



BEFORE THE  
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF

SHOW CAUSE NOTICE ISSUED TO

ALL PAKISTAN NEWS PAPERS SOCIETY (APNS)

*On Complaint Filed By*

EVACUEE TRUST PROPERTY BOARD (ETPB)

(F. NO: 61/ETPB/C&TA/CCP/2016)

Date(s) of hearing: 28-11-2016  
20-03-2018  
27-03-2018

Commission: Dr. Shahzad Ansar  
**Member**

Dr. Muhammad Saleem  
**Member**

Assisted by: Noman Amin Farooqi  
Director General (Legal)

Present on behalf of:

Evacuee Trust Property Board  
Complainant Mr. Osama Mehboob  
*Advocate High Court*

All Pakistan Newspapers Society  
APNS Mr. Umer Mujib Shami,  
*Secretary General*

Mr. Mehtab Khan,  
*Chairman Federal Capital Committee*

Dr. Tanvir Ahmed Tahir  
*Executive Director*



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## ORDER

1. This order shall dispose of the proceedings initiated *vide* Show Cause Notice No. 23 of 2016 dated 02<sup>nd</sup> August 2016 (the 'SCN'), issued by the Competition Commission of Pakistan (the 'Commission') to All Pakistan Newspapers Society ('APNS' or the 'Respondent') for *prima-facie* contraventions of clauses (a), (c) & (f) of subsection (2) of Section 4 read with subsection (1) of Section 4 of the Competition Act 2010 (the 'Act').

### FACTUAL BACKGROUND

#### A. PARTIES TO THE PROCEEDINGS:

2. The Complainant is a statutory body established under Act XII of 1975 and manages the evacuee trust properties in Pakistan. Its functions include placement of advertisements related to sale or lease of properties in the newspapers and periodical published in Pakistan. It was alleged by the Complainant Midas Private Limited (Midas), Press Information Department (PID) and APNS have colluded to block its advertisements in all of the newspapers and periodicals at a dispute over recovering payments.
3. Established in 1953, APNS is an association of more than 400 newspaper and periodical publishers spread all over the country. The primary objectives of APNS include protecting the interest of those publishers including certain monetary interests, which are discussed in this order. APNS is, as per the Enquiry Report, an association of undertaking in terms of Section 2(1)(q) of the Act. APNS members are hereinafter referred to as the "*member undertakings*" or the "*member publications*".

#### B. COMPLAINT, ENQUIRY AND SHOW CAUSE NOTICES:

4. On 29<sup>th</sup> February 2016, Evacuee Trust Property Board ('ETPB' or the 'Complainant') filed a complaint with the Commission under Section 37(2) of the Act for alleged violation of Section 4 of the Act (the 'Complaint'). Subsequent to receipt of the complaint an enquiry was authorized.



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5. Summarily, the Enquiry Report examined whether Midas, APNS, and PID have colluded in contravention of the provisions of Section 4 of the Act. The Enquiry Report noted that the accounting and payment disputes between the parties are *sub-judice* before different courts of Pakistan, hence the enquiry will not expound on them. The enquiry committee, therefore, concentrated on whether APNS as a trade association and its member undertakings are acting in contravention of Section 4 of the Act. The Enquiry Report examined the following rules, regulations, and circulars issued by APNS:

- a. *APNS Rules and Regulations Governing Conduct of Advertising Agencies (hereinafter, "APNS Rules" or the "Rules")*
- b. *Special Supplement Rules (hereinafter, "SS Rules")*
- c. *Advertising Rules and Code of Ethics (hereinafter, "ARCE" or the "Code of Ethics"),*
- d. *Rules for the Acceptance of Advertising Business by the Members (schedule B of APNS Memorandum of Association; hereinafter, "APNS-MOU")*
- e. *APNS Circular No. APNS/2013/200 (the "2013 Circular")*
- f. *Rule and Regulations of Media Buying Houses (hereinafter, "MBH Rules")*

6. The enquiry in the matter was concluded *vide* the Enquiry Report dated 27<sup>th</sup> July 2016 (the '**Enquiry Report**'). Enquiry Report found that clause 1 through 9 of APNS Rules deals with accreditation of advertising agencies by its Executive Committee. Based on the analysis of the documents and evidence gathered in the course of investigation, it was concluded that clause 3(a), 3(b), 3(c), 3(d), 4, 4A(iii), 7 (read with para 13 of ARCE), 4A(v), 6 and 9, 4A(iv) pertaining to conditions for accreditation of advertising agency, trade discount, credit terms and handling of government business are, *prima facie*, restrictive and discriminatory in contravention of Section 42(a) and 4(2)(f) read with Section 4(1) of the Act. With regards to fixing of the commission of the advertising agencies, the Enquiry Report further highlighted that clause 4A (iii) and 7 of APNS Rules (and paragraph 12 of ARCE) envisage capping of the commission and clause 10 bars negotiating advertising rates. In the similar vein, the Enquiry Report found that the paragraph 5 of APNS MOU



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bars member publications from offering lower rates, and paragraph 1 of SS Rules also caps trading discount/commission for supplements in contravention of Section 4(2)(a) read with Section 4(1) of the Act. It was further observed that clause 9 of APNS Rules relates to the clearing of payment mechanism and empowers APNS to operate as a clearinghouse on behalf of its members in contravention of Section 4(2)(a) read with Section 4(1) of the Act. If there is any deviation from the aforesaid rules, APNS may impose sanctions and blacklist clients on behalf of its member undertakings and paragraph 12 of ARCE imposes a restriction on direct business between clients and the publication. According to the Enquiry Report, APNS and its member undertaking *vide* 2003 Circular have attempted to coerce the government clients to purchase more advertising space, which *prima-facie* constitutes the imposition of restrictive trading conditions in contravention of Section 4(2)(a) read with Section 4(1) of the Act. Finally, clause 3(c), 3(e), 4, 7 and 14 of MBH Rules relating to accreditation, renewal of registration, restriction on business, fixing of the commission of MBHs were also found in contravention of Section 4 of the Act. The aforementioned clauses may hereinafter be referred to as the “impugned clauses”.

7. Based on the aforesaid findings of the Enquiry Report, the Commission initiated proceedings under Section 30 of the Act against the Respondent by issuing SCNs. The relevant portions of the SCNs are reproduced hereunder:

*“5. AND WHEREAS, in terms of the Enquiry Report in general and paragraphs 23-26 in particular, the relevant market is the market for advertising space in newspapers and periodicals in Pakistan;*

*6. AND WHEREAS, in terms of the Enquiry Report in general and paragraph 28 in particular, the rules, regulations, codes, and circulars of APNS, having been adopted through internal procedures, the decisions of APNS;*

*7. AND WHEREAS, in terms of the Enquiry Report in general and paragraphs 85-91 in particular, there are 18 instances of APNS decisions that amount to price-fixing and/or restrictive trading conditions in prima facie violation of Section 4(1) read with Section 4(2)(a) of the Act and 6 instances of APNS decisions that amount*



*to applying dissimilar conditions in prima facie violation of Section 4(1) read with Section 4(2)(f) of the Act;*

**C. WRITTEN RELIES AND HEARINGS IN PROCEEDINGS UNDER SECTION 30 OF THE ACT:**

8. On being noticed, the Respondent *vide* letter dated 02<sup>nd</sup> August 2016, filed its written reply to the Enquiry Report and the SCN besides making oral submissions on hearings held on 28<sup>th</sup> November 2016, 20<sup>th</sup> March 2018 and 27<sup>th</sup> March 2018.
9. In its written reply, the representative for the Respondent submitted that it is a law abiding organization and is willing to address the concerns raised in the Enquiry Report as it may be advised by the Commission. During the hearing held on 28<sup>th</sup> November 2016, the Secretary APNS reiterated that APNS having a compliance-oriented approach proposes to amend the impugned clauses to the satisfaction of the Commission. In addition, the Secretary APNS submitted draft amendments and rationale to a few of the impugned clauses. The hearing held on 20<sup>th</sup> March 2018 was adjourned due to the absence of the representative for APNS. On hearing held on 27<sup>th</sup> March 2018, the representative for APNS submitted that they have amended the impugned clause for the Commission's perusal. If there are any reservations, they are willing to comply with as their Board Meeting is scheduled for 31<sup>st</sup> March 2018. With reference to the hearing and the commitment made by APNS, an email was sent to APNS by the Office of Registrar on 2<sup>nd</sup> April 2018 inquiring about the Board Meeting and amendments proposed to be made. However, no reply was given by APNS. Thereafter, on 21<sup>st</sup> June 2018 APNS was again reminded to address the concerns communicated during the last hearing. However, again no reply was filed by APNS.

**DELIBERATION AND ANALYSIS**

**A. ISSUES:**

10. On a careful review of the SCN and the Replies filed by APNS and replies filed by the Respondent and other materials on the record, the following issues arise for consideration and determination in this case:



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- I. Whether the Respondent has adopted decisions that tantamount restrictive trade practices and/or price-fixing in the relevant market in contravention of Section 4(2)(a), 4(2)(c) and 4(2)(f) read with Section 4(1) of the Act?
- II. If the answer to the above question is affirmative, whether there exist substantial and reasonable grounds that would mitigate the severity of the consequences attracted by the contravention of the Act.
11. Keeping in view the submissions made before it and the documents submitted, we shall now examine the aforementioned points *in seriatim*.
12. The Bench, at the outset, refers to paragraph 17 of the Enquiry Report which mentions that the enquiry is unconcerned with the parties' accounting/payment disputes which are currently *sub-judice*. Had it been merely a case of penalties for (late) payment of commercial invoices between the parties, the Commission might not have initiated the enquiry under Section 37(2) of the Act. We will, therefore, constrain our assessment *viz.*, the alleged anticompetitive practices within the purview of the provisions of Chapter-II in general and Section 4 of the Act in particular.
13. For the purposes of proper appreciation of applicability of relevant provisions relating to the anticompetitive agreement of undertakings and/or decisions by associations of undertakings, it is useful to consider the various elements of Section 4 in some detail.
14. Section 4(1) of the Act prohibits undertakings from entering into agreements or in the case of association of undertakings (or trade association) from adopting decisions, which have the object or effect of preventing, restricting or reducing competition within the relevant market. Section 4 in the relevant parts is reproduced 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 services which have the object or effect of preventing, restricting or*



reducing competition within the relevant market unless exempted under Section 5 of the Act.

(2) such agreements include, but are not limited to –

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

...

(c) fixing or setting the quantity of production, distribution or sale with regard to any goods or the matter or means of producing any service;

...

(f) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage.

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

15. ***In the matter of Show Cause Notice issued to Pakistan Automobile Manufacturers Authorized Dealers Association (PAMADA) and its Member Undertakings dated 10 April 2015 reported as 2016 CLD 298, the Commission has observed that a violation of Section 4 of the Act may, *inter-alia*, occur through:***
- (i) *an agreement or anticompetitive practices of undertakings*, and/or (ii) *a decision by associations of undertakings*. Therefore, before proceeding with the factual analysis of the alleged contraventions and contentions of the Respondent, the Commission will briefly discuss the status of APNS as an association of undertaking, the concept of agreements/decisions by an association of undertakings, and the relevant market in which its member undertakings are operating on.

***Association of undertakings:***

The Enquiry Report in its paragraphs 20 and 21 notes that APNS is an association of undertakings and its member undertakings are engaged in the business of publishing the newspapers and periodicals across the country. APNS comprises of a General Body and an Executive Committee. Annex-A to the Enquiry Report



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shows that the General Body consists of more than 400 member publications. Its Executive Committee comprises of 35 members with one President, one Senior Vice-President, one Vice-President, one Secretary General, one Joint Secretary and one Finance Secretary. The Executive Committee is responsible for the general management and control of the business, conduct of relations with and between the advertising agencies and member publications as well as dealing with an application for accreditation of advertising agencies. Hence, APNS is a trade association in terms of Section 2(1)(q) of the Act.

***Decisions by the association of undertakings:***

17. For applying Section 4, the existence of an agreement is a *sine qua non*. "Agreement" has been defined in Section 2(b) of the Act to include any arrangement or understanding or practice, whether formal or informal, oral or in writing. Section 4 applies not only to agreements of undertakings, it also applies to the decisions by associations of undertakings. It is a widely acknowledged principle of competition law that the constitution of a trade association is itself a decision. Further, the instruments governing the conduct of an association also constitute a decision. Equally, a recommendation by a trade association, whether or not binding on or compiled by its members, tantamount a decision for the purposes of Section 4 of the Act. In this case, the formation of APNS is stated to benefit the member undertakings engaged in the publication of newspapers and periodicals in Pakistan. APNS and its member undertakings have framed rules, regulations, and circulars, which require the advertising agencies to obtain, *inter alia*, permission/accreditation and trade on certain discounts and conditions before which they could place business with the member undertakings. Therefore, the rule, regulations, and circulars issued by APNS are "decisions" under Section 4(1) of the Act.

***Relevant market:***

18. In paragraph 25, the Enquiry Report has defined the relevant market as the market for placement of an advertisement in newspapers or periodicals across Pakistan. APNS has not contested the said demarcation of the relevant market. In paragraph 28 of PAMADA Order, the Commission has observed that for the purposes of enforcement of Section 4 prohibition, the [precise] definition of the relevant market



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is not a precondition to assess a violation. What matters most establishing a violation under Section 4 is the existence of the anticompetitive agreement of undertakings or decision by an association of undertakings. Therefore, a detailed determination of relevant market for the purposes of assessment of the actual or possible contraventions of the provisions of Section 4 of the Act on the part of the Respondent is not necessary in the present case too.

19. The Commission will proceed now to discuss the alleged contraventions of the provisions of Section 4 of the Act. The issues identified above are addressed seriatim.

***Restrictive trading conditions:***

20. The Enquiry Report in its paragraphs 31 to 41 states that *vide* clause 4(A) of APNS Rules, the association has devised an accreditation process for advertising agencies. The process consists of two stages. At first stage, the agencies are granted “associateship” or “provisional” level accreditation. After one year, the agencies may be admitted as “confirmed” accredited agency provided they are able to furnish:

- i. a list of their clientele, and*
- ii. a guarantee of PKR 1.5 million.*

*Besides, advertising agencies seeking APNS “confirmed” accreditation under clause 3 must:*

- i. have been in active operation as an agency for at least six months prior to application and must have placed the business of PKR 5 million with member publications within the last 12 months (clause 3(a)).*
- ii. have at least five clients (clause 3(b)).*
- iii. furnish a guarantee that the business to be placed by it with APNS member publications during every year of its accreditation would not be less than PKR 5 million (clause 3(c)).*
- iv. have furnished a letter of authorization from the agency's clients indicating their proposed budget for press advertising for the ensuing 12 months (clause 3(d)).*



*Clause 4 further requires that:*

- v. *“The Executive Committee may accept, defer or reject applications for confirmation without assigning reasons thereof. The decision of the Executive Committee of the Society on such applications shall be final and binding on the applicants.”*

21. It has been contended in the Enquiry Report that the accreditation conditions enforced by APNS empower it to control the entry of advertising agencies into the relevant markets. For instance, the clause 3(c) requiring placement of business of PKR 5 million with APNS member publications for over one year period to be eligible for “confirmed,” accreditation amounts to unfair trading practice since the “associate” agencies are given lesser discount/commission than “provisionally” accredited agencies. APNS has unfettered discretion to accept, defer or reject accreditation without assigning any reason. The rules restrict “associate” agencies from handling government business. The Enquiry Report has concluded that these pre-conditions are restrictive of normal trading activity in the relevant market and discriminatory and are therefore in contravention of Section 4(2)(a) and 4(2)(f) read with Section 4(1) of the Act.
22. As justification, APNS has contended that most of the advertising business in the relevant market is transacted on credit. In order to tackle the issue of bad debts, APNS and its member undertakings have devised “*a system of accreditation to advertisement agencies after verifying their business credentials and financial standing and taking certain guarantees from them. Member publications can deal with accredited agencies and extend credit to them with greater ease of mind*” (paragraph 36 of the Enquiry Report).
23. As noted above, Section 4(2)(a) of the Act provides that any agreement of undertakings and/or decision by an association of undertakings imposing restrictive trading conditions is prohibited. However, before moving further, we must clarify that every trade practice which is in restraint of trade may not necessarily be a restrictive trading condition under Section 4(2)(a) of the Act. When a trade practice, especially set out by a trade association provides for benchmarking or standardization of industry practice, which might enable undertakings to test efficiency of their own when compared to that of others, thereby promoting



competition, is not likely to constitute restrictive trading condition, albeit it may be, to a certain extent, in restraint of trade. Nevertheless, it is clear that where a trade practice has the object or the effect, actual or probable, of preventing, restricting or reducing competition it is liable to be treated as a restrictive trade practice.

24. In view of the consideration discussed above and keeping in view the existing facts and circumstances relating to the advertisement publishing in the print media market in Pakistan, we are of the considered opinion that the rules, regulation, and circulars issued by APNS are decisions by APNS and its member undertakings, having actual or probable effect of diminishing or preventing competition in the relevant market. To operate in the relevant market, the advertising agencies have to procure APNS accreditation for several aspects. The process of accreditation devised by APNS, its unfettered discretion to accept, defer or reject accreditation applications, allowing different credit terms for the same business, putting of extraneous conditions of minimum amount of prior business and guarantee of future business as well as the constraints imposed on the placement of government business by non-accredited agencies, among other things, are simply not the functions of a trade association and in this case they are clearly devoid of any redeeming virtue. We therefore conclusively found them to be anticompetitive in contravention of Section 4(2)(a) and Section 4(2)(f) read with Section 4(1) of the Act.

***Fixing of trade discount/commission:***

25. The Enquiry Report in its paragraphs 42 to 50 has noted that the advertisement agencies carry out business transactions on price margin/commission basis with the APNS member publications.
26. The Enquiry Report has found that under clause 7 and 4(A) (iii) of APNS Rules, the advertising agencies who are accredited with APNS are offered a 15% discount, plus 5% extra if the business is on a cash basis. While associate agencies are to be offered a maximum trade discount/commission of 14% and non-accredited agencies are not offered a discount exceeding 6.5% - on advance cash payment. Further, Clause 10 of the APNS states that "all accredited agencies shall accept



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and release business at the scheduled rates of member publications and any effort to negotiate for lowering the rate shall be treated as a violation of the Society's rules".

27. Similarly, paragraph 5 of APNS MOU prohibits member publications to "accept business at rates lower than its scheduled rates except for charitable organizations. Any change in the scheduled rates shall be notified to the Society one month before such change is enforced". If an advertisement is placed in a special supplement, paragraph 1 of SS Rule further requires that "the sponsoring agency of a special supplement will be required to provide authority letter of the clients and undertaking by the agency to share 50% of trade discount, not exceeding 15% of the invoice with participating agencies on the advertisement contributed by them in the supplement at least 7 days before the date of the supplement".
28. In view of the Enquiry Report, trade discount/commission capping policy envisaged by APNS amount to fixing prices in contravention of Section 4(2)(a) read with Section 4(1) of the Act. APNS has argued that advertising agencies, one the one hand, could place an advertisement that offers it the highest trade discount and are free to fix their advertisement rates, but on the other hand, APNS is capping the trade discount/commission that can be offered by a member publishing. According to the Enquiry Report, these practices result in lowering of price competition amongst its member publications. In addition, clause 10 of APNS Rules is intended to eliminate the possibility of negotiating trade discount/commission. Else, their accreditation is canceled.
29. APNS was asked to explain the rationale to fixing of agencies commission. In its submissions, APNS stated that the financial guarantees and other formalities are meant to ensure creditworthiness of the advertising agencies. Furthermore, APNS submitted that "*there is no anticompetitive element involved as all member publications are free to fix their own advertisement rates and are free whether to extend discount or not*" (Paragraph 45 of the Enquiry Report).

30. During the proceedings, APNS has not challenged the findings of the Enquiry Report viz., capping of trade discount/commission of advertising agencies and barring their negotiating capacity, among other things. Before analyzing the



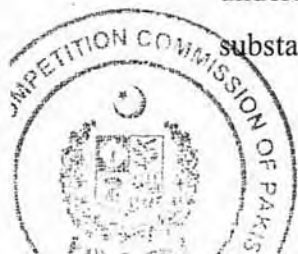
impugned clauses and the findings of the Enquiry Report, we consider it pertinent to discuss the concept of price-fixing in the context of Section 4(2)(a) of the Act.

31. The decisions adopted by APNS in relation to trade/discount and commission offered to advertise agencies appear to be the result of horizontal agreements between APNS and its member undertaking. The agreements eliminate price competition among the rival undertakings. On this point, the Commission, *in the matter of Show Cause Notice issued to Karachi Stock Exchange et al., dated 18 March 2009 (KSE Order)*, has described the concept of “price-fixing” as follows:

*46. [...]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 (emphases added).*

*47. Thus “explicit price” of any good or service is a function not only of nominal price, but also of credit terms, applicable discounts, rebates, terms of delivery, and the like.*

32. In view of the foregoing, price-fixing means any term of sale or purchase that may affect the price competition in the market. Even selling a product for free might affect the price that the customer must pay and thus capture by the notion of price-fixing. Therefore, agreements of undertakings or decisions by the association of undertakings to fix prices are universally condemned as they are deemed to substantially lessen or restrict competition in breach of Section 4 of the Act.



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33. The question to be decided in this case is whether the fixation of trade discount/commission for advertising agencies by APNS amounts to price-fixing in contravention of Section 4(2)(a) of the Act. However, before considering whether this reasoning is applicable to the case in point, we would like to highlight that in every business, marketing products, and services, offering discounts and rebates are one of the key considerations for market players, including the end-consumers. Without the system of trade discount and price margins or commissions led by market forces that drive economic growth, the market players may not survive, which is likely to result in economic inefficiencies and ultimate consumer's detriment.
34. By fixing trade discount or commission for the agencies and barring price negotiation between the advertising agencies and member publications, APNS has directly or indirectly become a forum for member undertakings to agree on commercially sensitive matters which have as their object or effect that amounts to fixing of prices in contravention of Section 4(2)(a) read with Section 4(1) of the Act. We, therefore, reject the argument of APNS that "*...all member publications are free to fix their own advertisement rates and are free whether to extend discount or not*" noted in paragraph 27 above. Furthermore, we observe that any recommendation by APNS, even if it has no binding effect, which may affect the price or non-price competition between the advertising agencies and between advertising agencies and the member publications and others, shall not escape Section 4(2)(a) prohibition.

***Operating a clearing system on behalf of its member undertakings:***

35. The Enquiry Report in its paragraphs 51 through 62 has revealed that APNS has devised a debt/payment clearing system which appears to be anticompetitive in terms of Section 4(2)(a) read with Section 4(1) of the Act. Briefly, APNS allows its accredited advertising agencies a 75 day credit period. Under clause 9 of APNS Rules, its calendar is divided into twelve monthly periods and in case of non-payment, a member publication can lodge a complaint against an advertising agency on the 15<sup>th</sup> day of the payment month upon APNS may grant a grace period of 7 days after the payment is overdue.



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36. APNS action against the defaulting advertising agency consists of three stage. At first, APNS will initiate an action on the 23<sup>rd</sup> day of the payment and suspend the agency's accreditation status. Upon complaint, the defaulting advertising agency is given 4 weeks to pay off the balance and APNS would impose 1% Late Payment Surcharge (LPS) on the overdue payment till it reaches 4%. APNS would also ½% of LPS and pay off the balance to member publication. In the second stage, a member publication who had not lodged a complaint on the 15<sup>th</sup> day could do so on the 22<sup>nd</sup> day of the month. In such a case, APNS would charge 1% of the total LPS. If a member publication is not able to lodge a complaint on the 22<sup>nd</sup> day, it could do so on the 29<sup>th</sup> day, APNS share of LPS would be 2%. Upon formal request of the defaulting advertising, APNS can grant an extension of 1 to 60 days. If a defaulting agency request for an extension of up to 15 days, APNS Office Bearers Committee has the discretion to grant such an extension. However, if a request is made for up to 30 days or 60 days, the major claimants are consulted and the extension is granted with the consent of 50% and 75% of claimants respectively. When a member publication does not consent to a 60 days extension, APNS will force the defaulter, to pay off its balance immediately. In addition, APNS has a dispute resolution mechanism in place to resolve disputed bills. According to the Enquiry Report, once a complaint is filed with APNS, the member publications are not allowed to receive any payments from the defaulting agency but only via APNS. In addition, the member publications cannot unilaterally withdraw their complaints or allow any extension to the advertising agencies on their own. Therefore, dictating such rules is beyond the scope of an association and such matter should be left up to the client and service provider.

37. APNS has submitted that clause 9 of APNS Rules “*provides a mechanism and guidelines so as to avoid fraud and malpractice. It further ensures that payments for advertisements are made in a timely manner while providing a certain cushion period (75 days credit facility) to all advertising agencies. It may be noted that the said procedure is in consonance of standard business practices and is an effective method to increase business efficacy in our field*” (paragraph 58 of the Enquiry



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38. We have carefully examined the above rules and the underlying rationale submitted by APNS and find that the submissions made by APNS are devoid of merit. It has failed to provide any economic justification or positive correlation between the functions of an association and governing the conduct of business viz., pricing and credit evaluation that involve or affect members and other undertakings. Instead of encouraging members to handle their pricing activities on their own as a normal business conduct, APNS has created a de facto price alliance between its member undertakings. Credit dispute being commercial/legal matter can unquestionably be accounted for by individual undertakings. No association must adopt a decision or set mechanism to do so. We are of the considered opinion that this practice of APNS amounts to governing freedom of the trading activities from the advertising agencies and the member publications both, hence is anticompetitive in contravention of Section 4(2)(a) read with Section 4(1) of the Act.

***Sanctions for violation of APNS Rules:***

39. The Enquiry Report in its paragraphs 63 through 69 has further revealed that vide Clause 14 “Violation of Rules Fines/Penalties” of APNS Rules, APNS has evolved a system of sanctions imposed on the advertising agency and clients in contravention Section 4(2)(a) read with Section 4(1) of the Act. The relevant parts of clause 14 are reproduced hereunder:

*“No accredited agency shall act against the directives of APNS or be involved in releasing business of its clients through some other agency or approach any other forum against the decisions of APNS arbitration. In case of violation, APNS would take punitive action including fine, penalty, or suspension of business”.*

*“No accredited agency shall accept the business of a client list by APNS with an agency whose accreditation/associateship has been suspended or withdrawn unless it has secured clearance from APNS”.*

*“The advertising agencies shall not release the advertisements of blacklisted clients and/or blacklisted agencies, advertisements of a*





*listed client of accredited/associated agencies through any source whether directly or by clients”.*

40. APNS has stated that clause 14 empowers to act as a forum for an alternative dispute settlement in the relevant market. The Bench finds that APNS is not simply a forum for dispute resolution. Its plenary powers to blacklist and penalize clients and advertising agencies, among other things, cannot be justified as a legitimate function that may be performed by a trade association. APNS letter/circular dated 28 January 2016 restricting its member publications and the advertising agencies to block the placement of advertisements of ETPB is one of the examples. We, therefore, find that clause 14 restrictions stifle competition and impede the development of the market in contravention of Section 4(2)(a) read with Section 4(1) of the Act.
41. Furthermore, we are of the considered opinion that clause 14 also has the potential to enable APNS and its member publication to organize collusive/collective boycotts and place pressure on other undertakings such as the clients and the advertising agencies, which is a form of output restriction, and thus, anticompetitive by object, in contravention of Section 4(2)(c) read with Section 4(1) of the Act.

**Restriction on direct business and APNS Circular APNS/2013/200:**

42. Paragraphs 70 through 75 of the Enquiry Report further show that APNS has placed a stringent restriction on direct business between clients and the member publications. Paragraphs 12 and 15 of ARCE is reproduced hereunder:

*“Member publications shall not favour direct advertisers by giving them better facilities such as lower rates, longer credit period, preferential positions, trade discounts and supplying artwork at nominal rates”.*

*“The members of the society shall be free to approach clients of advertising agencies for the purpose of procuring advertisement business. However, all such business shall be routed through the appointed agency and the agency will be entitled to trade discount,*



*not exceeding 15% of the invoice, if client list under the agency, as per the Rules of the Society”.*

43. Thus, by virtue of the above rules, APNS is an undisputed position to dictate the member publications whether or not to entertain a direct client and negotiate business terms with them on the one hand, but they are free to approach the clients directly on the other hand. However, still, if they approach the clients directly, they are restricted to route the business through the appointed agencies.
44. In addition, APNS *vide* the 2013 Circular has intimated its member publications to not accept government business because it has decided to publish its tender notices on websites. The relevant parts of the 2013 Circular are as follows:

*“We have to inform you that the Executive Committee of the APNS at its meeting held on September 19, 2013 has noted with grave concern that the Federal Government has decided to issue tender notices on websites which tantamount to deprive the print media of a sizeable quantum of advertisements and also curtail the information from the prospective bidders of their access to such of their access to such important public information. The Executive Committee has decided to advise member publications, not to a publication containing the information to visit the website for display of tender notices, etc.*

*The member publications are hereby advised in their long-term interest not to publish any advertisement which does not give the information/material of a notice (tenders, bids, prequalification, job opportunities, auctions, etc) but states to visit the website of the issuing authority for details of the notice. In case of any confusion, the member may contact the APNS Secretariat for advice”.*

45. As per the Enquiry Report, the above clause restricts the individual publications to decide the terms and conditions on which they transact business with clients and agencies. APNS as an association cannot dictate whether a direct business can be handled by publications. It appears that no permitting any trade discount is a form



of price-fixing while denying longer credit terms and preferential positions are restrictive trading practices. Furthermore, APNS is engaged in coercing its member publications as well as government clients to purchase more advertising space in contravention of Section 4(1)(a) read with Section 4(1) of the Act.

46. Based on the analysis of the evidence presented in the Enquiry Report and submission of the Respondent, we observe that in a market economy business are free to set their prices and discount their goods and services as they deem fit. Business undertakings must set their prices and all other terms of doing business independently of their competitors and trade association if any. APNS or any other trade association cannot *inter-alia*, direct or dictate the modes of doing business to its member publications and the advertising agencies, and the black-listing of clients, relaying direct clients via advertising agencies. The aforesaid rules and circulars issued by APNS and practices adopted by it are restrictive and anticompetitive in nature in terms of the provisions of Section 4(2)(a) read with Section 4(1) of the Act.

***Rules and regulations for registration and conduct of MBH:***

47. According to Rule 1 of MBH Rules, “a media buying house (MBH) is an independent legal entity registered with Registrar of Joint Stock Companies as a company having a separate registered office. Its core business will be that of planning, negotiating, buying and releasing advertising for a client or a bifurcated client (that client which has been listed with APNS as a bifurcated client) of an accredited advertising agency”. The Enquiry Report in its paragraphs 76 to 80 has highlighted that APNS have envisaged certain mandatory rules for MBH to do business in Pakistan. These are:

- i. ***Accreditation:*** *As per the Enquiry Report, an MBH intending to do business in Pakistan has to seek APNS accreditation which inter-alia requires: (i) appointment letter by at least three APNS listed clients (clause 3(c))*

ii. ***Renewal of Registration:*** *An MBH is required to pay a sum of PKR 100,000 along with a list of its clients and the quantum of business*



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*placed by it by to the member publications during the preceding years (clause 4)*

iii. **Restriction on Business:** *An MBH may plan, negotiate and release business of only those private clients, which are already listed with it. The clients will be required to place a minimum business of PKR 5 million per annum in print media and it shall not release business on behalf of non-accredited advertising agencies or of non-listed clients to APNS member publications (clause 7).*

iv. **Fixing of Commission:** *A rate of commission of 15% is fixed out of which the MBH may retain a maximum of 3% and pass on the rest to the concerned listed brand agency (clause 14).*

48. A careful perusal of the above rules suggests that no company can effectively engage in the business of print media advertisements unless it has been accepted by APNS. The association is virtually controlling all aspect of the advertising business in Pakistan. In the light of overwhelming evidence on record, there is no direct or indirect evidence to rebut the findings of the Enquiry Report. We therefore are of the considered opinion that the activities of the member publications and rules, regulations and circulars issued by APNS are arbitrary and discriminatory resulting in limiting and restricting and preventing the organic evolution of the competitive fabric of the relevant market in contravention of Section 4(2)(a) read with Section 4(1) of the Act.

### **REVISIONS TO IMPUGNED RULES OFFERED BY APNS**

49. On 25 June 2018, APNS has submitted its rational to the impugned clauses and proposed an certain amendments, which are as follows:

#### ***Rational to Clause 3(a)***

*According to APNS "the condition of placement of business of Rs. 5 million for a non-accredited agency applying for accreditation is required to establish by the applicant that it has been operational as an advertising agency and is an active business entity.*



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However, the APNS agrees to amend the Clause by replacing “Rs. 5 million” to “a considerable amount”.

**Rational to Clause 3(b)**

“A non-accredited agency must have a clientele for placement of business in member publications to be granted accreditation hence, the requirement of minimum five clients. However, the APNS may amend the Clause as directed by the CCP”.

**Rationale to Clause 3(c)**

“The accreditation is granted to applicant agency to avail credit facility in member publications to secure a credit accorded by members hence, a guarantee is required through the amount covers a part of the credit. However, the APNS agrees to amend the Clause as directed by CCP”.

**Rationale to Clause 3(d)**

“The undertaking from clients for placing business through the applicant agency is meant to ensure that the agency has a solid clientele. However, the Clause may be deleted as it is not operational in practical terms”.

**Rationale to Rule 4**

“The authority given to the Executive Committee is to accept or reject any application for accreditation is meant to ensure that only those agencies be accredited which have a good track record of business during their operation as a non-accredited agency. If any agency fulfills the requirements but had indulged in unethical or un-businesslike practices, the Executive Committee may reject the application. No agency may be given credit facility which has an objectionable track record in the market. However, the APNS may amend Clause as advised by CCP while taking into the above APNS rationale”.



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***Rationale to Rule 4(a)(iv)***

*“The government advertisement is the main source of income of member publications especially medium-sized, smaller and regional publications. The associated agencies having placed a nominal security of Rs. 1.5 million, cannot be allowed to handle government advertisements as being a small business entity, they cannot pay the dues of member publications from their own as government advertisers do not pay their bills in two months of the advertisement. However, there is no bar for advertising agencies to obtain provisional accreditation. If any agency intends to deal with government clients, it may apply for provisional accreditation instead of Associateship. In this regard, Rule 4 has been amended to provide a choice for an applicant agency to apply for Associateship or provisional accreditation”.*

***Rationale to Clause 4(a)(v)***

*“The difference in credit terms between associateship, provisional accredited and accredited agencies is based on their performance and period of relationship with APNS member publications. Associate agencies are required to place smaller amount of business i.e. Rs 1.5 million before application whereas provisional accredited agencies are required to place a minimum of Rs. 2.5 million to qualify the accreditation. Further, the associate agencies have to deposit a bank guarantee of Rs. 1.5 million whereas the provisional accredited agencies provide a bank guarantee of Rs. 2.5 million, hence, the difference between two categories on business and security. The credit facility for accredited agencies compared to associated and provisional agencies depends on the performance of the later two categories during the probation period of one year. If an agency’s performance during the period is satisfactory, its accreditation confirmed and its credit facility is increased in recognition of its performance. However, the APNS is ready to suitably amend the clause as advised by CCP while keeping into*



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account the APNS rationale for different categories of relationship”.

**Rational to Clause 6** *As commented under Clause 4(a)(v)*

***Rationale to Clause 9***

*The provision is inserted in the rules to update the Secretariat of the business placed by government clients through the respective agencies and their outstanding dues against clients so that APNS may facilitate in the recovery of dues. If a client does pay the dues for business placed, it may not be extended further credit till the outstanding dues are cleared.*

***Rationale to para 12***

*Having withdrawn para 13, the preceding para 12 becomes redundant. The APNS agrees to delete the paragraph from Code of Ethics.*

***Rationale to Clause 14***

*The clients are only blacklisted for placement of advertisement in member publications on the complaint of default by agencies duly verified by the APNS. A defaulter client cannot be allowed for further credit till it clears the dues.*

***MBH***

***Rationale to Clause 3(c) – Media Buying House***

*This clause requires appointment letter by at least three clients for applying registration of a Media Buying House. The MBH is a larger business entity advertising agencies as it normally handles major multinational clients, hence the clause does not affect competition as there is no bar on non-registered MBH to operate in the market.*



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#### ***Rule 4 – Media Buying House***

*If a Media Buying House is registered with the APNS, it requires to renew its registration every year so that the Society may examine if the entity is functional and operative. The clause does not affect competition in the market.*

#### ***Rationale to Clause 7 – Media Buying Houses***

*The restriction of placing business of listed clients is required to ensure that the Media Buying House is negotiating, buying and releasing business of a client that has appointed it for the purpose. The clause does not affect competition in the market.*

### **REMEDIES/PENALTIES**

50. It is pertinent to mention that the Commission is cognizant about the existence of trade associations and the positive role which they might play in a market economy. The Commission will reiterate its position previously taken in **2016 CLD 289** and in its Order **in the Matter of Show Cause Notice issued to M/s Pakistan Poultry Association dated 16 August 2010**. The Commission has observed as under:

*“We believe that trade associations can play an important role in the development of the sector they represent. The Commission has already observed in its ICAP final order that the most important aim of the association is to develop consensus amongst its members regarding public policies that affect the sector. Associations also engage in activities that increase awareness of industry standards and technologies in the industry. At other times, associations may also serve as a platform to share useful information about the sector such as useful historical pricing data, [which, for instance, might help members to know where their business concerns are less efficient]. However, associations must also be extremely careful about what sort of activities may violate competition law. Discussion, deliberation, and decisions regarding purely [commercial matters] like current and future pricing, production and marketing are anticompetitive and should be avoided at all*





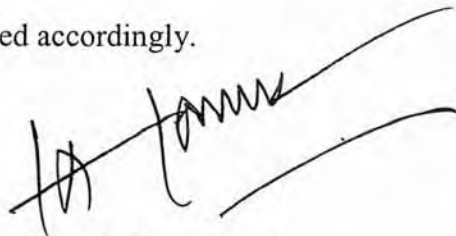
*costs by the associations. Associations have a responsibility to ensure that their forum is not used as a platform for collusive activities. The rule of thumb is not to allow discussion, deliberation or sharing of sensitive commercial information that may allow members, who are competitors, to coordinate business policy [in any manner]. Ensuring that everyone or anyone, member has a profitable business is not the job of an association”.*

51. In addition to the above, we would highlight that advertising/marketing in a free market is an indispensable component of the competitive process. One key aspect of competitive advertising market is that the undertakings engaged in this process should function efficiently and be free from restrictive practice which might lessen competition. Let the market forces determine competitive fabric of the market in terms of price and non-price price competition at all levels of the industry.
52. Having said that we find that even a cursory glance at the rules, regulations, and circulars issued by APNS disclose that unless an undertaking is a member of APNS, it cannot have any normal commercial relationship with the other members of association, creating economic, structural and legal barriers to entry in absolute terms in the relevant market. Trade association should
53. In case of a violation of Section 4 “prohibited agreements” of the Act, the Commission is empowered, inter alia, to impose a fine under Section 38 and annul the agreement and to issue a cease and desist order under Section 31 of the Act.
54. After considering all the facts and material available on record, we hereby hold that the above discussed impugned clauses are anticompetitive in contravention of Section 4(2)(a), 4(2)(b) and 4(2)(c) read with Section 4(1) of the Act and therefore declared void annulled with immediate effect.
55. Considering the findings elucidated in the earlier parts of this order, we hereby directs the Respondent i.e. APNS and its office bearers to cease and desist from indulging in the practices which are found to be anticompetitive in the preceding paragraphs of the order. Therefore, we hereby, annul all of the above rules, regulations, and circulars issued by APNS.



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56. With regard to penalty under Section 38 of the Act, we are of the considered view that the said anticompetitive conducts require to be penalized to cause deterrence in the future among the erring entities. However, the Commission recognizes the Respondent's cooperation and compliance-orientated approach as the mitigating factor and imposes a penalty of PKR 10,000,000/- (Rupees Ten Million Only).
57. APNS is directed to submit a compliance report in terms of this order in general and paragraph 50 *supra* with the Office of Registrar of the Commission within 60 (sixty) day from the date of issuance of this order. Subsequently, APNS may formulate new rules, regulation and circulars in compliance with the provisions of Chapter II of the Act and shall promptly seek exemption under Section 5 read with Section 9 of the Act.
58. In the event, APNS fails to comply with the directions given above within the time period specified and continuing contravening the Act in any manner, it shall be held further liable under Section 38 of the Act resulting in the imposition of financial penalties in the amount of PKR 25,000,000/- (Rupees Twenty Five Million) and an additional penalty PKR 1, 00,000/- (Rupees One Hundred Thousand) per day, from the date of passing this order.
59. In terms of the above, the SCN is hereby disposed of.
60. Ordered accordingly.



(Dr. Shahzad Ansar)  
*Member*



(Dr. Muhammad Saleem)  
*Member*



Islamabad, the 6<sup>th</sup> day of December 2018.