



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

**M/S Takaful Pakistan Limited and Travel Agent Association of Pakistan
(File No. 9/M(A&R)/CAA-TAAP/CCP/2007)**

Dates of hearing: 27th May 2009
25th August 2009

Present: Dr. Joseph Wilson
Member

Present for Takaful Pakistan Limited: Mr. Aziz H. Nishtar, Advocate
Mr. M. Ashraf Ali Siddiqui (DGM-Operations).

Present for Travel Agents Association of Pakistan: Mr. Aziz H. Nishtar, Advocate
Mr. Mohammad Hanif Rinch (Vice Chairman Region-4)

I. ORDER

1. The Competition Commission of Pakistan (hereinafter the “Commission”) took cognizance of the Agreement dated 10 September 2008 (hereinafter the “TAAP Agreement-I”) entered into by Travel Agent Association of Pakistan (hereinafter “TAAP”) with Takaful Pakistan Limited (hereinafter “TPL”), on the information provided by the Civil Aviation Authority of Pakistan (hereinafter “CAA”) vide its letters dated 25 and 29 September 2008. The TAAP Agreement-I introduced an insurance product which comprises (i) default insurance plan for travel agents and (ii) passengers’ travel insurance at a premium of PKR 300 for domestic ticket and PKR 600 for international ticket. Later on, the TAAP Agreement-I was replaced by another agreement dated 11 March 2009 (hereinafter the “TAAP Agreement-II”) which is still in force. The TAAP Agreement-II also provides for both default insurance and travel insurance at the premium of PKR 300 for domestic ticket and PKR 600 for international ticket. The issues in this case are:

- (i) Whether TPL by tying two distinct products of default insurance and passengers’ travel insurance is abusing its dominant position in contravention of Section 3 of the Competition Ordinance, 2009 (hereinafter the “Ordinance”).
- (ii) Whether the Agreements operate to fix the premium for travel insurance to be charged from the customers/passengers and restrict competition in violation of Section 4(2)(a) of the Ordinance, 2009;
- (iii) Whether the Agreements by imposing supplementary obligation on TAAP violates Section 4(2)(g) of the Ordinance; and

- (iv) Whether TPL and TAAP, through its member travel agents, are engaged in deceptive marketing practices by failing to give and/or giving false information to passengers as to the price and/or character of the travel insurance in contravention of Section 10 of the Ordinance.

A. Preliminary Observation as to the Status of the Ordinance

2. On 2 October 2007, the President of Pakistan promulgated the Competition Ordinance, 2007, which provided for the establishment of the Competition Commission of Pakistan (hereinafter “the Commission”) and introduced a contemporary competition regime in Pakistan. This ordinance was later given protection under Clause 5(1) & (2) of the Provisional Constitutional Order of 2007 (PCO).¹ A seven member bench of the Supreme Court of Pakistan validated the PCO on 15 February 2008 in the *Tikka Iqbal* Case. However, on 31 July 2009, a fourteen member bench of the Supreme Court in *Sindh High Court Bar Association v Federation of Pakistan*², declared the PCO as unconstitutional and, *inter alia*, directed that all ordinances protected by the PCO be placed before the Parliament by or before 28 November 2009.
3. The Federal Government introduced the Competition Bill 2009, which was approved by National Assembly’s Standing Committee on Finance.

¹ The text reads as follows:

5. (1) Any ordinance promulgated by the President or by the governor of a province shall not be subject to any limitations as to duration prescribed in the Constitution.

(2) The provisions of clause (1) shall also apply to an ordinance issued by the President or by a governor which was in force immediately before the commencement of the Proclamation of Emergency of the 3rd day of November, 2007

² PLD 2009 SC 879.

However, the Bill could not be introduced in the National Assembly before the expiry of the deadline given by the Supreme Court. On 26 November 2009, the President of Pakistan promulgated the Competition Ordinance of 2009,³ giving validity to all the actions and decision made under the Competition Ordinance 2007 by giving effect to the Competition Ordinance of 2009 from 2 October 2007.⁴

II. UNDERTAKINGS

4. TPL is a company registered with the Securities and Exchange Commission of Pakistan (hereinafter “SECP”) under Insurance Ordinance, 2000 to transact Non-life /General Takaful business. TPL is an undertaking as defined in clause (p) of section 2(1) of the Ordinance.
5. TAAP is a trade association registered with the Ministry of Commerce, Government of Pakistan under the Trade Organizations Act 2007. TAAP is an undertaking as defined in clause (p) of section 2(1) of the Ordinance.

III. FACTUAL BACKGROUND

6. All travel agents accredited with International Air Transport Association (“IATA”) in Pakistan are required to settle their sales with their respective airlines through Billing Settlement Plan (“BSP”) which was introduced by IATA in Pakistan in 2006.⁵ BSP is a system designed by IATA to facilitate and simplify the selling, reporting and remitting procedures of travel agent and improves cash flow for BSP Airlines.⁶ BSP serves as a central clearing-house through which data and funds

³ Ordinance No. XLVI of 2009, the Gazette of Pakistan, Extra, Nov. 26, 2009, Page 495 et seq. [Part I].

⁴ *Id.* Section 1(3): “It shall come into force at once and shall be deemed to have taken effect on and from the 2nd October 2007.

⁵ http://www.iata.org/worldwide/asia_pacific/pakistan/

⁶ http://www.iata.org/ps/financial_services/bsp/index.htm

flow between travel agents and airlines instead of every agent having an individual relationship with each airline.⁷

7. Until September 2008, IATA accepted collective guarantees from banks on behalf of travel agents in Pakistan against liability coverage of the fortnightly settlement of accounts of their airline passenger tickets sales. These collective bank guarantees were backed by assurance to the respective banks by TAAP and a group of travel agents, known as “Polani Group.” TAAP and Polani Group in turn used to require collaterals as security from their respective travel agents members on whose behalf they arranged the guarantees.
8. On 30 July 2008, the Executive Council of IATA in Pakistan held a meeting and announced that effective 1 October 2008, IATA-BSP will only accept individual guarantees from travel agents towards their ticket sales. It was also decided to accept the guarantee from other insurance companies in addition to bank guarantees provided these insurance companies meet IATA’s eligibility criteria.⁸
9. TAAP being the representative association of the travel agents was aware of the fact that majority of its members will not be able to arrange individual guarantee because of high cash margin and collateral conditions. In its annual general meeting held in January 2008, TAAP formed a committee to explore the insurance cover opportunities to meet the requirement of IATA-BSP management.⁹ Thereafter, TPL and TAAP entered into the TAAP Agreement-I to provide liability coverage to travel agents. The TAAP Agreement-I provided for the individual guarantee (defined as “Guarantee” in the Agreement) to meet the financial security requirements of the IATA after introduction of the BSP

⁷ http://www.iata.org/ps/financial_services/bsp/how_bsp_works.htm

⁸ Para 10, Minutes of Meeting regarding Default Insurance Scheme held at CAA by the Director (Economic & Oversight) on 29th September 2008.

⁹ Written Submissions by TAAP vide letter dated 20th November 2008.

in Pakistan in connection with liability coverage of each travel agent towards his principal airlines for the settlement of sales.

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

(i) Personal Accident (death or disability)	PKR300,000
(ii) Loss of Baggage	PKR 25,000
(iii) Loss of Travel Documents	PKR 10,000

11. The two products provided under the TAAP Agreement-I *i.e.*, Guarantee and Passenger Takaful Cover are collectively termed as the “Takaful Scheme” in the Agreement. The said Takaful Scheme under the TAAP Agreement-I remained in operation from 1 October 2008 to 11 March 2009. Then a new agreement (the TAAP Agreement-II) was signed by the both Undertakings on 11 March 2009 to revoke the earlier Agreement and replace the Takaful Scheme with its new version. The term Guarantee and Passenger Takaful Cover have the same definitions and scope and serve the same purpose under the TAAP Agreement-II. The two products are also referred as Takaful Scheme under the TAAP Agreement-II.
12. On 24 September 2008, Mr. Ashwaq Ahmad Mirza, Ex-Convener TBC, TAAP, approached Director (Economic & Oversight) of CAA, vide letter LHE/BC/4092 about the new insurance guarantee plan *i.e.*, Takaful Scheme. According to the said letter, the plan was to arrange liability and passenger insurance from TPL and charge from passengers an amount of US\$ 10 on international ticket and US\$ 5 on domestic ticket that would

be deposited with TPL. After completing three years, TPL will refund a certain percentage of the first year's surplus to the participating travel agents and the same pattern will follow in second and third year of the scheme.

13. The Director (Economic & Oversight),CAA, taking notice of the matter, advised Country Manager, IATA, Pakistan vide letter dated 25 September 2008 to put on hold all further progress on the Takaful Scheme till such time that CAA is satisfied about the transparency of this plan and the protection of consumer rights. A meeting was called on 16 October 2008, inviting Country representative of IATA, Chairman TAAP, Dy. GM Agency Affairs PIAC, and others to address the impact of the Takaful Scheme.
14. Participants of the meeting expressed their views and concerns on the Takaful Scheme which resulted in TAAP giving the following assurances :
 - a. That TAAP would ensure that no one will be refused the sale of a ticket for travelling by a particular airline (including PIA), if the passenger declines to pay the premium of US\$ 10 for international ticket or US\$ 5 for domestic ticket as the case may be.
 - b. That the information and instruction to this effect would be displayed at a visible place at all sale points of travel agents participating in the Takaful Scheme.
15. In the aforesaid meeting, TAAP was advised to seek opinion of the Commission to avoid subsequent adverse consequences as the CAA is only an administrative body and the matter should be reviewed by some higher forum like the Commission.
16. TAAP never approached the Commission to seek the opinion of the former on the Takaful Scheme. However, exercising its powers under section 37 of the Ordinance read with Regulation 16 of Competition (General Enforcement) Regulations, 2007, the Commission proceeded with the inquiry. An inquiry committee comprising of Ms. Nadia Nabi

and Ms. Safia Alam, Joint Directors, was constituted to inquire into the matter.

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

- a.* The Takaful Scheme is not a default insurance scheme as envisaged in earlier letters and meeting of CAA, in fact it is a combination of three types of insurance:
 - i. Insurance coverage for the participating travel agents' contractual liability towards their principal(airline) through IATA;
 - ii. Passenger travel health coverage; and
 - iii. Passenger travel accident coverage outside the aeroplane fuselage. Travel accident inside the airplane fuselage is covered by the airline itself under the Warsaw Convention in case of international journey.
- b.* This is the first liability insurance coverage scheme in Pakistan, which is one of its kind in the world as well.
- c.* That IATA under BSP discontinued the acceptance of existing collective guarantee plan and asked accredited travel agents to furnish individual guarantee from eligible financial institutions.
- d.* TAAP aware of the situation that majority would not individually meet the margin and collateral requirements of banks, made an arrangement with TPL for a customized product to provide liability insurance cover and also a passengers' medical and accident cover.
- e.* The Takaful Scheme is an addition to the existing products available to travel agents. Therefore, competition has not been compromised in any way. Conversely, the market has become more competitive. The travel agents are free to seek liability cover from TPL or from more than a dozen banks already providing the guarantee which is fully acceptable to IATA.
- f.* In addition to the agents' liability coverage, a passenger will optionally get health insurance cover and accidental cover throughout their travel. Other "much inferior" products covering only health and travel accident cover of the passenger were being sold for Rs 2,500 or more. But after introduction of the TPL product, the improved competition has now

forced the existing providers of those insurance cover to reduce their prices drastically to match the TPL product prices.¹⁰

18. The Inquiry Officer, in order to have a comprehensive understanding of the Takaful Scheme sought comments of CAA which were received *vide* its letter of 12 February 2009. The CAA raised the following concerns, namely:

- a.* All the travel agents participating in the Takaful Scheme would have to sell the said insurance policy at a fixed price.
- b.* There would be an incentive for a travel agent to refuse sale of a ticket to a customer unwilling or refusing to pay the cost of insurance in favour of the one willing to pay the same, particularly in a high demand and low supply situation.
- c.* The choice of purchasing a ticket directly from an airline office will generally not be available to travel agents in small cities and towns.
- d.* The number of travel agents and ability to purchase online air ticket in small cities and town would also be limited. Uneducated class of air travellers on domestic and international routes may thus be vulnerable to exploitation.¹¹

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

2. . . . For the purpose of obtaining an insurance cover the primary requirement is that one must have an insurable interest in the subject matter of insurance. “Insurable Interest” may be defined “as a legal right to insure arising out of a financial

¹⁰ Para 7 of written submission of TAAP dated 20th November, 2008.

¹¹ Para 2 of letter dated 12th February 2009.

relationship recognized at law between the insured and subject matter of insurance”. This principle equally applies in case of a takaful arrangement.

3. For Aman Travel Takaful coverage the travel agents, prima facie, have neither any contractual obligation towards their clients (air ticket purchasers) nor they are responsible for accident/sickness which the passengers may suffer during the traveling. Therefore, arranging of the takaful cover and charging of the contribution therefore by the travel agent to the passenger without his consent defies the basic requirement i.e. contractual or legal or statutory obligation on the part of the travel agent to obtain the takaful medical coverage on the life of passenger.¹² (emphasis added).

20. The Inquiry Officers also conducted a survey of travel agents within Islamabad on 10 & 12 February 2009 to ascertain whether the “Notice for Travelers” informing customers about the Passenger Takaful Cover, as assured by TAAP,¹³ has been visibly displayed at the sale points of travel agents participating in the Takaful Scheme. No such Notice was found in any of the sale point of travel agents by the Inquiry Officers. On inquiring about the mode of charging the premium from customers, it was learnt that the premium amount is included under the head of service charges and there was no separate Passenger Takaful Cover handed over to customers (passengers), they are not even informed about the said takaful premium or takaful cover. It was also confirmed that premium is being charged as a matter of course and not at the option of the passenger.
21. TPL was sent a letter on 6 February 2009, seeking its comments on the Takaful Scheme in respect of issues which emerged upon examination of the TAAP Agreement-I as well as from the survey. TPL, in its submissions received on 27 February 2009, referred to a new agreement that revoked and replaced the TAAP Agreement-I. However, TPL did

¹² SECP, letter dated 20 March 2009, signed by Dr. Mumtaz A Hashim, Adviser (Insurance).

¹³ Para 4 of Minutes of the Meeting dated 29th September 2008 held at CAA.

not provide a copy of the new Agreement, instead told the Inquiry Officers to obtain the copy from TAAP. Submissions made by TPL are summarised hereunder:

- a.* “Amaan Travel Takaful” *i.e.*, Passenger Takaful Cover is the primary product while the others (Guarantee) are “additional covers.” “TPL is primarily offering travel protection for the fare-paying clients of the desirous travel agents and only in consideration of them introducing quality business; TPL offers to provide them the requisite guarantees somewhat on a complementary basis.”
- b.* TPL denied that premium is charged from customers. It contended that agents pay their due share of contribution, on their own, on the benchmark basis of “per ticket sold” by the individual travel agent. However, if any customer opts for the travel coverage, premium is collected from the customer on behalf of TPL and all such cases invariably receipt is duly issued and provided to the said customer.
- c.* The reason for the stipulation of five years’ continuity from participants is that number of international agreements had to be concluded for this scheme and a considerable amount has been spent in developing the supporting infrastructure. Hence it would not be financially feasible for a shorter duration, though, it is reiterated, clear provisions do exist for premature exit by any individual participant.
- d.* The Takaful Scheme will not limit the ability of travel agents to explore other options as they are free to choose whether to join the scheme or not and those who have opted for the scheme have done so only because they felt it gave them a competitive advantage of being able to provide their passengers with incremental values on their tickets. As far as choice of customers is concerned it is not limited by this scheme as they have several options to purchase tickets *i.e.* directly through email, airline offices, non IATA members and TAAP members who are not participating the Takaful Scheme.
- e.* Responding on the issue of passing the premium payment to customers, TPL stated that “at least this is not what we have agreed with TAAP on behalf of their participating member travel agents. What we know for sure that each travel agent submits the said amount on the agreed benchmark of per ticket sold by him.”
- f.* TPL provides Takaful coverage to each passenger buying tickets from the participant travel agent. For that purpose TPL arranged a web portal, which can be accessed by travel agents round the clock, to instantly draw up a certificate of coverage clearly mentioning the name of passenger, ticket, passport number, and other relevant details as well as the extent and scope of coverage provided.
- g.* The Takaful Rules, 2005 allow Takaful companies in Pakistan to invest the amount contributed by the individual participant, return the

investment income back into the Fund and to distribute the surplus at the end of scheme to participants.

22. Legal representative of TAAP, Mr. Aziz Nishtar, was contacted to inquire about the new agreement referred to in the written submissions of TPL in its letter of 27 February 2009. Mr. Aziz Nishtar categorically denied the existence of new agreement or any ongoing negotiations for the new agreement. He also confirmed that TAAP Agreement-I is the only agreement signed between the Undertakings regarding Takaful Scheme and sent a copy of the TAAP Agreement-I through facsimile for clarification.
23. After examining the TAAP Agreement-I, written submissions filed by the Undertakings and comments of other concerned regulatory bodies, the Inquiry Officers completed the inquiry by submitting the Inquiry Report on 30 April 2009. The Inquiry Report concluded that Takaful Scheme is, *prima facie*, a trade restrictive agreement between TAAP and TPL violating sections 4(2)(a) and 4(2)(g); the conduct of TAAP amounts to abuse of dominance in violation of section 3 (3)(c), (d) of the Ordinance. And the Agreement also appears to constitute deceptive marketing practices by TPL as well as TAAP in contravention of section 10 (2)(a), (b) of the Ordinance and that it is necessary in the public interest to initiate proceedings against TAAP and TPL under section 30 of the Ordinance.
24. Based on the recommendations made in the Inquiry Report, the Commission initiated proceedings under section 30 of the Ordinance and issued Show Cause Notices to both Undertakings on 6 May 2009.
25. TPL replied to the Show Cause Notice, through its counsel Aziz Nishtar, under a cover letter dated 24 May 2009. The submission made by TPL are:

A. Preliminary legal objections and questions:

1. Letters by CAA dated 25th and 29th September, 2008 do not constitute a reference as envisaged in section 32 of the Competition Ordinance, 2007. CAA is not federal government therefore there was no reference from federal government. If the letters by CAA were treated as complaint, then there is breach of Regulation 18 and 19 of the Competition (General Enforcement) Regulations, 2007.
2. Why inquiry was kept secret from TPL and TAAP? And why the inquiry was conducted without the participation of TPL and TAAP.
3. Flaws in inquiry report
 - i. Agreement between TPL and TAA dated 20th September, 2008 has been replaced by agreement dated 13th March, 2009¹⁴ which changed the whole scheme. In new agreement passenger insurance is the main product and travel agents' liability coverage is an ancillary product.
 - ii. Without confronting the parties before issuance of show cause notice the Commission has negated the principles of natural justice.
 - iii. Inquiry report concludes on abuse of dominance without any market presence of TPL at the time of the designing and introducing the instant product.

B. Reply to issues raised in Show Cause Notice (SCN)

1. TPL holds 0.5% of total insurance/ takaful market share. As regards travel business, TPL had 0% of the relevant market share at the inception of our said Takaful Scheme. Of course after introduction of our said scheme several travel agents have accepted our coverage. In reality, even now TPL does not hold any dominant position since out of total 3M international tickets sold annually in Pakistan during last seven months of operation of Takaful Scheme we have covered only 171,000 tickets which would be around 300,000 tickets annually. This gives only 10% of the market share of the tickets. Only 300 travel agents have opted for the scheme out of 4000 outlets of TAAP members, non-TAAP members, GSAs, PSAs, Haj/Umra operators and airlines' own sales outlets.
2. Tying different insurance product together as a bouquet is neither ethically wrong, nor lawful nor unusual for the contemporary insurance practices. It is done so to make acceptable for reinsurance companies the "undesirable risks" bunched with more "profitable products."
3. Contemporary insurance companies are tying 21 different products to the basic Schengen visa requirement comprising of only three components. Incidentally these also include bail bond which itself is a guarantee cover. Traveler desiring to get only three components has to pay for entire 21 products.

¹⁴ The Agreement however is dated 11 March 2009 instead of 13 March 2009.

4. Agreement between TPL and TAAP provides a convenient coverage to clientele of travel agents putting incremental values on their tickets. It is not trade restrictive as majority of travel agents have not opted for it.
5. Agreement does not fix the premium to be charged from the customers. Infact charging on a “per ticket basis” is just a bench mark and has the effect of convenience of payment of contribution in installments. This by no means can be stretched and declared to be a charge on the customer since this is not clearly the case as the charging premium from customers is nowhere written in the agreement
6. The very subject of the Agreement is provision of passenger takaful cover in order to provide incremental value to the business of the participating travel agents whereas provision of the guarantee is a supplemental matter.
7. We would like Commission to elaborate on how the provisions under the agreement arranging and administering a joint pool safeguarding the common interest of travel agents can be termed as collective guarantee instead of individual guarantee harming the interests of airlines. We have issued individual guarantees to IATA as per their requirement and how we arrange the business at our end is our outlook an as a matter of fact our arranging a joint pool for the common interest of the participating travel agents has been the very mechanism that made it a success story.
8. Agreement does not mislead customers as to the price of the product. Desiring passengers are duly provided with our travel takaful certificate that clearly enunciates the scope of coverage provided to them, the limits thereof, the benefits and contact details for making claims.

C. Comments on Inquiry Report

1. The Agreement does not bind parties for five years as there is an exit clause for them.
 2. Observation made by the inspection team in the inquiry report is wrong that Rs. 170 out of Rs. 600 will be refunded. We nowhere have committed to it in our agreement nether we are in this position to fix or commit any such amount in face of various variables.
 3. It is baseless to say that premium charged account for both guarantee and passenger takaful cover. Still we are prepared to amend our agreement whereby the participating travel agents will not be required to club this build up collateral amount with the per ticket amount.
26. TPL, in its reply to show cause notice, again referred to the new agreement (TAAP Agreement-II) but did not send the copy of the same. However, on inquiring a copy of the agreement was faxed on 26 May

2009, a day before the hearing was conducted. Mr. Aziz Nishat represented both TAAP and TPL at the hearing. During the course of the first hearing, several preliminary questions were raised and additional information was sought from the Undertakings. Later, in a letter dated 1 June 2009, both Undertakings were required to submit the following information and documents:

- i.* Correspondence with IATA concerning the Takaful Scheme;
- ii.* Detail working of funds and reserve created for travel agents and passengers;
- iii.* Break up of contribution towards Guarantee and passenger travel insurance;
- iv.* Insurable interest of travel agents in Passenger Takaful Cover; and
- v.* Complete record of sales of Passenger Takaful certificates issued to customers.

27. Abovementioned information and documents were submitted by Mr. Aziz Nishtar in his letter dated 22 June 2009. Correspondence with IATA at annexure A included emails exchanged between TPL and IATA which did not contain any material information or discussion on the Takaful Scheme. Other submissions made by the counsel are summarised as under:

- i.* Working of funds and reserve created for travel agents (annexure B):
 - a. Cash margin of 6% of the total guarantee is collected from TAAP at the inception of the guarantee. This amount is to be increased to 12% by way of fortnightly installments in respect of cash collateral build up at Rs.70 for each ticket contribution received from the participating travel agents. This amount is kept to off set any payout if any Guarantee is called by IAA-BSP management. TPL invests funds built up by such collateral into remunerative instruments and earnings are credited into TAAP collateral account after deduction of Mudarib fee.
 - b. As far as working of funds and reserve of “Amaan” standard cover is concerned, Rs.530 contribution is charged to travel agents per international ticket for Amaan standard cover. After deduction of

wakala fee net amount is kept into special TAAP pool within Participants' Takaful Fund (hereinafter "PTF") maintained for contributions coming from the travel agents to pay ReTakaful Contribution, claims on account of TAAP-Pool specific expense. Statutory reserve is formed by putting 6% of the net contribution for the first year and 4% for second year and 2% of third year. 75% of the reserve for the first year shall be added back to pool on the completion of third year and subject to non-utilization. Same percentage in second year shall be added back to this pool on completion of forth year and so forth and so on. TPL invests the Funds in the said pool and any income derived is added back to the pool balance. TPL deducts 25% Mudarib fee on the investment income. Surplus of the fund left in the pool is distributed to the respective participants on pro rata basis.

- c. Contribution for the top up cover is charged to passengers which depends on the duration and package. After deduction of wakala fee net amount is kept into PTF for paying ReTakaful Contribution, claims on account of Travelers' Cover, Statutory Reserves Build-up and any other specific expense. TPL invests the Funds in the said PTF and any income derived is added back to the said PTF. TPL deducts 25% Mudarib fee on the investment income. Surplus of the fund left in the pool is distributed to the respective participating passengers on pro rata basis.
- ii. There is no separate fund for the passengers. TPL does not sell takaful cover to the passengers. TPL has offered such cover as a part of bundled product to the travel agent who is free to assign the benefit of travel health and accident to passengers. The agents offer travel insurance cover to their fare-paying passengers as a marketing tool by adding incremental values. *The travel agent is free to assign those benefits to the opting customers at any price according to the market forces. However, the participating travel agent is obliged under the contractual arrangement between TAAP and TPL to pay Rs.600 for every international ticket sold by him.* The amount received from top ups is put into a separate PTF fund distinct from the pool maintained for the travel agents. (emphasis supplied)
- iii. Contribution from Amaan top-up cover is charged from the passengers. TPL charges Wakala fee from the contribution and the net contribution is kept in PTF maintained for passengers. TPL invests the funds in PTF and any income derived is added back to the PTF balance after deduction of 25% Mudarib fee. If any surplus is left in the PTF after paying claims and other expenses, such amount is distributed to the participating passengers on annual basis.
- iv. Regarding break-up of Guarantee and passenger travel insurance premiums, it was submitted that Guarantee expenses are Rs1000. However, Rs.600 received from the travel agents against sale of each international passage, the break up is Rs.70 for the collateral reserve and Rs.530 towards providing cover to the passengers who was assigned the benefits under the scheme.

- v. The principle of insurable interest prohibits any person to procure or cause to be procured, directly or by assignment or otherwise any contract of insurance upon the person of another unless the benefits under such contract are payable to the person insured or his personal representative, or to a person having, at the time when such contract is made, an insurable interest in the person insured. For 'Amaan' standard cover, Travel agents are the Participants whereas the Passengers or their next of kin are the beneficiaries. For 'Amaan' top-up travel agents are distributors/takaful agents whereas the passengers are the participants and the beneficiaries may be passengers themselves or their next of kin.
28. The letter further mentioned a compact disc containing data of two fortnights' sales selected randomly to show details of certificates issued for travel insurance as enclosure. However, the same was not enclosed with the letter. Later on, the joint legal representative of the Undertakings was requested to send the disc. Instead of sending the disc, a PDF file was emailed which does not provide the price or premium charged for the travel insurance or details of the passengers in whose favour Passenger Takaful Cover was issued.
29. I will address the issues identified in paragraph 1 above in *seriatim* below. But first I will address the preliminary objection regarding the reference by CAA.
30. It has been argued that the reference by CAA cannot be considered a reference by the Federal Government as required under Section 37 of the Ordinance in order for the Commission to initiate an inquiry. To ascertain whether the assertion put forward by TPL has any merit, it may be useful to look at the definition of the term 'Federal Government' and the relation of CAA with the Federal Government of Pakistan.
31. At the outset, it must be noted here that neither the Ordinance; the General Clauses Act 1897 nor the Civil Aviation Authority Ordinance 1982 defines the term Federal Government. Reliance therefore must be placed on the ordinary usage of the term 'Federal Government' which would mean the government that manages the affairs of a federation. The Federal Government of Pakistan derives its powers from the Constitution

of 1973, and is competent to deal with matters enumerated in the Federal & Concurrent Legislative lists given in the Fourth Schedule. Entries 22, 23 and 24 of Part 1 of the Federal Legislative List deal with the subject of civil aviation in the country and enable the Federal Government of Pakistan legislate in this behalf.

32. The CAA was created under the Civil Aviation Authority Ordinance 1982 to regulate civil aviation on behalf of the Federal Government. According to Section 7(1) of the CAA Ordinance, the affairs of the CAA are to be managed by a board, members and chairman of which are listed in Section 7(2) and 7(3) respectively. The three Sections are reproduced here for ease of reference:

7. Management.-(1) The general direction and administration of the Authority and its affairs shall vest in a Board which may exercise all powers, perform all functions and do all acts and things which may be exercised, performed or done by the Authority.

(2) The Board shall consist of the following members, namely:-

- (i) Secretary General, Ministry of Defence, Government of Pakistan.
- (ii) Vice-Chief of Air Staff, Pakistan Air Force.
- (iii) Secretary, Ministry of Finance, Government of Pakistan.
- (iv) Secretary, Planning Division, Government of Pakistan.
- (v) Secretary, Aviation Division, Government of Pakistan.
- (vi) Managing Director, Pakistan International Airlines Corporation.
- (vii) Chairman, Pakistan Banking Council.
- (viii) Director-General.

(3) The Secretary General, Ministry of Defence, shall be the Chairman of the Board.

33. It is clear from the constitution of the Board that the CAA, for all practical purposes, is controlled by the Federal Government through the Secretaries of its various Ministries and heads of other departments. The board headed by the Secretary for Defense to the Federal Government of Pakistan, who is the representative of the Federal Government for

matters pertaining to civil aviation under the Rules of Business 1973.¹⁵ Reference must also be made to the description of CAA on its own website which states that:

Pakistan Civil Aviation Authority is a Public sector autonomous body working under the Federal Government of Pakistan through the Ministry of Defence.¹⁶

34. Regulatory bodies perform their duties on behalf of, and are an arm of, the government. Thus, CAA's referral to the Commission needs to be seen as a reference on behalf of the Federal Government for the purposes of Section 37.

Issue 1: Whether TPL by tying two distinct products of default insurance and passengers' travel insurance is abusing its dominant position in contravention of Section 3 of the Ordinance.

IV. DISCUSSION

A. *Application of Section 3*

35. Section 3 prohibits tie-ins. "Tying occurs when a seller refuses to sell one product, which a buyer desires, unless the buyer also agrees to purchase a second product that the buyer would not otherwise want from this seller on the offered terms."¹⁷ "The desired product is called the 'tying' product; the other is the 'tied' product."¹⁸

¹⁵ Read entry 16 (vi) on the Ministry of Defense website available at http://202.83.164.26/wps/portal/Mod!/ut/p/c0/04_SB8K8xLLM9MSSzPy8xBz9CP0os_hQN68AZ3dnIwML82BTAYNXTz9jE0NfQwNfc_2CbEdFALW8Dus/

¹⁶ http://www.caapakistan.com.pk/about_us.aspx

¹⁷ See Areeda & Hovenkamp, FUNDAMENTALS OF ANTITRUST LAW, 3rd Edition, Aspen 2008 at p. 17-7. [hereinafter "Areeda & Hovenkamp"].

¹⁸ *Id.*

36. Section 3 in relevant part is reproduced below:

3. Abuse of dominant position.-(I) 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;

(c) tie-ins, where the sale of goods or service is made conditional on the purchase of other goods or services;

37. The relevant product market, in the instant case, is the guarantee or default insurance offered by different financial institutions, banks, general insurance companies and takaful companies to airlines on behalf of travel agents.

38. Once the relevant market is determined, the next step is to determine whether the concerned undertaking holds dominant position in the relevant market or not? Under section 2(e) of the Ordinance dominance of an undertaking is deemed to exist if such undertaking has ability to behave to an appreciable extent independent of competitors, customers, consumers and suppliers. Section 2(e) also provides a quantitative threshold for presuming the dominant position of an undertaking, if its market share in the relevant market exceeds forty percent. Section 2(e) is reproduced as under:

“dominant position” of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave to 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.

39. The ability ---to behave to an appreciable extent independently of competitors, customers, consumers and suppliers--, in other words “market power” can be “derived from patents, high market share, or offering a unique product which competitors are unable to offer.”¹⁹ Further, in the tying context, the market power is the power “to force a purchaser to do something that he would not do in a competitive market.”²⁰
40. TPL in its letter dated 20 November 2008, submitted “that there is no earlier agreement covering default insurance scheme because in Pakistan this is the first liability insurance coverage scheme which we understand is not [] common in other parts of the world as well.” The product (default insurance) offered by TPL is unique as it does not require large amount of cash or other security as collateral from the travel agents, which banks and other insurance companies in the relevant market would require. The inability of travel agents to pay large cash margin and collaterals required by other financial institutions for individual guarantees coupled with the paucity of time available at TAAP’s disposal contributes to the market power of TPL.²¹ Instead, TPL would collect premium from travel agents on the basis of tickets sold. Thus, TPL derive its dominant position by the uniqueness of the product it offered to TAAP.

¹⁹ Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2, 104 S.Ct. 1551 at 1560-61.

²⁰ Lawrence A. Sullivan & Warren S. Grimes, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK, 2nd edition Thomson, West 2006 at p. 29. Citing Eastman Kodak Co. v. Image Technical Serve., Inc., 504 U.S. 451, 464, 112 S.Ct.2072, 119 L.Ed.2d 265 (1992) (quoting Jefferson Parish Hosp. Dist. No.2 v. Hyde, 466 U.S. 2, 14, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984). The Kodak Court, 504 U.S. at 464, also cited with approval the market power definition in Fortner Enters., Inc. v. United States Corp., 394 U.S. 495, 503, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969).

²¹ See, TAAP’s letter dated 20 November 2008, “ TAAP being the representative association of the travel agents and having managed the sales settlement of its agents over last quarter of a century, was fully aware of the majority of its member would not individually meet the strict margin and collateral conditions of the banks and would go out of business in consequence.”

41. TPL argued that it “holds 0.5 % of total insurance/ takaful market share. As regards travel business, TPL had 0% of the relevant market share at the inception of our said Takaful Scheme.”²²
42. High market share is indeed indicative of market power. But “market participants with a high market share may exercise little or no market power.”²³ On the other hand, a market player “might have market power notwithstanding a modest share of sales”²⁴ where his “product might differ enough from that of rivals.”²⁵ The difference in product would put him in a separate “relevant product market” with a 100 per cent market share.²⁶

In cases such as Northern Pacific Ry.Co. v United States,²⁷ United States v. Loew’s, Inc.,²⁸ and Fortner Enterprises, Inc. v. United States Steel Corp.²⁹, the Court relied on the uniqueness of the tying product and the defendant’s concomitant ability to force a buyer to purchase the tied product, rather than the defendant’s interbrand market share, to establish the defendant’s ability to force an unlawful tied purchase.³⁰

43. To prove a claim for tying, this Commission in the case of *Bahria University*³¹ set forth the following five elements test to be satisfied: (1) a tie exists between two distinct products; (2) the tying seller has dominant position in the tying product market so as to be able to prevent, restrict, reduce or distort competition in the tied product market; (3) coercion (or forcing) by the seller to purchase the two products; (4) the

²² See para 30(B)(1) above.

²³ Sullivan & Grimes, *supra* note 20, at pp. 39-40.

²⁴ See Areeda & Hovenkamp, *supra* note 17, 5-21. [hereinafter “Areeda & Hovenkamp”].

²⁵ *Id.*

²⁶ *Id.*

²⁷ 356 U.S. 1, 5-7, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). For a discussion of the Supreme Court’s tie-in jurisprudence, see Grimes, Antitrust Tie-in Analysis After Kodak: Understanding the Role of Market Imperfections, 62 ANTITRUST L.J. 263, 299-307 (1994).

²⁸ 371 U.S. 38, 45-47, 83 S.Ct. 97, 9 L.Ed.2d 11 (1962).

²⁹ 394 U.S. 495, 498-500, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969).

³⁰ Sullivan and Grimes, *supra* note 20, at Page 51.

³¹ <http://cc.gov.pk/Downloads/order/Bahria%20University.pdf>.

tie restricts competition in the tied product; and (5) the tying seller has some economic interest in the sale of the tied product.³²

44. It must be made clear here that in the above five point test, if the first three points are proved then there is no need to prove the remaining two points. If the element of coercion or forcing is not apparent, only then it needs to prove points 4 & 5.
45. **Two distinct products:** TPL under both TAAP Agreement-I and the TAAP Agreement-II sold to TAAP both individual guarantee (the Guarantee) and passenger travel and medical insurance (the Passenger Takaful Cover) together. The two products are considered distinct if, in the absence of tying, the buyer would purchase them from two different markets. The two products tied in the instant case are entirely distinct. For individual guarantee, the beneficiary is a travel agent. For passenger travel and medical insurance, the beneficiary is a passenger. The bundling is indeed unique, and requires no further discussion to prove that the products are distinct.
46. **Dominant position of the tying seller:** In the instant case, individual guarantee, being the “desired product” is therefore the **tying product**, and the passenger travel and medical insurance is the **tied product**. Discussion at paragraphs 39 to 42 above, prove that TPL has dominant position in the tying product.
47. During the course of proceedings, TPL changed the object of agreements from, as stated in TAAP Agreement-I, to arrange individual guarantees

³² In the matter of Bahria University (File No. 05/Sec-3/CCP/08), reliance was placed on *Eurofix-Bauco v Hilti*, Commission Decision 88/138/EEC; *Tetra Pak II*, Commission Decision 92/163/EEC, OJ 1992, L72/I; *Reifert v. S. Cent. WLS Corp.* 450 F.3d 312; 2006 U.S. App. LEXIS 14327; 2006-1 Trade Cas. (CCH) P75,283 (2006) *Cert denied US Reifert v. S. Cent. Wi Mls Corp.*, 2007 U.S. LEXIS 2856 (U.S., Mar. 5, 2007). *See also Carl Sandburg Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203, 208 (7th Cir. 1985); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)]; *Moore v. Matthews & Co.*, 550 F.2d 1207, 1212 (9th Cir. 1977); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 35, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984).

for TAAP member travel agents to “to introduce appropriate medical and travel Takaful coverage for the passengers buying air tickets from its participating members” as stated in TAAP Agreement-II.

48. The relevant part of the recital of the TAAP Agreement-I is reproduced as under:

To meet the financial security requirements of International Air Transport Association (IATA) after introduction of the Billing and Settlement Plan (BSP) in Pakistan, which seeks individual guarantee from each travel agent instead of collective or group cover currently applicable, TAAP is desirous of arranging individual guarantee for each of its participating members in connection with liability coverage of the fortnightly settlement of accounts of its airline passenger ticket sales. It also seeks to introduce appropriate medical and travel Takaful coverage for the passengers buying air tickets from participating members;³³

The company presents and warrants that being a licensed Takaful company in Pakistan, it is authorised under law and by its Memorandum and Articles of Association to provide the required liability insurance coverage within the shariah and to underwrite such risks and it has appropriate resources at its command to fulfil its obligations under this agreement.³⁴

49. Recital part of the TAAP Agreement-II states:

TAAP seeks to introduce appropriate medical and travel Takaful coverage for the passengers buying air tickets from its participating members;³⁵

The Company presents and warrants that being a licensed Takaful company in Pakistan, it is authorised under law and by its Memorandum and Articles of Association to provide the required Travel Medical, hospitalisation and Accident coverage, specifically tailored for this segment and marketed under the name “Amaan Travel Takaful Cover.”³⁶

Article 2.12 of the TAAP Agreement-II goes on to state:

In consideration of the goodwill and trust reposed by the participating member agents of TAAP in the Company and their

³³ Para (A) of the recital of the TAAP Agreement-I.

³⁴ Para (B) of the recital of the TAAP Agreement-I.

³⁵ Para (A) of the recital of the TAAP Agreement-II.

³⁶ Para (B) of the recital of the TAAP Agreement-II.

adoption and marketing of the Company's Takaful products, the Company hereby agrees to provide cover to the desirous participating TAAP members as their option, covering their contractual liability to their principal airlines through IATA, by providing an appropriate guarantee coverage to this effect to IATA on behalf of the said participating TAAP members.

50. It should be mentioned here that changing the primary product sought from individual guarantee to medical and travel Takaful in TAAP Agreement-II will not affect the analysis here. The tying product would remain the "individual guarantee" in which the travel agents are originally interested.
51. **Coercion or force:** It will be useful to traverse the factual background against which TAAP Agreement-I and TAAP Agreement-II were executed.
52. IATA introduced BSP in Pakistan in 2006. Until September 2008, IATA accepted collective guarantees from banks on behalf of travel agents. However as of 1 October 2008, IATA would only accept individual guarantees from travel agents. In order to meet new requirements of IATA, TAAP explored possibilities of arranging individual guarantees for its members.
53. Mr. Aziz Nishtar, joint legal representative of both TAAP and TPL, in his letter of 20 November 2008 written on behalf of TAAP stated:

TAAP, being the representative association of the travel agent and having managed the sales settlement of its agent over last quarter of a century, was fully aware that majority of its member would not individually meet the strict margin and collateral conditions of the banks and would go out of business in consequence. The matter was therefore, deliberated in the TAAP's annual general meeting in January 2008 and formed a committee to explore the insurance cover opportunity which was believed to be less expensive one hand and lesser requirements.

Consequently, with the help of different financial and legal professionals the TAAP was able to convince TPL to develop a customised product to provide liability insurance cover and to

cover the passengers' medical and accident cover, which resulted into the product that many of our members are now using.

54. Mr. Aziz Nishtar, being the architect of the Scheme as admitted by himself in the hearing, and being the representative of both TAAP and TPL, whose interests are distinct and in conflict, I am not convinced that the travel agents, who were facing imminent pressure of having their business shut down, were interested or even thinking for passengers' medical and accident cover. The real reason for tying these two distinct products becomes evident from TPL's letter dated 5 November, 2008 written to the SECP. The second paragraph on page 3 of the letter states:

When we [TPL] approached the international ReTakaful market with this proposal, most of them declined initially on the plea that travel agents' default coverage had not been a profitable line of business historically. However, Munich Re Re Takaful subsequently came up with the suggestion that they may consider our request provided this coverage is bunched with some substantial business as bouquet. (emphasis added).

The third para on page 4 of the letter reads:

As a result of all these efforts, we jointly came up with the unique package whereby the travel agents were to be benefited by way of our Takaful coverage for their contractual liability to the airlines on account of credit passage sales, that was acceptable to IATA; the passengers were to be offered an ideal options to obtain a very sophisticated Takaful protection by way of international travel health and accident coverage extended world-wide, Takaful Pakistan was to benefit from a significant volume of business most of which was hitherto not even within the domain of the contemporary insurance market, Munich Re ReTakaful was to similarly benefit from a large volume of business emanating from a low insurance penetration country like Pakistan and IATA was to have their comfort from the instant availability of default liability coverage.

55. While the idea to tie two distinct products came from Munich Re Re Takaful, the question remains whether TPL was able to force TAAP to do something that TAAP would not do in a competitive market? The answer is in affirmative, for the following reasons.

56. Article 2.3 of the TAAP Agreement-I states that “The Agreement shall also cover Travellers’ Takaful Cover as laid out in Schedule ‘C’ which the Agents may offer optionally to the passengers buying tickets from them.” It means that a travel agent may or may not offer travel insurance to his customer/passenger. But Article 6.1 of the TAAP Agreement-I requires that “Each Agent shall pay to BSP Management along with Bill Settlement, Rs. 600 for each ticket issued by him for an international destination and Rs. 300 for each domestic ticket issued by him during the Settlement Period.” This means that irrespective of the fact whether the travel agent sold travel insurance to his customer or not, he has to pay to BSP management PKR 600 for every international ticket and PKR 300 for domestic ticket sold by him.
57. Similar provisions find their way in the TAAP Agreement-II as well. Article 2.1 of the TAAP Agreement-II reads: “The Agreement shall cover the Travellers’ Takaful package scope and extent of which is laid out in hereunder. *The agents may pass on the benefits of this package to the passengers buying tickets from them on optional basis.*” Article 5.1 of the TAAP Agreement-II reads: “Each Agent shall pay to BSP Management along with Bill Settlement, Rs. 530 for each ticket issued by him for an international destination and Rs. 265 for each domestic ticket issued by him during the Settlement Period.”
58. During the course of hearings, the representatives of TPL and TAAP were asked to explain the above provisions. Mr. Hanif Rinch made it clear that for every international ticket sold by TAAP participating member, corresponding travel insurance is issued by TPL. The travel agent may or may not pass on the benefits of that insurance to the passenger. Travel insurance is treated by travel agents as a gift such a pouch or a leather passport jacket given by travel agents to their preferred customers. However, for each international ticket issued, the travel agent would have to pay RKR 530 for international ticket.

59. The representatives of TPL and TAAP made it categorically clear that the contribution amount mentioned under the both TAAP Agreement-I and Agreement-II, is the premium of Passenger Takaful Cover which is compulsorily paid by travel agents with each international and domestic ticket sold. It is also confirmed from the letter dated 22nd June, 2009 sent by TPL for additional information on the Takaful Scheme. Section B of the Annexure B to the letter provides the detailed working of Funds and Reserves of Passenger Takaful Cover named as Amaan Standard Travel Takaful Package. Paragraph 1 states that “contribution for Amaan standard cover is charged to the travel agents at PKR 530 per international ticket issued.” Representatives of the Undertakings stated during the hearings that in fact Passenger Takaful Cover is sold to travel agents and they are bound to pay the premium amount along with each ticket sold by them irrespective of the fact that customer is willing to avail the travel insurance package or not.
60. I find the above arrangement clearly anomalous and lopsided. For each international ticket issued, TPL would issue a corresponding travel insurance, which in the majority of cases is not passed on to passengers, and yet the travel agent would to pay a premium for travel insurance on behalf of its customers. It is more than obvious that TPL was able to force TAAP to accept this arrangement, which TAAP would not have accepted under competitive market conditions.
61. TPL denied the allegation in the Inquiry Report that TPL imposed supplementary obligation of accepting passenger Takaful cover on TAAP.³⁷ It denied that it used any force or coercion. Given that the element of “force” is proven, I would nonetheless address these remaining two points of full rule of reason inquiry of tying arrangement to asses whether it should be condemned under section 3 (assuming for a

³⁷ Paragraph 7, TPL’s Submissions dated 24 May 2009.

moment that TPL has not imposed any supplementary obligation on TAAP).The remaining two elements are (i) that the tie restricts competition in the tied product; and (ii) the tying seller has some economic interest in the sale of the tied product.

62. **Tying restricts competition in the tied product:** TPL, along with its written submission provided a list of travel agents who are participating in the Takaful Scheme and availing the Guarantee under the TAAP Agreement-I and the TAAP Agreement-II. The total number of participating travel agents according to this list is 320, the figure confirmed by TPL and TAAP during the hearing. The relevant product market being the guarantee or default insurance/takaful for IATA accredited travel agents, the market thus comprises travel agents who are IATA accredited and are required to furnish individual guarantee as per the requirement of IATA-BSP management. During the course of hearing both TPL and TAAP confirmed that the total number of IATA accredited travel agents in the country is around 520. This means that travel agents who are participating in the Takaful Scheme constitute 61% of the total IATA accredited travel agents in the country. These 320 participating travel agents further sell tickets to non-IATA travel agents, which are sold along with the travel insurance. Collective volume of tickets sold with travel insurance by the participating travel agents and non-IATA travel agents who purchase tickets from the participating travel agents constitute a non-insubstantial number of tickets sold with TPL travel insurance and thereby substantially foreclose competition in the market of tied product *i.e.*, travel insurance.
63. **Economic interest of TPL:** The economic interest of TPL is obvious from selling its other line of products. By tying the Passenger Takaful Cover with the Guarantee, the TPL will be able to collect PKR 530 with each international ticket and PKR 265 with each domestic ticket sold by its 320 participating travel agents. Moreover, the following excerpt from

TPL's letter dated 5 November, 2008 written to the SECP confirms the economic interest of TPL in tying the products.

As a result of all these efforts, *we jointly came up with the unique package whereby* the travel agents were to be benefited by way of our Takaful coverage for their contractual liability to the airlines on account of credit passage sales, that was acceptable to IATA; the passengers were to be offered an ideal options to obtain a very sophisticated Takaful protection by way of international travel health and accident coverage extended world-wide, *Takaful Pakistan was to benefit from a significant volume of business most of which was hitherto not even within the domain of the contemporary insurance market, Munich Re ReTakaful was to similarly benefit from a large volume of business emanating from a low insurance penetration country like Pakistan* and IATA was to have their comfort from the instant availability of default liability coverage.³⁸ (emphasis supplied).

64. Since all the five elements of an illegal tying arrangement are proved above, it is held that tying of travel and medical insurance with default insurance by TPL amounts to abuse of dominance in violation of Section 3 of the Ordinance.

65. Now I will address issues 2 & 3 together below.

Issue 2: Whether the Agreements operate to fix the premium for travel insurance to be charged from the customers/passengers and restrict competition in violation of Section 4(2)(a) of the Ordinance.

Issue 3: Whether the Agreements by imposing supplementary obligation on TAAP violates Section 4(2)(g) of the Ordinance.

B. Application of Section 4

66. Section 4 of the Ordinance prohibits undertakings from entering into agreements or in the case of association of undertakings from making decisions, which have the object or effect of preventing, restricting or

³⁸ Third paragraph at page 4.

reducing competition within the relevant market. Section 4 in relevant part is reproduced here below:

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

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

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

...

(g) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature of according to commercial usage, have no connection with the subject of such contracts.

(3) Any agreement entered into in contravention of the provision sub-section (1) shall be void.

67. I will address issue No. 3 first. Imposing supplemental condition is the equivalent of tying arrangement. Tie-in arrangements, historically, have been challenged as prohibited agreements. Consider the following text:

There is an “agreement” component in tie-in offense under Sherman Act § 1 and Clayton Act § 3, but one that most tie-ins easily satisfy. The “contract, combination or conspiracy” that triggers § 1 is obviously present when the buyer promises to take its requirements of the second product from a supplier as an express quid pro quo for being allowed to buy the tying product. More generally, the purchase of the second product is inherently an agreement.³⁹

³⁹ Areeda & Hovenkamp, *supra* note 17 , pp. 17-15 & 17-16.

68. Having dealt with tie-in arrangement above, Issue No. 3 therefore does not require any further discussion here.
69. Turning now to Issue No. 2: whether the Agreements operate to fix the premium for travel insurance to be charged from the customers/passengers and restrict competition in violation of Section 4(2)(a) of the Ordinance.
70. TPL in its letter dated 27th February 2009 TPL states:

*We duly provide our Takaful coverage to each passenger buying air ticket form any of the participating travel agent. We have made special arrangement, at an exorbitant cost to ourselves, by virtue of which, the ticket issuing travel agents have direct access to our web portal round the clock, from any where in the world. Through this portal, they instantly draw out our Certificate of coverage clearly mentioning the name/particular of the passenger, ticket & passport number, etc as well as the extent and scope of coverage provided.*⁴⁰

71. In his letter dated 22 June 2009, Mr. Aziz Nishtar, writing on behalf of both TAAP and TPL stated at paragraph 3:

The agents offer the health and travel accident coverage to their fare-paying passengers **as marketing tool** by adding incremental values to the services already attached with the ticket. He is free to assign those benefits to the opting customers at any price according to the market forces or transfer benefits of such cover to certain other passengers **free of any charge**. However, the participating agent is obliged under the contractual arrangement between TAAP and TPL to pay Rs. 600 for every international passage sold by him.

72. From the preceding two paragraphs, it is clear that for each international ticket sold by participating travel agents, TPL provides takaful cover, for which each travel agent has to pay Rs. 600. Travel agents are passing on travel insurance to select international customers free of charge.⁴¹ Though the agreement between TPL and TAAP is vertical in nature, the

⁴⁰ TPL letter dated 27 February 2009, paragraph 2 at page 4.

⁴¹ For a detailed discussion on the arrangement between TAAP and TPL see paragraphs 54 to 60 above.

effect it has on the travel and medical insurance market is horizontal. Travel agents ought to be competing against each other. Under the TPL/TAAP agreement, all participating travel agents started to offer travel and medical insurance from TPL and that too for free in most instances. This amounts to price fixing.

73. In *Karachi Stock Exchange et al.*,⁴² this Bench defined price fixing as below:

The term “price fixing” includes not only fixing “explicit price” but also agreements to fix a “price element,” which “may include such things as (a) terms of financing; (b) the ‘grace period’ between delivery and payment due date (which is simply a form of financing); (c) discounts, including acceptance of discount coupons; (d) rebates; (e) formula to be used for determining the price, such as relative value scales, and similar arrangements; and (f) a willingness to entertain competitive bids. In sum, ‘price element’ is defined broadly to include any term of sale that can be regarded as affecting the price that the customer must pay, or any mechanism such as a formula by which the price may be computed.”⁴³ (Emphasis added).

74. From above, price fixing means any term of sale that affects the price that the customer must pay. Selling a product for free “affects the price that the customer must pay”, and thus captured by the definition of price fixing.
75. The agreement between TAAP and TPL thus has the object of fixing price of travel and medical insurance. The word ‘object’ as used in Section 4 does not refer to “the subjective intention of the parties when entering into the agreements, but the objective meaning and purpose of the agreement considered in the economic context in which is to be applied.”⁴⁴ Agreements that ‘by their very nature’ restrict competition are

⁴² <http://cc.gov.pk/Downloads/KSE%20Order%2018March.pdf>

⁴³ *Id.* at p. 20-68.

⁴⁴ In the Matter of Karachi Stock Exchange, Lahore Stock Exchange and Islamabad Stock Exchange (File No. 1/Dir(Inv) KSE/CCP/08) (hereinafter the “KSE case”), reliance placed on Whish, *supra* note 38 at p. 110 citing the following cases: cases 29/83 and 30/83 *Compagnie Royale Asturienne des Mines SA and Rheinzinc GmbH v Commission* [1984] ECR 1679, [1985] 1

treated as having that object⁴⁵ and it is unnecessary to prove that the agreement would have any anticompetitive effect.⁴⁶

76. In *Arizona v. Maricopa County Medical Society*, the U.S. Supreme Court held that “a restraint on trade that rarely serves any purposes other than to restrain competition is illegal without proof of market power or anticompetitive effect”, under the usual logic of the per se rule.⁴⁷ The Court further held “the *per se* rule ‘is grounded on faith in price competition as a market force [and not] *on a policy of low selling prices* at the price of eliminating competition.’”⁴⁸
77. The compulsory issuance of takaful cover by TPL for each international ticket sold by TAAP member travel agents and the takaful cover passed on passengers for free, in my opinion, has prevented, restricted and reduced competition in the travel insurance market, and the TAAP Agreements I and II, therefore violated Section 4(2)(a) of the Ordinance.

CMLR 688 paras 25-26; Case C-277/87 *Sandoz Prodotti Farmaceutici v Commission* [1990] ECR I-45; case T-148/89 *Tréfilunion v Commission* [1995] ECR II-1063, para 79.

⁴⁵ The KSE Case, reliance placed on Valentine Korah, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE, (Oxford, Hart, 9th ed. 2007) at p. 74 citing J Faull and A Nikpay (eds), THE EC LAW OF COMPETITION (Oxford, OUP, 1st ed. 1999) at pp. 82-83.

⁴⁶ The KSE Case, reliance placed on Whish, *supra* note 38 at 110, citing *Consten and Grundig v Commission*, Cases 56 and 58/64 [1966] ECR 299, p 342, [1966] CMLR 418, p 473, and *Vds v Commission*, case 45/85 [1987] ECR 299, p 342, [1966] CMLR 418, p 473.

In the U.S., agreements which ‘by their very nature’ restrict competition are referred to as “naked” restraints, *i.e.*, naked in the sense that the restraint “does not accompany any significant integration of research and development, production not accompany any significant integration of research and development, production or distribution,” and they are condemned under *per se* rule, *i.e.*, without inquiring into their effects.

“The definition of naked restraint offered here speaks of the “objectively intended purpose” of increasing price or reducing output. This phrase is used to indicate two things; first, the objectively measured and likely consequence of the restraint is more important than the defendants’ actual state of mind. The purpose of the rule identifying naked restraints is to enable relatively expeditious assessments of restraints, and as a general matter this is best accomplished by avoiding inquiries into the defendants’ actual state of mind. Indeed, the defendants’ state of mind is not even the determinative factor; a restraint might be naked even though it is well intended.”

The KSE Case, see generally, P 19-29 (footnotes omitted).

⁴⁷ 457 U.S. 332, 350-351 (1982)

⁴⁸ *Id.* at p 348.

Issue 4: Whether TPL and TAAP, through its member travel agents, are engaged in deceptive marketing practices by failing to give and/or giving false information to passengers as to the price and/or character of the travel insurance in contravention of Section 10 of the Ordinance.

C. Application of Section 10

78. Section 10 prohibits an undertaking from engaging into such deceptive marketing practices that give false information to consumers relating to price, character of goods. Section 10, in relevant part, is reproduced below:

10. Deceptive marketing practices.-(1) No undertaking shall enter into deceptive marketing practices.

(2) The deceptive marketing practices shall be deemed to have been resorted to or continued if an Undertaking resorts to-

(b) the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods;

79. The Inquiry Officers paid visits to the premises of IATA accredited TAAP member travel agents, in the area of Islamabad but did not find any notice --displayed conspicuously at the sale points of travel agents participating in the Takaful Scheme-- informing customers about the Passenger Takaful Cover that was assured by TAAP to the CAA.⁴⁹ In the absence of any such notice, passengers remain unaware of their right to ask for medical and travel insurance Certificate.

80. Given that for each international ticket sold by participant travel agents, there is a corresponding travel and medical insurance issued by TPL, and that not every passenger was informed of corresponding travel and medial insurance, and that it is inconceivable that the cost of PKR 600

⁴⁹ See paragraph 14(b) above.

paid by travel agent is not in some fashion passed on the customer as part of his ticket price, the travel agents thus attract Section 10(2)(b) by distributing information pertaining to ticket, which lack a reasonable basis related to its price.

81. From the foregoing, I hold that participating TAAP member travel agents are engaged in deceptive marketing and have/are violating Section 10 of the Ordinance.
82. Turning now to assess whether TPL has violated section 10. TPL in its letter dated 27 February 2009 stated:

[W]e [TPL] do have a provision within our travel scheme whereby any passenger may also opt for such coverage wither as an extension to the standard benefits or on stand alone basis. In such cases, the travel agents collect the contribution (premium) amount from the passenger on behalf of TPL.⁵⁰

83. Article 2.3 of the TAAP Agreement-I and Article 2.1 of the TAAP Agreement-II specifically mention that the Passenger Takaful Cover is optional meaning thereby that it can be purchased by any willing customer. “Amaan” Travel Takaful Coverage is the travel insurance policy to be issued with the ticket when travel insurance package is purchased by a customer. Preamble of the policy states that the member of the policy shall be the participant of the Takaful Fund and being a member of the Fund he is acknowledged as a beneficiary. Preamble of the “Amaan” Travel Takaful Coverage is reproduced as under:

This document may be called Participant’s Membership Document (PMD) (hereinafter referred to interchangeably as “contract” or “policy”) as defined in the Takaful Rules, 2005.

Preamble: This is to acknowledge that applicant (hereinafter called the ‘Participant’) as morefully described in the schedule hereto;

⁵⁰ TPL letter dated 27 February 2009, paragraph 4 at page 2.

i. Is accepted as a member of the Participants' Takaful fund (hereinafter called the Fund) operated by Takaful Pakistan Limited (hereinafter called the Company)

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

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

84. A bare reading of Amaan Travel Takaful Coverage suggests that the passengers/customers paying for their travel insurance are the members and the beneficiaries of the Participants Takaful Fund. Therefore, by being the beneficiaries they are entitled to the surplus of the Participants Takaful Fund. On the other hand the TAAP Agreement-I and the TAAP Agreement-II define the Participants Takaful Fund as a fund maintained by the TPL to deposit contributions to be paid by the travel agents. However, there is no provision in the TAAP Agreement-I and the TAAP Agreement-II, which provides for customers/passengers' Participants Takaful Fund when they opt to pay for the Passenger Takaful Cover. Depriving passengers/customers from their lawful right of becoming beneficiary of Participants Takaful Fund when they have actually opted for the Passenger Takaful Cover and made payment for it amounts to deception as to the character of the products purchased by them in violation of section 10(2)(b) of the Ordinance.

V. REMEDY/PENALTY

85. In view of the above, TPL and TAAP have violated sections 3, 4 and 10 of the Ordinance. The TAAP Agreement-II, which is still in force, is hereby declared void to the extent it violates provisions of the Competition Ordinance, 2009. TPL shall cease immediately and desist to

collect contribution from the travel agents in respect of passengers' travel insurance cover in the future.

86. For abusing its dominant position, TPL shall pay a penalty of PKR twenty million. It shall continue to provide TAAP members default insurance/Guarantee at the same rate of contribution *i.e.*, PKR 70 for each international ticket and PKR 35 for each domestic ticket sold by the travel agent, in accordance with paragraph 2 of Schedule A of the TAAP Agreement-II.
87. For fixing price of travel and medical insurance for passengers, TPL and TAAP shall each pay a penalty of PKR ten million.
88. For deceiving customers/passengers, TAAP shall collect from its members and pay a penalty of PKR ten million. TPL is ordered to rectify the Agreement, as it offered to do so at paragraph II. (24) page 16 of its written submissions dated 24 May 2009.
89. If any travel agent wants to offer travel insurance, he should place a notice to this effect conspicuously at his premises.
90. TPL and TAAP both are directed to submit compliance reports within a month. Upon failure to submit their respective compliance reports, TAAP and TPL shall be liable to pay an additional penalty of PKR 200,000 per day of non-compliance.
91. It is so ordered.

(DR. JOSEPH WILSON)
Member

Islamabad the 29th of January 2010.