BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF
Show cause notice dated 24 December 2007 for Violation of Section 4 of the Ordinance

M/s. Pakistan Banks' Association, Allied Bank Limited, Habib Bank Limited, MCB Limited, United Bank Limited, Faysal Bank Limited, Hong Kong & Shanghai Banking Corporation Pakistan, Saudi Pak Bank, Soneri Bank Limited, Crescent Commercial Bank Limited, Emirates Global Islamic Bank Limited, NIB Bank Limited, Dubai Islamic Bank (Pakistan) Limited, Dawood Islamic Bank Limited, KASB Bank Limited, JS Bank Limited, Bank Al Habib Limited, Industrial Development Bank of Pakistan, ABN AMRO Bank, Atlas Bank Limited, Arif Habib Bank Limited, Habib Metropolitan Bank Limited, My Bank Limited, Bank Islami (Pakistan) Limited, Meezan Bank Limited, Pak Oman Microfinance Bank Limited, Deutsche Bank, National Bank of Pakistan, Standard Chartered Bank (Pakistan) Ltd, Citi Bank N.A. Pakistan, First Women Bank Limited, Bank Al Falah Limited, SME Bank Limited, The Bank of Khyber, Zarai Tarqiati Bank Limited, Askari Bank Limited, Khushali Bank, First Microfinance Bank Limited, Punjab Provincial Co-opertive Bank Limited, Al Baraka Islamic Bank, The Bank of Punjab and Oman International Bank.

(File No 2/sec-4/CCP/07)

Dates of Hearings	February 12, 13, 14, 20, 21, 2008 and March 07, 2008
Present:	Mr. Abdul Ghaffar Member (Mergers & Cartels), Mr. Javed Qaiser Senior Executive (Investigation)

Present for the undertakings:

Pakistan Bank's Association	Mr Mehmood Mandviwalla Advocate Mr Naveed-Ul-Haq Chahudhry, Advocate

Allied Bank Limited Habib Bank Limited MCB Limited United Bank Limited Faysal Bank Limited Hong Kong & Shanghai Banking Corporation Pakistan Saudi Pak Bank Soneri Bank Limited Crescent Commercial Bank Limited Emirates Global Islamic Bank Limited NIB Bank Limited Dubai Islamic Bank (Pakistan) Limited	Mr Taimur Ali Mirza Advocate
Dawood Islamic Bank Limited	Mr Rauf Ahmad Nawaz Butt
KASB Bank Limited	Mr Khalid Mahmood Salim
JS Bank Limited	
Bank Al Habib Limited	Mr Liaquat H Merchant Advocate
Industrial Development Bank of Pakistan	Mr A.I. Chundrigar Advocate Mr Ashraf Ali, Head of operations
ABN AMRO Bank	Mr Mehmood Mandviwalla Advocate Mr Nasir Islam, Country Compliance Head Mian Ejaz Ahmad, Head Legal Affairs
Atlas Bank Limited	Mr. Babar Wajid, Group Product Manager Retail Banking
Arif Habib Bank Limited	Mr Raza Dyer, Head of Operations Mr Aziz Morris
Habib Metropolitan Bank Limited	Mr Moonis Jaffery, Head of Operations
My Bank Limited	Mr Muhammad Imran. Senior Vice President

Bank Islami (Pakistan) Limited	Mr Jawad Khan, Head Compliance & Legal Affairs
Meezan Bank Limited	Mr Muammad Raza, Head of Liability Product & Service Quality Mr Fazal Rehman Hajano Assistant Manager, Legal Affairs
Pak Oman Microfinance Bank Limited	Fahim A. siddiqui, Head of Operations
Deutsche Bank	Mr Mehmood Mandviwalla Advocate
National Bank of Pakistan	Mr Nafees A Siddiqui Advocate
Standard Chartered Bank (Pakistan) Ltd	Mr Nafees A Siddiqui Advocate
Citi Bank N.A. Pakistan	Mr Yawar Shameem, Senior Vice President Ibrar gul Niazi, Legal Counsel
First Women Bank Limited	Mr Bahzad Haider Advocate Mr Ishaq Shah Advocate Mr Jam Asif Mehmood Advocate
Bank Al Falah Limited	Mr Muhammad Falak Sher, Chief Compliance Officer
SME Bank Limited	Mr Naseer Durrani, SEVP & Head of operations
The Bank of Khyber	Mr Khurshid alam, VP/Head Banking Operations
Zarai Tarqiati Bank Limited	Mr Alamgir Khattak, SVP Mr Mehmood Karim Qureshi, VP
Askari Bank Limited	Mr Hassan Aziz Rana, country Head Legal Affairs Division Syed Hassan Sajjad, SVP
Khushali Bank	Mr Umar Farooq, Head Operations
First Microfinance Bank Limited	Mr Mutabiat Shah, Head clients Market Mr Adnan Zafar, Manager Finance

Punjab Provincial Co-opertive Bank Limited	Mr Javaid Iqbal Mr Sohail Malik
Al Baraka Islamic Bank	Mr Muhammad Junaid Younas Ghori, VP Mr Nayyar Mehmood, Incharge product development
The Bank of Punjab	Mr Abid Ali, Chief Manager Mr Khawaja Shahzad Gul, Area Manager
Oman International Bank	Mr Aziz Abbas, Senior Manager Mr Lal Rajwani, Asst Manager Credit Admn

Background

1. Competition Commission of Pakistan (the "Commission") is established under the Competition Ordinance, 2007 (the "Ordinance") which provides for the maintenance of free competition in all spheres of commercial and economic activity to enhance economic efficiency and protect the consumers from anti-competitive behavior. While performing its functions, the Commission is under a statutory duty to ensure that no undertaking or association of undertakings violates the provisions of the Ordinance, and in this regard is empowered to take necessary actions for carrying out the purposes of the Ordinance.

2. Section 4 of the Ordinance prohibits agreements by the undertakings and/or decisions by an association of undertakings which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under Section 5 of the Ordinance.

3. On 5 November 2007, the Pakistan Banks' Association (PBA) made a public announcement of its decision by an advertisement in the daily newspaper, The News, which *prima facie* suggested that the banks were using the platform of PBA to collectively decide rates of profit and other terms and conditions regarding deposit accounts including the fixing and capping of the maximum rate of profit; fixing and capping of maximum balance requirement of a category of accounts; limiting the number of withdrawals; and fixing the rate of charge on balances below a certain minimum balance.

4. The Commission took *suo moto* notice of the above mentioned announcement made by the PBA on behalf of its member banks. The necessary preliminary information gathered by the Commission shows that PBA is incorporated as a private limited company and offers membership to all financial institutions operating in Pakistan. At present, it has 49 members which are broadly categorized as follows:

1. Government Owned Banks;
2. Privatized Banks;
3. Small and Medium Enterprises;
4. Private Banks;
5. Foreign Banks; and
6. Development Financial Institutions (DFIs).

5. According to the information available on the PBA website, following financial institutions are members of the PBA:

<u>Government Owned Banks:</u>

1) First Women Bank Limited
2) Industrial Bank of Pakistan

3) Khushhali Bank
4) National Bank of Pakistan
5) SME Bank Limited
6) The Bank of Khyber
7) The Bank of Punjab
8) The Punjab Provincial Co-operative Bank Limited
9) Zarai Taraqiate Bank Limited

Privatized Banks:

10) Allied Bank Limited
11) Habib Bank Limited
12) MCB Limited
13) United Bank Limited

Small and Medium Enterprise:

14) First Microfinance Bank Limited
15) Pak Oman Microfinance Bank Limited

Private Banks:

16) ABN MARO Bank (Pakistan) Limited
17) Arif Habib Bank Limited
18) Askari Bank Limited
19) Atlas Bank Limited
20) Bank Al-Fallah Limited
21) Bank Al-Habib Limited
22) Bank Islami Pakistan Limited.
23) Crescent Commercial Bank Limited
24) Dawood Islamic Bank Limited
25) Dubai Islamic Bank Pakistan Limited
26) Emirates Global Islamic Bank Limited
27) Faysal Bank Limited
28) Habib Metropolitan Bank Limited
29) JS Bank Limited
30) KASB Bank Limited
31) Meezan Bank Limited
32) My Bank Limited
33) NIB Bank Limited
34) PICIC Commercial Bank Limited
35) Saudi Pak Commercial Bank Limited
36) Soneri Bank Limited
37) Standard Chartered Bank (Pakistan) Limited

Foreign Banks:

38) Al-Baraka Islamic Bank B.S.C. (E.C.), Pakistan
39) Citibank N.A. Pakistan
40) Deutsche Bank AG, Pakistan
41) Hong Kong & Shanghai Banking Corporation Limited, Pakistan
42) Oman International Bank S.O.A.G., Pakistan

Development Financial Institutions (DFIs):

43) House Building Finance Corporation
44) National Investment Trust Limited
45) Pak Kuwait Investment Company (Pvt.) Limited
46) Pak Libya Holding Company (Pvt.) Limited
47) Pak Oman Investment Company Limited
48) Pakistan Industrial Credit & Investment Corporation Limited
49) Saudi Pak Industrial & Agricultural Investment Company (Pvt.) Ltd.

Show Cause Notice to PBA

6. In the above background, the Commission initiated proceedings under section 30 read with section 31(b) of the Ordinance against the PBA and all its member banks (except DFIs who do not operate deposit accounts) and a show cause in the following terms was issued on 24 December 2007:

> "*(1)* ***Whereas*** *Pakistan Banks' Association is an undertaking (hereinafter referred to as 'the undertaking') as defined in Section 2(1)(p) of the Competition Ordinance, 2007 (hereinafter referred to as 'the Ordinance');*
> *(2)* ***And whereas*** *the undertaking at present has forty nine Financial Institutions as its members (hereinafter referred to as 'the members') including seven Development Financial Institutions (hereinafter referred to as 'the DFI's);*
> *(3)* ***And whereas*** *the members of the undertaking (excluding the DFIs) are engaged in normal commercial banking;*
> *(4)* ***And whereas*** *the undertaking has published its decision, through press (print media) including the daily 'The News' dated 5th November, 2007, informing the account holders of all the members that:*
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> *"Under the auspices of Pakistan Banks' Association, all scheduled banks introduce the Enhanced Savings Account (ESA). Now you*

can earn 4% p.a. profit on your average balance up to Rs.20, 000 in your PLS Savings Account. If your account falls under this category, it will be automatically converted into an ESA, giving you more access to financial services and offering a better return on your savings.

ESA offer the following advantages:

- *4% profit p.a. calculated and credited quarterly on your average balance;*
- *No additional documentation required;*
- *All PLS accounts (with average balances up to Rs.20,000/-) will automatically be transferred to ESA on October 31, 2007;*
- *4 free debit transactions every month (excluding ATM), otherwise PLS rates on Saving Account will apply;*
- *Only Rs.50 will be deducted per month, if your average balance falls below Rs.5,000 during the month;*
- *Countrywide access to ESA customers of all banks; and*
- *No hidden charges."*

(5) ***And whereas*** *the implementation of decision of the undertaking has:*

i) *Created dissimilar condition amongst the PLS account holders as the account holders having an average balance of Rs.20,000/- are getting a return at 4% per annum on their balances, while the account holders having a balance of more than Rs.20,000/- are getting return on their balances at normal PLS rates;*

ii) *Forced the members to charge Rs.50/- per month from the ESA account holders having balances during the month below Rs.5,000/- depriving the small savers to avail the opportunity of maintaining their accounts with the members like the following that mostly required no minimum balance and used to pay handsome return to their account holders.:-*

Bank	***Deposit Range***	***Profit***
FWBL	*Up to Rs.4,999/-*	*2.00%*
IDBP	*No minimum balance requirement*	*3.00%*
SME Bank	*No minimum balance requirement*	*3.25%*
The Bank of Khyber	*No minimum balance requirement*	*1.95% (monthly product basis)*

Bank of Punjab	*No minimum balance requirement*	*1.95% (monthly product basis)*
ZTBL	*No minimum balance requirement*	*1.00%*
Bank Al-Fallah	*Up to Rs.24,999/-*	*2.00%*
BankIslami Pakistan	*Re.1 to Rs.99,999/-*	*2.35%*
Habib Metropolitan Bank	*No minimum balance requirement*	*4.50%*
Saudi Pak Commercial Bank	*Minimum balance Rs.1,000/-*	*4.00%*
Al-Baraka Islamic Bank	*No minimum balance requirement*	*2.65% (July – Sept, 2007)*
Bank Al-Habib	*No minimum balance requirement*	*1.50% (six monthly product basis) + free life and disability insurance*

iii) Converted PLS saving accounts, said to be interest free accounts, into interest bearing accounts with guaranteed return of 4% to holders of account having balance up to Rs.20,000/-, without the consent of the account holders leaving no option for the small savers to avail interest free PLS saving scheme.

(6) ***And whereas*** *such practice of the undertaking, prima facie, is a violation of Section 4(1) and Section 4(2) (a) (c) & (f) of the Ordinance;*

(7) ***And whereas*** *the Competition Commission of Pakistan (hereinafter referred to as "the Commission") is satisfied that for the contravention of Section 4(1) and Section 4(2) (a) (c) & (f) of the Ordinance, it is necessary to initiate proceedings against the undertaking under section 30, giving the undertaking an opportunity of being heard and placing before the Commission facts and material in support of its contention, before making an order under section 31(b) and also imposing a penalty at the rates prescribed in Section 38 of the Ordinance.*

(8) ***Now therefore****, the undertaking is called upon to place before the Commission facts and material in support of its contentions by January 10, 2008 as to why an appropriate order under Section 31(b) may not be passed and a penalty at the rates prescribed in Section 38 of the Ordinance, may not be imposed on it."*

Reply by PBA

7. In response to the above mentioned show cause notice, PBA filed its initial reply on 9 January 2008. Opportunity of hearing in person was also granted. The authorized

representative of the PBA stated that the Enhanced Saving Account (ESA) is basically an extension of the Basic Banking Account introduced by the State Bank of Pakistan (SBP) in November 2005. Customers having balances below Rs.20,000/- were not provided any service before introduction of ESA. It was decided to provide a minimum service to small savers in the shape of ESA. He stated that ESA was introduced on behest of the regulator in the larger public interest. Compliance with the PBA decision is not mandatory for banks and it is up to the banks to implement ESA. He explained that PBA has a consultative role in framing of policies and highlighting problems of the banking sector to the SBP. On the issue of service charges, he maintained that before this decision of the PBA, banks were charging so high a rate that in some cases the entire account balance was adjusted against service charges. Through this decision, PBA has restricted banks not to charge more than Rs.50/- per month. He argued that introduction of ESA by PBA and its member banks is not anti-competitive behavior.

8. On 28 February 2008, PBA filed its final reply and for the first time raised the objection that since the Ordinance was promulgated on 2 October 2007, it has lapsed under Article 89 of the Pakistan Constitution and all proceedings, hearings and notices issued or commenced by the Commission have no legal effect and therefore the instant proceedings commenced by the Commission under the Ordinance stand nullified, are without jurisdiction and are also *quorum non judice*.

9. PBA further mentioned that it is an association of various banks and financial institutions operating in Pakistan and that:

"(1) Its objectives are:

(a) *To promote, advance and protect the rights, privileges and interests of banks and financial institutions functioning in Pakistan and to take such actions as may be necessary in dealing with governmental, legislative or other measures affecting aforesaid banks and financial institutions generally.*

(b) *To promote and develop sound banking and financing principles, practices and conventions and to assist, co-ordinate and encourage the study, development and improvement of banking and financing procedure, practice and custom in all respects.*

(c) *To collect, classify and circulate statistics and information relating to banks and financial institutions functioning in Pakistan and in respect of matters affecting bankers or banking in general*

*(2) Upon consultation with the State Bank of Pakistan, the PBA initiated projects to encourage deposit mobilization across a wider range of its Members' existing customer base. After conducting its due diligence in the banking industry, PBA realized that there was a need to provide better rates of return to small depositors. Before the introduction of the Enhanced Savings Account ("**ESA**"), small depositors did not have many lucrative options where they could invest their money and receive a worthwhile rate of return. It was felt by the PBA and its Members that there was a need to offer better rates of return to small depositors so that they could have a better option of investing their savings. With this idea in mind the ESA was introduced with a profit rate of 4% which was higher than the rates of return previously being offered by the banks.*

(3) This new category of savings accounts was introduced to encourage small savers and help in increasing the over all deposit base of the banking sector, which would in turn assist in the long term economic and social development of Pakistan.

*(4) The ESA was introduced specifically to cater for customers having balances up to PKR 20,000 in their Profit and Loss Savings Account ("**PLS Accounts**") and was the first account established specifically*

for small savers, giving them the opportunity to receive higher rates of return on their savings.

(5) *The ESA offered small savers a 4% annual rate of return, provided that an average balance of upto PKR 20,000 was maintained in the account.*

(6) *In order to ensure a country wide access to the customers, the ESA was introduced by many of the PBA's Members excluding those banks and financial institutions which opted not to have the ESA.*

(7) *The respondent does not have any authority or power to enforce its proposals and its Members are free to decide whether they want to introduce a certain scheme or product or not.*

(8) *The ESA was such a scheme and while many Members thought it to be a product that would be beneficial for their customers, others did not introduce it.*

(9) *Notwithstanding the higher rates of profit being offered to the small savers by the implementation of the ESA, the customers were also offered a wide range of banking services including but not limited to; no hidden charges and unlimited credit transactions. The limit on debit transactions was put in place in order for banks to keep transactional costs low so that they would be able to offer a higher rate of return on the deposits. Restrictions on debit transactions have been in place in the past on regular PLS accounts and were not introduced for the first time specifically in case of the ESA.*

(10) *Furthermore, SBP in terms of its Circular No. 16 of 2005, authorized the banks and financial institutions to offer different rates of return to depositors / investors.*

(11) *The ESA is a new product introduced to run parallel to the other PLS Accounts offered by the members and offers a 4% annual rate of return.*

(12) *The customers whose old PLS Accounts were converted to the ESA retained the option of not having their PLS accounts converted to the ESA and continuing with their regular PLS Accounts.*

(13) *The PBA's members provides various PLS Accounts to their customers who maintain balances of amounts which are in excess of PKR 20,000 and are receiving even higher rates of returns than those being provided to the ESA account holders.*

(14) *The PBA did not force any of its Members to charge PKR 50 per month from ESA account holders whose balance fell below PKR 5,000 in any given month. The respondent is an association of banks and can only give proposals. The decision to follow or adopt any proposal of the respondent is the sole discretion of the member banks. This can be reaffirmed by the fact that many Members of the respondent have*

not introduced the ESA. These Members have not been penalized in any manner for not introducing the ESA and still continue to be Members of the respondent. The Respondent and these Members still maintain a strong working relationship. Further, the charge of PKR 50 being levied on customers going below the minimum threshold is necessary as banks incur cost in maintaining accounts. These costs are not only restricted to the ESA and are generally charged on all operating accounts in accordance with the banks' Schedule of Charges which is updated every six (6) months as provided by SBP. The charge of PKR 50 is the general cost of maintaining low balance accounts in any bank. Moreover, in terms of SBP's Prudential Regulations No XIII (Review of the Instructions on Services Charges on PLS Deposit Account), SBP has allowed banks to levy service charges on all types of PLS deposits provided that such charges are indicated in their half yearly schedule of charges. The Respondent's members on the advice of the respondent have further notified their customers and potential ESA account holders of all the terms and conditions pertaining to the ESA and therefore has complied with all the regulatory requirements laid down by SBP in charging the minimum account maintenance fee.

(15) The 4% per annum return being paid to the ESA customers is not interest but profit. The respondent's notice appearing in the News dated 5th November 2007 referred to by the Commission reads "Now you can earn 4% p.a. ***profit*** *on your average balance of Rs. 20,000 in your PLS Savings Account." This sentence clarifies the factual and legal position that the 4% per annum return on the balance in the ESA was profit and not interest. Thus the ESA is not an interest bearing account but a non interest bearing PLS account with only a higher rate of profit. The small savers were therefore not deprived of the option to earn interest free PLS savings. Furthermore, the small savers have the option of not having their PLS accounts converted into ESA and can keep holding their previous accounts as regular PLS accounts. It is reiterated that the ESA is a type of PLS account which by default makes it a non interest bearing account."*

10. The PBA in its submissions to the Commission also drew attention to the concept of "appreciable effect" in context of competition law and stated that:

"(1) Many banks including Islamic banks have not introduced the ESA while some banks have. According to the statistical bulletin released by the SBP in February 2008 as of June 2007, PKR 3,372,551.5 Million was the amount of total deposits held in accounts in the scheduled banks of Pakistan. Out

of this only PKR 1,456,922.6 Million was held in savings accounts. The deposits held by the scheduled banks of Pakistan in savings accounts form approximately 43.2% of the total deposit base of the scheduled banks of Pakistan. Furthermore, the Bulletin also states that only PKR 76,066 Million was held in accounts having balances less than PKR 20,000. PKR 76,066 Million is only 2.25% of the total deposit base of PKR 3,372,551.5 Million held in accounts by the scheduled banks of Pakistan. Further, the figure of PKR 76,066 Million also includes current accounts having balances less than PKR 20,000. The ESA as already mentioned is only applicable to PLS accounts having balances less than or up to PKR 20,000. Thus the ESA scheme introduced by the respondent's Members affects less than 2.25% of the total deposit base of the scheduled banks of Pakistan. All banks have not introduced the ESA which brings the overall percentage of deposits affected by the ESA scheme to an even lower number.

(2) *Even if it is said that the ESA has had an adverse effect on the competition amongst banks, the Appreciable Effect is very low; lower than 2.25% of the entire deposit base. Banks are still competing through open market competition in relation to more than 97% of the total deposit base*

(3) *The Respondent relies upon the following decisions: (i) The European Community case law authority of the VISA I decision of August 2001, in which the Commission granted clearance to Visa's No Discrimination Rule Agreement ("**NDR**") as the NDR lacked Appreciable Effect on competition and (ii) the Bagnasco case [Bagnasco v Banca Popolare di Novara [1999] ECR I-00135]. The Bagnasco case concerned the agreed uniform banking conditions decided by the Italian Banking Association ABI in relation to the opening of current account credit facilities and guarantees.*

(4) *The respondent and its Members have not behaved in the manner of a cartel by introducing the ESA scheme. For a cartel to exist, there are certain elements which have to be present. First and foremost, one condition necessary for a cartel to exist is that there is an agreement between the competitors aimed at raising the price of a product or service to a level higher than the one that would have prevailed under normal competitive conditions. In the present situation, there is no cartel in existence as the price of any service has not been raised by the Respondent in agreement with its Members. Raising the price of a product or service has a negative impact on the end user. However, raising the profit rate that is given to an account holder benefits him. The raising of the price of a product or service is not the same as the raising the profit rate payable on a savings account. To the contrary, the price and profit rate have a negative relationship. If the case*

had been that the Respondent in consultation with its Members had reached an agreement whereby the rate of profit that would be offered to PLS account holders would be lowered than what it would normally had been under competitive conditions then and only then would there be any possibility of the existence of a cartel.

(5) Further for the cartel to exist, the other condition that is vital is the adverse effect on the customers. Cartel agreements by their very nature have to be adverse in their impact on the interests of the customers. To the contrary to this, the raising of the profit rate offered to PLS account holders through the special ESA scheme has benefited the account holders as they are now receiving a higher rate of return than they would have previously earned. This fact also completely and conclusively negates the existence of a cartel in the present case.

(6) Cartels are formed through arrangements about which intense efforts are made to keep the same confidential as cartels are illegal in nature and have adverse effects on customers. The respondent on the other hand advertised the agreement it had reached with its Members through a leading national daily newspaper of Pakistan and hence the question of any cartel like agreement does not even arise. The agreement was advertised so that account holders would come to know about the positive step the Respondent and its Members had taken for them.

(7) Public interest should also be taken into consideration in this matter. The respondent in direct consultation with the SBP had introduced the ESA with the view to provide small savers with a higher rate of profit on their minimal savings. The threshold of PKR 20,000 signifies that the ESA targets first and foremost the low income strata of the Pakistani society. Account holders maintaining average balances upto PKR 20,000 do undoubtedly belong to the low income segment of society which before the introduction of the ESA did not have access to the higher profit rates which were being offered to account holders having high balances. The profit rate of 4% per annum on the ESA is a higher rate of profit than one that would be possible if competition and market forces were allowed to determine the same. A comparison can easily be drawn between the profit rate offered on the ESA and the profit rate that is being determined through open market competition on normal PLS accounts. If the ESA is withdrawn, the low income segment of the Pakistani society will be deprived from the higher profit rate of the ESA and will only get much lower PLS rates as they were getting before."

PBA also submitted a copy of Chapter 3 of Statistical Bulletin for February 2008 on banking system issued by SBP in support of its arguments on "appreciable effect".

Show Cause Notice to Banks

11. On 24 December 2007, show cause notices were also issued to 42 member banks (except DFIs) for contravention of Section 4(1) and Section 4(2) (a) (c) & (f) of the Ordinance and proceedings were initiated under Section 30.

Reply by Banks which implemented ESA

12. In response to the above mentioned show cause notice, 41 member banks (except PICIC Commercial Bank Limited that has merged in to NIB Bank Limited from 1 January 2008), submitted their replies on the basis of which it is clear that seven (7) banks namely, Habib Bank Limited, Muslim Commercial Bank Limited, National Bank of Pakistan, Saudi Pak Commercial Bank Limited, Allied Bank Limited, Atlas Bank Limited and United Bank Limited have implemented the ESA scheme in terms of the subject public announcement. With the exception of National Bank these banks have generally argued that:

> *"(i) The bank being a member of Pakistan Banks Association has in accordance with the proposal prepared by PBA in consultation with the State Bank of Pakistan under the Banking Companies Ordinance, 1962 established and introduced an Enhanced Saving Account;*
> *(ii) This account was introduced to cater for the segment of customers who have balances of up to PKR 20,000 in their Profit and Loss Savings Accounts which is a new deposit category account specifically introduced for small savers;*

(iii) The Competition Ordinance will not apply in their case ;

(iv) The Account will not in any manner create unreasonable monopoly power or unreasonable concentration of economic power or reduce competition between banks and financial institutions with regards to the banking services; and

(v) Being a member of the PBA, the bank concurs with the reply dated 9 January 2007 submitted by the PBA to the Commission."

13. The authorized representatives of these banks further mentioned that introduction of ESA by PBA and other banks does not amount to anti-competitive behavior and it has been introduced at the behest of the regulator (i.e, SBP) in the larger public interest.

14. On behalf of Atlas Bank, it was submitted that introduction of ESA scheme by PBA is not creating cartel-like behavior because consumers' rights are not affected. Moreover, it is not charging service charges related to the minimum balance requirement of the ESA scheme or in respect of any of its other products.

15. National Bank of Pakistan in its reply stated that:

" a. SBP through its letter No.BPRD/SLD-06/420/2007 dated January 16, 2008 replied to NBP that "In this connection we have to advise that since ESA Scheme has been prepared by banks under the arrangements worked out by Pakistan Banks Association, NBP should implement the same.

b. There was no choice on the part of NBP in relation to the implementation of the decision of the PBA.

16. National Bank, during the hearing apart from reiterating its reply stated that question of fixation of interest rate is beyond the scope of the Commission as this is an issue which has to be looked after by SBP.

Reply by Banks which did not Implement ESA

17. Faysal Bank Limited, KASB Bank Limited, Hong Kong & Shanghai Banking Corp and ABN AMRO Bank (Pakistan) Limited, in their initial replies to the show cause notice, stated that they have introduced ESA scheme. However, subsequently the authorized representative of these banks stated that their clients have not implemented the ESA scheme and contended that their earlier response regarding implementation of the ESA scheme was not correct. However, in their written replies they repeated the stance taken by PBA.

18. Crescent Commercial Bank Limited (CCBL), NIB Bank and Soneri Bank, in their initial reply, stated that they have not implemented the ESA scheme; hence there is no violation of the Ordinance. Subsequent to the hearing, the learned counsel of CCBL, NIB Bank and Soneri Bank submitted a detailed reply and repeated the reply as submitted in the case of PBA.

19. Arif Habib Bank Limited, MyBank Limited and Habib Metropolitan Bank Limited initially submitted a reply stating that:

> *"(i) The Enhanced Saving Account (ESA) was introduced under the auspices of the Pakistan Banks Association with the guidance of State Bank of Pakistan. The introduction of ESA was not mandatory on Banks' offering a similar or a product better than the ESA;*
>
> *(ii) We have not introduced the ESA as we are already offering a better yielding and better serving PLS Savings Product providing Country*

wide free On-Line Banking Services to all our customers regardless of the deposit size; and

(ii) In view of the availability of the above product the management decided against introduction of the ESA so that we can continue to provide better services and higher return to all segments of the society without any discrimination."

20. Standard Chartered Bank (Pakistan) Limited (SCB) in its initial reply stated that SCB has not implemented the ESA and that SCB never approved nor implemented any ESA product giving a fixed rate of 4% per annum for balances in excess of Rs.5,000/- and less than Rs.20,000/-. Subsequently in its reply dated 20 February 2008 SCB submitted that:

"(1) The Competition Commission lacks jurisdiction since the Competition ordinance 2007 was promulgated by the President on October 02, 2007 and lapsed pursuant to Article 89(1) of the Constitution of Pakistan, 1973 on 02 February 2008. Accordingly, all notices, hearings or proceedings of any nature taken pursuant to the Competition Ordinance 2007 has similarly lapsed and is devoid of any further legal effects.

(2) SCB never launched the ESA. The issue was being informally discussed within SCB when the commission notice dated December 24, 2007 was received; hence any possible implementation of the product was immediately shelved until further clarification was received from the Competition Commission and/or SBP/PBA.

(3) The ESA profit rate of 4% p.a. would otherwise be inconsistent with SCB exciting profit rate for SCB high yield account product and other products of SCB which provide profit to savers/accountholders equivalent to or in excess of 4%."

21. The authorized representative of the Bank of Punjab during the hearing explained that their bank did not launch ESA Scheme, as it was already offering schemes having better returns to the customers.

22. Bank Al Habib Limited (BAHL) has stated that 'Pakistan Banks Association (PBA) is an association of commercial banks and development finance institutions of Pakistan. It recently developed the scheme of ESA mainly with modifications to encourage small savers and that:

> " *The key features of ESA as implemented by BAHL are as follows:*
>
> *(i) Existing PLS savings accounts are not automatically transferred to ESA. Instead, any existing or new customers, who wish to avail of ESA, are required to open a new account by completing fresh account opening forms, which are affixed with the stamp "ENHANCED SAVINGS ACCOUNT (ESA)". Meanwhile, the traditional PLS savings accounts continue to be available under the old terms and conditions applicable to such accounts.*
>
> *(ii) The minimum balance charge of Rs.50 per month is not applicable to our ESA customers, even if the average balance falls below Rs.5,000/- during the month. Furthermore, our ESA customers will be eligible for payment of profit even if average monthly balance falls below Rs.5, 000/-."*

23. BAHL submitted that directives of PBA do not have any statutory force unlike the directives and circulars of SBP. Similarly, PBA has no statutory powers to enforce strategies and proposals. The power of enforcement of orders, directives and circulars vests in SBP.

24. The learned counsel of Punjab Provincial Co-operative Bank Limited (PPCBL) during the hearing explained that the undertaking is working under Cooperative Societies Act not Banking Act and mostly deals with the Societies' affairs. He informed that his client is a member of the PBA and acts on its advice. PBA advised his client for payment of 4 % interest but it is giving 5% interest on savings accounts. Its clients are not

charged any amount if the balance in the account is less than Rs.5,000/-. PPCBL is a scheduled bank as declared by the SBP and is also registered under section 10 of the Cooperative Societies Act, 1985; therefore, Agricultural or Cooperative Societies are its shareholders. Subsequently, PPCBL submitted its written response on 27 February 2008 reaffirming its earlier stance.

25. SME Bank Limited, in its initial reply, stated that " *The ESA scheme was designed by PBA in consultation with SBP so the issue has been referred to them and that SME Bank has still not initiated any step on the implementation of the said product/scheme*".

26. The learned counsel of JS Bank Limited during the hearings stated that his client has not implemented the ESA scheme. He stated that the decision of the PBA to introduce ESA scheme was just a proposal and it was not binding on the banks to implement ESA. Subsequently, JS Bank Limited submitted its written response on 21 February 2008 and stated that "*the meeting regarding the Enhanced Savings Account scheme at which certain officers of the Bank were present, was simply an opportunity for members of the PBA to explore the Scheme in greater detail. The meeting was merely an avenue to discuss the potential of a new deposit category, which has as its object the desire to alleviate hardship that may exist amongst customers who have balances of up to PKR 20,000 in their accounts."* Further, JS Bank has supported the stance of the PBA and reproduced most of the points of the reply of the PBA.

27. The Bank of Khyber in its initial reply stated that they have not introduced the ESA scheme yet as it is pending final approval by the Management Committee of the bank.

28. Bank Al Falah Limited, in its initial reply, stated that due to certain reasons, including operational as well as software related issues, they have not yet implemented or offered the ESA scheme. Therefore, no PLS Savings Account has been converted into an ESA and that ESA, if and when offered, will be only upon written requests of the customers, and no PLS Savings Account, which could fall under ESA category, will be, automatically converted into an ESA. The bank also stated that the ESA scheme will not be implemented until the final decision by the Commission. A written response was submitted by the bank on 21 February 2008 reaffirming its earlier stance.

29. Deutsche Bank Limited, Industrial Development Bank of Pakistan Limited (IDBPL); and Oman International Bank Limited have submitted the same reply and stated that Enhanced Saving Account scheme referred to in the Notice has not been introduced; hence, no violation is made out.

30. On behalf of IDBPL it was submitted that:

"i) *IDBP was not aware of the decision as well as the publication of the decision and therefore, did not write to PBA regarding the ESA.*

ii) For the above reason, IDBP's Board of Directors or any forum or senior management did not discuss the subject matter.

iii) IDBP has not introduced ESA. It can introduce the same later on if

the ESA `scheme falls within the legal framework and the Competition Commission decides that it has no objection to the ESA scheme as framed by PBA or an amended version which may be approved by the Competition Commission."

31. Oman International Bank (OIB) submitted a detailed response on 13 March 2008. It was also stated that the ESA scheme proposed by the PBA was reviewed by the Management Committee and it was decided not to participate in this scheme due to the fact that OIB does not offer products based on customer classifications in order to avoid discrimination while considering products targeting high and/or low level income groups.

32. First Women Bank Limited (FWBL), in its initial reply, stated that it has not yet introduced the ESA product due to its system's incapacity and their reservations relating to this particular product, which they have already taken up with the PBA. Learned attorney of FWBL during the hearing reaffirmed that FWBL has not implemented the ESA scheme.

33. Askari Bank Limited, in its initial reply, stated that although they were a member of PBA, they decided not to introduce ESA so they have not in any manner violated the provisions of the Ordinance. During the hearing, it was submitted that after taking into consideration the merits and demerits of the ESA scheme, Askari Bank has decided not to introduce the ESA scheme.

34. Citibank N.A. Pakistan, in its initial reply, stated that in a meeting dated November 20, 2007 held between Citibank and representatives of the Pakistan Banks' Association, Citibank had declined to participate in the PBA's initiative regarding offering the ESA scheme. Consequently, the said product does not form a part of their branch banking portfolio. The authorized representatives in the hearing, and the bank, in its subsequent written reply, reaffirmed the earlier stance.

35. Zarai Taraqiati Bank Limited, in its first reply, stated that they have not implemented the ESA scheme. The authorized representative of ZTBL explained that ZTBL is a DFI with a license to engage in commercial banking from SBP and that it was a scheduled bank as per definition of scheduled banks in Banks Nationalization Act 1974. ZTBL has mostly employees' salary accounts and accounts of those people to whom agriculture loans are disbursed. They explained that although ZTBL is a member of the PBA they have not introduced the ESA scheme as PBA is not a regulatory body and its decisions are not binding. ZTBL submitted its written response on 26 February 2008 reaffirming its early stance.

36. Islamic Banks, namely: Al Baraka Islamic Bank, Dubai Islamic Bank Pakistan Limited, Emirates Global Islamic Bank, Dawood Islamic Bank Limited, Bank Islami Pakistan Limited; and Meezan Bank Limited stated that being Islamic banks implementation of ESA scheme was not possible as it is offers a guaranteed return of 4% about which their Shariah Board has reservation (pre-fixation of profit rate).

37. Micro Finance Banks, namely: The First Microfinance Bank Limited, Pak Oman Microfinance Bank Limited and Khushhali Bank, took the stance that they are incorporated under the Micro Finance Ordinance of 2001 and are not scheduled banks, hence the advertisement/notice is not applicable.

Determination

38. Having set out the brief background and facts of the case and also setting out the respective arguments of the respondents, I will now proceed to examine the issues in the subject matter.

39. I must first address the preliminary objection that the Ordinance has lapsed and, therefore, the proceedings, hearings and notices issued or commenced are of no legal effect and without jurisdiction. It is settled law that the Commission is not the appropriate forum to raise this issue. It was settled in Akhtar Ali vs Altaf-ur-Rahman, PLD 1963 Lah 390, that where there is an objection to the jurisdiction of a tribunal or that the law under which that tribunal is created is defective or invalid, such issue is not for the tribunal to decide. The tribunal must proceed on the assumption that its existence is legal and valid until a court of competent jurisdiction decides or directs to the contrary. This view has been consistently relied upon and upheld by the Superior Courts of Pakistan.

40. The PBA and several of the banks assert that the ESA scheme was introduced in consultation with the SBP and that it is basically an extension of the basic banking

account introduced by the SBP in November, 2005. Such position, it is importantly noted, apart from not being accurate misses the fundamental point. The issue before the Commission is not the introduction of a saving scheme by a bank pursuant to a SBP circular but whether the terms and conditions of the ESA scheme prominently advertised by PBA is tantamount to a breach of Section 4 of the Ordinance. The Commission feels that it is grossly inappropriate on part of the PBA to persistently drag SBP in this matter and attempt to draw a picture of conflicting regulatory approaches. While the Commission is fully aware of its statutory duties and the scope of its functions, it is also duly cognizant of the role of SBP as the apex regulator of the Banking Sector. The Commission does not encourage PBA or any bank to suggest that the SBP was, directly or indirectly, a party to any practice deemed anti-competition under the Ordinance. No evidence has been placed on record by PBA to support that the ESA scheme has the approval/blessings of SBP. The copy of the letter of SBP submitted by NBP, which it appears was in response to NBP's letter after its implementation of ESA and after receipt of the show cause notice from the Commission, clearly states that the ESA scheme was prepared by "the banks under the arrangement worked out by PBA". It appears from the said SBP reply that SBP has distanced itself from the formulation of the ESA scheme and required the banks to take responsibility for the decisions of their representative body, which they have proceeded to implement. Even otherwise, the counsels for the banks appearing before the Commission have not drawn attention to any SBP directive to fix by itself or through the PBA profit

rates, deposit limits or other terms and conditions for a category of depositors in the manner sought to be achieved by the ESA scheme. Nor has any nexus between SBP and PBA, on the basis of which SBP could have acted through PBA, been established, even remotely.

41. Having addressed the preliminary objections, I will now proceed further to address the issue whether the subject advertisement falls within the purview of the prohibitions prescribed by Section 4 of the Ordinance. Section 4 of the Ordinance in its relevant parts reads as follows:

> *"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"*

42. It is an admitted fact that the introduction of ESA Scheme was under the auspices of the PBA. That introduction of the ESA Scheme upon the advertised terms was a decision of the PBA has neither been denied by PBA in its pleading nor during the course of the hearing. This decision clearly fixes the price with regard to provision of banking service in respect of ESA: the purchase price being fixed at 4%. Furthermore, the decision fixes the manner or means of providing services by imposing automatic conversion of PLS account (with average balances up to Rs. 20,000/-), and fixing Rs. 50 as deduction charges per month in case the average balance falls below Rs. 5,000/-. Regarding charges of Rs.50/- per month on balances below Rs.5,000/-, PBA submitted

that "the SBP in terms of their circular have restricted banks not to charge more than Rs. 50/- as administrative expenses on PLS accounts, therefore, it is at the discretion of the banks whether to charge the said amount or not charge any amount". I am at a loss to understand why the PBA seeks refuge under SBP's circular. PBA did not give any flexibility to its members. I have also noted that the PBA announced a charge of Rs.50/- p.m. i.e. Rs.600/- p.a. on balance below Rs. 5,000/- which works out to be 12% per annum (or 24% on the average balance of Rs.2,500/-); whereas the ESA scheme requires a member bank to itself pay 4% to the depositor. Interestingly, if on a very simplistic basis, it is assumed that only 25% of the ESA accounts have balances below Rs. 5,000/-, then the service charges of 12% per annum recovered from these accounts would equal the 4% paid on the remaining 75% of ESA funds.

43. The fixing of 4% return for balances below Rs. 20,000/- results in creating dissimilar conditions, as depositors below Rs. 20,000/- get a higher rate of return of 4% as compared to account holders with balance above Rs. 20,000/- who get a very low return. The PBA has stated "that the customers with balances of more than Rs. 20,000/- who may not be getting the same return may be receiving other benefits and services which are only provided to such customers". What precisely these other benefits are could not be clarified by their learned counsel. Moreover, PBA states that "alternatively the said customers retain the option of opening the accounts with a balance of up to Rs.20,000/-". However, upon enquiry learned counsel for PBA confirmed that a person cannot open more than one account with the same branch.

44. PBA's argument that the 4% per annum return being paid to ESA customers is not interest but profit as stated in the public notice dated 5 November 2007 is also not credible as several member banks refuse to consider the same as Sharia compliant accounts (that is non-interest bearing). There is also no weight in PBA's argument that "this new category of savings account were introduced to encourage small savers and help increasing the over all deposits base of the banking sector, which would in turn assist in the long term economic and social development of Pakistan". PBA by fixing the upper limit of Rs. 20,000/- is in fact discouraging the small savers from saving more than Rs.20,000/- and keeping it in their PLS accounts. The learned counsel informed that those member banks of PBA who adopted and implemented ESA scheme have developed their software through which PLS accounts having balances up to Rs.20,000/- are automatically converted into ESA accounts. Therefore, it is difficult to validate the PBA view that "the customers whose PLS accounts were converted into the ESA, retained the option of not having their PLS account converted to the ESA and continuing with their regular PLS accounts".

45. In view of the foregoing, it is abundantly clear that the PBA decision vis-à-vis ESA scheme has the object or effect of preventing, restricting or reducing competition in the banking sector, hence a violation of section 4 of the Ordinance. I might add that it appears that the sheer lack of any concern or objection to PBA's collusive activities from any quarter made PBA careless to the extent that it advertised the ESA scheme

in the national press and held a question and answer session to discuss it fully, without regard to the impact of such decision in the market.

46. It needs to be appreciated that a decision of an association of undertakings reflects an understanding between its members and when such a decision is acted upon by a member bank it constitutes an 'agreement' between the association and the member, as defined in clause (b) of sub-section 1 of Section 2, which reads as follows:

> *"agreement includes any arrangement, understanding or practices, whether or not it is in writing or intended to be legally enforceable".*

The ordinary dictionary meaning of the terms 'understanding' 'arrangement' and 'practice' is as follows:

> 'understanding' means an agreement, of an implied or tacit nature,
>
> 'arrangement' means 'the act or process of arranging', the manner in which a thing is arranged or something arranged,
>
> 'practice' connotes repetition of certain events.

Hence, the scope of the definition of the term "agreement" is very wide. It includes the adoption of the decision of PBA in terms of the subject advertisement by a member. The subject advertisement in itself reflects a declared understanding reached between the members of PBA and also an arrangement forced upon customers. Where such arrangement is acted upon, it would also constitute practice carried on by the banks adopting such decision. There can not be a more formal version of acting in a cartel like behaviour. The counsel for PBA contented that the essential elements of cartel do not

exist in the present case. I must state with disappointment that the purported essentials of a cartel are misconceived. Cartel formation or cartel-like behaviour does not always pertain to raising the price of product or services to a level higher than the one prevailing under normal competitive conditions. Cartel formation or cartel like behaviour is established where price is fixed, regardless whether it is raised, lowered or even rendered stagnant. Here it is also important to dispel the misconception that establishing an actual adverse effect on customers is essential to determine cartel like behaviour. In cases falling under *per se* violations no further inquiry is needed. With regard to secrecy again the fact that it has come out in the open would not take it out from the purview of the violations committed. Moreover, the ostensible purpose was held out to be in the public interest thus clouding the real intent i.e. to cap the interest payable by the members in a competitive environment and provide comfort to members that their would not be any competition in attracting deposit of small depositors. Simply put, cartel is an agreement amongst willing competitors, the competitors collude on any business aspect (whether capacity utilization, division of markets, introduction of innovation etc.) rather than taking such decisions competitively. Accordingly, in the present case the cartel behaviour on part of the banks implementing the ESA scheme stands evidently established.

47. PBA as well as several banks also argue that implementation of ESA does not in any manner result in anti-competitive practices and such arrangement cannot be termed as restricting, distorting or reducing competition within the relevant market. In this

regard it would be useful to draw attention to the wording of sub-section 1 of Section 4 as reproduced above. An agreement falls within the purview of section 4, if the agreement has the 'object' or 'effect' of preventing, restricting, distorting or reducing competition within the relevant market. The term 'object' in section 4 does not refer to the subjective intention of the parties but to the objective meaning and purpose of the agreement. The words object or effect do not have a cumulative impact and are to be read as importing distinct meanings. Under the Competition Law regime adopted by the Ordinance, certain agreements are deemed to have the 'object' of restricting competition without having to establish their effects. Sub-section 2 of Section 4 lists such agreements, which in its relevant part reads as under:

> "4(2) *Such agreements include, but are not limited to*
>
> *(a) fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any service;*
>
> *(c) fixing or setting the quantity of production, distribution or sale with regard to any goods or the manner or means or providing any services;*
>
> *(f) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a disadvantage."*

48. Section 4 of the Ordinance is primarily based on Article 81 of the EU Treaty. In EU if an agreement does not have an anti-competition object then it constitutes an infringement of Article 81 only if it has anti-competition effects. The effects test requires an examination of the economic conditions prevailing in the relevant market and effects of the agreement on competition in the said market. It is in such eventuality that "appreciable effects" may have relevance. However, in EU and as well as in the US,

competition authorities have taken the view that certain types of agreements (hardcore horizontal cartel agreements) – direct or indirect price fixing (as in the present case), limiting or controlling production, markets, or agreeing levels of output or dividing markets – by their very nature always restrict competition and so are prohibited per se regardless of effect, impact or the fact that very small undertakings are involved. Moreover, the list of agreements included in sub-section 2 of Section 4 when read with sub-section 1 of Section 4 verifies this position, as it enumerates a list of agreements which have and are to be treated as having, the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under Section 5 of the Ordinance. For claiming exemption, the onus lies on the parties seeking exemption in terms of Section 9 of the Ordinance.

49. Way back in 1927, the Supreme Court of US in United States v Trenton Potteries, 273 US 392 (1927) observed that:

> *"The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions."*

50. In Volkswagen AG vs Commission of European Communities July 06, 2000 the European Court of the first instance observed:

> *"It is settled case-law that for the purpose of the application of Article 85(1) there is no need to take account of the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved (see Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299, 342, and Case C-219/95 P Ferriere Nord v Commission [1997] ECR I-4411, paragraphs 12 to 14)"*

51. On behalf of PBA and the banks, it is argued that even if ESA has had an adverse effect on competition amongst banks, the Commission should take into account the "appreciable effect" doctrine. In this connection, it is averred that not more than 2.25% of the entire deposit base would be effected by the ESA scheme. It is argued that banks are still competing through open market competition in relation to more than 97% of the total deposit base. This view, it must be pointed out, is misconceived. While it is settled that "appreciable effects" are no more relevant in the subject case, as the PBA decision and ensuing agreement by member banks to act accordingly falls clearly within the scope of sub-section (2) of Section 4 in particular, clauses (a), (c) and (f). Assuming that the appreciable effects had to be taken into account, Commission would not only be restricted to look at the deposit amount alone or evaluate the effects only on the past or present scenario, but also to reasonably project in to the future the likely effects of the scheme on the banking scenario which could have been appreciable. Also, PBA has conveniently over looked that the number of account holders having

balances below Rs.20,000/- are 11,318,020 constituting 45.12% of 25,083,039 total account holders. However, since it is a case of a *per se* violation, there is no need to delve into further discussion on the point.

52. I will now turn my attention to the two international cases relied upon by the learned counsel for the PBA. In the Bagnasco case, the Italian Banking Association imposed the following conditions on its member banks:

> "The banks can change *interest rate at any time by reason of objective factors such as changes on the money market in contracts for the opening of current-account credit facilities. The banks can change these by means of a notice displayed on their premises or in such manner as they consider most appropriate".*

The European Commission (EC) held that:

> *"Standard bank conditions, in so far as they enable banks, in contracts for the opening of a current-account credit facility, to change the interest rate at any time by reason of changes occurring in the money market, and to do so by means of a notice displayed on their premises or in such manner as they consider most appropriate, do not have as their object or effect the restriction of competition within the meaning of Article 85(1) of the EC Treaty".*

In my view, the Italian Banking Association did not impose any restrictive condition on its member banks but advised them to follow the realities of the free market mechanism. Therefore, the EC did not consider it as restrictive of competition. However, in the case of PBA, it has laid down all the terms and conditions of a scheme including fixing of price. Therefore, I do not see any similarity or comparison with the referred case.

The second case referred to by the learned counsel pertains to the 'No Discrimination rule' Decision 2001 of the EC, wherein it has been mentioned that:

> *"After a thorough investigation, the European Commission (EC) has taken a favourable view with regard to certain rules in the Visa International Payment Card Scheme, which has been notified for formal clearance. One of these rules in the scheme was no-discrimination rule, a rule which prohibits merchants from charging customers a fee for paying with a Visa card, or offering discounts for cash payments. Although the EC had originally objected to this rule, but subsequently has concluded that its abolition would not substantially increase competition. This conclusion has been reached in the light of the results of market surveys carried out in Sweden and in the Netherlands, where the no-discrimination rule was abolished following the intervention of national competition authorities. Those studies revealed that the abolition of the rule in those countries had not an appreciable effect."*

This case is clearly distinguishable from the case at hand. It was a case where the object of distorting, reducing or restricting competition was not that obvious and for this reason effects had to be taken into account. Moreover, it was intended to give equal and not preferential treatment to Visa card holders as against purchasers making payment in cash. The PBA counsel has not brought out any similarity in the facts or circumstances of the case permitting reliance on this case.

53. It is also not appreciated that PBA and participant member banks developed the ESA scheme in the larger public interest. Firstly, they are not welfare organizations but commercial entities. Therefore, primarily they have to look after the economic interest of the company and its shareholders. Altruistic

ventures, if any, have to be subject to such paramount mandate. Secondly, the high banking spreads and bank profitability are not indicative of banks being really worried about the public welfare or the welfare of their customers/depositors. It seems that it is due to this cartel-like behaviour that people are entrapped by dubious deposit schemes such as those of the undesirable cooperatives, Taj Company, "Double Shah" and so on. If the banking industry had been serving the customers on real commercial terms, it is possible that fewer people may have been enticed by such scandalous schemes. Moreover, preferences to invest in National Savings Schemes could also be attributed to the lack of competitive returns and service to the depositors by banks. Purportedly, the cartel generously allowed its members to pay 4% profit in public interest or as charity to small account holders out of their enormous profit earnings. In fact, as noted earlier, the "charity" or "public welfare" embodied in the ESA scheme appears to involve giving with one hand and taking back with the other. Instead of questionable charity of this nature, adherence to sound norms of competition as envisaged by law would mean market-based competitive return for depositors, efficient functioning of banking institutions, and multiple benefits for the economy. Like any other modern competition law, "economic efficiency" and "consumer protection" are the two motivating pillars of the Ordinance, which the Commission is bound to enforce. It needs to be appreciated that open and healthy competition is good both for consumers and for businesses. If businesses compete on a level playing field, they

will flourish, and consumers are more likely to pay lower prices, get better quality of service and more choices.

54. I would like to add that penalty could have been imposed on all scheduled banks who are members of PBA based on the subject advertisement which admittedly is a decision of PBA. The decision of PBA could have been argued to reflect the understanding reached between the members of PBA. However, I am of the view that this is a case where participation in the prohibited agreement could be best established in cases where ESA scheme has been implemented in terms of the advertisement. For this reason I am giving the benefit of doubt to all those scheduled banks which have not implemented the ESA scheme or have taken an independent decision not to implement it, as advertised.

Penalties

55. In view of the foregoing, I am of the considered view that PBA has acted beyond its mandate as per its own submission and has been instrumental in the formation of a cartel of the banks which is prohibited under Section 4 of the Ordinance. It is, therefore, necessary to pass a remedial order under Section 31 and Section 38 of the Ordinance. Accordingly, PBA is directed to discontinue this practice forthwith and not to repeat the prohibition specified in Section 4 of the Ordinance. Owing to its lead role, PBA is directed to pay a sum of Rs.30.00 million by way of penalty within 30 days of the issuance of this Order, for having violated Section 4 of the Ordinance.

56. I have examined the replies, arguments, presentation made in hearing and documents submitted by the learned counsel and authorized representatives of Habib Bank Limited; Allied Bank Limited; Muslim Commercial Bank Limited; United Bank Limited; Saudi Pak Bank Limited, Atlas Bank Limited and National Bank of Pakistan. All these banks have admittedly implemented the ESA scheme. Most of the points raised by them are the same that were raised in the case of PBA, and to that extent I will not repeat the views I have already expressed. However, a few points raised by the learned counsel of NBP are discussed hereinafter.

57. The learned counsel of NBP stated that the question of fixation of interest rate is beyond the scope of the Commission. I may clear the misconception that the Commission neither has a mandate nor intention to fix the interest rate, instead the Commission holds that it is the sole discretion and prerogative of the banks to individually decide the rate of profit etc according to their own commercial policy and desist from collusive decision-making, which is a practice prohibited under law.

58. It is pertinent to point out that I have also examined the annual reports for the year ended 31 December 2006 of all these banks. According to these reports the total deposits in the savings accounts operated by Habib Bank Limited; Allied Bank Limited; Muslim Commercial Bank Limited; United Bank Limited; Saudi Pak Bank Limited, Atlas Bank Limited and National Bank of Pakistan amount to Rs.732.362 billion whereas the statistical bulletin supplied by their learned counsel

shows total deposits in the savings account operated by all the scheduled banks at Rs.1,240.839 billion. It shows that the aforementioned banks control 59.02% of the total savings deposit market. It also appears from their replies discussed in previous paragraphs that these banks have colluded and agreed upon formulating and implementation of the ESA scheme under the umbrella of PBA and thereby indulged in the formation of a cartel, a practice that is prohibited under Section 4 of the Ordinance. Therefore, it is necessary to pass a remedial order under Section 31 and Section 38 of the Ordinance in their case as well. Accordingly, these banks are directed to discontinue such practice forthwith and not to repeat the prohibition specified in Section 4 of the Ordinance. Section 38(2) of the Ordinance empowers the Commission to impose a penalty not exceeding fifty million rupees or an amount not exceeding fifteen percent of the annual turn over of the undertaking for violation of any provision of Chapter II (including Section 4) of the Ordinance. The violation by the above mentioned banks attracts maximum penalty. However, considering that the Ordinance is a new law and that due to non-enforcement of any anti-trust law in the past, such cartel-like behaviour had apparently become a norm, I am inclined to impose a lower penalty. Also, I feel that mere imposition of maximum penalties is not likely, at this stage, to foster the Commission's objective of strengthening and enforcing the new competition law regime. The Commission, therefore, directs the each of the above banks who have

implemented the scheme to pay an amount of Rs. 25.00 million within 30 days of the issuance of this Order.

59. I have examined the replies, arguments, presentation made in hearing and documents submitted by the learned counsel and authorized representatives of Faysal Bank, KASB Bank, Hong Kong & Shanghai Bank, ABN MARO Bank, Crescent Bank, NIB Bank, Soneri Bank, JS Bank and found that although these banks did not introduce the ESA scheme but they nevertheless appear to be party to the agreement pronounced and notified by the PBA. However, considering that these banks did not act upon the decision no penalty is imposed upon them. However, they are reprimanded and warned of severe consequences specified under the Ordinance for any subsequent violation of the Ordinance, whether on their own accord or at the behest of the PBA.

60. In my opinion the following banks developed their savings as well PLS account product irrespective and independent of the PBA decision to introduce ESA scheme: Habib Metropolitan Bank, The Bank of Khyber, Bank Al-Falah, Bank Al-Habib, Bank of Punjab, My Bank, Deutsche Bank, Industrial Development Bank of Pakistan, Oman International Bank, First Women Bank, Askari Bank, Standard Chartered Bank, Citibank, Punjab Provincial Cooperative Bank, Arif Habib Bank, SME Bank Limited and Zarai Taraqiati Bank, and hence are not liable to any penalty.

61. I have examined the replies, arguments, presentation made in hearing and documents submitted by the authorized representatives of the Islamic banks, namely, Al-Baraka Islamic Bank, Dubai Islamic Bank, Emirates Global Islamic Bank, Dawood Islamic Bank, Meezan Islamic Bank and Bank Islami and found that although Islamic banks are members of the PBA, they have expressed their reservations to PBA on implementation of ESA scheme as their management and their Sharia Boards did not find it to be sharia compliant product. Although it has been stated by all the above mentioned Islamic banks that ESA scheme has not been implemented by them, yet Al-Baraka Islamic Bank, Dubai Islamic Bank, Emirates Global Islamic Bank and Dawood Islamic Bank have subscribed to the behavior and practice of the PBA and preferred arguments in their written replies to justify the collusive decision made by the banks under the umbrella of PBA. I have discussed these points in earlier part of the Order pertaining to the PBA, hence, for the sake of brevity would not repeat the same. Accordingly I hereby order to dispose off the show cause notices issued to all the above mentioned Islamic banks and strongly advise those banks who are supporting PBA, to dissociate themselves from approving, promoting or condoning such cartel-like conduct in future.

62. I have examined the replies, arguments, presentation made in hearing and documents submitted by the authorized representatives of the micro finance

banks, namely, First Microfinance Bank Limited, Pak Oman Microfinance Bank Limited and Khushhali Bank Limited, and found that although microfinance banks are members of the PBA they were not a party to the announcement of the PBA as the advertisement was not applicable to such banks as these are not scheduled banks. Accordingly the show cause notices issued to the above mentioned microfinance banks are hereby disposed off.

Order passed and signed by me on 10th day of April 2008 at Islamabad.

(Abdul Ghaffar)
Member (C&M)