# BEFORE THE
# APPELLATE BENCH
# COMPETITION COMMISSSION OF PAKISTAN
# IN THE MATTER OF

**APPEAL FILED BY KARACHI STOCK EXCHANGE (GUARANTEE) LTD AGAINST THE ORDER OF THE COMPETITION COMMISSION OF PAKISTAN DATED 18-03-2009**

**Bench Members:** **Khalid A. Mirza**
Chairman

**Ms. Rahat Kaunain Hassain**
Member (Legal)

**Dates of Hearing:** 17-04-2009, 18-05-2009, 15-06-2009

**Present:** **For Karachi Stock Exchange (Guarantee) Ltd**

Mr. Adanan Afridi, Managing Director KSE
Mr. Kamal Azfar, Senior Advocate Supreme Court
Mr. Haider Waheed, Advocate High Court.

**For Lahore Stock Exchange (Guarantee) Ltd**

Mian Shakeel Aslam Managing Director LSE
Mr. Walid Iqbal, Director LSE
Mr. Ahmad Hasan Khan, Chief Regulator Officer, LSE
Mr. Asif Baig Mirza, Member LSE.

## ORDER

1. This Appeal was filed on April 10, 2009 against the Order dated 18.03.2009 passed by a single Member in the Show Cause Notice No. 26 of 2008-09 (herein after referred to as the '**Impugned Order**'). It has been held in the Impugned Order that the imposition of a floor on the prices of securities listed at the three stock exchanges of the country amounts to a violation of section 4 of the Competition Ordinance, 2007 ('the Ordinance').

2. The Appellant also filed an application for interim relief along with the Appeal, praying to suspend the operation of the Impugned Order until the issuance of final order in the subject Appeal. This Appellate Bench granted interim relief by suspending operation of paragraphs 75 of the Impugned Order *inter-alia* on the ground that it is in public interest that the matter be finally settled by the Commission and allowing any penalty to incur prior to the final decision of the Commission does not appear to serve the interest of justice in the particular facts of this case.

3. Hearings in the subject proceedings were held on December 18, 2008 and January 15, 2009, the Appellant has also submitted written arguments. During the hearings, the case was mainly argued by Mr. Kamal Azfar, Senior Advocate Supreme Court.

4. Briefly the facts leading up to this Appeal may be summarized as follows:

i. The KSE vide its notice dated August, 27, 2008 decided to place a floor based on the closing prices of securities as on August, 27, 2008 both in the Ready and Futures Market, whereby the individual security prices remained free to trade within the normal circuit breaker limits, but not below the floor-price ('the Floor') level of 27.8.2008.

ii. On the same date, the SECP contacted MD of the LSE and the ISE to invite comments on the proposals of KSE to (i) Freezing/flooring of market (ii) market closure for a definite/indefinite time period and/or (iii) market continuation.

iii. MD of the LSE replied the same day to the SECP after consulting the LSE's Board of Directors. The MD of the LSE pointed to potential 'negative repercussions for the market and confidence of the investors specially the foreign investors'. He also said that 'the clearing house of LSE is fully under control through the adoption of the required risk management procedures/rules and as a result required margins are intact'. He further pointed out that 'if KSE does decide to close the market then LSE will follow the same in order to avoid technical/procedural problems and avoid any distortion of the Market and hence maintain uniformity'.

iv. LSE imposed a floor vide its notice dated 28.8.2008 on the securities listed at LSE pursuant to KSE's decision. ISE also imposed a floor on the

same date. The SECP vide its directive dated 11.12.2008 directed the three stock exchanges to remove the Floor on 15.12.2008.

v. CCP, taking note of the situation requested information and views of the three stock exchanges on placement of Floor under the Ordinance. The three stock exchanges submitted their comments which included, inter alia, imminent danger of economic collapse, global financial crisis as the reasons for the imposition of the Floor. The LSE also cited avoidance of price disparity as one of the basis for its actions as it imposed the Floor after KSE.

vi. On 12.3.2008 an Inquiry Report was concluded that recommended the initiation of proceedings against the KSE, LSE and ISE for prima facie violation of section 4 of the Ordinance.

vii. CCP issued a show cause notice dated 4.12.2008 under section 30 of the Ordinance wherein the three stock exchanges of the country were called upon to explain the imposition of the Floor as it prima facie violated section 4(1) and 4(2)(a) of the Ordinance. The matter was heard by CCP on 14.1.2009.

viii. Through the Impugned Order CCP imposed a penalty of Rs. 200,000/- on ISE, Rs. 1 million on LSE and Rs. 6 million on KSE.

ix. Through Applications for Interim Relief dated 10.4.2009 and 14.4.2009 respectively, KSE and LSE prayed for suspension of the Impugned Order till final decision of this Appeal. The said Applications were granted.

5. We have examined various legal grounds on which KSE has based its appeal. Before framing any issues requiring determination in this regard, we would like to summarize the Legal grounds on which the Appeal has been based:

i. Impugned Order is incorrect on the basis of law and facts as the conduct of the three stock exchanges did not amount to collusion or acting in concert to fix prices. There was no agreement between the stock exchanges. The actions of the KSE, ISE and LSE were independent.

ii. Application of *per se* rule in the instant case was not warranted. The Impugned Order was passed without keeping in view the then prevailing economic context. Furthermore, the actions of KSE amounted to action in the public interest and thus did not warrant punishment.

iii. KSE acted under its powers under the Risk Management Regulations. The actions of the CCP amount to punishing those who had acted in

accordance with actions allowed under the said Regulations. Hence the Impugned Order is without legal basis.

iv. The concept of Resale Price Maintenance ('RPM') is not applicable to KSE. KSE is not the supplier of securities to any person (whether the brokers trading on KSE's stock exchange or the brokers' customers). No question of resale arises in the case of KSE. The matter of imposition of the Floor is wholly beyond the scope of the RPM concept.

v. KSE is not an association of undertakings and neither is there any agreement between the three stock exchanges. Each exchange is an entity separate from its members. The Impugned Order ignores these important factual and legal issues.

vi. The conduct of KSE should not have attracted punishment under the Ordinance as behaviour of KSE, considering the circumstances, would fall under the exemptions laid out in section 9 of the Ordinance.

vii. Through the Impugned Order CCP has encroached upon the regulatory powers of the SECP. The SECP ought to have been made a party to the proceedings and this was not done. CCP is acting like a 'super-regulator' by regulating the regulators. Hence the Impugned Order is illegal and without jurisdiction.

viii. CCP failed to appreciate the role of the SECP in the imposition of the Floor. The SECP showed tacit approval of the Floor and issued a directive for its removal after it had been in place for 110 days. Furthermore, SECP during the course of the 110 days desired the continuation of the Floor.

ix. CCP failed to act in the public interest as required by the Ordinance. Impugned Order fails to appreciate the effects and consequences of the financial crisis on the economy of Pakistan and the securities markets in particular.

x. The Impugned Order is unlawful as the proceedings were initiated without fulfilling the pre-requisites contained in s. 37 of the Ordinance. The Commission failed to conduct an inquiry as required by the Ordinance. Furthermore, the subsequent proceedings were initiated even though they were not in the public interest.

**SUBMISSIONS FOR AND ON BEHALF OF LSE:**

6. It is pertinent to point out at the outset that, during the hearing conducted on 15.2.2009, LSE through its representative Mr. Asif Baig Mirza conceded that LSE's conduct in placing a floor contravened section 4 of the Competition Ordinance, 2007. LSE submitted that it had made a mistake and requested the Appellant Bench

to take a lenient view of its conduct. Although, it was asserted that the circumstances prevailing at that time left no other option for LSEand the Commisson was urged to take into account the same and appropriate reduction in the penalty was also pleaded.

7. While LSE decided not to contest the Appeal after initially filing its Grounds of Appeal we deem it no more necessary to address the grounds taken before the Appellate Bench prior to 15.2.2009. Nevertheless, these Grounds being substantially similar to those raised by the KSE stand addressed in this Order:

**ISSUES:**

8. For disposal of this Appeal, the issues that emerge in the given facts and circumstances are as follows:

   i. Whether the stock exchanges placed the floor as 'undertakings' or associations of undertakings? If so, whether the actions of the stock exchanges fall within the purview of prohibited agreements or prohibited decisions under section 4 of the Ordinance?

   ii. Whether the subject issue falls within the regulatory domain of SECP or CCP?

   iii. Whether the Show Cause Notice has been duly issued and proceedings have been initiated in accordance with law after fulfilling the pre-requisites?

   iv. Whether there is any merit in precedent cited in the Impugned Order?

v. Whether there existed any mitigating circumstances leading up to and during the time the Floor was in place?

**Issue (i):**

(a) Whether the stock exchanges placed the floor as 'undertakings' or associations of undertakings?

**(b)** (b) If so, whether the actions of the stock exchanges fall within the purview of prohibited agreements or prohibited decisions under section 4 of the Ordinance?

9. KSE has raised the issue that the Impugned Order wrongly classified the stock exchanges as 'associations of undertakings' rather than 'undertakings'. It has been argued that the stock exchanges act as front-end regulators, with an independent Board of Directors and are hence 'undertakings' in their own right. The stand taken by the Appellants is that an association of undertakings would, for instance, be a voluntary association of professionals whereas the Appellant is a regulatory body. We examine these contentions in light of the Impugned Order:

10. The scope and purview of the definitions of both 'undertaking' and 'association of undertakings' has been dealt with at length in the *ICAP* matter and we would be reverting to that decision now and then for appropriate reference. Since the term 'association of undertakings' is included in the definition of the term 'undertaking'

the question is whether a stock exchange can aptly and properly be characterized as an association of undertakings?

11. In terms of section 2(1)(m) of the Securities and Exchange Ordinance, 1969 stock exchanges are defined as:

> "stock exchange" means any person who maintains or provides a market place or facilities for bringing together buyers and sellers of securities or for otherwise performing with respect to securities *the functions commonly performed by a Stock Exchange, as that term is generally understood, and includes such market place and facilities*. (Emphasis added)

12. The functions commonly performed by a stock exchange include offering a platform used for maintaining or providing a market place through brokers of a stock exchange who are its members. As per the Securities and Exchange Ordinance, 1969:"*Broker" means any person engaged in the business of effecting transactions in securities for the account of others.* In terms of this definition, it is simpler to address whether a broker falls within the purview of an 'undertaking'.

13. To this end the basic test for the determination of an undertaking is that set out in section 2 (1) (p) of the Ordinance. An undertaking would *include*, inter alia, any person, natural or legal, engaged (directly or indirectly) in offering services on a market. This definition covers, inter alia, a person engaged in the provision of services. Brokers are professionals who offer services individually on a stock exchange, in return for a fee. Brokers are members of stock exchanges at Lahore, Karachi or Islamabad. Hence in terms of the definition laid down in section 2(1)(p) of the Competition Ordinance, brokers are an undertakings in their own right.

14. We refer to the observation in the *ICAP* matter (decided by the Appellate Bench):

> '*the term 'association' is not defined under the Ordinance. Under sub-section (2) of Section 2 of the Ordinance the words and expressions not defined in the Ordinance shall have the same meaning as assigned under the Companies Ordinance, 1984. Since the Companies Ordinance also does not define this term, the plain and ordinary dictionary meaning of 'association' may be reverted to. In this regard, it may be useful to refer to Black's law dictionary 7th edition where under the term 'association' is assigned the following meanings.*'
>
> *a) The process of mentally collecting ideas, memories, or sensations.*
>
> *b) <u>A gathering of people for a common purpose; the persons so joined.</u>*
>
> *c) An unincorporated business organization that is not a legal entity separate from the persons who compose it.*
>
> • *If an association has sufficient corporate attributes, such as centralized management, continuity of existence, and limited liability, it may be classified and taxed as a corporation. – Also termed unincorporated association; voluntary association. (emphasis added)*
>
> *The term professional association is defined as follows:*
>
> *a) <u>A group of professionals organized to practice their profession together, though not necessarily in corporate or partnership from.</u>*
>
> *b) A group of professionals organized for education, social activity, or lobbying, such as a bar association.*

*An association of practitioners of a given profession (http://www.thefreedictionary.com/professional+association) (emphasis added)*

*a body of persons engaged in the same profession, formed usually to control entry into the profession, maintain standards, and represents the profession in discussions with other bodies.*

*[English Collins Dictionary] (http://dictionary.reverso.net/english) (Emphasis added)'*

15. Keeping the above in view, interestingly, the Memorandum and Articles of Association of these exchanges, in particular, that of KSE, state that '***the name of the Association is Karachi Stock Exchange (Guarantee) Limited***'. Furthermore, the stated objects of stock exchanges make provision for protecting the interests of its members. These include *'applying, appropriating and spending all moneys and income of the Exchange for the benefit, welfare and security of the Exchange, its members. To create, raise, collect and apply and appropriate funds for the benefit and welfare of members of the Exchange'*. Similar provision would appear in the Memorandum and Articles in other Exchanges.

16. As we understand, the brokers at the stock exchanges have a common purpose, i.e. to offer brokerage services in a market and the stock exchange as an association of its members (which includes brokers) provides a forum to which its members voluntarily submit for regulation of its conduct in accordance with the association's rules and regulations. The Membership criteria include payment of a fee to the association. In lieu thereof, certain privileges and benefits accrue to each broker/member.

17. It is also pertinent to point out that nothing has been placed on record to establish that merely because the stock exchanges are companies limited by guarantee they cannot be treated as associations of undertakings for the purposes of competition law. It is imperative to appreciate that what is relevant is not the legal status or form but the actual manner in which an entity functions/operates. One must not overlook that even historically stock exchanges have been acting as an association of stockbrokers who meet to buy and sell stocks and bonds according to fixed regulations.

18. In view of the foregoing, it is our considered view that the stock exchanges have been rightly classified in the Impugned Order as associations of undertakings. The word 'association of undertakings' is covered by the definition of undertaking in section 2(1) (p) of the Ordinance and hence the Show Cause Notice fairly and justly classified the stock exchanges as undertakings. The Appellants themselves maintain that they are 'undertakings' even otherwise the undertakings have argued before the Single Member on the aspect of not being an association therefore the argument by the Appellants that they were not made aware of the case against them is not valid.

19. It is also pertinent to point out at this stage that although KSE denied being associations of undertakings at the first instance, through its Supplemental Written Submissions it has argued that it is not even an 'undertaking' and is hence exempt from the purview of competition law. Intriguingly enough, KSE's stance has shifted considerably.

20. This is a new issue raised by KSE and even though it was not raised before the Learned Member we will still deal with this issue for the sake of completeness. KSE has placed reliance upon case-law from the European jurisdiction to argue that a public authority does not qualify as an undertaking when conducting activities in the exercise of official authority. KSE cited Wouters case. KSE contended that restrictive rules that are proportionate and ancillary to a regulatory system that protect a legitimate public interest fall outside Article 81 (1) of the EC Treaty. We feel it is important to mention that while case-law from the European jurisdiction has persuasive value it cannot be argued or applied out of context. It is our considered view that KSE has placed reliance on *Wouters* in ignorance of its rationale. As far as the European case law is concerned *Wouters* seems to be one of the most misunderstood precedents cited before us. As had already pointed out by us in the supra *ICAP* case :

> '*regarding the question, in* ***Wouters,*** *whether the regulation that was passed (concerning the regulation of the profession) was exempt from competition law because the Bar also had a public policy role, the court specifically stated that when adopting such a regulation, a professional body is "neither fulfilling a social function based on the principle of solidarity…it acts as a regulatory body of a profession, the practice of which constitutes an economic activity……'*

21. Pakistani law is specifically clear on the matter whereas the concept of an 'undertaking' has not been defined through a statute in EC. It is one that developed through case-law. The Ordinance defines an undertaking which clearly covers a regulatory body (and association of undertakings) as well.

22. Furthermore, in *Hemat* it was stated that bodies even though created by and subject to public law and even though regulatory of a business or profession are still capable of being an undertaking or an association undertakings within Articles 81, 82 and 86 of the Treaty *(EC Commission v Italy Waqqas to provide ctiation)* *(Pavlov citation WM and Wouters)*..

23. Oddly enough, KSE and LSE have both raised the issue of relevant market and stated that the Learned Member failed to determine the relevant market. We fail to understand how the issue of relevant market can be alleged to have remained unaddressed. This is clear after reading Para 41 of the Impugned Order which for ease of reference is reproduced below:

> '*Section 4(1) talks of relevant market, which term is defined under section 2 (1)(k) of the Ordinance.49 In the instant case, the relevant product market comprises the listed securities in all the three stock exchanges of Pakistan, traded both in ready market and futures market, and the relevant geographical market is where the trading of such securities takes place, namely KSE, LSE and ISE….*'

24. The Learned Member clearly states that the relevant product, in this case, is constituted by the securities listed on the 3 stock exchanges. The relevant geographic market is where the listed securities are traded, and by this is meant KSE, LSE and ISE. We are aligned with the conclusions reached by the Learned Member. We feel this was an apt and proper determination, as required in the context. As stated, it is quite surprising that parties could allege a failure to determine relevant market after reading Para 41 of the Impugned Order.

***Issue (i)(b): Whether actions of KSE and LSE were correctly held to be within the purview of section 4 of the Ordinance?***

25. Moving onto the related issue of whether the actions of KSE and LSE were correctly held, as per the Impugned Order, to be covered by section 4 of the Ordinance.

26. The relevant parts of section 4 of the Ordinance are reproduced below:

> **Prohibited agreements**.-*(1) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings, shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5 of this Ordinance.*
> *(2) Such agreements include, but are not limited to-*
> *(a) Fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale or distribution or any goods or the provision of any service;*
> *(3) Any agreement entered into in contravention of the provision sub-section (1) shall be void*.

27. The Impugned Order states at Para 48 that the price floor established horizontal price fixing at two levels; first between members of each undertaking as owners of securities, as sellers and buyers of securities in their own right. Secondly the price was fixed by brokers as service providers to buyers, sellers, investors and traders. We are fully in agreement with the observation in the Impugned Order that the decision of the stock exchanges to place price floor had the effect of preventing,

restricting and reducing competition in the relevant market for reasons detailed below. In fact it is our considered view that the very object of such act operates as a naked restraint.

28. In our considered view the Learned Single Member, at Para 56 of the Impugned Order succinctly elaborated upon the following effects of such decision:

> *"As the decision applied to all listed securities in Pakistan, in Ready and Futures Markets, and was applicable for 109 calendar days, during trading sessions, i.e., the whole of a business day, it had immense effect on the trading volume at the Undertakings, so much so that the trading volume declined by more that 98 per cent. (See para 41 above). The decision, thus, restricted, reduced and prevented competition as follows:*
>
> *i. It set the minimum price of the securities.*
>
> *ii. The decision to set the price floor for securities had the effect of fixing "price element" and therefore the price, for the provision of brokerage services to buyers, sellers, investors, traders.*
>
> *iii. It prevented competitive bidding – the very essence for which stock markets are established.*
>
> *iv. It created a private market for the sale and purchase of listed securities. Submissions made by both KSE and LSE alluded to this fact. For example, KSE submitted, "it may be seen that trade also continued unabated off-market pursuant to SECP directions and the floor did not hinder such activity all."80 Similarly, LSE submitted, "[i]n fact, a large number of broker to broker sales did take place during the entire period that the 'floor' was in place."81 Prior to the price floor decision, bids were made in public. Traders had the advantage of procuring competitive prices by trading in an open and transparent manner in terms of the system of an exchange. With the imposition*

*of price-floor, the creation of private market disadvantaged the buyer and sellers, as they could not procure competitive prices.*

*v. The imposition of price-floor reduced the trading volumes by over 98 per cent, transforming the hustling and bustling stock exchanges to a standstill.*

*vi. It moved buyers and sellers away from a direct contact available in an exchange setting and forced them to trade privately thereby increased the "risks necessarily incident to a private market."82 The decision, thus, created asymmetric information for buyers and sellers.*

*vii. It virtually entrapped investors who wanted to sell their securities at a price less than the prices fixed and could not find the buyers at or above the prices fixed by the decision of the Undertakings. Thus, it created a barrier to exit.*

*viii. The floor prevented investors from purchasing securities at market prices by imposing artificial minimum prices. This, in effect, created a barrier to entry.*

*Ix Imposition of the price floor severely restrained the choice of buyers and sellers as to the price at which they wish to conduct transactions.*

*x. The decisions put a restraint on the right of alienation of security dealers, as they had no option to dispose of securities but on the floor of stock exchange.*

*xi. Imposition of the price floor altered the saving and investment behaviour of market agents and had unquantifiable adverse effects on the entire economy."*

29. As for the finding in the Impugned Order in Para 48 that:

> *"The decision of the Undertakings to set the price floor established horizontal price fixing at two levels: first, between members of each undertaking qua owners of securities, i.e., as sellers and buyers of securities in their own right. Second, as brokers qua service providers, the decision to set the price floor for securities had the effect of fixing "price element" and therefore price for the provision of brokerage services to buyers, sellers, investors, and traders."*

30. We are in agreement to the extent that such decision resulted in and operated as having the effect of fixing price horizontally between members of the stock exchange in their capacity as owners of securities and as well as fixing price element vertically for the provision of brokerage services to buyer, sellers, investors and traders which is why it has been held as violation of section 4.

31. However, in determining whether the members had the intention or were the force behind taking of such a decision is a matter which could have been addressed had the brokers been made party to the proceedings. Although from the facts available on the record it seems quite plausible to argue that the *subjective intention* of the brokers was behind the '*objectively intended purpose of the decision*' of the stock exchange. As mentioned in the Impugned Order in the case of KSE, the letter to Chairman SECP by the Managing Director of KSE, dated 27.8.2008, makes it clear that '100 out of 103 members urged the Board for flooring of the price level of securities based on the closing price of the market as of August 27, 2008'. This on the facts seems to have been the prime consideration for the KSE Board, i.e. the interests and demands of its members. It is interesting to point out that all the

independent directors present dissented and voted against the placement of floor as is evident from the Minutes of the Meeting dated 27.08.2008 and despite such dissent the Members' interests prevailed. Nonetheless, we are of the considered view that any such finding could have been given only after providing due opportunity of hearing to the parties concerned. The concerned department may very well take up this issue if it so deems appropriate.

32. It is pertinent to point out that as asserted on behalf of LSE no consensus of Members was obtained nor were they consulted. We feel that both in the case of KSE and LSE the act of the exchanges to place a floor can more aptly be characterized as a decision resulting in and pertaining to price fixing by an association of undertakings.

33. In view of the above, the resultant price fixing at the horizontal and vertical level makes it abundantly clear that such decision had the object of preventing, restricting and reducing competition and hence the effects had to be anti-competitive. Even otherwise, the adverse effects on competition as re-produced above including, setting minimum price, fixing price element and therefore the price for the provision of brokerage services to all the interested players, prevention of competitive bidding, reduction of trading volumes by over 98%, trapping of investors looking to sell below the price floor level, making investors buy at minimum artificial prices, placing restraint on choice etc. clearly reinforce this point Accordingly, there is no doubt in our mind that placing of the floor by the stock exchanges constituted a violation of section 4(1) read with section 4(2)(a) of the Ordinance.

34. We would also like to point out that the Appellants maintain that the Impugned Order is incorrect on the basis of law and facts as the conduct of the three stock exchanges did not amount to collusion or acting in concert to fix prices. It has been argued that there was no agreement between the stock exchanges. We are of the considered view that the Single Member has nowhere given a finding of cartelization amongst the stock exchanges in placing the floor. Although a violation of section 4(2) (a) could perhaps have been established by looking at the collective conduct of the three stock exchanges in greater detail in the Enquiry Report and by addressing such collusion in the Show Cause Notice.

35. As per the facts available on the record KSE imposed the floor on 27.08.2008 and LSE and ISE followed suit on 28.08.2008. KSE and LSE argued that there never was any agreement for price fixing with regard to the provision of brokerage services. To assert that competition law is not violated just because parties were *reluctant initially* to join an arrangement, understanding or practice and became part of it later is no defence. Even if any undertaking was bullied into entering an agreement or even if it never intended to implement or to adhere to the terms of the agreement would be immaterial. Keeping in view that the threshold for a finding of 'agreement' is much lower under competition law as compared to law of contract and concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective or the adoption of given line of conduct on the market has been held to be an agreement in the EU; it could have perhaps been held so in the instant case as well ***(Bayer AG v Commission [2001] 4 CMLR 126, affirmed on appeal: [2004] 4 CMLR 653)***. However, proof of finding of a direct or indirect

concurrence of wills would have been possible had the matter been so probed. Perhaps it was for lack of such probe or evidence that no such finding was given by the Honourable Single Member. KSE also contended that the Learned Member erred by resorting to an application of the *per se* rule. According to KSE this rule has been overruled in ***Leegin Creative Leather Products Inc.,***. This argument too suffers from fundamental infirmities. In the said case the US Supreme Court overruled the *per se* rule with respect to vertical agreements and not horizontal ones. Its application to a prohibited decision relating to and resulting in price fixing is misconceived. We would also like to add that from the mere reading of the Impugned Order, it is evident that the Learned Single Member has addressed at length the object as well as the effects of such decision. As pointed out by the Learned Member the word 'object' in this context means not the subjective intention of the parties when entering into the agreement, but the objective meaning and purpose of the agreement considered in the economic context in which it is to be applied *(Compagnie Royale Asturienne des Mines SA and Rheinzinc GmbH v Commission [1984] ECR 1679, [1985] 1 CMLR 688)*. Certain pernicious types of agreements have been held by the ECJ to have as their object the prevention, restriction or distortion of competition. These agreements include price fixing, market sharing, quotas, collective exclusive dealing, export bans etc.

36. Also, the effect of the decision operated as 'fixing price' for brokers' services e.g. making the provision of services subject to trading at the fixed minimum prices for their clients' securities. Provision of brokerage services was linked with a price

element, i.e. the floor price as set on 27.8.2008. Therefore, the Learned Member rightly characterized the behaviour/decision in the nature of price fixing.

37. Given the unprecedented nature of the situation at hand, the Learned Member relied on the *Chicago* case and analyzed the nature of the decision, the scope of the decision and its effect on competition in ample detail. In light of the above, we do not find merit in the contentions that offering brokerage services, subject to a price element (floor price), does not amount to price fixing.

38. Having established and characterized the nature of the behaviour falling under the purview of price fixing, observations, if any, pertaining to 'Resale Prince Maintenance' and objections in respect thereof by the Appellant are rendered irrelevant.

**Issue (ii): Whether the subject issue falls within the regulatory domain of SECP or CCP?**

39. The Appellant argued that the Commission has purported to act as a super-regulator in the present matter. The argument is premised on the fact that SECP is the regulatory body entrusted with powers and responsibilities regarding the capital and securities market. It has been argued that the Commission has encroached upon the regulatory domain of SECP. KSE has also argued that Commission has acted like a regulator of regulators and that this is untenable. After a thorough examination of the arguments we, in our considered view, do not believe that the Commission has in

any way encroached upon the regulatory domain of SECP for reasons recorded below:

"*KSE has failed to draw our attention to any provision relating to ensuring competition or to regulation of anti-competitive conduct under the SECP Act and the SEO, 1969.*
*In this regard we refer to the Order of the Commission in the matter of KSE's abuse of dominant position where it was held:*

> *'We find it pertinent to mention here that no provision in the securities laws of Pakistan covers anti-competitive practices by and among undertakings operating in the securities market. The areas of regulation envisaged by the laws governing SECP and the Commission are completely distinct. The situation is analogous to other federations like the United States where the Federal Trade Commission regulates competition related matters and the Securities and Exchange Commission regulates matters relating to incorporation and regulation of corporations in matters other than competition.*
>
> *In our view the issue of jurisdiction can be best understood with reference to which law is relevant and applicable to an entity in a given context. By way of an example, consider a corporate entity engaged in the telecom sector; as far as this entity's regulation regarding incorporation, filing of accounts, issuing of prospectus etc is concerned, the relevant law will be the companies legislation and the sector specific regulator (in that case the SECP) will have jurisdiction. In relation to this entity's filing of tax returns the Federal Board of Revenue will be the relevant regulatory body and the relevant law will be the tax code of Pakistan. In relation to its*

*licensing requirements and other related matters, the relevant law will be the licensing legislation in the telecom sector and Pakistan Telecommunication Authority will be the relevant regulator. Similarly, if and when this entity indulges in practices or enters into agreements that allegedly prevents, distorts or reduces competition within the relevant market then the relevant and the applicable law will be the competition related legislation and the concerned enforcement agency will be the Commission. Since the present complaint involves an issue of competition which falls expressly within the purview of the Ordinance, we feel it ought to be abundantly clear that the matter falls squarely within the jurisdiction of the Commission……The role of the SECP clearly is to ensure an orderly securities market and a reduction in systemic risk. However, wherever an undertaking is in a position to influence the relevant market and competition within the relevant market then the Commission steps in. In our view there is no conflict regarding jurisdiction'.*

*The object and purpose of SECP Act, was generally to provide for a regulator for corporate entities and capital markets. However, the object and purpose of the Ordinance is to make provisions to ensure free competition in all spheres of commercial and economic activity, including but not limited to capital and securities market, to enhance economic efficiency and to protect consumers from anti-competitive behavior. Therefore, upon comparison of the said objects, for the purposes of ensuring free competition, it is our considered view that Ordinance is a special law, and it will prevail over other laws including but not limited to the SECP Act and SEO 1969. The Ordinance is a special enactment, which has provided for special*

*situations, which are not provided in any other law for the time being in force such as 'Abuse of dominant position', 'Prohibited Agreements', Merger Control, and Deceptive marketing practices, which prevent, restrict, reduce, or distort competition in the relevant market, therefore, it is our considered view that Ordinance, being a special law shall prevail over a general law such as SEO 1969 or SECP Act. The following judgments have been relied upon to support this conclusion: Lahore Beverage Company (Pvt.) Limited vs. Muhammad Javed Shafi; 2008 CLC 759, Attaullah Khan vs. Samiullah; 2007 SCMR 298. The role of the SECP, therefore, clearly is to ensure an orderly securities market and reduction in systemic risk. In our view there is no conflict regarding jurisdiction. Any agreement adversely affecting competition in a relevant market can be examined by the Commission. Collusive practices and other agreements reducing or distorting competition cannot be caught by the SECP Act, SEO 1969 or even Companies Ordinance, 1984 as these laws do not envisage control of such practices. The issue here is one of the applicability of relevant law.*"

40. We find no merit in the argument that the Commission is a super-regulator. The Commission is a creature of law and acting within limits and in exercise of its lawful powers. The role of the Commission, like any competition agency, should be understood to be that of a law-enforcement agency. It is not a regulator for *a* particular sector. It has been entrusted with a functional role of ensuring competition

in all spheres of commercial and economic activity. Sector specific regulators like SECP have jurisdiction over matters relating to incorporation, prospectus and audit requirements etc. Competition related concerns however such as abuse of dominant position, agreements regarding price fixing, collusive behaviour etc have not been addressed in the securities legislation in Pakistan. Regulatory domain of the SECP in matters squarely under its jurisdiction is sacrosanct and respected by the Commission and the CCP is not to be viewed as usurping the important functions of sector specific regulators when its actions are consistent with its legislative mandate and also consistent with contemporary best practices in the extant civilized world.

***Issue (iii):*** **Whether the Show Cause Notice has been duly issued and proceedings have been initiated in accordance with law after fulfilling the pre-requisites?**

41. Objections have also been raised to the effect that the procedural requirements of the Competition Ordinance were not complied with. KSE has argued that according to s. 37 of the Ordinance there are two pre-requisites to the initiation of proceedings. First, the *Commission* has to conduct an inquiry. Secondly, if after the Inquiry it is determined that initiating proceedings would be in the public interest then the show cause notice ought to be issued. We shall deal with both prongs of this objection.

42. Section 28 (1) (c) vests the authority to conduct enquiries in the Commission, however, by virtue of section 28 (2) the Commission has the power to delegate all or any of its functions and powers to any of its Members or officers. Through SRO

999(I)/2008 dated 19.9.2008 the Commission delegated to the Members the power to initiate inquiries and to appoint Inquiry officers. In exercise of this power and through lawful delegation the inquiry officer was appointed to conduct an inquiry into the conduct of stock exchanges when they imposed the price floor. Hence the inquiry was carried out in compliance with the procedural requirements of the Ordinance.

43. Once the inquiry is completed, the question arises whether or not issuing a show-cause notice would be in the public interest. The question is whether the Commission acted in the public interest in this case. Public interest is a term of wide import (*Zia-ulla Khan v Government of Punjab 1989 PLD 554 Lahore)*. In our view, it has to be construed keeping in view the context in which it is applied. Under the Competition Ordinance, public interest would include (but cannot be restricted to) free competition in commercial and economic activity. The Learned Member points out at Para 65 that counsel for KSE conceded that anything impacting confidence of investors is a matter of public interest. The Inquiry Report at Para 24 mentioned how setting a price floor impacted the confidence of investors. Hence an anti-competitive practice affecting the confidence of investors is clearly a matter of public interest in our view and the initiation of proceedings was therefore justified. Support is also placed on *Nahid Khan v Government of Pakistan 1997 PLD 513 Karachi* where the Honourable Court held that '*it is not possible to lay down any yardstick by which public interest could be measured but it could be left to the subjective satisfaction of the Authority concerned*'.

**Issue (iv): Whether there is any merit in precedents cited in the Impugned Order?**

44. The Learned Member while analyzing the behaviour of the stock exchanges placed reliance on the *Chicago* decision. The Appellants have raised the objection that placing reliance on this decision was misplaced as the said decision involved a consent decree and was found to be pro-competitive. It was argued that consent decrees are not binding precedents and reliance was placed by LSE on **2007 MLD 331**.

45. At the outset, we want to point out that we are not convinced by LSE's reliance on **2007 MLD 331**. In this case, it was held (on the facts) that where there were three parties to a dispute and two parties entered into a consent decree, the terms did not bind the third. We fail to see the parallel with the present situation. The facts are entirely different. The Learned Member was not applying any terms of the consent decree in *Chicago* to the stock exchanges. Neither was he following it as a binding precedent. Appellants have failed to point where or how the Learned Member considered *Chicago* a binding precedent. In fact at Para 53 the Learned Member stated that 'the *Chicago* decision is *relevant* to the case at hand and *instructive insofar as it gives a template* for ascertaining the legality, or for conducting the rule of reason inquiry'. The Learned Member clearly points out the unusual nature of the price floor. There was no precedent of that in competition law jurisprudence. The closest situation involved the 'call rule' in *Chicago*. Even then the case was not followed blindly but was applied in context. We say this because the Learned Member examined the *framework* used by Justice Brandeis and borrowed from it to

analyze the imposition of the price floor. The case was considered instructive and the template it offered was made use of. This, to our minds, was perfectly reasonable since the nature, scope and effects of the price floor were examined. The application of the rule of reason demanded exactly this. We fail to understand how a more thorough evaluation of this most unusual situation (price floor) could have been carried out. While examining legal precedents, it is principles and not conclusions that are the key elements. The import of principles laid down in *Chicago* was warranted. The application of those principles to a different set of facts can legitimately lead to a different conclusion. That is all that happened in the instant matter. The 'call rule' in *Chicago* was clearly less restrictive than a price-floor. The prices, as a result of this rule, did not change from the close of the day till 9:30 a.m. the next morning. The rule affected grain 'to arrive' and did not affect the whole market as the price floor did. There was, on facts, no appreciable effect on competition in *Chicago*. This is at variance with the situation regarding the price floor as the customers were locked in and artificial prices were kept in place with no apparent end in sight. Hence we feel that the Learned Member rightly relied upon the *Chicago* case in the Impugned Order. We find ourselves aligned with the reasoning employed and the conclusion reached by him.

46. Appellants have also argued that Learned Member could not have relied on the *ICAP* case as the same has been appealed before the Honourable Supreme Court of Pakistan. We would like to point out that the *ICAP* order holds the field till it is set aside. It is a trite principle of law that mere pendency of proceedings does not operate as an injunctive order. Even more importantly, the Learned Member merely

relied on dictionary definitions produced in the said case and the principle that an association of professionals is an association of undertakings. This proposition has wide support in various competition law jurisdictions, as has been enunciated in this Order too. Hence the reliance by the Learned Member on the *ICAP* case did not prejudice the Appellants in any way whatsoever. Their contention thus in this regard is repelled.

47. The Appellant has raised certain other objections/arguments which we deem proper to address here before deciding upon the last issue.

48. It has been argued that the Commission failed to take notice of the fact that the placing of floor and the earlier implementation of circuit breakers has the same objective and effect regarding markets. We do not find this to be true. Firstly, the circuit breakers were put in place at the intervention of SECP and it was not something the exchanges themselves implemented. Secondly, the circuit breakers impose a range for a particular day and although their use is not ideal the effects are nowhere near the same as the imposition of a floor for an extended period of time. Furthermore, KSE's argument works against its own case. If circuit breakers do have the *same* objective and effect then why were they not continued? A lesser restriction would not have as deleterious an effect on competition as a floor.

49. KSE has also raised the argument that the Impugned Order is defective as no notice was issued to SECP. We want to clarify that the law envisages issuance of notices to parties that appear to be in contravention of the provisions of Chapter II of the

Ordinance. KSE and LSE were the relevant parties suspected of anti-competitive behaviour in the present matter and show cause notices were duly issued to the two undertakings. It was their behaviour that, in the view of the Commission, merited inquiry and later issuance of a Show-Cause Notice.

50. Furthermore, nothing suggests that SECP reckoned that the floor was in the public interest. As pointed out by the Learned Member, this becomes clear from the SECP Directive dated 11.12.2008 wherein it was noted that '***it is in the public interest to allow the securities markets to function without any hindrance in order to maintain the confidence of the investors***'.

51. However, Minutes of KSE Board Meeting dated 25.10.2008, 26.10.2008 and 27.11.2008 reveal that SECP communicated to KSE that IMF wanted the floor to continue the floor to prevent flight of capital from the country. However this too was at best can be termed as a desire (recorded only in the Minutes of the undertakings' meetings) and at no point did SECP force KSE or LSE to keep the floor in place. Keeping in mind the fact that KSE and LSE did not ask SECP before imposing the floor, it is odd that delay in lifting the floor has been attributed to SECP. Nothing on record establishes that SECP issued directions or orders to keep the floor in place.

52. KSE also raised the argument that the Learned Member failed to appreciate the effect of Regulation 35 of the Competition (General Enforcement) Regulations 2007, which advocates co-operation between the Commission and other regulatory bodies

on competition matters to avoid duplication of activities. We feel the argument raised by KSE is fundamentally misconceived and misses the essence of Regulation 35. The said Regulation refers to Memorandum of Understanding that the regulatory bodies may enter into for co-operation purposes and has been quoted out of context.

53. KSE has also raised the argument that the Learned Member violated principles of natural justice by imposing a rather minor penalty on ISE. The concept of natural justice over the course of time has broadly been identified with the two constituents of a fair hearing; (a) that the parties should be given a proper opportunity to be heard and to this end should be given due notice of the hearing (summed up by the maxim *Audi alteram paretam*)[1] and (b) that a person adjudicating should be disinterested and unbiased. Nothing was said by KSE about how the Learned Member violated principles of natural justice. All parties were given a fair and proper hearing after being duly notified. No evidence of bias has been placed on record by any party. In our considered view the Learned Member acted in accordance with the law and ensured the implementation of procedural safeguards. Section 39 of the Ordinance also envisages leniency in the imposition of penalties where an undertaking makes a full and true disclosure in respect of an alleged violation. ISE at the first instance admitted a violation of the Ordinance and made due disclosure in this regard therefore taking a lenient view is justified and the Learned Member was well within his powers to impose a lenient penalty on ISE

[1] No one shall be condemned unheard.

**Issue (v): Whether there existed any mitigating circumstances for the Appellants?**

54. KSE and LSE have both raised contentions regarding mitigating circumstances that the Learned Member allegedly failed to take into account. Arguments have also been raised by both the Appellants regarding the global recession and the necessity of interference with the normal functioning of the market. In addition, KSE has also argued that the actions of KSE, in the imposition of the price floor, were pursuant to KSE Market Regulations and that KSE was acting in its capacity as a regulator. In particular KSE has cited Regulation 8 (8) of the Risk Management Regulations ('the Regulations') submitting that placing the floor was a *Force Majeure* act in terms of the cited regulation Clause (c) of Regulation 8 (8), i.e. on account of loss of liquidity. It has been argued that actions of KSE were aimed at stabilizing the market. Furthermore that since KSE was acting pursuant to law and in the public interest its actions cannot be impugned by any regulatory body including the Commission. We would like to divide these arguments as follows:

- 1) Question of exemption of stock exchanges from the anti-trust regime since the exchanges purportedly acted under its Risk Management Regulations and in the public interest.
- 2) Whether placing the floor was on account of loss of liquidity and a *force majeure* act in accordance with Regulation 8(8) of the Risk Management Regulations. If so, whether this exempts the stock exchange from its obligations under the Ordinance.
- 3) Whether there was any tacit approval of SECP and/or whether there were any mitigating circumstances leading up to the placing of a floor.
- 4) Question of any extraneous mitigating factors once the floor was put in place and before it was removed.

55. We will deal with the above in seriatim:

1) The question of exempting stock exchanges from anti-trust laws has not arisen for the first time. Global experience in this regard is indeed instructive. A similar situation was addressed by the United States Supreme Court in the case of *Silver v New York Stock Exchange*. In this case the Court faced the question whether the Securities and Exchange Act 1934 provided exemption to the NYSE from anti-trust laws. While addressing this question the Court held: '*the Securities and Exchange Act contains no express exemption from anti-trust laws. This means that any repeal of the anti-trust laws must be discerned as a matter of implication and it is a cardinal principle of construction that repeals by implication are not favoured… Since the anti-trust laws serve among other things to protect competitive freedom of individual business units to compete unhindered by the group action of others, it follows that the antitrust laws are peculiarly appropriate as a check upon anticompetitive acts of exchanges*'. Since the securities and capital markets legislation in Pakistan also does not contain any provision dealing with anti-competitive conduct or exemption from the competition law regime we hold that KSE cannot claim exemption from the provisions of the Competition Ordinance, 2007.

   As far as the question of Risk Management Regulations is concerned, it is pertinent to point out that the Regulations are a piece of secondary legislation and cannot supersede the provisions and requirements of a higher legislative instrument enacted by the Federation. Regulations, if and when they conflict with primary legislation, have to give way to the latter.

   A perusal of the minutes of the KSE Board Meeting, dated 27.8.2009 makes it clear that the crisis was discussed 'in view of the aggravated financial position being faced by a number of *members*' (emphasis added). Only one portfolio investor was consulted in a conference call. The Board was worried about a 'systemic default' (as stated in the Minutes) on the part of its

members. It is our considered view that the position of Members was given far more importance compared to that of other investors, who were barely contacted. The claim then that KSE was acting in the public interest does not carry much weight in light of material made available on record. Board of Directors of KSE acted pursuant to the demands of its members. Nothing on the record establishes that KSE's actions were principally motivated by public interest considerations. The interests of members seemed to take precedence. Same is the case for LSE which, although initially reluctant, chose to join the same band-wagon while protecting the interests of its members. A fortiori, it is an established principle of law that anything contrary to law cannot be in the public interest.

2) Since KSE has relied heavily on Regulation 8.8, we find it apt to examine it and analyze KSE's actions with reference to it.

Regulation 8.8 pertains to Force Majeure. It states that '*KSE Board may in its reasonable opinion determine that an emergency or exceptional market condition exists in a market ('a Force Majeure Event') including but not limited to:*

> *a) where the Exchange / Clearing Company is, in its opinion, unable to maintain an orderly and as a result of the occurrence of any act or event (including but not limited to any circumstance beyond the Exchange/ Clearing Company's control such as strike, riot, civil unrest or failure of power supply, communications or other infrastructure);*
> *b) the suspension, closure, liquidation or abandonment of any relevant market or underlying indices;*
> *c) the excessive movement, volatility or loss of liquidity in the relevant markets or underlying indices; or*

*d) where the Exchange reasonably anticipates that any of the circumstances set out in this clause (a) to (c) are about to occur or has occurred.*

*If KSE Board determines that a Force Majeure event exists then it may (without prejudice to any other rights under these Regulations and in consultation with NCCPL and CDC) take any one or more of the following steps:*

*a) Alter normal trading times;*

*b) Alter the Margin Percentage;*

*c) Amend or vary any transactions contemplated by these Regulations, including any Contract, insofar as it is impractical or impossible for the Exchange / Clearing Company to comply with its obligations to the Customer;*

*d) Close any or all open Contracts, cancel instructions and orders as the Exchange deems to be appropriate in the circumstances; or*

*e) Take or omit to take all such other actions as KSE Board deems to be reasonably appropriate in the circumstances having regard to the positions of the Exchange, Clearing Company, the Members and other customers.*

*If the Exchange determines that a Force Majeure Event exists, the Exchange will not be liable to the Members for any failure, hindrance or delay in performing its obligations under these Regulations or for taking or omitting to take any action in accordance with these Regulations.*

KSE has cited ground (c) of the 'Force Majeure Event', loss of liquidity, as the ground for invoking the Force Majeure clause. Hence first and foremost there is the issue of determination of a Force Majeure event by the KSE Board. Furthermore it is an established principle that the party seeking to be

excused under force majeure bears the burden of proving that his non-performance was due to circumstances beyond its control and that there were no reasonable steps that he could have taken to avoid or mitigate the event or its consequences (Chitty on Contracts, 2003 Edition, Volume I).

KSE has helpfully furnished a Report prepared by it regarding loss of liquidity in the market to assist the Appellate Bench- (the report was prepared during the course of hearing in the subject proceedings). However at the time of placing the floor we do not find any such Report or deliberation taken into account by the Board. The term 'Loss of liquidity' can generally be explained as *the degree to which an asset or security can be bought or sold in the market without effecting the asset's price. Liquidity is characterized by a high level of trading activity*. The Report explains that the Impact Cost is inversely proportional to liquidity in a market. Hence, the lower the Impact Cost the higher the liquidity and vice versa. The Report furnished lists 'certain securities' which have seen an average jump of 200% in their Impact Cost from April to August 2008. Surprisingly though the Report lays out no basis for selecting these securities. We remain in the dark about the rationale for selecting these. The basis for implying that these securities reflect the overall sentiment in the market hence remains unclear. Although we agree that liquidity declined, the Report in no way establishes that there was an *excessive* loss of liquidity, as envisaged by the Regulations. Minutes of KSE Board's Meeting dated 27.8.2008 (wherein decision to impose the price floor was taken) also do not refer to loss of liquidity,

excessive or otherwise. There seems to be a general concern for the economic slowdown and more particularly the interests of members of KSE. This raises serious questions about the amount of deliberation prior to imposing the floor.

Assuming (without conceding) that the determination made by KSE was reasonable the problem remains. The Regulations state that *if KSE Board determines that a Force Majeure event exists then it may (without prejudice to any other rights under these Regulations and in consultation with NCCPL and CDC) take any one or more of the following steps:*

> *(a) alter normal trading times;*
> *(b) alter the Margin Percentage;*
> *(c) amend or vary transactions contemplated by these Regulations, including any Contract, insofar as it is impractical or impossible for the Exchange/ Clearing Company to comply with its obligation to the Customer;*
> *(d) close any or all open Contracts, cancel instructions and orders as KSE deems appropriate;*
> *(e) take or omit to take all such other actions deems to be reasonably appropriate in the circumstances having regard to the positions of the Exchange, Clearing Company, the Members and other customers.*

KSE relied on sub-clause (e) of the above stated Regulation. Clause (e) is the catch-all clause and allows KSE to ) take or omit to take all such other actions deems to be reasonably appropriate in the circumstances having regard to the positions of the Exchange, Clearing Company, the Members

and other customers. However, the catch-all clause does not give a carte-blanche to KSE and the above sub-clause has to be interpreted in line with the requirements of reasonableness (as the actions have to be reasonably appropriate). Was imposing a floor the sole viable option? Why were the circuit breakers not continued? Both KSE and LSE have argued that imposing the price floor was legitimate as the objective and effects of a price floor were the same as circuit breakers put in place after the intervention of SECP. If the effects were the same as circuit breakers then imposing a floor seems to negate their very own logic.

Furthermore, *consultation* with NCCPL and CDC is required under the Regulations which without going into the details according to well settled principle must be 'meaningful'. Interestingly, the Minutes of the meeting of KSE Board dated 27.8.2008 refer to 'consultation' with CDC and NCCPL. However upon an examination of the letters (both dated 1.6.2009) produced by KSE as evidence of consultation we could not help but notice that CDC and NCCPL refer to having been 'informed' rather than 'consulted' in the circumstances. Nothing in the said letters refers to consultation or implies deliberation. In fact consultation, in its essence, is conspicuous by its very absence. Even more peculiar is the fact that CEO of CDC appears to have been informed after the KSE Board Meeting. Importantly his letter dated 1.6.2009 (ten months after the said action) simply reflects that he was 'informed over phone on the night of 27.8.2008 on the proposal of placement of floor on securities' prices' (while the meeting took place during the day).

Consultation has serious connotations in law. There is a clear difference between complying with the requirement of consultation and mere intimation of the decision.

Furthermore, ground (e) of Regulation 8.8 requires of KSE to have regard to the positions of the Exchange, Clearing Company, the Members and other customers. Other customers would clearly include the investing public. However,. There is no mention of loss of liquidity in the Minutes of Board Meeting dated 27.08.2008. The decision of the Board thus locked in many customers and all but eliminated the possibility of competitive bidding-the very essence of competition in the securities market. Therefore,it is our considered view that KSE did not even meet or comply with all the requirements of Regulation 8.8 of the Regulations.

Moreover, the Regulation states "If the Exchange determines that a Force Majeure Event exists, the Exchange will not be liable to the Members for any failure, hindrance or delay in performing its obligations under these Regulations or for taking or omitting to take any action in accordance with these Regulations". The force majeure exemption does not, in any way, grant immunity from the operation or effect of legislative instruments expressing the will of the Federation, such as the Competition Ordinance. At best it may give immunity to the exchange from any liability against claims by members.

Also, contrary to KSE's arguments, the imposition of the price floor in effect created barriers to entry and exit. The argument that the application of the floor was across the board and hence no barriers were created is not convincing in the least as customers/investors were locked in and free competitive bidding (below the floor) was all but eliminated. The Learned Member has aptly dealt with this aspect of the matter in Paragraph 57 of the Impugned Order as reproduced above.

3) The tacit approval of SECP, if any, repeatedly referred to by KSE and LSE, does not absolve LSE and KSE of the consequences of their actions. KSE Board took the decision to impose the floor after being urged to do so by its members. LSE followed suit to protect the interests of its members also. Thus, neither KSE nor LSE were directed by SECP to impose the floor and this fact has been admitted by LSE. LSE conceded, during the hearing dated 15.6.2009 before the Appellate Bench, that there was no direction from the SECP to impose the floor. KSE failed to put anything on record to prove to the contrary. Once the decision to impose the floor had been taken, SECP was notified by KSE. LSE and ISE chose to follow in undue haste. LSE accepted through its representatives before the Appellate Bench that imposing the floor was a mistake. ISE had already done the same at the initial proceedings before the Single Member. Therefore we do not find any mitigating circumstances at the time of taking the decision regarding placing the floor and the responsibility for taking such a decision squarely falls on the Appellant. We also feel it is important to emphasize that the exchanges must have been cognizant of the anti-competitive effects of a price floor. The

stock exchanges are not unfamiliar with the competition regime in Pakistan. The economy was not in a rosy state, we agree. However that does not give businesses and professionals the licence to act in willful defiance of the law.

4) Regarding mitigating circumstances, after the placing of floor KSE and LSE have argued that the exchanges were keen on removing the floor but other considerations weighed on them too. These included the communications with the Finance Ministry as well as the country's obligations under the Stand-By Agreement with the International Monetary Fund ('IMF'). This is a claim that is not entirely borne out when the evidence is examined. KSE imposed the floor without any fixed deadline in mind. This is clearly evident from the Notice to Members, issued by KSE, dated 27.8.2008. The said notice speaks of implementing the floor 'till further notice'. The same is true for LSE which had no end period in sight regarding the removal of the price floor. We also feel that it is imperative to mention that the *decision* to impose the floor was *not* taken under any obligation towards the IMF or any other donor agency. KSE's decision to impose the floor in the aftermath of its Board Meeting, after facing demands from its members, was one primarily aimed at protecting the interests of its members. LSE initially showed reluctance but then followed KSE and entered into the same arrangement. No evidence has been placed on record wherein the Finance Ministry or the IMF asked either of these exchanges to impose the floor. Once the floor had been imposed though, the Finance Ministry and IMF counseled against the removal of the floor. However there was never any direction or order from

any Ministry to maintain the floor. The desires of IMF did make a difference though. We have been mindful of all the circumstances existing at the time. Although we believe that the Learned Member has already taken a lenient and balanced view of the situation in the Impugned Order we are only willing to recognize to some extent that there were extraneous factors which may have contributed to the continuation of the floor or its removal. It is unfortunate that unlike the other stock exchanges KSE has not been able to admit and recognize its mistake -any or all of the justifications cannot grant them immunity from committing such contraventions of the law.

56. Notwithstanding the adamant behaviour of KSE so far, keeping in view the particular facts and circumstances of the case and in line with the spirit of ensuring future compliance; we are inclined to reduce the penalty by 50% (fifty percent) restricting it to a nominal sum of Rs. 500,000/- (five hundred thousand) **provided**:

    a) KSE admits the contravention,
    b) provides assurance to the Commission that no such action shall be taken in future and
    c) deposits the penalty within a period of 2 (two) weeks from the date of issuance of this Order.

57. The admission of contravention and assurance of future compliance must be submitted for and on behalf of KSE through a duly authorized representative in the form of an undertaking to the satisfaction of the Commission no later than a period of four weeks from the date of this Order. Failure to comply with the above, KSE

shall lose its opportunity to avail a lenient treatment and shall be liable to pay the original penalty as imposed by the Single Member in the sum of rupees one million.

58. Since LSE has already accepted the contravention and submitted not to contest the subject Appeal, keeping the above in view and appreciating its responsible conduct we are reducing the penalty for LSE to a nominal sum of Rupees 200,000/- (two hundred thousand).

59. Order accordingly.

**KHALID A. MIRZA**
(CHAIRMAN)

**RAHAT KAUNAIN HASSAN**
(MEMBER)

**Islamabad the November 26, 2009**