 'Prohibited Agreements', Merger Control, and Deceptive marketing practices, which prevent, restrict, reduce, or distort competition in the relevant market, therefore, it is our considered view that Ordinance, being a special law shall prevail over a general law such as SEO 1969 or SECP Act. The following judgments have been relied upon to support this conclusion: *Lahore Beverage Company (Pvt.) Limited vs. Muhammad Javed Shafi; 2008 CLC 759, Attaullah Khan vs. Samiullah; 2007 SCMR 298*.

39. Even otherwise, it is an established rule of construction/interpretation that even if both laws are considered special statutes, having *non obstante clauses*, present in the Ordinance absent in the SEO, 1969 the subsequent enactment will prevail over

earlier enactment(AIR 2000 SC 1535). The Division Bench of the Honourable Peshawar High Court in ***Muhammad Saleem vs. The State and another, 2002 P Cr. L J 216,*** at Para 12 of the judgment held that,

> *"The general principle of interpretation of statute is that special law shall have precedence over the general law and when there are two special laws and they are inconsistent on any provision/situation, then one which is later, shall prevail over the earlier one."*

ISSUE No. (iv):

Whether the Commission has acted in a partisan manner and with malafide intention in initiating the proceedings against KSE?

40. It was also submitted by the counsel of KSE that the Commission has acted in a partisan manner regarding the Complaint. The counsel of KSE was asked during the hearing to substantiate this with evidence. The counsel of KSE replied that ISE had earlier forwarded a commercial proposal to KSE for establishment of unified trading system between ISE and KSE which was refused by KSE. He further stated that since ISE could not achieve through a voluntary and free agreement as an arms-length commercial transaction, it is now seeking the same relief under the Ordinance which is a gross abuse of the law. We find the above arguments forwarded by the counsel of KSE completely unfounded and unjustified. As has been discussed, the allegations leveled in the complaint against KSE, meeting the requisite standard provided under the law, do allow for determination under the Ordinance. Hence the Commission has acted only to discharge its obligations under the Ordinance. An inquiry into issues such as those raised in the complaint is directly envisaged by the Ordinance. Moreover, the argument that KSE has already refused establishment of a unified trading

platform between ISE and KSE does not prohibit ISE to file a complaint against KSE under the Ordinance.

41. KSE argued that 'the Inquiry Officer relied upon selective data and the Commission has also relied on the same data'. We have noted that KSE has failed to provide any data whatsoever which showed that the best prices in commonly traded securities are not only available on KSE trading platform but also available on other exchanges. In absence of any such data, the data relied upon in the Enquiry Report has primarily been used for drawing the inference regarding the availability of best price at the platform provided by KSE. Even if minor inaccuracies in data exist this does not in any way have an impact on the inference drawn. i.e. availability of best price at KSE's platform. This will be addressed comprehensively later in this Order.

42. Furthermore, we have noted that the data in question in the Enquiry Report was taken from newspapers that show the previous day's trading data at KSE. So actually, the trading shown against the dates of 15th, 16th, & 17th was representing the trading data for 14th, 15th, and 16th of November, 2007. We have also noted that the Inquiry Officer has selected most heavily traded shares at KSE in various sectors i.e. OGDC, NBP, BOP, ARL. The securities of these companies were most heavily traded in the relevant dates provided above. The quotations of these shares were also confirmed by the Inquiry Officer at ISE and LSE. Thus the

argument of the counsel of KSE regarding incorrect data having no force is, therefore, not tenable *and* hence rejected.

43. In light of what has been discussed above, we find that KSE's allegation regarding *mala fide* initiation of proceedings, the partisan manner and the complaint being vexatious are unjustified, misconceived and against law and facts available on the record. KSE has fully participated during the inquiry process and all the requirements of fairness and procedural safeguards have been complied with. Even prior to the inquiry proceedings, in the particular circumstances of the case, the Commission sent the complaint to KSE for its comments. Correspondence, on behalf of KSE, has throughout been carried out by the Managing Director of KSE and its counsel. These factors establish that KSE has been participating in the proceedings all along and it was only after the initiation of proceedings when the legal objection with respect to *mala fide* allegation was raised which seems to be nothing but an afterthought on the part of KSE. Such an allegation would have had some substance had the actions of the Commission been unlawful under the Ordinance or had principles of natural justice been violated at the applicable stage during the course of proceedings. The Commission initiated the inquiry on the basis of a complaint that prima facie raised issues requiring further probe. It is our considered view that allegation/legal objection of KSE regarding *mala fide* of the Commission etc. is unjustified. The actions of the Commission were in line with its mandate under the Ordinance and had the Commission not proceeded further and summarily dismissed the

complaint, it would have been taken as miscarriage of justice and unfair not only to ISE but also to investors/consumers in the securities market in Pakistan.

ISSUE No. (iv)

Whether the three stock exchanges constitute 'relevant market' under the Ordinance?

44. The concept of 'relevant market' is central to any determination regarding an allegation of abuse of dominant position (as per s. 3 of the Ordinance). Any such alleged abuse has to take place in a 'relevant market', comprising of a product and geographic market. The arguments and contentions of the parties regarding this all-important concept of 'relevant market' are set out and analyzed below.

45. KSE in its written reply and also during the course of hearings in the matter argued that each stock exchange is a distinct 'marketplace' in its own right. According to this argument the three stock exchanges, taken together, do not constitute the "relevant market", for trading of listed securities, for the purposes of the Ordinance, 2007. It was further argued that each stock exchange is a separate market place established as such under the SEO, 1969 and it is unlawful for a broker registered on one stock exchange to trade on another stock exchange (without being registered on the latter). It was forcefully argued by the counsel of KSE that through the complaint, the members of ISE want to become members of KSE without making payments for KSE membership. It was also stated that directions if any in this regard by the Commission would be in breach of SEO, 1969. The real motive of the Complaint has been alleged to be an attempt to enable members of ISE to trade on KSE without being members of the latter and

thus gain free of cost benefits and advantages. This practice is not allowed under the SEO, 1969 because only members of a stock exchange can trade on such exchange and that also if he is a broker to trade on such stock exchange under the Brokers and agents Rules, 2001. Moreover, there is a bar in law i.e. the SEO, 1969 to unified trading platform for the three stock exchanges in the country. It is incorrect to say that the physical demarcation of the securities market in Pakistan is illogical.

46. Both ISE and LSE in their written replies/comments filed with the Commission in the instant matter and also through oral submissions argued before us that the listed securities market in Pakistan consists of all the three stock exchanges. Each stock exchange may be a marketplace according to the SEO; however, this is no substitute for the concept of a relevant market under the Ordinance. A single market for the purposes of competition law may, and often does, consist of physically disparate market places. The commonly traded securities on all the three stock exchanges are of the companies having registered offices all over Pakistan. Furthermore, KSE has admitted the fact that its automated trading system (KATS) can be used by anyone from anywhere in Pakistan. ISE and LSE counsels said that this admission of KSE goes against its own argument that there is physical demarcation of the securities market in Pakistan. The Counsels of ISE and LSE argued that for the commonly traded securities after implementation of KATS as well as other important advancement in technology, the so called physical demarcation of each stock exchange has become illogical.

47. The counsel of both LSE and ISE have vehemently denied as stated by KSE counsel that the purpose of ISE is to enable members of ISE to trade on KSE without being members of the latter and thus gain free of cost benefits and advantages. It was reiterated by them time and again that at present, bids and offers of investors entered into the trading systems of KSE cannot be matched with those entered at ISE even if the security of a company being traded is listed at both stock exchanges and for that reason, members of ISE and LSE have to route many orders of their clients (investors) through the members of KSE. This also results in higher out of pocket brokerage costs being paid by investors at LSE and ISE and hence the interests of the consumers are adversely affected. They clarified the fact that access to the common trading platform should be available only for the common listed securities on all the three stock exchanges and not for others.

48. The counsel of LSE argued that with the advancement in technology and the prevalence of integrated trading there is no reason whatsoever to maintain the competition-diminishing barriers to trading on KSE. The three stock exchanges being the "relevant market" under the Ordinance, 2007 must function as a common trading platform with a view to enhancing competitive efficiency for the investors. Both the counsels of ISE and LSE stated that the present artificial segmentation of KSE only serves to distort the national securities market in the country and places investors acting through the members of ISE and LSE (for the

common listed securities) at a disadvantage. The counsel of LSE went on to say that the present artificially segmented securities market serves to inflict regional discrimination. Consequently the existing segmentation is unjust, arbitrary and violative of the law, the Ordinance, 2007 in particular.

49. The interveners in this case submitted in their written comments that ISE and LSE have started a UTS which has provided the access to the investors on non-discriminatory basis but KSE is unwilling to implement a similar trading system because unified trading system have numerous benefits to the investors in term of greater liquidity, better price discovery, security and greater transparency in terms of entire transaction being documented and traceable. Moreover it discourages the practice of "arbitrage".

50. We have heard the parties at length on this issue and also perused the written replies/comments filed by them in this regard. We find it appropriate to discuss here the difference between the "market or marketplace" under the SEO, 1969 and the "relevant market" as provided under section 3 of the Ordinance, 2007. At the outset we must say that the proceedings are being initiated against KSE under the Ordinance, 2007 and not any other law, hence we are concerned with the "relevant market" in the instant matter. But still we consider it appropriate to address the concepts of market or market place and the "relevant market" which will facilitate and ensure a fuller understanding of these important concepts

51. It is a fact that under SEO, 1969, the word marketplace is used but that word has no matching for the words "relevant market" as has been used in section 3 of the Ordinance, 2007. Both words have different meaning pursuant to the text and provisions of each law. In the instant case as has been said above, we are not concerned with the market or market place rather we have to consider the "relevant market" for the purpose of matters relating to competition under the Ordinance, 2007 as is the case in the instant matter. The term "relevant market" as provided under the Ordinance, 2007 has two factors which are to be considered. The first factor is the "product" and the second element is "geographical area." We will deal with each of these factors separately hereunder for better understanding.

52. We find it appropriate to give our due considerations to the definition of "relevant market" as provided under section 2(k) of the Ordinance, 2007 which is reproduced hereunder:

> *"relevant market" means the market which shall be determined by the Commission with reference to a product market and a geographic market and a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products' characteristic, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of the Competition are appreciably different in those areas;* (emphasis added)

53. The above quoted definition of the "relevant market" clearly defines both the product and the geographical area for the purpose of the "relevant market." It is evident from the definition that product must be interchangeable or substitutable by the consumers by reason of the product characteristic and prices and the intended use. Similarly, the geographical area comprises of the area in which the undertaking are involved in the supply of products or services. It is obvious to us that the definition of the relevant market could not be provided in the SEO, 1969 for the fact that such law does not deal with the issues pertaining to competition. However, we need to deal with the definition of the "relevant market" in considering the instant matter.

54. It needs to be appreciated that the terms "market place" and the "relevant market" are entirely distinct terms under distinct laws and have entirely distinct connotations. There are three stock exchanges in Pakistan i.e. ISE, LSE and KSE. A total of 654 companies are registered at KSE, 516 on LSE and 247 on ISE. However, the commonly listed securities constitute 90% of the trading volume of listed securities in Pakistan. The 'securities' being traded on all the three stock exchanges constitute a 'product', the "product" is traded on all the three stock exchanges which are referred to as "market places" by counsel for KSE . Although the market places are geographically apart in the physical sense of the word, there is no territorial barrier or prohibition on trading in the securities listed at the three stock exchanges. The product has acceptability and a potential market throughout Pakistan. Hence, for all intents and purposes, the whole of

Pakistan is one "geographic market" for the "product" i.e. commonly listed securities on all exchanges.

55. Furthermore, the registered office of some of the "blue chip" companies, like PTCL, OGDCL, PTC, APL, POL are located in Islamabad, whereas they are listed on all the three exchanges. Similarly, many companies have their registered offices in cities like Lahore, Faisalabad, Sialkot, but they are listed on all the three exchanges.

56. Admittedly, the product in the instant matter could be nothing else but the securities listed at the three stock exchanges i.e. shares of companies. Both ISE and LSE have clarified that they are seeking a common trading platform which means they are referring to such listed securities or shares that can be commonly traded on a centralized platform. There is no doubt in our minds that commonly trading securities could only be securities listed on all three stock exchanges. Moreover, it has been argued by ISE and LSE that such common securities are homogenous as well because they have almost the same face value and they can also be substitutable. We agree with the contention of ISE and LSE that the "product" is the securities of the commonly listed companies on all the stock exchanges for the purposes of the Ordinance, 2007. In support, reliance is placed on ***Trade Practices Commission vs. Ansett Transport Industries (Operations) Pty. Limited and other [1978] E.C.C. 340*** wherein it was held that,

> *"From the point of view of buyers, a market represents a range of goods or services which are substitutes for one another in satisfying the buyer's requirements of a particular type. If there*

> *is variation in the relative prices of the goods or services offered for sale in a given market, then buyers can be expected readily to switch their custom from one seller to another or from one product to another.*

57. Now we consider the "geographic market" component with respect to the relevant market for the purposes of the Ordinance. The parties have vehemently contested each other's arguments on this point. ISE and LSE as well as the interveners are of the view that the three stock exchanges constitute the "geographic market" while KSE has forcefully denied this fact and argued all along that the "geographic market" in this case is the area of each stock exchange and the three stock exchanges cannot be taken collectively (three markets) as one geographic market. We are not inclined to agree with KSE on this point and find merit in the arguments of counsels appearing for ISE, LSE and the Interveners. We reach this conclusion because: (i) the companies whose securities are listed have offices including registered offices and head offices in various parts of Pakistan and are not confined to any one city (ii) KSE has allocated terminals to its members for the purpose of trading and such terminals can be installed in any part of the country (iii) the registered agents of the members of KSE can take trading orders with respect to listed securities from any part of the country on behalf of the members of KSE and they are not bound by geography and finally (iv) it has been admitted by the counsel of KSE that KSE has allowed online trading through KATS. This means there is no demarcated geographical area for KSE alone, or for any other stock exchange for that matter in view of the available technology. Furthermore, it is pertinent to mention that upon inquiry the counsel of KSE failed to point out the geographical area of KSE as an allegedly distinct market.

58. The counsel for KSE has forcefully argued during the hearing that each market place is geographically bound and KSE should be regarded as a distinct and separate market. He was specifically asked to clarify that if it is assumed without conceding that if KSE is a separate market for the purpose of the Ordinance, 2007; who would be the competitors of KSE? He replied instantly that the members of KSE would compete with each other. This cannot be the case. The fact that LSE and ISE being the other two exchanges cannot be ignored and for all purposes these exchanges are competitors of KSE and not its members. He was further asked to explain as to what the members of KSE compete for. In other words, what is the subject matter of competition in the securities market? To this, he failed to reply. However, we clarified that the members of stock exchanges compete with each other for trading orders and nothing else.

59. We have also considered if there is any prohibition under law for access of a member of a stock exchange on another stock exchange for matching orders of commonly traded securities. No provision on such prohibition under any of the corporate laws being administered by SECP including SEO, 1969 has been pointed out. As a matter of fact had there been any bar for such an access for the members of different stock exchanges to match orders for commonly listed securities on all the stock exchanges, SECP would not have approved and promulgated the Regulations for the Unified Trading System (UTS) between ISE and LSE. By promulgation of such regulations, now the members of LSE and ISE

can match trading orders on both the stock exchanges. This lends strength to our conclusion that UTS is allowed under the law including SEO, 1969.

60. Also relevant is the issue raised by ISE, that orders of ISE investors routed through KSE members remain un-regulated; SECP expressed the view that "the orders routed by a member of a stock exchange through a member of another stock exchange are not unregulated. However it is our considered view that SECP has not fully appreciated the issue. Since orders entered into the trading system of one exchange cannot be entered into the trading system of another exchange, even if the security is listed at both exchanges, brokers of ISE route orders of their clients through brokers of KSE. This does result in un-regulated trading because in such a situation the broker at ISE becomes the client of the broker at KSE. And the investor at ISE, in such an instance, has no recourse against the broker at KSE.

61. Moreover, we agree with the counsel of ISE that the expression "relevant market" used in subject or context of the Ordinance, 2007 is distinct and from the expression the "market place" used in subject or context of SEO, 1969. As already stated the Ordinance is a special law and therefore, for the purpose of determining the "relevant market" in the subject or context of the Ordinance, 2007, the provisions of SEO, 1969 are of no relevance at all.

62. It was also argued by the counsel of KSE that in order to match orders on two stock exchanges, a member must possess brokerage registration for both the stock

exchanges. Again we find no merit in this argument. The counsel failed to point out any particular provision relating to double brokerage registration requirements. Moreover, under the UTS Regulations there is no such requirement for members of ISE or LSE to have double brokerage registration in order to match orders on both the stock exchanges.

63. Therefore, keeping in view the definition of the "relevant market" it is evident that since the commonly listed securities of the companies incorporated at various places in Pakistan are traded on all exchanges and having same depository and clearing companies, the conditions of competition at ISE, LSE and KSE are sufficiently homogeneous. Hence, they constitute a single geographical market i.e. "relevant market".

64. Furthermore, in the presence of such manifest evidence as has been discussed above, we hold that the geographic market cannot be restricted to where each stock exchange has its office. Hence, the geographic market with respect to the listed securities for the purposes of the Ordinance, 2007, extends to all the three stock exchanges within Pakistan. This means that all three stock exchanges collectively constitute the "relevant market" for the purposes of the Ordinance in the instant case.

ISSUE No. (v)

Whether or not KSE occupies the "dominant position" in the relevant market in terms of Clause (e) of sub-section (1) of Section 2 of the Ordinance, 2007?

65. The counsel of KSE while construing Section 2(e) of the Ordinance, 2007 stated that if KSE establishes that it cannot behave independently of its competitors then it does not enjoy dominant position in relevant market. KSE alternatively also argued, while construing the expression "deemed" in Section 2(e) of the Ordinance, 2007 that each one of the exchanges (i.e. ISE, LSE and KSE) has ability to behave independently of competitors to appreciable extent, therefore, all enjoy dominant position and thus question of abuse of dominant position does not arise. We would like to consider first Section 2(1)(e) of the Ordinance, 2007 which defines the term "dominant position" and is reproduced hereunder:

> *"dominant position" of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have ability to behave in an appreciable extent independently of competitors, customers, consumers and suppliers and* **the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent***; (emphasis added)*

66. By bare reading the above definition one can easily determine that there are two parts of this provision. The first is relating to the presumption of fact and the latter is presumption of law. The first part of the provision is relating to the deeming clause and the dominant position of an undertaking can only be deemed to exist if and only if upon an analysis of the facts it is concluded that an undertaking has the ability to behave, to an appreciable extent, independently of its competitors

etc. Therefore, in order to find out whether an undertaking is deemed to be in a dominant position for the purpose of the first part of the above provision, one has to take into account activities of such an undertaking and if after thorough research in this regard it is revealed that such undertaking can act to an appreciable extent independently of its competitors only then it can be deemed/assumed that the undertaking is in a dominant position.

67. However, it is highlighted that we are not concerned with the first part of the above provision i.e. section 2(1)(e) of the Ordinance, 2007 which relates to the "deeming clause," instead we need to deal with the second part of the provision. The second part of the said provision is based on the presumption of law and not of fact. The second part of the provision under consideration provides that if an undertaking's share of the relevant market exceeds 40%, it *shall* be presumed to have the "dominant position". In the first part of the provision an analysis of fact is required before something is deemed. In the latter part, the one at hand all that is required is the existence of certain percentage of the market share and after that no further analysis is required. Once you cross the forty percent threshold, there is only one inference and that is of dominance. The only way of rebutting such a presumption is to prove that a party has less than forty percent of the share in the relevant market.

68. It is reiterated here again that for the purpose of this case, the "relevant market" is the securities market comprising of all the three stock exchanges. Therefore, we

need to see if KSE holds 40% or more of the relevant market i.e. the securities market in Pakistan with respect to commonly traded securities.

69. The Counsel of ISE as provided in the complaint, written replies/comments and in oral submissions argued before us during the hearing that the commonly listed securities on all the three exchanges constitute approximately 90% of the total trading volume of listed securities in Pakistan and of this 90%, around 87% of the market share is with KSE, whereas, ISE and LSE respectively account for only 13% of the trading volume. Hence, KSE enjoys dominant position in the relevant market in terms of clause (e) of sub-section (1) of Section 2 of the Ordinance, 2007. This fact has also been endorsed by LSE and not objected to by the counsel of KSE in his replies/comments filed in the Commission nor during the course of hearing. Therefore, it is an admitted fact that KSE does hold more than 40% (i.e. 87%) of the "relevant market".

70. However, we must clarify the fact that under the Ordinance, 2007, merely holding a "dominant position" in the relevant market is not prohibited and therefore does not attract any penal provisions of the Ordinance, 2007.

ISSUE No. (vi)

Whether KSE is abusing its dominant position?

71. The fact that an undertaking holds a dominant position is not by and of itself contrary to the Ordinance. However, an undertaking enjoying a dominant position

is under a special responsibility not to engage in conduct that may distort competition. The Court of First instance in the case of Case 322/81, Michelin v Commission [1983] ECR 3461, at paragraph 57 held that:

> *[F]inding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market .*

72. Even under the Ordinance, it's not the dominant position, but its abuse, which is prohibited under Section 3 of the Ordinance, which is reproduced below:

> ***Abuse of Dominant Position**.— 1) No Person shall abuse dominant position.*
>
> *(2) An abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent restrict, reduce or distort competition in the relevant market.*
>
> *(3) The expression "practices" referred to in sub-section (2) shall include, but are not limited to--*
>
> *(a) limiting production, sales and unreasonable increases in price or other unfair trading conditions;*
> *(b) price discrimination by charging different prices for the same goods or services from different customers in the absence of objective justifications that may justify different prices;*
> *(c) tie-ins, where the sale of goods or service is made conditional on the purchase of other goods or services;*
> *(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by their nature or according to commercial usage, have no connection with the subject of the contracts;*
> *(e) applying dissimilar conditions to equivalent transactions on other parties, placing them at a competitive disadvantage;*

> *(f) predatory pricing driving competitors out of a market, prevent new entry, and monopolize the market;*
> *(g) boycotting or excluding any other undertaking from the production, distribution or sale or any goods or the provision of any service; or*
> *(h) refusing to deal.*

73. It would be relevant to elaborate the concept of abuse of dominance from the well settled case law of the European Courts; the European Court of Justice in **Case 85/76, Hoffmann-La Roche [1979] ECR 461, at paragraph 91**, defined the concept of abuse under Article 82 of the Treaty in the following terms:

> *The concept of abuse is an objective concept relating to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.*

74. It has been alleged that KSE is responsible for causing regional discrimination. applying dissimilar conditions on similar transactions and does not make the best price available to ISE and LSE members, which is adversely affecting the competition within the relevant market and is also discouraging investors, which is not only affecting the economy of the country but also competition *inter se* KSE, ISE and LSE.

75. Free market mechanism requires that the actual and potential investors are participants in a system that maximizes opportunity for the most willing seller to

meet the most willing buyer. The Commission initially compiled trading data over the course of 3 days in November, 2007, namely 15th, 16th and 17th November. As already stated in this Order, KSE raised various objections regarding the veracity and the credibility of conclusions drawn from the data in the Enquiry Report. In response to these objections, the Commission has maintained that the source of trading data was newspaper reporting that shows the previous day's trading data — so there is no issue of data being fake or engineered. The data provides a sample snap shot of three days trading in a few active scrips in Karachi. Even if the domain is expanded over a longer period the picture does not change. The Enquiry Report, for informational reasons, presented sample data holistically with respect to certain actively traded scrips and it is noted with regret that KSE appears to have conveniently picked on isolated examples, presented in a slanted manner, which tend to obfuscate and in and of themselves, do not prima facie vitiate the validity of the Report.

76. As mentioned above, KSE cannot deny and has not denied the basic conclusion that most of the time, the best price for the product is available at the trading platform of KSE, — and, on occasion, it is the only exchange with quotes. The reason for this is that KSE is by far the most liquid exchange in the country. The conclusion that, owing to its status as the most liquid exchange, best price for the product-whether as a buyer or a seller- is available at the trading platform of KSE is one that is not only intuitive but also borne out by data collected and analyzed before as well as recently by the Commission.

77. Following table has been compiled on the basis of trading data of the three stock exchanges in the month of November 2007: [Table is **annexed with this Order as Annexure A**] The time period during which this data has been collected and analyzed runs from Nov 1 to Nov 12, 2007 and from Nov 26th to Nov 30th, 2007. The Commission selected, for analysis, securities of 11 companies commonly listed and heavily traded on all the three stock exchanges on all the days of the selected time period. November, 2007 was chosen as the month for collecting and analyzing data as this was the month when the complaint was lodged with CCP.

78. By virtue of UTS, the quotations for various scrips at ISE and LSE are the same. However, the volumes traded at the two exchanges differ. Therefore the sources of the aforesaid data include UTS database (for share quotations at ISE and LSE), ISE and LSE Databases (for share volumes at each exchange respectively), and the historical data available on the website of KSE.

79. This was a laborious exercise as each trade regarding the 11 selected securities (during the selected period) was analyzed. As part of this exercise the Highest and lowest execution prices at UTS as well as KSE were noted. The conclusions outlined below, only support and confirm the contentions made in the Enquiry Report i.e. the best price, at most of the times is available in one segment of the relevant market i.e. KSE.

80. On the basis of average of daily trading volumes at all the three exchanges, the market share of KSE comes out to be 83.99%, LSE 14.48% and ISE 1.52%. From the perspective of a seller, the best price is the highest price. On the basis of data collected and analyzed there is an 81% chance that the highest price for the seller will be available at KSE. 107 times out of 132 times the highest price was available at KSE.

81. If you are a buyer and looking for the lowest price of a share on all the three stock exchanges, there is 79% chance (again on the basis of data) that you will get the lowest price at KSE.104 times out of 132 the lowest price of a share was available at KSE.

82. There is no doubt that stock exchanges are peculiar undertakings that produce listing, trading, and clearing services and "sell" price information. Competition between exchanges, in fact, takes place on many grounds, such as the provision of immediacy, low spreads, low volatility, liquidity, efficient price discovery, transparency and low commissions and other transaction costs. The more competition there is, the more likely it is that exchanges themselves will adopt rules that benefit and protect customers.

83. In fact, the investors at Islamabad and Lahore who intend to place orders through ISE or LSE do not have access to the best price that is usually reflected at KSE. The conduct of KSE shows that it is restricting and distorting competition on the

relevant market by refusing to allow access to LSE and ISE of the best price and to match orders, which ultimately is harming the investors/consumers.

84. We have heard a number of arguments as far as the exact characterization of the behaviour of KSE is concerned. These arguments relate to:

- refusal to deal; and
- the 'essential facility' doctrine.

We have examined the two in turn and their applicability in the present context below.

85. Counsel for ISE argued that section 3(3) (h) of the Ordinance is relevant as the conduct of KSE in the relevant market amounts to a 'refusal to deal'.

Counsel of ISE cited the judgment of the U.S. Supreme Court in the matter of ***Aspen Skiing Co. vs. Aspen Highlands Skiing Corp. 472 U.S. 585 (1985)*** wherein it was held that:

> *[A]lthough even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor (and the jury was so instructed here), the absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstance. Lorain Journal Co. v. United States, 342 U. S. 143. The question of intent is relevant to the offense of monopolization in determining whether the challenged conduct is fairly characterized as "exclusionary," "anticompetitive," or "predatory." In this case, the monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor, but instead elected to make an important change in a pattern of distribution of all-Aspen tickets that had originated in a competitive market and had persisted for several years. It must be assumed that the jury, as instructed by the trial court, drew a distinction "between practices which tend to exclude or restrict competition, on the one hand, and the success of a business which reflects only a superior product, a well-run business, or luck, on the other,"*

86. The Counsel of KSE disputed this argument vehemently and contended that the judgment of Aspen Skiing supports the stance of KSE as, in Aspen Skiing the Undertakings were already in collaboration, but in the instant case, there was no collaboration between KSE, ISE and LSE and KSE's refusal can not be taken as an exclusionary one in the instant case. On the face of it the argument advanced by KSE seems persuasive but this ceases to be the case upon a deeper examination of the relevant legal principles. Although generally undertakings are free to choose their business partners, but for every such step there has to be a reasonable justification, which is lacking in the instant matter. In our considered view there appears to be no rational commercial justification for KSE's conduct. As it was held by the United States Supreme Court in *Aspen Skiing* that even though there is no responsibility on the dominant undertaking to co-operate, but it has to be determined (in light of evidence) whether the conduct of an undertaking is exclusionary, anticompetitive or predatory, and whether there is a reasonable justification for such conduct. The adverse impact of KSE's behaviour on competition can be gleaned from the fact that the 'best price' is not available at ISE and LSE and hence investors at these exchanges are deprived of the same by virtue of KSE's refusal to allow the other two exchanges access to its trading platform. The bid-and-offer gap for securities being traded is greater at LSE and ISE than it is at KSE because of the restricted depth at LSE and KSE. KSE as a market place offers the greatest depth, primarily for historical reasons and yet it seeks to exclude the other two exchanges and their investors from benefiting from this market depth for no rational commercial justification. This lack of depth is, in

turn, caused by the artificial division of the national securities market. The existence of the large bid-and-offer gap at LSE and ISE acts as a signal of market inefficiency to investors, particularly the large sophisticated institutional fund managers. Hence LSE and ISE along with their members and investors suffer competitive disadvantages only by reason of KSE's desire to perpetuate an artificial division serving only its members' interests. Moreover, when ISE and LSE are willing to pay a fee for such access to KSE's platform it becomes even more difficult to justify such refusal.

87. Counsel for KSE further argued that reliance cannot be placed on *Aspen* as this case is part of a limited number of cases in which 'refusal to deal' has been found to be in violation of section 2 of the Sherman Act. The learned counsel also referred to the US Supreme Court judgment in *Verizon v. Trinko* where Justice Scalia said that *Aspen* was part of a limited number of cases of refusal to deal amounting to anti-trust violation since there was evidence of a voluntary course of dealing in the past. According to learned counsel no voluntary course of dealing existed between LSE, ISE and KSE in the past and hence *Aspen* was not applicable. In *Verizon* refusal to deal was not found to be in violation of section 2 of the Sherman Act. In a way this case shows the limits of 'refusal to deal' being an anti-trust violation.

88. However, one needs to be mindful of the fact that under the Sherman Act, refusal to deal/supply has never been an expressly defined offence and it is one that has

been crafted by the American courts as an exception. Whereas, under the Pakistani law, refusal to deal has been provided as a *specific instance* of abuse of dominant position under s. 3(3) (h) of the Ordinance. Hence what the courts have crafted as an exception in America has been specifically provided by the legislature to be an actionable instance of abuse of dominant position as a general rule.

89. All that is necessary in the present context is whether the essentials of the law are fulfilled. Under Pakistani law refusal of *a* facility, by virtue of being 'refusal to deal', can amount to abuse if an undertaking is in a dominant position, which KSE clearly is. The refusal to deal need not necessarily be a refusal of an essential facility for the purposes of section 3 of the Ordinance. So far as it prevents, reduces or distorts competition in the relevant market without legitimate business justification it would fall within the purview of the law. The question for the Commission here then is whether refusal by KSE to allow bids and offers of investors entered into the trading systems of the other two stock exchanges from being entered into the trading system of KSE amounts to distortion of competition. Furthermore, whether there is a rational commercial justification for such exclusionary and anti-competitive conduct by KSE.

90. This refusal to deal clearly has a negative effect on competition as it contributes to price disparity and prohibits price discovery for the consumers not placing their orders through KSE. And lastly there appears to be no "objective justification" for

refusal on the part of KSE of 'best price' to ISE and LSE, because its pre-eminence does not arise from any peculiar effort on part of KSE's members. Therefore, this refusal, results in dissimilar conditions in various segments of the securities market that results in price disparity for investors acting through LSE and ISE. This disparity results in investors, acting through ISE and LSE being placed at a competitive disadvantage. Regarding the argument concerning voluntary course of dealing between the three exchanges, we note that incidentally there has been close collaboration between KSE, ISE and LSE in the past in the matter of clearing and settlements, and securities dematerialization. Thus, KSE's refusal to collaborate on another utilitarian aspect, namely a common trading platform remains anomalous in the absence of any legitimate business justification.

91. The case of *Verizon* has been stressed upon considerably by KSE's counsel and contested by ISE and LSE. We deem it appropriate to address the issues raised by this case at some length. At the outset, it is our considered view that everything has to be examined in context. A blind application of *Verizon* will only lead to a situation fraught with difficulties.

92. Furthermore, the case of *Verizon* can be distinguished on many grounds; namely that *Verizon* makes it very clear that the amount of in-built regulatory mechanisms regarding anti-trust issues is important. The Federal Telecommunications Act (in *Verizon*) had a specific procedure to ensure that parties could not refuse to

deal/supply. Furthermore, dealing and supplying the relevant information had been made mandatory under the FTA and an enforcement mechanism had been provided. Can the same be said for KSE when it refuses access on non-discriminatory terms to brokers from Lahore and Islamabad? We believe not. The regulatory body in *Verizon* had already acted to remedy the situation and that is clearly not the case in the present instance. *Verizon* also makes it clear that anti-trust analysis must always be attuned to the particular structure and circumstances of the industry. KSE operates in a market in which its platform makes available the best price. By refusing to deal in the present context, KSE's actions result in distortion of competition in the relevant market. *Verizon* is also distinguishable as it refers to limited ambit of exceptions in light of pre-existing anti-trust standards developed by US courts. These 'exceptions' (such as refusal to deal) have been crafted by American courts and are not provided in the Sherman Act. Pakistani law is significantly different in this respect. Refusal to deal, as per statute, is a practice that can amount to abuse of dominant position.

93. *Verizon* involved dealing with rivals to whom provision of information was made mandatory by law to cure any possible anti-competitive practices. In the present context, refusal to deal is extends to consumers and investors from the general public and no in-built checks have been provided in the legislation governing the capital and securities markets. Moreover, *Verizon* was a situation in which anti-trust enforcement, apart from FTA, would have required day-to-day supervision by the courts. In the present context, the establishment of a system to ensure

centralized/common trading platform to provide access to and availability of best price is a remedy that can be *institutionalized.* A ready example of this is the UTS functioning between LSE and ISE. Such a mechanism would not require day-to-day monitoring by competition enforcement agency.

94. *Verizon* never expressly over-rules *Aspen* which upheld the principle that the absence of an unqualified duty to cooperate does not mean that every time a firm declines to participate in a particular cooperative venture, that decision may not have evidentiary significance, or that it may not give rise to liability in certain circumstances. *Lorain Journal Co. v. United States*, 342 U.S. 143.

95. The counsel for LSE at this stage referred to the concept of 'essential facility/service', which is linked to the concept of 'refusal to deal'. An argument was made that instead of applying American law on 'refusal to deal', the case-law of the European jurisdiction should be studied and applied. Further it was argued that the spirit of the Ordinance is closer to that of the European law, in terms of 'abuse of dominant position'. To support the argument that 'refusal to deal' and 'essential facility' are related concepts, the judgment of the European Court of Justice ('ECJ') in the ***Oscar Bronner case [1999] 4 CMLR 112*** was cited. In this case the opinion of the Advocate General is relevant as the same was relied upon by the European Court of justice, it states that, when an undertaking has stranglehold in the relevant market (as KSE does in the present matter) then intervention by the authorities is justified on the ground of refusal to deal or the

essential facilities doctrine. It goes on to say; 'That might be the case for example where duplication of the facility is impossible or extremely difficult owing to physical, geographic or legal constraints'. The ***IMS case [2004] 4 CMLR 1543*** according to LSE supports the same line of reasoning.

96. Although we agree that the concept of essential facilities is linked to the concept of 'refusal to supply/deal', generally this concept is applied where a dominant undertaking refuses to supply a ***service or platform*** to a competitor as opposed to a product. KSE has argued through its supplemental written submissions, dated 7.3.2009, that the ***Bronner*** case relied upon by LSE is not applicable in the present context. The reason for this is that ***Bronner*** and ***IMS*** do not recognize that access to a dominant undertaking's facility should be granted merely because it would be more advantageous for a competitor. KSE also argued that competitors are not to be protected under competition law and only competition itself is to be protected. KSE also pointed out that allowing access to a dominant undertaking's facility can result in only short term gains and these too will be upset by long term losses/disadvantages to the securities market and the economy which were not explained. However the Supplemental Submissions filed by KSE state (while quoting *Whish on Competition Law)* that essential element in ***Bronner*** is indispensability. We agree that the facility must be something that is incapable of being duplicated, or which could be duplicated only with great difficulty. What is linked to the concept of indispensability is the idea of an actual or potential substitute. As stated, the pre-eminence of KSE stems from the history of Karachi

as a city. Due to historical as well as geographical constraints the platform provided by KSE cannot be duplicated, lacks an actual or potential substitute and hence in our view can be said to constitute an essential facility.

97. Essential facility doctrine in USA has received a rather restrictive interpretation. It is important to bear in mind that although the 'essential facility' doctrine is recognized to be a sub-set of 'refusal to deal', dealing with an issue in terms of the latter does not always require the matter to be decided with reference to 'essential facility' doctrine. *Aspen* is a case where an anti-trust violation was based on refusal to deal without going into the 'essential facility' doctrine. Another example of such a case is ***CTC Communications Corp. v. Bell Atlantic Corp., 77 F. Supp. 2d 124.***

98. *Verizon* makes it clear beyond doubt that although the 'essential facility' doctrine has not been overruled by the US Supreme Court, it has not been accepted either. This concept, as applied by the lower courts in America involves the following elements:

(i) The dominant player controls access to an essential facility;
(ii) The facility cannot be reasonably duplicated by a competitor;
(iii) The dominant player denies access to a competitor; and
(iv) It was feasible for the dominant party to grant access.

99. While looking at arguments regarding 'refusal to deal' and the 'essential facility' doctrine we deem it important to deal with the most often cited case, as was done

by KSE as well, that is, United States v. Colgate Co. 250 U.S. 300 (1919). The U.S. Supreme Court held:

> In the absence of any purpose to create or maintain monopoly, the [Sherman Act] does not restrict the long recognized right of trade or manufacturer engage in *entirely private business,* freely to exercise his own independent discretion as to parties with whom he will deal. (Emphasis supplied).

100. We appreciate the rationale laid down in *Colgate* where the entity concerned is engaged in *entirely private business.* One needs to appreciate that running a stock exchange is not an "entirely private business." Stock exchanges are established and its operators are "charged with an important **public trust** to carry out their self-regulatory responsibilities effectively and fairly, while fostering free and open markets, protecting investors, and promoting **the public trust**." [1]

101. Stock exchanges thus cannot invoke the rule laid down in Colgate. "For certain facilities, assets, and property that are 'affected with the public interest,' like stock exchanges, "the essential facilities doctrine is one expression of the venerable principle in Anglo-Saxon law favoring open access."[2]

102. We have reviewed the literature and cases involving essential facility, while there may have been some disagreement among scholars as what constitutes "essential facility" in private businesses, there is no disagreement in the case of a public

[1] See Andreas M. Fleckner, *Stock Exchanges at the Crossroads,* 74 Fordham L. Rev. 2541 at 2518 (2006) .
[2] See, Brett Frischmann, & Spencer Weber Waller, *Revitalizing Essential Facilities,* 75 Antitrust L.J. 1 (2008).

utility, *i.e.*, "a business infused with the public interest that was required to serve all."[3] We are of the opinion, that a stock exchange is "a business infused with the public interest that was required to serve all," and therefore see the application of "essential facility" doctrine in the case at hand completely fitting.

103. Trading platform of KSE can be termed as the essential facility being controlled by KSE. It cannot reasonably be duplicated. The option of setting up a substitute for such a facility does not appear possible and viable. KSE has failed to establish or provide any convincing arguments that access to best price can be provided through any other facility or in any other manner as things presently stand. The fact that ISE and LSE already have trading platforms fails to meet the test of reasonable substitution. Assuming that a separate stock exchange can be set up in Karachi, the existing legal framework provides for regulatory barriers. By KSE's own submission: "The policy of the SEC Ordinance is therefore clear: **there are to be different exchanges (i.e., markets) at different places** in Pakistan for the trading of securities".[4] Thus, the facility at KSE cannot be duplicated even in Karachi. The benefits of refusal to deal do not favour LSE, ISE or even KSE. The sole benefits of refusal to deal accrue to brokers of KSE. This only results in short term gain for brokers at KSE at the cost of any benefit to the investors at large. This short term gain militates against the possibility of an efficient market in the long term which can provide benefits to all investors.

[3] Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles,* 58 Antitrust L.J. 841 at p. 843 (1989) quoting Associated Press v. United States, 326 U.S. 1, 28-29 (1945) (Frankfurter, J., concurring).
[4] Paragraph 10, KSE Submissions dated June 23, 2008.

104. In the words of Professors Frishmann and Waller:

> The significant positive externalities ("spillovers") that open access produces make open access socially desirable and internalization through exclusive property rights inefficient. Stated more broadly, open access to infrastructural resources supports society's economic interest in wealth maximization and allocative efficiency as well as other societal goals of fairness, equality, and nondiscrimination.[5]

105. Moreover, the term facility can apply to tangibles and intangibles, such as Information itself. From the above analysis we are of the view that the trading platform of KSE is an essential facility and not allowing open access to this facility has the effect of impairing competition which is not in the public interest. The refusal by KSE to provide access to ISE so far has restricted competition in the relevant markets and therefore amounts to abuse of dominant position.

106. Keeping in view the above, the conduct of KSE, which is the guardian of the artificially segmented relevant securities' market and its refusal to allow access to its platform through which all the customer/investors in the relevant market would have equal access to the "best price" available in the market and depriving the investors acting through ISE and LSE of the access to the "best price" amounts to exclusionary and anticompetitive conduct and lacks a reasonable business justification. Therefore such conduct is, in our considered view, in violation of the provisions of sub-section (2) of Section 3, in particular clause (h) of sub-section (3) of Section 3 of the Ordinance.

[5] See, Brett Frischmann, & Spencer Weber Waller, *Revitalizing Essential Facilities,* 75 Antitrust L.J. 1 at p. 4 (2008).

107. Even though the SCN alleged violations of section 3 (3) (b), (e), (g) and (h), the complainants and those in their support stressed the issue of 'refusal to deal' and did not emphasize or offered any significant arguments regarding the rest of the practices alleged in the SCN. In our view, once a finding of abuse of dominant position has been established for 'refusal to deal' on part of KSE, the case at hand will not turn on the issue of whether the rest of the allegations in the SCN are made out or not. However, in the interests of fairness, we would like to summarily address this issue too. In our considered view, a finding of refusal to deal is, in the present context, linked to the other 'practices' amounting to abuse of dominant position which have been alleged in the SCN. A finding of refusal to deal has been established and we feel 'practices' referred to in section 3(3) (b), (e), (g) flow from such refusal to deal in the present context. In our considered view KSE's refusal to deal results in price discrimination by charging different prices for the same services in the absence of objective justifications. Such refusal to deal also leads to application of dissimilar trading conditions to equivalent transactions, which places them at a competitive disadvantage. This is especially relevant with reference to the investing public at the two stock exchanges other than KSE. Lastly, refusal to deal by KSE also leads to exclusion of other undertakings from the provision of services offered at the platform provided by KSE.

108. At this point we also consider it pertinent to address the objection raised by KSE Counsel that unifying the trading platform would reduce competition in the

"relevant market" and whether by unifying the trading platform the Commission would act against its objectives provided under the Ordinance, 2007**.**

109. KSE stated that the Commission will act against its objective if it decides to allow the unified trading platform for the commonly traded securities. It was argued by the counsel of KSE that if the members of one stock exchange are allowed to have access on the trading floor of other stock exchange without becoming members of such stock exchange, this would mean diminishing of separate legal entity of the two stock exchanges and therefore there will not be any competition between the two stock exchanges which will result into one stock exchange and the competition will lessen in such a situation due to merger between such two stock exchanges. The counsel of KSE said that the competition is between the stock exchanges; therefore, it is necessary that there shall not be any unified trading system between all the stock exchanges for the commonly traded securities. According to KSE's counsel this would eliminate competition amongst the stock exchanges. We find this argument in contrast to what has been earlier said by the counsel of KSE. Earlier while arguing as to who competes in stock exchanges; his reply was that members of each stock exchange compete with each other. But now while arguing this issue, the counsel changed his mind.

110. The counsels of ISE and LSE were of the view that the competition is always between the members of the stock exchanges for trading orders of securities. That is the reason of setting up of Unified Trading System (UTS) in many countries

where the various stock exchanges do occupy their distinct and separate positions but the members of all the stock exchanges compete with each other for the trading orders through UTS. Since in Pakistan by virtue of its refusal to agree to a common trading platform, similar to the UTS, the benefit of availability of best price is being reaped alone by members of KSE. In our considered view it is important to point out the argument for the creation of a unified trading platform does not negate the possibility of three stock exchanges continuing to compete with each other. If a unified trading platform is established, the three exchanges will continue to compete for orders with each other essentially based on services and comparative advantage. A unified trading platform will only ensure the issue of availability of best price to the investors.

111. The Commission's responsibility is to protect the consumers from anti-competitive behavior and to provide a level playing field for free competition in all spheres of economic and commercial activity, be it the securities market that comprises of all the three stock exchanges in the country. The commission strongly condemns any abuse of process of law and would never act in aid of such conduct.

112. We find the argument of KSE counsel that a unified trading platform will diminish the separate legal entities (stock exchanges) as one that lacks any persuasive value. Each stock exchange is a company limited by guarantee having its independent corporate existence and separate Board of Directors. If a common

trading platform was to be established it will not affect in any manner whatsoever the separate existence of the stock exchanges or their independent corporate personality in their own right. Unified trading platform/UTS is functioning in other countries, including USA and Pakistan itself (between LSE and ISE) whereby the stock exchanges continue to maintain their independent and distinct corporate existence.

113. It has been repeatedly argued by the counsel of KSE that a single trading platform if created would amount to merger resulting in creation of monopoly thereby destroying the competition in the relevant market. We do not find merit in this argument. ISE and LSE counsels while arguing on this point said that a merger always involves joining of assets and liabilities, which the complaint does not seek. The relief being sought through the complaint is the centralization of trading systems of the stock exchanges so as to ensure availability of 'best price' to the investors of all the exchanges so as to ensure free competition in the "relevant market". KSE's counsel at this point argued that a unified trading platform would in effect create a merger between the three stock exchanges. In relation to this we posed the question whether the value of the seats of ISE or LSE had changed after they established UTS amongst them. The counsels for ISE and LSE replied in the negative. Hence, in our considered view there is no merit in this argument as well.

114. As for the argument by KSE that it infringes property rights even if it is assumed that KSE is alleging that property right is in relation to its business and therefore

fundamental right enshrined Article 18 is infringed, such an argument would be against the very provisions of Article 18, which specifically contains the proviso that *"nothing in this Article shall prevent… the regulation of trade, commerce or industry in the interest of free competition therein"*. Needless to add that pursuant to this very mandate of Article 18 of the Constitution, Competition Ordinance, 2007 has been enacted.

115. All that the unified trading platform would do is provide opportunity to the members of more then one stock exchange to match their trading orders placed on each others trading floors for the securities of common listed companies. This brings them more trading business and enhances liquidity in their respective stock exchanges without disturbing their distinct and independent corporate existence. A unified trading system has numerous benefits to the investors in term of greater liquidity, better price discovery, security and greater transparency in terms of entire transaction being documented and traceable. Moreover it discourages the practice of "arbitrage".

116. KSE's counsel also raised the argument that accepting the prayer raised by ISE and LSE for the creation of a common trading platform is not within the powers of the Commission. Reference has also been made to the fact that centralized stock exchanges in other countries (such as India and the USA) have been formed through legislation. In this regard we are of the view that it is important to keep in mind that ISE and LSE have not argued for the creation of a separate 'stock

exchange'. What has been argued and prayed for is merely a common/centralized trading platform in order to provide access to best price to all investors for the commonly listed securities, while the three stock exchanges retain their independent existence. We are of the considered view that in terms of section 31 of the Ordinance the Commission is duly empowered to grant the relief prayed for in this case and to require the undertaking concerned to take such actions as may be necessary to restore competition and not to repeat prohibitions (specified in the Order)

Remedy

117. The situation as it stands is in need of immediate rectification. However, the Commission realizes that the competition regime is at its nascent stage. In the given facts and circumstances of the case, the Commission's focus is on ensuring compliance and prefers a compliance oriented approach. The remedy granted below gives KSE a period of six months from the date of issuance of this Order.

118. The Commission hereby directs that refusal to deal on part of KSE cannot continue. KSE is, therefore, directed to take such measures along with the other exchanges of Pakistan to enter into an arrangement similar to that of UTS existing between LSE and ISE to ensure availability of and access to the best price of commonly listed securities (on all exchanges) to all investors including those LSE and ISE (regardless of geographical location). This is necessary to restore competition in the relevant market. Upon failure to comply with this direction KSE will be liable to pay a penalty of Rs.50 million at the end of the six month

period and thereafter an additional penalty of Rs.250,000/- per day if the non-compliance continues. To facilitate implementation the Commission further directs that if reasonable commercial terms for the arrangement/facility are not agreed between the parties within two months of the date of this Order, any or all parties can make a reference to the Commission which will then proceed to appoint a firm of chartered accountants to make such determination. Under all circumstances it shall be KSE's responsibility to ensure compliance within the time periods stipulated above.

(Khalid A. Mirza)	(Maleeha Mimi Bangash)	(Dr. Joseph Wilson)
Chairman	Member	Member

Islamabad May 29, 2009