BEFORE THE
COMPETITION COMMISSION OF PAKISTAN
IN THE MATTER OF

SHOW CAUSE NOTICE ISSUED TO

INSTITUTE OF CHARTERED ACCOUNTANTS OF PAKISTAN (ICAP)
(F. NO: 1(52)/ICAP/C&TA/CCP/2012)

Dates of hearing:	October 4, 2012 November 1, 2012 November 16, 2012 November 27, 2012
Present:	Ms. Rahat Kaunain Hassan **Chairperson** Mr. Abdul Ghaffar **Member** Dr. Joseph Wilson **Member**

On behalf of:

Institute of Chartered Accountants of Pakistan (ICAP)	Mr. Ahmed Saeed, President Mr. Abdullah Yousaf, Member Council Mr. Yaqoob Satttar, VP (South) Mr. Naeem Akhter Sheikh, VP (North) Mr. Shoaib Ahmed, Secretary Mr. Salman Akram Raja, ASC Mr. Sameer Khosa, Barrister, Ms. Amna Hussain, Advocate Mr. Malik Ghulam Sabir, Advocate
M/s. ACCA Pakistan Ltd	Mr. Arif Masud Mirza, Head of ACCA Pakistan Mr. Haroon A. Jan, Head of ACCA Lahore Mr. Rehan Uddin, Head of ACCA Karachi Ms. Noor Ulain, Head of ACCA, Islamabad

1. This order shall dispose of the proceedings initiated pursuant to the Show Cause Notice No 105/2012 dated 17 September 2012 (the '**SCN**') issued to the Institute of Chartered Accountants of Pakistan (**ICAP**) for the *prima facie* violation of Section 4 of the Competition Act, 2010 (the '**Act**').

2. The SCN was issued against ICAP primarily on the basis of the directive bearing no. ICAP\DET\001855\1174 dated 4 July 2012 (the '**July Directive'**) whereby ICAP prohibited its members and chartered accountant firms from training non-ICAP accountancy students. The said directive was alleged to be *prima facie* in violation of Section 4 of the Act as it appeared to have had the object or effect of preventing, restricting or reducing competition. However, ICAP among other grounds maintains that pursuant to the subsequent directive dated 24 October 2012 (the '**October Circular**'), the prohibition was further narrowed down only to such members and accountancy firms who are approved training organizations of ICAP, which renders the SCN without basis.

Background and Facts

3. ICAP issued the July Directive wherein ICAP advised all the chartered accountancy firms as well as its members to *...refrain from engaging trainees of other accounting bodies, particularly trainees of foreign institutes of chartered accountants or any other accounting body of similar nature.*

4. Concern was raised before the Commission informally from the affected students pursuing membership of other accountancy bodies contending that

the July Directive is barring them from receiving training required for their profession.

5. The Commission, taking cognizance about the potential violation of the Act, wrote to ICAP on 16 July 2012, to ascertain the rationale behind the imposition of the bar under the July Directive on training of non-ICAP students. The Commission was particularly concerned that the July Directive could result in the foreclosure of chartered accountants firms as means of training to non-ICAP students in the field of accountancy.

6. ICAP in its reply dated 12 September 2012 submitted that:

    a. *ICAP only approves chartered accountant firms as 'training organizations' under the Ordinance [Chartered Accountants Ordinance, 1961] if the same comply with and fulfill the requirements of the Ordinance and for the purpose to provide training to 'students' which are registered with ICAP. These approved training organizations can take any person for training but such person needs to be registered with ICAP as a student. Chartered accountant firms which are not approved 'training organization' of ICAP may employ/train any person. However, if such person performs work which is regulated by ICAP under the Ordinance, then ICAP can ask such person or the chartered accountant firm to comply with the Ordinance in order to regulate them; and*

b. *If a person, including a student of a foreign accountancy body, fails to meet the eligibility criteria to work as a trainee in the 'training organization' approved by ICAP, he cannot be equated with student of ICAP who meets the eligibility criteria. ICAP is authorized under the Ordinance to require minimum education from any person to work as trainee/student in the 'training organization' approved by ICAP and regulated under the Ordinance. Requiring minimum education to work as trainee in the training organization' could not be taken as an 'entry barrier' for students of foreign accountancy bodies who are not qualified to be the trainees in the 'training organizations' regulated by ICAP under the Ordinance; and*

c. *ICAP fully recognizes its responsibilities towards the students of foreign accountancy bodies who are pursuing foreign qualification in Pakistan and desire to obtain training in ICAP's approved 'training organizations'. Considering this, ICAP does not want to shut its door for such students provided they comply with the eligible criteria prescribed under the Ordinance and the Bye Laws made their under related to 'students' of ICAP*.

7. The Commission did not find the reply addressing the concerns of the Commission and issued the SCN to ICAP to clarify its position. As per the SCN, the comments received from ICAP, *prima facie*, failed to give any reasonable justification for the issuance of the July Directive and also failed

to address the concerns raised by the Commission for the imposition of such bar on its members. In addition, whereas the July Directive, in unambiguous terms, prohibited all members and chartered accountant firms of ICAP from giving training to non-ICAP students, the reply implied that '*Chartered accountant firms which are not approved 'training organization' of ICAP may employ/train any person'.*

8. On 24 September 2012, the Association of Certified Chartered Accountants (**ACCA**) filed an application for intervention stating that its students, required mandatory professional training to obtain membership and the July Director prohibited accountancy firms in public practice from providing this service to its students. The application was allowed and permission was granted to ACCA to become a party to the hearing.

9. On the first hearing scheduled for 4 October, ICAP requested, based on its recent elections, for a months adjournment to internally deliberate on a proposal that would address the competition issues raised by the SCN. ICAP also explained that the July Directive was required to curtail the decline seen in the training of ICAP students at public practice firms, and to ensure the quality of training being imparted. As amicable solution in the given issue was desirous and a preferred option the adjournment was allowed. The Commission granted a three weeks adjournment with the consent of the parties and scheduled the next hearing for 01 November, 2012.

10. In addition, the Bench required the parties to submit further information to clarify their position. ACCA and ICAP filed their responses on 17 and 24 October 2012, respectively.

11. ICAP also filed a preliminary reply dated 31 October 2012 along with the October Circular. The October Circular purportedly narrowed down the prohibitions only to those members and accountancy firms which are approved training organizations of ICAP. In its preliminary reply, ICAP's submissions were essentially as follows:

    a. due to the issuance of the October Circular, the SCN has lost its basis;

    b. the information requested in the Commission's questionnaire shows that the fact-finding is incomplete and hence the SCN is unwarranted;

    c. the SCN does not define the relevant market;

    d. the SCN wrongly treats trainee students as providers of accounting services;

    e. Section 4 of the Act only covers agreements and decision in respect of the 'provision of services'. It is clear that in so far as students are the providers of services, no decision has been taken in respect thereof. Decision with respect to acquisition of service, including acquisition of services by under training accountancy students is beyond the scope of the Act;

f. ICAP is not an association of undertakings but is a statutory body created by Chartered Accountants Ordinance 1961 (the '**CA Ordinance**') and has the lawful right to regulate its 'training organizations';

g. all professional bodies, such as ICAP, have the right to determine the content, quality and manner of training to be received by students pursuing qualification and membership of such bodies. Students of foreign bodies have never been allowed to work as trainees;

h. other accountancy bodies such as ACCA are free to choose employers other than ICAP's approved training organizations; and

i. those non-ICAP students who fulfill the criteria in the CA Ordinance and bye laws can register with ICAP and be eligible for training at ICAP's approved training organizations.

12. ICAP filed further comments on 16 November 2012. It contended that:

a. other professional bodies such as ACCA have ample choice available for training ranging from commercial organizations to ICAP member firms that are not registered as ICAP training organizations;

b. no qualification granting body can commandeer the qualification granting capacity of another qualification granting body and it is preposterous for ACCA to demand that ICAP is under a legal obligation to allow ACCA to swamp its training organization to the detriment of ICAP students.

13. The answers to the Commission's questionnaire, ACCA also filed its comments regarding the October Circular on 13 November 2012. According to ACCA:

    a. the regulatory oversight of ICAP is restricted only to their 'training organizations' contractual relationship with ICAP students only and cannot be extended to non-ICAP students;

    b. the October Circular merely reinforces the purpose of the July Directive i.e. to prevent ICAP firms from offering training services to non-ICAP students, which is detrimental for competition;

    c. requiring non-ICAP students to register with ICAP increases the economic and academic burden on former and will unfairly persuade them to choose alternate qualifications;

    d. ICAP's actions will restrict international accountancy firms' ability to operate in Pakistan by affecting how they can hire in Pakistan.

14. In addition, the Commission sought the opinion of the Institute of Chartered Accountants of England and Wales (**ICAEW**) and the Chartered Institute of Management Accountants (**CIMA**) on the subject issue.

15. ICAEW provided its comments through a letter dated 22 October 2012, stating that:

a. there is a strong demand from practice and business to ensure that they are able to develop their staff in order to be able to compete internationally;

b. there is a significant demand from school leavers and graduates in Pakistan to gain an internationally recognized professional qualification;

c. ICAP's directive appears to place protectionism above both the professional and national interests and we would suggest that these are better served by strengthening the profession in Pakistan through maintaining an open environment to encourage continual investment and improvement.

16. These comments were also provided to ICAP vide Commission's letter dated 19 November 2012. Most of the information requested from the parties was also furnished to the Commission.

Issues

17. In the given facts, the primary issues that require determination are:

a. Whether the July Directive issued by ICAP can be termed as a decision of an association of undertakings?
b. Whether with the issuance of the October Circular, the SCN has lost its basis?; and if not
c. Whether the July Directive, read with the October Circular, is a decision in relation to provision of services and is anti-competitive in terms of Section 4 of the Act?

Nature of July Directive

18. In order to address the first issue, we need to look at the nature of the July Directive to determine whether it is a decision by an association or not. In 2009, while considering a price fixing directive issued by ICAP (*In re: Institute of Chartered Accountants of Pakistan*) we held that ICAP is an association of undertakings regardless of its public law nature. We followed the principle laid down in Wouters v Algemene Roaad can de Nederlandse Orde can Adcovaten (C-309/99) ECR I-1577 (hereinafter '*Wouters*'), wherein it was observed:

> *58 When it adopts a regulation such as the 1993 Regulation, a professional body such as the Bar of the Netherlands is neither fulfilling a social function based on the principle of solidarity, unlike certain social security bodies (Poucet and Pistre, cited above, paragraph 18), nor exercising powers which are typically those of a public authority (Sat Fluggesellschaft, cited above, paragraph 30). It acts as the regulatory body of a profession, the practice of which constitutes an economic activity]*.

19. In the same decision Commission referred to the Architects' Association Decision:

> 18. In the ***Architects' Association EU Commission's Decision of 24 June, 2004***: *"[T]he fact that under the Act of 26 June 1963 establishing an Architects' Association the Association has the task of drawing up a code of ethics and ensuring that it is complied with*

> *cannot take this professional organization outside the scope of Article 81 of the Treaty.*
>
> *The public-law status of a national body such as the Association does not preclude the application of Article 81 of the Treaty."* (Emphasis added)

20. In relation to the ICAP's status, the Commission in the subject order further observed:

> *19. … there is no dispute that the Appellant acts as a regulatory body of a profession, the practice of which constitutes an economic activity. As per Appellant's own website, it is a body of Chartered Accountants in Pakistan and represents accountants employed in public practice, business and industry, and the public and private sectors. Its objective inter alia, is to maintain professional standards and to promote professional values and ethics. Even "a public law status of a national body" such as enjoyed by the Appellant does not, in our view, precludes the application of Section 4 of the [Competition] Ordinance. As manifest from the quoted definitions and the cited case law, the voluntary aspect or the regulatory status is not material in regarding an entity as an 'association'…*

21. However, in the instant case, for the purposes of application of Section 4(1) of the Act, we have to establish that while issuing the July Directive, ICAP acted as an association of undertakings. In this connection, we refer to the test used by the European Court of Justice in *Pavlov v Stichting Pensioenfnonds Medische Specialisten* (C-180/94 to C-180/98) [2000] ECR

I-6451 and *Wouters* which we find persuasive and instructive. Summarizing the test used in these two cases, Paul Gorecki in a case comment titled 'A Decision of an Association of Undertakings: Reflections on a recent Irish Supreme Court decision, Hemat v The Medical Council' states:

> *The European Court has adopted a two step methodology in determining whether an association of undertakings is subject to competition law: are the members of the association/body undertakings? What is the nature of the decision of the association of undertakings?*

22. Thus, when dealing with professional bodies, in order to distinguish whether such body acted as an association taking an economic decision rather than a public body, taking a regulatory measure, the following two aspects need to be established:

    a. That an overwhelming majority of the members of such a body taking the decision consists of undertakings; and
    b. That the decision taken by such a body pertains to the sphere of economic activity.

23. Consequently, we will look at both; the organizational composition as well as the nature of the decision. ICAP's institutional structure is composed of two main organs: i) the general body comprising all the members who are chartered accountants, and ii) ICAP's council which is vested with management powers and comprises of elected members and nominees of the Federal Government.

24. The plain reading of Sections 3 and 4 of the CA Ordinance clearly demonstrates that only those related to the accountancy profession can become members of the general body of ICAP. These members are known as chartered accountants in terms of Section 7 of the CA Ordinance. Section 9 of the CA Ordinance sets out the composition of ICAP's council that is vested with the management powers. The relevant portion reads:

> ***9. Constitution of the Council of the Institute***
>
> *(1) There shall be a Council of the Institute for the management of the affairs of the Institute and for discharging the functions assigned to it under this Ordinance.*
>
> *(2) The Council shall be composed of the following persons, namely,-*
>
> *(a) the prescribed number of persons, not being less than twelve, elected from the two prescribed regional constituencies by the members of the Institute belonging to such constituencies from among such members of at least five years' standing, the number of members to be elected from each such constituency being such as may be prescribed:*
> *...*
> *(b) not more than four persons nominated by the Federal Government*

25. From the above, it is evident that all members of the general body of ICAP are professional accountants engaged in providing various accountancy services in the public and private sectors. There is absolutely no doubt that

chartered accountants are undertakings as per the definition provided in Section 2(1) (q) of the Act. The ICAP's council currently comprises 15 elected members and 4 ex-officio government nominees. As per the CA Ordinance, elected members from the accountancy profession would always outnumber the government nominees in the ratio, at least 3:1. In such a setting, decision-making is naturally being done by ICAP members. Where all members of the general body and the overwhelming majority of the council members are primarily undertakings, we have no doubt in our mind that ICAP clearly comes out as an association of undertakings.

26. The second aspect is to consider whether the July Directive pertains to the sphere of economic activity or is characterized as the exercise of the powers generally exercised by a public authority e.g. prescribing ethical standards, ensuring procedural standardization, or serving a similar public purpose.

27. The July Directive seeks to bar ICAP members from training non-ICAP students. These accountancy bodies represent competitors of ICAP members, for the provision of many accountancy services such as assurance, due diligence, taxation etc. other than the statutory audit services. The members and their accountancy firms provide training to accountancy students as a requirement for membership of various accountancy bodies.

28. It is important to recognize here that the provision of these training services is on part of the public practice firm or other commercial organization to

the accountancy students. The trainer/approved accountancy firms of ICAP provide practical experience to the students and offer mentorship and guidance in developing and polishing the professional skills of these students. In return for these training services, the students' accountancy skills\services are to be utilized by the trainer\accountancy firms or organizations.

29. Production of goods and provision of services would fall within the purview of 'economic activity'. The training services offered by the approved chartered accountancy firms are one of the services offered by such firms in the market to the accountancy students in general. These firms, as stated above are undertakings in term of clause (q) of subsection (1) of Section 2 of the Act and so are the trainees or interns (whether ICAP or non-ICAP students) who are directly or indirectly engaged in the provision of services pertaining to accountancy profession. Therefore, the provision of accountancy training services offered to accountancy students is an economic activity and it is evident that the decision to bar ICAP's members from providing training opportunities to non-ICAP students is a decision that falls in the sphere of economic activity and would therefore be subject to competition law.

30. It is also pertinent to add that while the July Directive relied upon Section 22 of the CA Ordinance, no explanation whatsoever has been offered as to how the said section is applicable. For ease of reference Section 22 of the CA Ordinance is reproduced below.

22. Penalty for using name of the Council, awarding degree of Chartered Accountancy, etc. –

(1) No person shall-
(i) use a name or a common seal which is identical with the name or the common seal of the Institute or so nearly resembles it as to deceive or as is likely to deceive the public;

(ii) award any degree, diploma or certificate or bestow any designation which indicates or purports to indicate the possession or attainment of any qualification or competence possessed by a person by virtue of his being a member of the Institute; or

(iii) seek to regulate in any manner whatsoever the profession of chartered accountants.

(2) Any person contravening the provisions of sub-section (1) shall, without prejudice to any other proceedings which may be taken against him, be punishable with fine which may extend on first conviction to one thousand rupees, and on any subsequent conviction with imprisonment which may extend to six months, or with fine which may extend to five thousand rupees, or with both.

31. Going by the plain and ordinary meaning of the referred provision, we are at a complete loss as to how the training of non-ICAP students could be prohibited by Section 22 of the CA Ordinance. Section 22(1)(i) prohibits the use of the name or the common seal belonging to ICAP. Section

22(1)(ii) prohibits the award of any qualification or designation which may indicate that a person is a member of ICAP. Section 22(1)(iii) prohibits any person other than ICAP from seeking to regulate the profession of chartered accountants.

32. In our considered view, in terms of Section 22(1)(i), neither the non-ICAP students nor the concerned accounting firms are using the name or the common seal belonging to ICAP. Similarly, in terms of Section 22(2)(ii), the non-ICAP students are clearly distinguishable from ICAP students in terms of their qualifications, and their categorization while working with ICAP members and their firms. As acknowledged in the minutes of ICAP's annual general meeting referred below, non-ICAP students undertake internships which are then certified as training to their respective accountancy body. In contrast, ICAP students are registered as trainee students under the relevant bye-laws to complete their required articles. Neither these non-ICAP students nor the firms they work in are representing them as ICAP students. Coming to Section 22(1)(iii), none of the parties are trying to regulate the profession of chartered accountancy by providing training opportunities. The issue of prohibiting training for non-ICAP students, therefore, does not pertain to the aspects falling within the purview of Section 22 of the CA Ordinance. Even otherwise, if there were such provisions, the same had to be read subject to Section 59 of the Act which confers an overriding effect to the provisions of the Act notwithstanding anything to the contrary contained in any other law.

33. ICAP itself admits to distinction between ICAP and non-ICAP students in its internal discussion. We referred to the Minutes of Meetings of the 50th Annual General Meeting (AGM) of ICAP held on 16 September 2011 wherein this matter was brought up for discussion. The relevant portion, from Page 7, available at:

http://www.icap.org.pk/userfiles/reports/Minutes_50th_AGM.pdf

Excerpts of the minutes, for ease of reference are reproduced below (emphasis added).

S. No.	***Members' Observations & Comments***	***Response given***
5.	*Students are taking the route of ACCA and ICAEW and are using firms of Chartered Accountants for articles. We ourselves are giving our competitors access to the market.*	*Students of ACCA and ICAEW are not doing registered articles at CA firms. Instead, they are just doing internships at CA firms and technically it is not a violation of the Bye-Laws. At the completion of the internship, a general internship completion certificate is issued to the student which he/she then presents to ACCA and ICAEW as evidence of completion of his/her mandatory training period.*

34. Whereas, ACCA contended before the Commission that:

> *ACCA trainees are not required to register with ICAP for their training under any law or regulation. Most of the chartered accountancy firms run two parallel training programmes. One is for ICAP students and the other for ACCA trainees. However, some firms, on their own, require ACCA trainees to register with ICAP and put them into ICAP's articles purely in order to bind them with the firm for three years. However, internationally firms are well diversified and they recruit trainees belonging to different professional accounting qualification e.g. ACCA, ICAEW, ICAS, ICAI etc. ACCA wants the same global practices to be adopted by firms in Pakistan under no compulsion or restrictions from the local accounting bodies.*

Therefore in our view, upon comparison of both stances, one thing is clear i.e. whether we term non-ICAP students 'trainees' or 'interns'; technically it qualifies them to use the certificate as evidence of completion of their mandatory training period. As per ICAP's AGM minutes this is not in contravention of any of the bye-laws of ICAP. We also note that this practice has been in place for the last many years since 2004.

35. ICAP in its arguments also relied on *Hemat v The Medical Council [2006] IEHC 187* (hereinafter '*Hemat*'). Since ICAP has failed to establish the relevance of Section 22 of the CA in this instance, therefore the reliance on the *Hemat* is misplaced and misconceived. As for the excerpt from *Hemat*,

referred to by ICAP, the same cannot be taken in isolation and has to be read in the context. In *Hemat* case, the primary issue decided was that the medical council in issuing the Guide on Ethical Conduct and Behavior was held not to be an undertaking or association of undertakings for purposes of competition law. Dr. Hemat, the plaintiff in the said case, was a qualified medical doctor who had advertised the availability of his services in contravention of the ethical guidelines prescribed by the medical council and the council/defendant took disciplinary action by suspending his membership for a month for such conduct.

36. ICAP further contends that it, along with any other professional body, has the right to regulate its trainers and the content, quality and manner of training to be received by students pursuing its qualification. Prohibiting a trainer from providing training to a competitive bodies' member is not a regulatory matter but rather an economic one. ICAP is free to set stringent quality standards for its own students and their trainers in so far as it relates to their own students, but cannot forcefully apply the same to the students of other accountancy bodies in the garb of regulating, quality, content or manner of training. Such a measure is an attempt to drive competitors out of market and to protect its monopoly through cornering the market.

37. The example given about Pakistan Medical and Dental Council, teaching hospitals and foreign qualified medical students, is quoted out of context. There can be variance across accepted industry practices in different professions. The need for scrutiny and regulation maybe exponentially

higher in the medical profession where safety and integrity of the professional services is paramount. The same level of stringent scrutiny may not be required in other instances, for example, in case of lawyers and accountants. Also, the two situations can also be differentiated on the grounds that while house job training in the medical field only commences after the completion of the academic program, the training for accounting students is a simultaneous process along with academics.

38. During the hearing, ICAP counsel also argued that it can regulate the training of accountancy students. In this regard, scrutiny of Section 15 of the CA Ordinance reveals that ICAP can regulate the engagement and training of students under Section 15(2)(b). However the definition of a 'student' provided in Section 2(1)(gg) of the CA Ordinance, read with Bye Law 97 of the Chartered Accountants Bye-Laws, 1983 does not include non-ICAP students. To be considered a 'student' for purposes of regulation, a person must be registered with ICAP after fulfilling their established criteria under Bye Law 97. Since non-ICAP students either do not fulfill ICAP's criteria or are not registered with ICAP, they cannot be considered to be 'students' upon which the regulations of ICAP can be imposed. Therefore, ICAP does not appear to have any statutory powers to regulate the training of non-ICAP students who are not affiliated with ICAP.

39. On a similar note, ICAP suggests that any non-ICAP student which fulfills its criteria can register with it and hence become eligible for training at ICAP's trainers. This path has always been available for non-ICAP

students, and does not remedy the situation created by the July Directive or the October Circular. ICAP cannot compel its competitors' students to register and submit themselves to its jurisdiction. We find merit in the submission of ACCA in this regard that requiring non-ICAP students to register with ICAP increases the economic and academic burden on former and may unfairly persuade them to choose alternate qualifications. In our view, this has element of rent seeking rather than serving any constructive purpose.

40. ICAP lastly contends that no qualification granting body can commandeer the qualification granting capacity of another qualification granting body and it is *preposterous for ACCA to demand that ICAP is under a legal obligation to allow ACCA to swamp its training organization to the detriment of ICAP students*. As for the first part of the argument, we could not have framed it any better. Indeed, ICAP cannot commandeer the qualification granting capacity of its competitors by exclusively keeping the best training avenues for their own students. As for the second part, ICAP's training organizations are bound by ICAP's regulations only to the extent of ICAP's students. Towards that end, ICAP may require them to provide any resources or standards it may determine. However, to prohibit them from offering training programs for non-ICAP students is apart from being in violation of the Act also appears to be beyond the scope of ICAP's jurisdiction.

Effect of October Circular on the SCN

41. ICAP contends that the October Circular, by narrowing the scope of the original ban to only the voluntary training organizations of ICAP, has rectified the situation which led to the issuance of the SCN. However, ACCA does not agree and contends that in essence the situation remains unchanged as most of the ICAP approved training organizations are in fact also approved trainers for other professional bodies and the July Directive in fact was only applicable to the approved accounting firms as other firms could not have offered such training.

42. On comparison, it is clear that the July Directive had a wider scope and placed an absolute bar on all members of ICAP engaging trainees of other accounting bodies. However, the October Circular only clarifies that the July Directive was only applicable to such members that were allowed the status of "training organizations" for ICAP. The additional aspect pursuant to the October Circular was that the approved "training organizations" of ICAP can only train students of ICAP; therefore, these organizations may train students of other accountancy bodies including foreign accountancy bodies if such trainees register themselves as students of ICAP.

43. The net effect of the October Circular is to remove in-house ICAP members as well as the accountancy firms not enjoying approved training organization setup. As for the narrowing down of the scope from 'all members' to approved training organizations, such a position was neither tenable legally nor even intended as clarified in the said Circular itself.

44. The fact is that the October Circular continues to foreclose access to non-ICAP students to a large segment of the relevant market i.e. the ICAP approved accountancy firms as alleged in the SCN. Given the existing overlap of public practice firms as trainers for both ICAP and non-ICAP students, the ban imposed by the October Circular is not be materially different from the one imposed by the July Directive.

45. In any event, the approved trainers for ICAP comprise the top tier accountancy firms in Pakistan. After the October Circular, competitors of ICAP can at best hope for training at second or third tier accountancy firms. During the hearing the counsel for ICAP asserted that there is no compulsion for the chartered accountancy firms to become approved training organizations. However, if they opt and qualify for this status, they are bound to comply with the October Circular. Given the clear 'either-or' choice by ICAP, it would not make strategic, or professional, sense for ICAP members or their firm to become an approved employer for other accountancy bodies at the cost of abandoning their status as approved training organizations of ICAP. And it is not unlikely that being regulatees of ICAP, the abandonment may entail additional consequences for such firms.

46. In view of the foregoing, we do not find merit in ICAP's contention that subsequent to the October Circular, the SCN has lost its basis.

Whether July Directive is in Relation to Provision of Services and is Anti-Competitive

47. Now that we have determined that the July Directive is in fact a decision of an association of undertakings which pertains to the sphere of economic activity, and that the SCN has not lost its basis after the October Circular; the next step is to see whether this decision of ICAP is in relation to provision of services and is in violation of Section 4 of the Act.

48. In this regard, we would like to examine the objections taken by ICAP. These are primarily as follows:

> *3. Without prejudice to the foregoing, Paragraph 14 of the Show Cause Notice under reply has described the ICAP's Circular of 4 July, 2012 as "foreclosing access to such students to a large segment of the relevant market". The said paragraph 14 or the Show Cause Notice under reply in general does not define or describe the envisaged "relevant market". If the words "relevant market" are meant to refer to the market for accountancy services, it is not understood how access of under training students to a large segment of the market has been foreclosed by the Circular of 4 July. 2012. Under training students are not supposed to offer accountancy services to the end users of such services. In any case, the Circular of 4 July, 2012 does not in its own terms bar unqualified, under training students of accrediting bodies other than ICAP, including*

foreign accrediting bodies, from accessing the market for accountancy services

4. In maintaining that, prima facie, access of under training students to a large segment of the relevant market has been foreclosed, the Show Cause Notice under reply treats such students as providers of a service. Furthermore, the Show Cause Notice under reply appears to treat all entities that may avail of the services of such students as the relevant market. The ICAP Letter of 4 July, 2012 is seen as prohibiting ICAP member firms who are acting as training organizations for ICAP from acquiring the services of such students. It is only in this prospective that the access of students to the relevant market can be said to have been, prima facie, foreclosed.

5. It may be noted that Section 4 of the Act of 2012 makes a distinction in its treatment of goods on the one hand and services on the other. As regards goods, Section 4 covers all agreements or decisions in respect of production, supply, distribution, acquisition or control of goods. However, as regards services, the said Section only covers agreements or decisions in respect of the "provision of services". It is clear that in so far as students are the providers of services no decision has been taken with respect to the provision of the service provided by them. A decision with respect to acquisition of a service, including acquisition of services provided by under training accountancy students is beyond the scope of Section 4 of the Act of 2010.

> *6. Given that the Show Cause Notice under reply is based on the alleged foreclosure of access to the under training accountancy students to a "large segment of the relevant market" the said Notice is beyond the scope of Section 4 of the Act of 2010 in so far as the said Section does not cover any agreement or decision with respect to the acquisition of any service.*

49. We will address these objections point wise. The objection that the 'relevant market' is not defined in general or in paragraph 14 of the SCN is not correct. We note that paragraph 4 of the SCN clearly defines the relevant market in the following terms:

> ***4. AND WHEREAS**, in accordance with Section 2(1)(k) of the Act, the relevant product/service market for the subject proceedings is the market for the provision of professional training to the students, pursuing membership of domestic or foreign accountancy bodies, while the relevant geographic market is the territory of Pakistan;*

50. Accordingly, the assumption that the 'relevant market' is the market for accountancy services or that the July Directive does not bar students of foreign accountancy bodies from accessing such a market is totally misconceived, and hence irrelevant.

51. The foreclosure of a large segment of the relevant market in the SCN clearly refers to the chartered accountancy firms that offer training to the

accountancy students and are known as approved training organizations of ICAP. If we look at the numbers there are 174 accountancy firms that are approved training organizations of ICAP. ACCA has only 147 accountancy firms as approved employers out of a total of 325. It was not denied by ICAP that most of these 147 ACCA approved employers are also approved training organizations of ICAP. Thus there is direct foreclosure of a large number of ACCA approved trainers in addition to those of ICAP.

52. Since, the understanding of the 'relevant market' as defined in the SCN is misconceived by ICAP; hence, the argument based on such premise is also flawed. It is not a question before the Commission whether the service of the students can be availed by all entities in the market. The issue is whether the accountancy firms can be barred from providing training opportunities to the students pursuing the qualification or membership of foreign accountancy bodies. By merely terming this aspect as 'acquisition of services', the application of Section 4 of the Act cannot be avoided. As explained above, and also in paragraph 27, the subject matter of the SCN is the provision of accountancy training services to the non-ICAP students not the services rendered by such students to the chartered accountancy firms.

53. In order to further illustrate as to how the July Directive forecloses the relevant market and also the ancillary market for provision of accountancy services. It needs to be appreciated that professional accountancy training is a part and parcel of obtaining membership of any professional accountancy body be it ICAP or otherwise. Naturally such trainings allow students to be

exposed to the practical aspects of various accountancy services. Depending on the professional body in question, this training can be obtained from approved training organizations which can include public practice accountancy firms and commercial organizations.

54. Normally, each accountancy body has a list of public practice firms and/or commercial organizations, which are recognized for imparting training necessary to complete the requirements for getting membership of the institute. These recognized trainers then accept accountancy students and certify that experience gained by the students at the requisite times during or at the conclusion of the training period. It would be pertinent to mention here that the one public practice firm or commercial organization can typically become a recognized trainer for more than one professional accountancy body by maintaining parallel programs and allocating distinct resources.

55. It is important to recognize that training through a public practice accounting firms is a valuable form of training for accountancy students. While there are other avenues such as in-house training at commercial concerns in public or private sector, accountancy firms offer a greater exposure and experience to students on a broader range of subjects which is not substitutable to any training or experience offered by other approved employers of ACCA.

56. In our considered view such prohibition on accountancy firms forecloses, shuts out and precludes not only a large segment of the relevant market for non-ICAP students but also the most valuable segment. The accountancy firms are restricted in their choice and freedom to engage a trainee while at the same time it deprives the non-ICAP students, both quantitatively and qualitatively, from gaining such experience practically from the most prestigious segment of the training market. This adversely impacts the accountancy firms as well as the value of the qualification offered by direct competitors of ICAP. Thereby restricting, preventing and reducing competition in the relevant market.

57. It is relevant to mention here that ICAP is not the first association of chartered accountants that has tried to shield itself from competition through such anti-competitive measures in the professional training market. In May 2010 Portuguese Competition Authority has fined the Chamber of Certified Accountants (COCA) in the tune of 229,300 euros for anti-competitive practice, involving the obligatory training of certified accountants. COCA artificially segmented the training market, reserved a third of the obligatory training exclusively for itself, and stipulated particular criteria for the admission of other training bodies and the approval of their training courses. While the case itself maybe different on factual aspects from the one before us and the provision invoked maybe distinct (as in the Portuguese case it was a case of abuse of dominance as well as anti-competitive decision making by the professional body), the broader principles in both case converge at the same point which is to

disallow protectionist behavior of professional bodies that also serve as regulators for their profession when it harms competition.

58. In this regard, consider the example of the legal profession for comparison. Currently, fresh law graduates or even law students pursuing local and foreign qualifications are hired by law firms for training. These include graduates from local public universities, local private universities, foreign universities, and distant learning programs. Bar members from many common law jurisdictions are allowed to work with law firms in Pakistan courts. This approach has helped the country in improving the quality of legal services available within the country. It would not be hard to imagine what the repercussions would be if the local bars in the country decided not to allow engaging any foreign law degree holders or students pursuing such degree from working or receiving training at law firms or the top law firms for that matter.

59. Secondly, the July Directive is also creating a barrier for these students seeking entry in the market for provision of accountancy services in Pakistan in terms of paragraph 15 of the SCN. This ancillary market for accountancy services pertains to provision of assurance, taxation, due diligence services etc. We are aware that ICAP already enjoys monopoly vis-à-vis statutory audits under the Companies Ordinance, 1984. Additionally, not being able to get trainings at approved accountancy firms, the non-ICAP students would be placed at a competitive disadvantage vis-à-vis their ICAP counterparts. We reiterate that training with other

approved employers, in the case of ACCA for instance, is not a substitute for the training at approved accountancy firms by ICAP. It appears that instead of competing, ICAP seems to be unlawfully leveraging its statutory monopoly to other related fields of accountancy.

60. It is relevant to refer back to the minutes of the 50th AGM of ICAP in its relevant part to illustrate the reason behind the July Directive.

> *The Chairman then invited members to comment on the Council Report and the audited Financial Statements for the year ended June 30, 2011. The comments on the Council Report and the audited financial statements and the responses given by the Chairman and other officials are elaborated below:*

S. No.	***Members' Observations & Comments***	***Response given***
2.	*It seems that the Institute does not have clear action plan to counter tough challenge from competitive qualifications. It is high time to take solid assuring steps in this regard.* *ICAEW gives far more weightage to ACCA as compared to ICAP but on the other hand we want to replicate ICAEW syllabus.*	*The Council is very well aware of the challenges faced by the profession in the country and it does recognize that other competitive qualifications being offered in Pakistan and are a big challenge.* *The problems identified are all related and the Council definitely has an action plan and is actively working on it. ICAP is actively pursuing*

	What is the logic in this contradictory stance?	*ICAEW for 100% recognition of its qualification for the benefit of the members. In addition to this, the Institute is working to restructure its syllabus and examination structure to achieve this objective.*
3.	*It was pointed out that there are certain audit firms providing training to students of other professional Institutes and majority of the members were in favour of curbing this practice. The members felt that the Institute can use its regulatory powers or if not given in the Bye Laws even amendments in Bye Laws may be made for the purpose This would ensure that CA firms would register ICAP students only.*	*As per the prevailing bye laws and training guidelines, there is no specific restriction on practicing members to engage in such practice. Further, we should not act in haste as it might result in litigations. The President informed the house that the Council is aware of the issue and it would be deliberating on the issue for appropriate action/strategy in the light of the views expressed by members.*

61. The above is self explanatory with the thrust that the predominant concern is to counter the growing competitive challenge faced by ICAP and its members and to achieve this end.

62. During the course of the hearing, ICAP contended that the purpose of the July Directive was to ensure the 'quality of training' being imparted to ICAP's accountancy students by ensuring that resources meant for ICAP students was not used for non-ICAP students. According to ICAP, the bye laws and policies allow one firm to train only a select number of students. In furtherance of its argument, ICAP relied on extracts from *Wouters* reproduced below:

> *97. However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article 85(1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in relation to integrity and experience (see, to that effect, Case C-3/95 Reisebüro Broede [1996] ECR I-6511, paragraph 38). It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.*
>
> …

105. The aim of the 1993 Regulation is therefore to ensure that, in the Member State concerned, the rules of professional conduct for members of the Bar are complied with, having regard to the prevailing perceptions of the profession in that State. The Bar of the Netherlands was entitled to consider that members of the Bar might no longer be in a position to advise and represent their clients independently and in the observance of strict professional secrecy if they belonged to an organisation which is also responsible for producing an account of the financial results of the transactions in respect of which their services were called upon and for certifying those accounts.

…

107. A regulation such as the 1993 Regulation could therefore reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned.

…

110. Having regard to all the foregoing considerations, the answer to be given to the second question must be that a national regulation such as the 1993 Regulation adopted by a body such as the Bar of the Netherlands does not infringe Article 85(1) of the Treaty, since that body could reasonably have considered that that regulation, despite the effects restrictive of competition that are inherent in it, is necessary for the proper practice of the legal profession, as organised in the Member State concerned.

63. We believe that ICAP's reliance on the case dicta is misplaced. The *Wouters* case and the case at hand can be distinguished at many levels. The 1993 Regulations mentioned in the *Wouters* were concerned with the restriction placed on the associations' own members to create partnerships with anyone apart from lawyers. We discussed this case previously in the matter of price fixing by ICAP. The relevant portion is reproduced below:

> *54 ...the controversy in Wouters relates to a regulation adopted by the Netherlands Bar Association on joint professional activity regarding partnerships between lawyers and other practitioners. Under this regulation, certain professionals (such as notaries, tax consultants and patent agents) were allowed to integrate their activities with those of lawyers, while accountants were prevented from entering partnerships with lawyers.*

In the case before us, the prohibition contained in the July Directive is on the provision of training to a competitor association's accountancy students.

64. The objective in the *Wouters* 1993 Regulations was held to ensure the proper practice of the legal profession. On the other hand, in this case, the facts on record, clearly suggest that the July Directive was issued to protect the interest of ICAP and its members rather than the accountancy profession as a whole. Also, it is aimed at restricting competition offered by students of rival accounting bodies in the relevant market.

65. ICAP need not ban its members from training students of other accountancy bodies to purportedly improve the quality of training for their own students. It can always prescribe higher standards, and already has a quality control review mechanism in place. It can even demand a parallel program for ICAP students from its approved trainers; however, this does not mean that it has to be at the cost of barring non-ICAP students to get training at such accountancy firms. Indeed, such measures can not ensure quality of training to ICAP students.

66. In view of the above, we are of the considered view that the relevant market in the SCN has been correctly defined, and also that the July Directive is in violation of Section 4 of the Act.

67. As it stands, the CA Ordinance grants exclusive auditing rights to ICAP members alone. If ICAP is allowed to restrict competition in the remaining accountancy services barring its accountancy firms from offering training services to accountancy students, it may eventually mean the end of any meaningful competition; both in the relevant as well as the ancillary market for provision of accountancy services.

68. In fact, we find merit in ICAEW submissions that ICAP's directive appears to place protectionism above both the professional and national interests and that these are better served by strengthening the profession in Pakistan through maintaining an open environment to encourage continual

investment and improvement. The accountancy market in Pakistan would be strengthened not by protectionism but by allowing free competition.

69. All over the world, public practice run multiple parallel training programs for students affiliated with various professional accountancy bodies and in our considered view ICAP should act in sync with the industry norm rather than carving out an exception or creating a hegemony for itself with such protectionist's approach. Upon review of various regimes the position that emerges is that while this profession is a regulated domain in the majority of the countries, such behavior is certainly not the industry norm nor has ICAP been able to substantiate its stance to justify regulating its members in such a manner.

70. While taking measures such as these may be in the interest of ICAP (not necessarily in the interest of accountancy profession) and these involve, resorting to unlawful practices which are in contravention of Section 4 of the Act. As discussed, we are of the considered view that the July Directive, as well as the October Circular, has effect of preventing, restricting and reducing competition in the relevant market by foreclosing the public practice component of the relevant market for non-ICAP students and raising barriers to entry in the ancillary market for provision of accountancy services, is in violation of Section 4 of the Act and the same are therefore without any legal force.

71. The importance of the accountancy profession in the economy of Pakistan has also to be taken into consideration. Public practice and in-house accountancy services have become an integral part of the business environment. Various aspects of accountancy, including auditing, assurances, taxation etc. are crucial for any business. Under the various financial sector laws of the country, including the Companies Ordinance 1984, the corporate sector has to maintain accounting procedures and conduct fiscal audits. Accountants and public practice accountancy firms provide such services. The steady supply of qualified accountants is therefore almost a pre-requisite for a healthy business environment. Professional accountancy bodies such as ICAP, ACCA, and ICEAW contribute towards ensuring that quality standards are maintained in the profession. The route towards gaining suitable accounting qualification involves the mandatory training of accountancy students with approved training organizations including the accountancy firms.

72. According to ACCA, public practice accountancy firms typically offer training opportunities to ACCA students in March/April and September/October. Similarly, ICAP students are generally inducted by public practice firms in May and September. Both, however, also submit that there can be slight deviance from this trend occasionally. For ACCA, there are almost 325 approved trainers including 147 public practice firms. For ICAP, there are 174 approved trainers, all of which are the public practice firms. ICAP states that approximately 55,000 people are registered with them as students; out of which 23,000 are considered active, and that

average in take of students is 4000 a year with 900 students becoming eligible every year to seek training. Similarly, ACCA states that 35,000 people are currently registered with them 3,500 who have passed the exam but have not completed the required training. On average 9,000 new students register every year.

73. Without getting into the accuracy of numbers, it can safely be inferred that the registered number of students pursuing ACCA qualification is on the rise and that there is growth in the number of the potential new entrants to the accountancy profession. The majority of these new entrants are citizens of Pakistan pursuing their qualification within Pakistan; hence, it is immaterial whether these students are pursuing membership of foreign accountancy body or a local one.

74. The fact that subsequent to the July Directive, ACCA has seen an almost 55% decline in registration of students is also alarming. Competitors who have legitimately established themselves in global market should not be subjected to such barriers.

75. In our considered view, ICAP ought not to discourage, discriminate or otherwise unequally treat growing number of a human resource essential for a vibrant economy. As a natural corollary of competition in the market, the increase in the number of such professionals in the past has provided and should continue to provide, the businesses and other consumers not only with a greater choice but also improved quality and reduced costs for accountancy services.

76. We can appreciate that ICAP is inclined to act with a view to protect its members but such action, as mentioned has to be within the bounds laid down by law and cannot be premised on ethos espousing attitude eroding fair market conditions. The fact the market is responding to such qualified personnel, is in itself evidence that there is growing need and recognition of such expertise. Thus, as for the loss of business or career opportunities to the accountancy firms, accountancy bodies, students thereof or any other affectee; the proper course of action to be pursued is compensation before the courts of competent jurisdiction.

77. As for the penalty and remedy under Act, taking into consideration all the above facts and circumstances including: the relevance of the accountancy profession for businesses, keeping in view that the subject matter pertains to a professional body, bearing in mind that such practices are to be strongly condemned and discouraged in the interest of justice we hereby:

    a. hold and declare the July Directive and October Circular to be in violation of Section 4 of the Act and to be without any legal force. Accordingly, the subject accountancy firms are free to engage non-ICAP students as interns/trainee;

    b. impose a penalty of PKR 25 Million on ICAP; and

    c. restrain ICAP, from issuing similar directives/circulars in future having the effect of barring its approved training organizations from engaging non-ICAP students for training.

78. In the event that ICAP continues the subject practice in violation of this order, it will be liable to pay a penalty of PKR 1 Million everyday for such violation in terms of Sub-Section 3 of Section 38 of the Act.

(Rahat Kaunain Hassan)	(Abdul Ghaffar)	(Dr. Joseph Wilson)
Chairperson	Member	Member

Islamabad, the 10th January, 2013.