BEFORE THE
COMPETITION COMMISSION OF PAKISTAN
IN THE MATTER OF
SHOW CAUSE NOTICES ISSUED TO ALL PAKISTAN CEMENT MANUFACTURERS ASSOCIATION AND ITS MEMBER UNDERTAKINGS
(F. No. 4/2/Sec.4/CCP/2008)

Dates of hearing:	05-12-2008, 29-12-2008, 26-01-2009, 11-08-2009 & 25-08-2009
Present	**Mr. Khalid A. Mirza** **Chairman** **Ms. Rahat Kaunain Hassan** **Member (Legal)**
Present for:	
Lucky Cement Ltd, Askari Cement Ltd. – Nzp, Mustehkum Cement Ltd., Bestway Cement Ltd.	Raja Muhammad Bashir, Advocate Supreme Court
Al-Abbas Cement Ltd., Dewan Cement Ltd., Cherat Cement Ltd., Fecto Cement Ltd., Dewan Hattar Cement Ltd., D.G Khan Cement Co. Ltd.,	Mr. Jahanzaib Awan, Advocate of Khalid Anwar & Co.
Maple Leaf Cement Factory Ltd., Gharbiwal Cement Ltd., Flying Cement Ltd., Pakistan Cement Ltd.,	Mr. Salman Akram Raja, Advocate Supreme Court and Mr. Ghulam Sabir, Advocate
Pioneer Cement Ltd., Askari Cement Ltd – Wah	Mr. Ali Sibtain Fazli, Advocate Supreme Court, Mr. Nasar Ahmad and Mr. Ahmad Tariq, Advocates
All Pakistan Cement Manufacturers' Association Dandot Cement Ltd., Fauji Cement Co Ltd., Kohat Cement Co Ltd.,	Sardar Shahbaz Ali Khan Khosa, Advocate High Court, Mr. Asim Mumtaz, Mr. Waheed Baloch & Mr. Salman Faisal Advocates.
Attock Cement Pakistan Ltd.,	Qazi Faez Isa, Advocate Supreme Court, Mr. Yousaf Khosa, Advocate
Dadabhoy Cement Industries Ltd.,	Mr. Ajazuddin Qureshi, G.M. (Legal & Commercial Affairs)

ORDER

1. This Order will dispose of the proceedings pursuant to the Show Cause Notice No. 02/15/2008-09 dated 28 October 2008 (hereinafter referred to as the "**SCN**") issued to the following undertakings: M/s. Askari Cement Limited-Wah, Askari Cement Limited-Nzp., Bestway Cement Limited, Cherat Cement Company Limited, D.G. Khan Cement Company Limited, Dandot Cement Limited, Fecto Cement Limited, Fauji Cement Company Limited, Flying Cement Company Limited, Gharibwal Cement Limited, Kohat Cement Company Limited, Lucky Cement Limited, Maple Leaf Cement Factory Limited, Mustekhum Cement Limited, Pakistan Cement Limited, Pioneer Cement Limited, Dewan Hattar Cement Limited, Attock Cement Limited, Dadabhoy Cement Industries Limited, Al-Abbas Cement Limited and Dewan Cement Limited.

FACTUAL BACKGROUND

2. All Pakistan Cement Manufacturers' Association, is registered body and was incorporated in 1992 under Section 32 of the Companies Ordinance 1984, (hereinafter referred to as the "**Undertaking**") within the meaning of Section 2(1)(p) of the Competition Ordinance, 2007 (the "**Ordinance**"). It is the primary association of cement manufacturers in Pakistan who are members of the Undertaking and are referred to as the "**Member Undertakings**".

3. According to its Memorandum of Association (hereinafter referred to as the "**Memorandum**") the Undertaking has been established for, *inter alia*, the following objectives: providing a common forum for the cement manufacturers; protecting, safeguarding and promoting the interest of its members; monitoring production levels of its members and thus, the industry as a whole; and coordinating and securing co-operation amongst its members.

4. The necessary preliminary information gathered by the Commission shows that the Undertaking offers membership to all cement manufacturers operating in Pakistan, on the payment of a fixed entrance fee plus an additional annual subscription fee. At present, it has twenty-one (21) members (out of a total of twenty-nine (29) cement manufacturers in Pakistan) members (mentioned above).

5. On 20 March 2008, a news item appearing in the daily 'Jang' and on the website of 'Geo News' revealed that the price of cement was raised by Rupees fifteen (Rs.15) to Rupees twenty (Rs.20) per bag across the country, pursuant to the Agreement. The newspapers items have been reproduced below:

> ***"Geo News dated Thursday, March 20, 2008***
>
> *LAHORE: The price of cement has been raised by Rs 15 to 20 per bag across the country.*
>
> *The decision to this effect was made at a meeting of All Pakistan Cement Manufacturers Association (APCMA) held here on Thursday.*

The hike in cement price from Rs 240 to Rs 260 was said to be because of rising prices of coal, gas and another meeting of APCMA Will be held in the next week I which it is likely that the cement price may be raised further."

Jang Dated 20-03-2008

سیمنٹ کی قیمت میں ۱۵ سے ۲۰ روپے فی بوری اضافہ:

لاہور۔پاکستان میں سیمنٹ کی قیمت میں ۱۵ سے ۲۰ روپے فی بوری اضافہ کردیا گیا ہے۔اس بات کا فیصلہ آل پاکستان مینوفیکچررز ایسوسی ایشن کے اجلاس میں کیا گیا۔اجلاس میں پٹرولیم مصنوعات،کوئلہ،گیس اور بجلی کی قیمتوں میں اضافہ کو جواز بنا کر سیمنٹ تیار کرنے والی کمپنیز نے سیمنٹ کی فی بوری قیمت 240 روپے سے بڑھا کر 260 روپے کردی ہے۔ذرائع کے مطابق،اے پی سی ایم اے کا ایک اور اجلاس اگلے ہفتے ہوگا جس میں سیمنٹ کی قیمتیں مزید بڑھائے جانے کا امکان ہے۔

6. In light of the past trading practices of the cement industry and the above-mentioned newspaper item, the Commission considered it necessary to collect evidence of any suspected collusive arrangement amongst the Member Undertakings. Accordingly, the Commission in pursuance of the powers conferred under Section 34 of the Ordinance, authorized a team of four (4) officers off the Commission namely Mr. Javed Qaiser (Senior Executive), Mr. Ikram-ul-Haq (Executive Officer), Ms. Shaista Bano (Executive Officer) and Mr. Syed Mubashar Hussain (Executive Officer) to enter and search the office of the Undertaking at House No. 27-28/3-4, FCC, Gulberg-IV, Lahore on 24 April 2008.

7. Mr. Shehzad Ahmad, Secretary of the Undertaking, along with a few other persons, allegedly obstructed the lawful search process undertaken by the authorized officers of the Commission. Accordingly, the Commission issued an order for forcible entry under Section 35 of the Ordinance and proceedings initiated by the Commission in this regard are pending adjudication in separate proceedings.

8. Importantly, evidence recovered included a marketing arrangement entered into by the Member Undertakings and the Undertaking itself, on 8 May 2003 (the "**Agreement**"). The Agreement contains such clauses/rules by virtue of which, quotas with respect to production and supply of cement were fixed in order to maintain the desired and targeted price level amongst the Member Undertakings. The covenants of the Agreement have been reproduced in the show cause notice in para-10 below.

9. The Agreement facilitated its Member Undertakings to engage in practices, which prevented, restricted and reduced competition within the cement industry in Pakistan. The Agreement, therefore, *prima facie*, constituted a 'prohibited agreement' in terms of Section 4(1) of the Ordinance and in particular clauses (a) and (c) of sub-section (2) of Section 4 of the Ordinance.

10. Accordingly, the Competition Commission of Pakistan (hereinafter the "**Commission**") took *suo moto* action under Section 30 read with Section 31 (b) of the Ordinance and issued the SCN to the Undertaking and all its Member

Undertakings, under which the Undertaking and its Member Undertakings were required to show cause in writing by 13 November 2008. The SCN was issued on the following terms:

> "**Whereas** All Pakistan Cement Manufacturers' Association is an undertaking (hereinafter referred to as the "**Undertaking**") as defined in clause (p) of sub- section (1) of Section 2 of the Competition Ordinance, 2007 (the "**Ordinance**");
>
> 2. **Whereas** the Undertaking, at present, has twenty one member companies/entities engaged in production and sale of cement in the relevant market, (hereinafter referred to as the "**Member Undertakings"**) namely, M/s. Askari Cement Limited-Wah, Askari Cement Limited-Nzp., Bestway Cement Limited, Cherat Cement Company Limited, D.G. Khan Cement Company Limited, Dandot Cement Limited, Fecto Cement Limited, Fauji Cement Company Limited, Flying Cement Limited, Gharibwal Cement Limited, Kohat Cement Company Limited, Lucky Cement Limited, Maple Leaf Cement Factory Limited, Mustekhum Cement Limited, Pakistan Cement Limited, Pioneer Cement Limited, Dewan Hattar cement Limited, Attock Cement Pakistan Limited, Dadabhoy Cement Industries Limited, Al-Abbas Cement Limited and Dewan Cement Limited.
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> 3. **Whereas** the Competition Commission of Pakistan (hereinafter referred to as the "**Commission**") took *suo moto* notice of a news item appearing on the website of 'Geo News' on March 20, 2008 and also in the daily 'Jang' of the same date, that the price of cement was raised by Rs. 15 to Rs. 20 per bag across the country, pursuant to a decision of the Undertaking, in a meeting of its Member Undertakings;
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> 4. **Whereas** in order to collect evidence of any suspected collusive arrangement amongst the Member Undertakings brokered by the Undertaking, the Commission in pursuance of the powers conferred under Section 34 of the Ordinance, authorized a team of four officers of the Commission namely Mr.Javed Qaiser (Senior Executive), Mr.Ikram –ul- Haq, (Executive Officer), Ms. Shaista Bano (Executive Officer) & Mr.Syed Mubashar Hussain (Executive Officer) to enter and search the office of the Undertaking at H.No.27-28/3-4, FCC, Gulberg-IV, Lahore (the "**Office**") on April 24, 2008;
>
> 5. **Whereas** Mr. Shehzad Ahmad, the Secretary of the Undertaking along with few other persons allegedly obstructed the lawful

search process undertaken by the authorized officers of the Commission which was followed by an order for forcible entry under Section 35 of the Ordinance and proceedings initiated by the Commission in this regard are pending adjudication;

6. **Whereas** the copies of documents collected from the Office of the Undertaking by the authorized officers of the Commission upon being allegedly provided selective/limited access to the documents on April 24, 2008 and the documents subsequently supplied by the Undertaking vide letter dated July 09, 2008, show that the Undertaking has in effect taken the decision and facilitated its Member Undertakings to enter into an agreement under the name and style of "marketing arrangement" (hereinafter referred to as the "**Agreement**") effective from May 08, 2003 (copy enclosed);

7. **Whereas** the Agreement pertains to fixing the quota with respect to production and supply of cement and to ensure that sale of cement is not below the target/minimum price by each of the Member Undertakings which *per se* has the object and effect of preventing, restricting and reducing competition within the cement industry in Pakistan in terms of the following:

"The members of APCMA agree to the following:

(1) This agreement will come into effect on May 08, 2003 and initially be valid till June 30, 2005.

(2) To ensure future marketing arrangements are fair and transparent, a monitoring system by an independent and reputable firm of Chartered Accountants (Riaz Ahmad & Company) will be put in place. This will be operated by the Secretary under supervision of the Chairman.

(3) The monitoring system for daily dispatches will be paid for by the members. Each member will contribute Rs.500, 000/- (Rupees five hundred thousand only) for this purpose and an account will be rendered to the members by the Secretariat on yearly basis. Augmentation of funds for this service will be made by the members as required by the Secretariat. Payment of fees for subscription overdue and for monitoring arrangement will be settled by May 15, 2003.

(4) Each member's capacity for calculating monthly quota will be on the basis of the attached annexure 'A'.

(5) During the period the agreement is in force, no BMR or capacity expansion shall be allowed to any member unit for quota purposes and new capacities in pipeline will be considered on merit, as and when, same come on stream. List

of such capacities shall be provided by the members to the Secretary by June 30, 2003.

(6) The Chairman's decision regarding fixation of monthly quota shall be binding on all members. He may consult members on quantity of quota to be fixed each month but will have the final say in this regard.

(7) Any increase or decrease in monthly quota shall be effective on prospective and not on retrospective basis. Any increase or decrease in monthly quota shall be at the sole discretion of the Chairman and binding on all members in order to maintain the desired and targeted price level.

(8) Quota will only be allowed to be carried forward up to 60 days and will lapse thereafter.

(9) Sale of clinker will be allowed but will be deducted from the selling member's quota.

(10) No transfer of quota will be allowed from unit to unit.

(11) Price monitoring committees will be established at the regional level in Islamabad, Lahore, Karachi and Peshawar to avoid under selling. The committees will be headed by the following who will co-opt members as required:

i.	*Mian Aziz Ur Rehman*	*Islamabad*
ii.	*Mr. Kaleem Mobin*	*Lahore*
iii.	*Mr. Muhammad Abdullah*	*Karachi*
iv.	*Mr. Muhammad Nasir*	*Peshawar*

(12) All exports by sea or land route shall remain outside the purview of quota.

(13) Un-utilized quota of 28,000 metric tones in case of Essa will be allowed to the unit to be utilized @ 3000 metric tones per month in addition to the monthly quota of the unit.

(14) Attock Cement will be allowed to sell 5000 metric tones clinker to Pakistan Slag on one time basis as this transaction precedes agreement date.

(15) Excess/shortages of quota from the past stand null and void.

(16) Rule 5 above shall equally apply to the existing members in case they acquire any unit privatized by the Government as related to BMR following acquisition."

Annex-A

Detail of Agreed Cement Capacities

Name of Units	***Rated Capacity***	***% age***
Askari Cement (Wah)	*945,000*	*6.17*

Askari Cement (Nzp)	*630,000*	*4.12*
Bestway Cement	*1,039,500*	*6.79*
Cherat Cement Co.	*787,500*	*5.15*
Dandot Cement Ltd.	*504,000*	*3.29*
D.G.Khan Cement	*693,000*	*4.53*
	1,039,500	*6.79*
	1,732,500	*11.32*
Fauji Cement Ltd.	*945,000*	*6.17*
Fecto Cement Ltd.	*630,000*	*4.12*
Gharibwal Cement	*567,000*	*3.70*
Kohat Cement Co.	*567,000*	*3.70*
Lucky Cement Ltd	*660,000*	*4.31*
	660,000	*4.31*
	1,320,000	*8.62*
Maple Leaf Cement	*494,550*	*3.23*
	1,039,500	*6.79*
	1,534,050	*10.02*
Pioneer Cement Ltd.	*630,000*	*4.12*
Saadi Cement Ltd. (now Dewan Hattar)	*567,000*	*3.70*
	12,398,550	*81.01*
Attock Cement Ltd.	*756,000*	*4.94*
Dadabhoy Cement	*530,000*	*3.46*
Essa Cement Ltd. (now Al Abbas Cement)	*157,500*	*1.03*
	315,000	*2.06*
	472,500	*3.09*
Pakland Cement(now Dewan Cement)	*787,500*	*5.15*
Zeal Pak Cement(now ceased to be member of APCMA)	*360,000*	*2.35*
South region Sub-Total	*2,906,000*	*18.99*
Grand Total:	*15,304,550*	*100.00*

8. **Whereas** Bestway Cement Limited letter No.BCL-22-111/796 dated October 16, 2006 wherein the subject is "Agreement for marketing arrangement – capacity fixation" and is addressed to Mr. Shehzad Ahmad, Secretary of the Undertaking states*:*

"This is with reference to your e-mail dated 26th September, 2006.

We have reconsidered the proposal. We are of the view that the current Agreement, valid up to 30th June, 2007, covers the agreed capacities of the existing units as well as makes adequate provisions for new kilns and the units undergoing BMR".

9. **Whereas** the Agreement has remained in force at the time of promulgation of the Competition Ordinance, 2007 and thereafter in terms of the following:

i) The minutes of meeting dated May 18, 2005 (item 3) of the Undertaking wherein it has been stated that 'the House unanimously agreed to keep the monitoring arrangement in place beyond June 30, 2005'.
ii) The minutes of meeting dated October 15, 2007 (item 3) of the Undertaking wherein it has been stated that '*it is not possible for the industry to contribute for the continuation of the services of Riaz Ahmad and Company for Voluntary Verification of data being provided to the Government by individual members of the Industry. Therefore, the members agreed to discontinue the services of Riaz Ahmad and Company beyond the close of the current financial year i.e. June 30, 2008 till decided otherwise.*'
iii) The invoices raised by Riaz Ahmad and Company Chartered Accountants' dated March 18, 2008 and February 19, 2008 in respect of monitoring and dispatches also support the continuity and existence of the Agreement during such period.
iv) The Undertaking's letter dated May 29, 2008 to Riaz Ahmad and Company stating, '*please consider this letter as one month notice and discontinue the assignment (verification of cement dispatches) with effect from June 30, 2008. However, it does not rule out the possibility of re-appointment of Riaz Ahmad and Company or appointment of another firm to continue the monitoring.*

10. **Whereas** clauses (2)&(3) of the Agreement, read with the letter of the Undertaking dated May 14, 2003 addressed to all Members and the letter dated May 06, 2006 addressed to Mustehkum Cement Limited clearly illustrate that the intent and purpose of monitoring of cement dispatches conducted through Riaz Ahmad and Company was to enforce and implement the "marketing arrangement" under the Agreement effectively.

11. **Whereas** in view of the foregoing, the Commission is satisfied that the Undertaking and the Member Undertakings have been engaged in practices prohibited under the Ordinance which has the object and effect of preventing, restricting and reducing competition within the cement industry in Pakistan i.e. the 'relevant market' and that it *prima facie* constitutes violation of sub-section (1) of Section 4 and in particular clauses (a) & (c) of sub-section (2) of Section 4 of the Ordinance;

12. **Whereas** it is the responsibility and obligation of the Commission under the Ordinance to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti- competitive behavior.

13. **Now, therefore**, you as the Member Undertaking (as highlighted above) is called upon to show cause in writing within fourteen (14) days of this show cause notice and to appear and place before the Commission, facts and material in support of its contention and avail the opportunity of being heard either in person or through an authorized representative on *November 11th, 2008 at EDR of Pearl Continental Hotel Shahrah-e-Quaid-e-Azam Lahore at 01.30 p.m.* as to why an appropriate order under clause (b) of Section 31 may not be passed and a penalty at the rates prescribed in Section 38 of the Ordinance, may not be imposed upon it.

14. If no reply to the Show Cause Notice is received within the stipulated period or the Undertaking fails to appear before the Commission on the date fixed for hearing, the Authority shall proceed in the matter as provided under the law.

15. Given under my hand and seal of the Commission on this 28th day of October 2008.

(Abdul Ghaffar)
Member

List of Enclosures:-

1. Copy of the Agreement dated May 08,2003
2. Bestway Cement Limited letter No.BCL-22-111/796 dated October 16, 2006
3. The minutes of meeting dated May 18, 2005
4. The minutes of meeting dated October 15, 2007
5. The invoices raised by Riaz Ahmad and Company Chartered Accountants' dated March 18, 2008 and February 19, 2008
6. The Undertaking's letter dated May 29, 2008 to Riaz Ahmad and Company
7. Letter by the Undertaking dated May 14, 2003 addressed to all Members
8. Letter dated May 06, 2006 addressed to Mustehkum Cement Limited"

11. On the date fixed for hearing on 10 November 2008, the Member Undertakings obtained a stay order, whereunder the Honorable Islamabad High Court observed as under:

> *"Respondents may proceed with the Show Cause notice but restrained from passing a final order…."*

12. Subsequently, three (3) hearings were held on 5 December 2008, 29 December 2008 and 26 January 2009 and after the announcement of the judgment by the Islamabad High Court in the open court whereby all the writ petitions have been dismissed being premature, another hearing opportunity was provided on August 11, 2009 to the parties concerned vide hearing notice dated August 03, 2009 at Islamabad to appear and make additional submissions (if any) before the Commission. On the said date of the hearing and a day prior to the hearing the Commission received various requests for adjournment. During the hearing the Commission was informed that writ petitions have been filed in the Lahore

High Court Lahore and the Honourable High Court after hearing the preliminary submissions was pleased to pass the following order in stay application:

> "*Notice, the petitioner shall enter appearance before the commission, and the commission conducts and concludes the proceedings in the matter but subject to notice and until the next date of hearing shall not pass any adverse order against the petitioner. Relist on 24-08-2009.*"

13. On 24-08-2009 the Honourable Lahore High Court, Lahore allowed the Commission to pass the final order.

SUBMISSIONS AND OBJECTIONS

Constitutional Objections

14. In reply to the SCN, the Member Undertakings made the following constitutional objections that:

    a. the Ordinance is *ultra vires* of the Constitution of the Islamic Republic of Pakistan 1973 (hereinafter referred to as the "**Constitution**") and beyond the legislative power of the Federation, being outside the scope of the Federal Legislative List and the Concurrent Legislative List;

    b. the Ordinance in no longer a law as according to Article 89(2)(a)(ii) of the Constitution, as it stood automatically repealed on 3 February 2008, after expiry of four (4) months from the date of promulgation and it had never been re-issued or re-promulgated and is thus no longer an active law;

c. the Ordinance is not the appropriate legislation to be used as the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance 1970 (hereinafter referred to as the "**1970 Ordinance**") could have been used, but even otherwise the issues addressed in the SCN refer to those that occurred prior to October 2007 and since the Ordinance was promulgated later, it is against the Constitution to regulate them with the Ordinance (Section 59 of the Ordinance);

d. The 1970 Ordinance was promulgated under framework of the Constitution of the Islamic Republic of Pakistan 1962, which had features peculiar to itself and the Constitution does not have such features. Therefore, the Constitution has an absence of such power to legislate;

e. The Order authorizing Commission's officers "to enter and search the office" 'violates Fundamental Rights enshrined in the Constitution', including Articles 4, 8, 14, 17, 18 and 24;

f. The Ordinance bestows judicial powers on the Commission in violation of the constitutional principle of separation of power. The members of the Commission are appointed by the Federal Government and are not independent as required by the Constitution (the Commission is an 'executive body with members who are clothed with none of the attributes of a lawful judge as envisaged by the Constitution');

g. The Ordinance is *ultra vires* the Constitution as it does not provide right of appeal before an independent judicial forum and the Section 41 appeal is illusory. Contrary to the said section, appeal under the 1970 Ordinance lay to the High Court; and

h. Section 42 of the Ordinance is ultra vires the Constitution because this is enlarging the jurisdiction of the Supreme Court of Pakistan, as the Supreme Court may only hear cases which have been advanced to it through High Court (with limited exceptions) and this is 'smack in the face of the long embedded and judicially acknowledged doctrine of Audi Alterm Partem and the principle of Natural Justice'.

Legal Objections

15. In reply to the SCN, Member Undertakings made the following legal objections that:

(a) The power of the Federal Government to issue policy directives to the Commission and the fact that the Commission is bound to comply with the same undermines the position of the Commission and negates the basic requirement of independence and impartiality;

(b) Section 30 of the Ordinance requires the Commission to issue the said SCN, which in fact has been issued by a member of the Commission; therefore, the SCN is void itself and should be withdrawn;

(c) The functions and powers of Commission are stipulated under Section 28 of the Ordinance and this section does not grant Commission with the right to take *suo moto* action;

(d) The Commission has erred in treating the entire Pakistani market of cement as being one market; therefore, it is not the "relevant" market for the purposes of Sections 2 (1) (k) and 4(1) of the 2007 Ordinance;

(e) According to the law, the Commission should have made an enquiry pursuant to Section 37 (1) and (2), prior to conducting search and issuing the SCN under Section 30 and this lapse of procedure renders the entire proceedings arbitrary and illegal. Further, the Commission was extremely lax in issuing the SCN as it did so seven (7) months after taking *suo moto* notice.

(f) Notice under Section 30 is specifically covered under Section 37 (4) and from a plain reading it emerges that a Section 37 (4) inquiry must be concluded prior to conducting of raid. However, at the time the raid was carried out, the Commission had no way of knowing whether or not the Member Undertakings were guilty of any anti-competitive behavior and whether it was necessary in the public interest to commence proceedings.

(g) The exercise of powers under Section 34 of the Ordinance has to be for the purposes of enforcing any provision of the Ordinance. The Order authorizing Officer of the Commission to enter and search is contrary to Section 34 of the Ordinance. There must be some *prima facie* evidence and the Commission must identify the provision, which may have been violated, as the Ordinance does not authorize a 'fishing expedition'. Since investigation has not been carried out accordingly, it should be rendered illegal automatically, making the raid void *ab intio* and hence, the Commission cannot rely on material allegedly recovered from the raid[1] on the principle of 'fruits of a poisonous tree'.

(h) According to the principle of 'fruits of a poisonous tree', documents recovered by the Commission are not admissible in evidence.

(i) According to Section 34 (6) of the Section it is mandatory for the raiding officers to prepare and sign an inventory of any documents seized and this requirement not complied with.

(j) The rules and regulations to the Ordinance make no provision for establishing the manner in which Appellate Benches are to be constituted;

(k) Since the same case has already been adjudicated and decided by the Lahore High Court in *DG Khan Cement v Monopoly Control Authority* reported at 2006 CLD 1237, it cannot be re-adjudicated by the Commission;

[1] Discuss: Collector of Sales tax v Food Consults (Pvt) Ltd (2007 PTD 2356)

(l) The Agreement cannot be used as a basis for the issuance of the SCN as it does not fall within the regulatory ambit of the Ordinance and/or Commission for the following reasons:

(i) It is not a 'prohibited agreement' in terms of Section 4 of the Ordinance; and
(ii) Notwithstanding the above, there is no available evidence to show that the Agreement was ever implemented and/or that it was ever effective after the promulgation of the Ordinance;

(m) The scope of Section 4 of the Ordinance does not cover situations where an agreement, which was executed prior to the promulgation of the Ordinance, remains in force after its promulgation. Instead it only covers situations where undertakings or their associations '*enter into an agreement*'; and

(n) Section 4 (1) and 4(2) (a) and (c) of the Ordinance are prospective in nature and cannot have retrospective effect. Accordingly, since the Agreement was not only executed but it also expired (i.e. June 2005) before the promulgation of the Ordinance (i.e. 2 October 2007), the Commission cannot take action on the basis of the Ordinance.

16. In addition to the above objections, we must mention that a few applications were also filed by some of the undertakings. The first in this regard is an application under Section 33 of the Ordinance read with Regulation 23 of the Competition (General Enforcement) Regulation, 2007 for summoning of witnesses and documents filed on behalf of Askari Wah Cement Limited and Pioneer Cement Limited. Such objection has also been taken on behalf of Lucky

Cement Limited, Askari Cement Limited-Nzp. and Mustekhum Cement Limited etc. in its replies to the SCN filed before the Commission.

17. On 26-01-2009 another application was filed on behalf of the Pioneer Cement Limited and Askari Wah Cement Limited raising an objection that the one of the Members presiding the present proceedings had also authorized the forcible entry and since the legality of the forcible entry order is in itself questioned such member cannot adjudicate the subject proceeding.

18. Similarly, another objection has been taken that the Commission and its Members being beneficiaries from any penalty that may be levied on the 'Respondents' (i.e. the Member Undertakings) should not hear the matter being 'judges in their own cause'.

19. An application was also filed on part of the Undertaking (APCMA) on 26-01-2009 (third date of hearing) for quashment/suspension of the proceedings after having argued the entire case on merits.

Deliberation and Analysis

Constitutional Issues

20. The objections as to the constitutionality of the Ordinance and as to the constitution of the Commission have been stated at para-13 above. In this regard we find ourselves in Agreement with the view taken by the Single Member of the Commission in Banks' cartelization case and in the Stock Exchanges case

for placing/fixing a price floor for securities. We also consider it relevant to refer to some of the excerpts from the judgment of the Superior Courts as relied upon by the Single Member in the said case of the Stock Exchanges. It is important to refer to the judgment of the full bench of the Supreme Court of Pakistan in *Pir Sabir Shah v. Shad Muhammad Khan, Member Provincial Assembly N.W.F.P*. (P.L.D 1995 Supreme Court 66), where the Court examined the question whether a tribunal is the competent forum to adjudicate on the constitutional *vires* of law under which it has been created. The Court noted as follows:

> "*…there is distinction between a provision of a statute, which creates a Special Tribunal and a provision of such statute which specifies disputes/matters over which such a Special Tribunal will have jurisdiction. The Special Tribunal so created cannot decide that the provision under which it has been created is ultra vires the Constitution or that its appointment/constitution is defective or invalid*." (Emphasis added).

21. The *Pir Sabir Shah* Court discussed the case of *Akhtar Ali Parvez v. Altafur Rehman* reported at PLD 1963 (W.P.) Lahore 390, where a full bench of the High Court of West Pakistan, headed by Manzur Qadir, C.J., dealt with the question of jurisdiction of Special Tribunal in detail. The Court reproduced the following observation from the opinion of Manzur Qadir, CJ in *Akhtar Ali*:

> *"An objection to the jurisdiction of a Tribunal may take one of the following general forms-*
>
> *(i) that the law under which that Tribunal is created is defective or invalid;*
> *(ii) that the Tribunal is not constituted or appointed validly under the law;*

(iii) that a party or parties is or are not amenable to the jurisdiction of the Tribunal; and

(iv) that the subject matter is outside the field in which particular court is competent to act.

It seems to me that when an objection is taken to the jurisdiction of the Tribunal, that objection must be treated as a preliminary objection and must be resolved before taking any further action. . . If a plea falling in the first or the second category is raised before a Special Tribunal, the answer of the Special Tribunal, which is a creature of the special law and is constituted or appointed under that law, must be simply and shortly that these matters are not for the Special Tribunal to decide. If a party needs a decision on those points, it will have to apply to the Courts of general jurisdiction in appropriate proceedings for that purpose. If, for example, a Rent Controller is told by a party before him that the West Pakistan Urban Rent Restriction Ordinance is invalid, he ought not, on that ground, adjourn the proceedings in that case to hear elaborate arguments on some future date. Were he to do so, the logical procedure for him would be, not only to adjourn that case but to adjourn all cases, and not only to adjourn cases but also to wind himself up as a Rent Controller till he has decided whether he is a Rent Controller or not a Rent Controller under a valid piece of Legislature. Similarly, if a Rent Controller is told that his own appointment is defective, it is not for him to postpone the hearing in that particular case because his appointment is challenged as defective; if it is defective, it is defective not only for the case in which the objection has been raised but also for all other cases. In respect of all such objections, the obvious and short answer of the Rent Controller must be that he, being a creature of the very laws or notifications which are being challenged before him, cannot suspend himself till he determines that matter; and that he must proceed so far as he is concerned on the assumption that his existence as a Rent Controller is of legal validity until a Court of competent jurisdiction decides or directs to the contrary."

22. Further, we would like to add that in *Mehr Dad v. Settlement and Rehabilitation Commissions* (P.L.D. 1974 SC 193), the Supreme Court of Pakistan held that "it is true that a Tribunal cannot go into the *vires* of the enactment under which it has been created and in *Chempak (Pvt) Ltd. v Sindh Employees' Social Security Institution (Sessi)* reported in 2003 PLC 380, Court held that " as observed by the Full Bench of Hon' able Supreme Court, comprising 12 judges, in

Federation of Pakistan v. Aitzaz Ahsan (PLD 1989 SC 61) it is a well-settled principle of Constitutional interpretation that until a law is finally held to be *ultra vires* for any reason it should have its normal operation".

23. As for the lapse of the Ordinance under Article 89, it may be relevant to add that the Honourable Supreme Court Bench comprising of 14 Judges in its most recent judgment dated July 31, 2009 observed that the period of 120 days would be deemed to commence to run from the date of passing of the Supreme Court order, observing further, that steps may be taken to place all such Ordinances before the Parliament or the respective Provincial Assemblies in accordance with law.

24. In any event, the above supports the view that it is not for the Commission to address the objections raised as to the constitutionality of the Ordinance or the appointment of its members. Hence, we must proceed on the assumption that the existence of the Commission is legal and valid until a court of competent jurisdiction determines otherwise.

Disposal of Pending Applications:

25. As for the applications, the first one pertains to summoning of witnesses/documents with request to allow cross examination of the officers who conducted the search. We have deliberated on the grounds taken by the counsel for summoning of witnesses, documents and request for allowing cross examination. It has been submitted that "*during the previous date of hearing,*

despite requests of the counsels for the respondent companies the originals of the documents which were allegedly recovered during the raid and on the basis of which Show Cause Notice was issued were not produced before the Commission". In the interest of justice and equity it is argued that the four officers who conducted the 'raid' and 'allegedly recovered the documents' be called to appear before the Commission and Applicants/Respondents be allowed to cross examine them. It is further submitted that "*in terms of Qanoon-e-Shahadat Order, 1984, it is mandatory that every document on which legal proceeding are initiated against a party, have to be presented before the judicial forum and be approved in accordance with law.*" The Member Undertakings during the hearing vehemently argued that the documents relied upon were not recovered from the 'raid' and that the alleged Agreement was never signed by the Member Undertakings. They were asked during the hearing whether they were alleging that the Agreement has been forged or concocted by the Commission. This was also denied. It is important to mention that as per the record the authorized officers had only obtained photocopies of documents from the premises of the Undertaking, therefore, insistence by the Applicants that the Commission should produce the originals which could either be with themselves or with the Undertaking from where the documents were recovered, is misconceived. Moreover, SCN is not based on the statements/affidavits of the authorized officers it relies on the documents either recovered pursuant to forcible entry order or provided by the Undertaking upon request from the Commission. Such documents, with the exception of the Agreement itself are on

the letter head of the Undertaking or Member Undertaking. As for invoices these are attached with the cover letter bearing the letter head of Riaz Ahmed & Co. The photocopy of the Agreement bears the signatures of Member Undertakings and this fact of entering into the Agreement is reinforced when reference to the Agreement is found through its title i.e. the 'marketing arrangement' *inter alia* in the minutes of the meeting and all the documents relied upon in the SCN as also discussed above in relation to continuity of the Agreement. Therefore, in view of the facts and circumstances summoning of the officers or allowing their cross examination is uncalled for. The other application relates to the objection on the eligibility of one of the Members to preside these proceedings on account of signing the forcible entry order. At the outset, it is pointed out that grounds of illegality of the forcible entry order in any case have not been taken up or pointed out by the applicant undertakings (i.e. Pioneer Cement Limited and Askari Cement Limited). Apart from the fact that this objection has been raised/filed at a much later stage of hearing, after having extensively argued the case on merit, even otherwise, we find no merit in these objections. It must be borne in mind that the legality of the forcible entry order is not and cannot be the subject of these proceedings. We may add that in another matter, proceedings are pending adjudication before the adjudicating authority (comprising of members other than those who signed the forcible entry order). While those proceedings pertain *inter alia* to alleged abuse and obstruction of the process of the Commission by the concerned officers of the Undertaking during the search operation, the present proceedings pertain to

violation of Section 4 of the Ordinance for having engaged in practices prohibited under Chapter-II of the Ordinance, having the object and effect of preventing, restricting and reducing competition.

26. Without prejudice to what is stated above, it is our considered view that the authorization of forcible entry was granted in an administrative capacity. Furthermore, both the requirements under Section 35 of the Ordinance were fulfilled in order to entitle the members of the Commission to order the same. The officers of the Commission were refused, without reasonable cause, to conduct the search and exercise powers under Section 34 of the Ordinance and thereafter, the two (2) members of the Commission authorized the forcible entry in terms of Section 35 of the Ordinance. It needs to be appreciated that such order of forcible entry is administrative in nature and the thrust of such an order is to entail with it the element of surprise so that where certain undertakings are concealing facts/documents/material/information etc, the Commission may enter forcibly to recover the same. The success of any investigation/search/forcible entry pertaining to a cartel is directly dependent on the unexpected nature of the action. As far as we are aware, there are thirty (30) competition agencies around the world that do not give advance notice to the targets before conducting a search. If an opportunity of hearing before the forcible entry is conducted, it defeats the very purpose of the said entry, as it provides the undertakings an opportunity to conceal the very information/material that the Commission is looking for. In fact, no question of opportunity of hearing arises at this stage, and no implications of the principle

of natural justice are invoked, because this is not the incriminating stage. The opportunity of being heard is provided before adjudging and giving a finding for committing any violations of law and/or imposing any penalties in respect thereof and/or taking any action for committing such violations.

27. Most importantly, it needs to be appreciated that the right to appeal (if any) against such order passed by two Members of the Commission lies with the Supreme Court, as envisaged under Section 42 of the Ordinance, which has been reproduced below:

> *"42. Appeal to the Court. (1) Any person aggrieved by an order of the Commission comprising of two or more Members or of the Appellate Bench of the Commission may within sixty days of the communication of the order, prefer appeal to the Supreme Court."*

The plain reading of Section 42 suggests that if aggrieved against the order passed by the Commission, the correct course of action for the Undertaking would be to appeal directly to the Supreme Court. The said Order having not been challenged has attained finality. The same, therefore, cannot be challenged at this stage and that too before us.

28. In fact, the urge to somehow pin a conflict aspect on Members of the Commission is unique. It has been alleged that the Commission and its Members being beneficiaries from any penalty that may be levied on the 'Respondents' (i.e. the Member Undertakings) should not hear the matter being 'judges in their own cause'. It is important to point out that although the penalties (if) recovered by Commission shall form part of the Commission's

Fund (CCP Fund) in terms of Section 20 of the Ordinance, however, the Fund does not consist of penalties alone (as seems to have been wrongly propagated). It also includes:

(a). allocations by the Government;
(b). contributions from local and foreign donors or agencies with the approval of the Federal Government;
(c). returns on investments and income from assets of the Commission;
(d). all other sums which may in any manner become payable or vested in the Commission; and
(e). a percentage of the fees and charges levied by other regulatory agencies in Pakistan as prescribed by the Federal Government.

Moreover, penalties forming part of the CCP Fund is very much in line with the laws administered by all sector specific regulators in Pakistan, such as Securities & Exchange Commission of Pakistan, National Electric Power Regulatory Authority, Oil & Gas Regulatory Authority or Pakistan Telecommunication Authority etc. In any case, the Commission cannot spend more than its approved annual budget. Moreover, to ensure transparency and accountability, the Commission is required to maintain proper accounts which are to be audited by the Auditor General of Pakistan or by a firm of Chartered Accountants nominated by the Auditor General of Pakistan. The annual report is to be published in the official gazette and to be laid before both the houses of Majlis-e-Shoora (Parliament). In view of the above we are of the view that these grounds of conflict hold no merit and are irrelevant.

29. Lastly, an application for quashment and suspension of proceeding was also handed over on the third date of hearing when all the parties concerned had

argued and concluded their arguments on the merit of the case. This application was filed on behalf of the Undertaking (APCMA). It is relevant to add here that on August 24, 2009 at the hearing before the learned judge of the Honourable Lahore High Court, the view was expressed that the Member Undertakings may be allowed to appear before the Commission on the next day to further advance the arguments on the pending application for summoning of the witnesses. Accordingly, a hearing arrangement was scheduled for 25-08-2009 at the venue i.e. Saudi Pak Tower, Islamabad, where all the previous hearings were conducted. Mr. Waheed Baloch, Advocate and Mr. Salman Faisal, Advocate of Khosa Law Associate appeared and submitted a letter for and on behalf of APCMA and others signed by Sardar Shahbaz Ali Khan Khosa Advocate, stating *inter alia*….

> "*that in view of the order of the Honourable Lahore High Court, Lahore dated 24-08-2009 passed in WP No.15624/09, titled as APCMA Versus Federation of Pakistan etc whereby his Lordship Mr. Justice Mr. Umer Atta Bandial has been pleased to vacate the stay order dated 11-08-2009 and has allowed the CCP to pass the final order, subject to certain conditions, as well as dispose off the miscellaneous applications, filed by the petitioners, before 31-08-2009. It is therefore, requested that the said Application may also be decided with appropriate order and the Applicant be provided an opportunity to present its submissions, if any, against the proposed order.*"

30. The representatives were informed that this hearing intended to provide 'the opportunity' requested for to present submissions. The Commission cannot further adjourn the matter as no cogent reason is provided and the counsel has already made submissions on this account. The Commission further informed during the hearing that if the counsel desires to make any additional written

submissions in respect of this application he is allowed to submit/send fax and e-mail the same to the Commission by 5:00 pm the same day. It was made clear by the Commission that it will not allow the culture of adjournment to defeat the interests of justice. No such submissions were received within the time given. In any event we are of the considered view that this application is entirely misconceived as it is against the well established principle of law that the forum initiating the proceedings is not empowered to quash the same, on any ground whatsoever.

In view of the above, the applications merit dismissal in terms of the above.

Legal Objections

31. We shall now proceed to address the legal objections:

(a) With regard to the objection to the independence of the Commission and its impartiality, in our considered view, the same has no merit in law or in fact. While the Federal Government is empowered to issue policy directives under Section 54 of the Ordinance it can only do so, to the extent '*not in consistent with the provisions of the Ordinance*'. Furthermore, the independence of the Commission is ensured by expressly placing an obligation on the Federal Government to use its best efforts '*to promote enhance and maintain the independence of the Commission*'. The relevant provisions are recapitulated as under:

> *S 54 "**Powers of the Federal Government to issue directives**. – The Federal Government may, as and when it considers necessary, issue policy directives to the Commission, not inconsistent with the provisions*

of this Ordinance, and the Commission shall comply with such directives."

S 12(3) "The Commission shall be administratively and functionally independent, and the Federal Government shall use its best efforts to promote, enhance and maintain the independence of the Commission."

It is also noteworthy to point out that to preserve the independence of the Members or Chairman under the Ordinance, their removal by the Federal Government has been made subject to an inquiry by an impartial person or body of persons unless disqualification arises from judgment of a court or tribunal of competitive jurisdiction under Section 19 of the Ordinance which in its relevant part reads as under:

S 19(2) "Unless a disqualification referred to in section (1) arises from the judgment or order of a court or tribunal of competent jurisdiction under any relevant provision of applicable law, a Member or the Chairman shall not be removed or his appointment revoked without an enquiry by an impartial person or body of persons constituted in accordance with such procedure as may be prescribed by rules made by the Federal Government and such rules shall provide for a reasonable opportunity for the Member or the Chairman to be heard in defence."

In view of the above, there is no question for the Commission not being an independent body. Under the Ordinance the Commission is indeed an autonomous body and Federal Government policy directives cannot supersede the law itself. Moreover, the list of actions initiated or taken by the Commission since the time of its inception against undertakings which are strong, influential and with vested interests - would perhaps only reinforce the independence aspect of the Commission.

(b) The argument/ground that only the Commission and not any duly authorized person/body should issue the SCN is disappointing. The consequence that flows from such ground is that each SCN must be signed by five (5) members of the Commission. In the presence of an express power of the Commission to delegate any of its powers and functions to any of its Members or officers as it deems fit under Section 28(2) of the Ordinance the objection taken is baseless and irrelevant besides making the issuance of such SCN administratively cumbersome and complex. In any event, the concerned Member of the Commission signing the SCN is the Member designated to oversee cases pertaining to mergers and cartels. For this reason, the SCN was issued under his signatures as he was clearly empowered to do so vide the S.R.O/05(I)/2008 dated January 02, 2008. The objection, therefore, has no merit.

(c) The argument that Section 28 of the Ordinance does not grant the Commission the right to take *suo motu* action is misconceived. In fact, sub-clauses (a) and (f) of sub-section (1) of Section 28 read as follows:

> *"(1) The functions and powers of the Commission shall be:*
> *(a) to initiate proceedings in accordance with the procedures of this Ordinance and make orders in cases of contravention of the provisions of the Ordinance;*
> *(f) to take all other actions as may be necessary for carrying out the purposes of this Ordinance."*

From a plain reading of the above section, it is clear that the Commission is not restricted in any manner to take action on its own. In fact, in terms of the provision cited above the Commission is fully empowered to take suo motu action.

Further, Section 30 of the Ordinance also amply empowers the Commission with the exercise of such powers and there is no provision whatsoever in the Ordinance that restricts the Commission in any way from acting on its own cognizance.

For the purposes of initiating a proceeding under Section 30, all that is required is the satisfaction of the Commission that there has been or is likely to be a contravention of any provision of Chapter II of the Ordinance. The basis for reaching such satisfaction has not been specified; it may *inter alia* include a complaint, an inquiry or any other document/material/information, which becomes available to the Commission for reaching such satisfaction. Section 30 of the Ordinance, in its relevant parts, reads as follows:

> ***"30. Proceedings in cases of contravention.-*** *(1) Where the Commission is satisfied that there has been or is likely to be, a contravention of any provision of Chapter* ***II, it*** *may make one or more of such orders specified in section 31 as it may deem appropriate. The Commission may also impose a penalty at rates prescribed in section 38, in all cases of contravention of the provisions of Chapter II"*

Whether one goes by the plain and ordinary reading of the provisions of the Ordinance or takes a holistic view - either way there is no prohibition on taking a suo moto action by the Commission or on initiating proceedings in the absence of an enquiry under Section 30.

(d) With regard to the objection taken that Commission has erred in defining the 'relevant market' as the whole territory of Pakistan, at the out set we must state

that for violations under Section 4 of the Ordinance defining relevant market is not that pertinent as compared to the violations under Section 3 of the Ordinance. For example, a cartel between undertakings operating even in different relevant markets would remain prohibited under provisions of Section 4 of the Ordinance. However, we will address the argument. For the concept of 'relevant market' it is important to examine its definition. The term 'relevant market' has been defined in clause (k) of sub-section (1) of Section 2 of the Ordinance as follows:

> *""relevant market" means the market which shall be determined by the Commission with reference to a product market and a geographic market and a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products' characteristic, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of the Competition are appreciably different in those areas;"*

The concept of 'relevant market' in the Ordinance is similar to what exists under the European law. It is used in order to identify the products and undertakings that are directly competing with each other in a business. Accordingly, the relevant market is the market where the competition takes place.

As is clear from the above definition, the 'relevant market' consists of a product market and a geographical market. Whereas the former can be said to mean the market with respect to the different groups of goods available, the latter is the

market in terms of its geographic area in which those products are either produced and/or traded.

The relevant product market consists of all those products that are considered to be substitutable by consumers in terms of their prices, characteristics and end-uses. In identifying the relevant product market, several different factors need to be considered for instance substitutability, competition, prices and product demand elasticity. It is not necessary for the products to be identical in their functional and physical aspects, price or quality; in fact, it is sufficient that the products merely present themselves as real economic alternatives to the other i.e. they have the ability to influence consumer buying.

In the case at hand, the product in question is cement, a product that has no reasonable substitute. Each Member of the Undertaking is concerned in the manufacture and distribution of the same product. Therefore, there can be no doubt with respect to the fact that the Member Undertakings are operating in the same relevant product market.

The Counsel has stated that for all practical purposes, cement is a ‘homogeneous commodity’, which makes the market extremely sensitive to price differences between two (2) manufacturers, who are perceived to manufacture cement of the same quality. This statement of the Counsel does nothing but further prove that the cement manufacturers are operating in the same relevant market, as in view of the above discussion, when products do not

have reasonable substitutes, they are considered to be in the same relevant product market.

It may be relevant to note here that while it is true that all cement manufacturers are not Member Undertakings, the Member Undertakings are currently responsible for the largest share in the cement industry. Through the Undertaking one formula for all Member Undertakings is agreed upon whereby quotas for each Member is fixed as per the Agreement and in doing so the prospective market of each Member is not take into consideration. This further demonstrates that the product market is the same.

The elements to be taken into consideration when defining the relevant geographic market include the nature and characteristics of the concerned products, the existence of entry barriers, consumers' preferences, differences among the market shares of undertakings in the neighboring geographic areas, as well as significant differences between suppliers' prices and transport costs levels.

With regard to the relevant geographic market in this case, the Undertaking comprises of twenty-one (21) cement manufacturers, which are Member Undertakings. This leaves only a few cement manufacturers in Pakistan, which are not Member Undertakings. This statistic in itself demonstrates that the Member Undertakings are operating in the same geographic market.

Counsel has submitted that in reality Pakistan consists of several different markets and each cement manufacturer operates in some but not all of the said markets. It is noted that if the distribution of plants is such that there are considerable overlaps between the areas around different plants, it is possible that the pricing of those products will be constrained by a chain substitution effect, and lead to the definition of a broader geographic market. Accordingly, as admitted by Counsel, each cement manufacturer operates in some but not all of the said markets - there are evident overlaps, therefore, there is no reason to doubt that all the Member Undertakings are operating in the same geographical market.

Counsel has further contended that the high transport costs, requires manufacturers to sell their products close to their factory, which in turn, divides the geographic market. Although, it may be true that in some cases, transport costs may have the effect of limiting a geographic market, it must be borne in mind that a transport disadvantage might also be compensated by a comparative advantage in other costs, for example labour costs or raw materials; as in the case at hand. Accordingly, the transport costs in this particular case may not be used as a basis for dividing the relevant geographic market in which the Member Undertakings are operating.

It may also be useful to refer to the principles contained in the EU guidelines whereunder it has been stated that in order to belong to the same geographic market, it is not necessary that the products be produced in the same locality or

a neighboring one; instead it is of importance that all the said products are available to the same users.

In light of the above, the Members Undertakings and the Undertaking is operating within the 'relevant market' in terms of clause (k) of sub-section (1) of Section 2.

(e) In alleging that conducting an enquiry under Sections 37(1) and (2) is a necessary prerequisite for initiating proceedings under Section 30, Counsel for Member Undertakings has misconceived the entire scheme of the law. It is our considered view that power to initiate proceedings under Section 30 is not dependent upon conducting an enquiry. Although, it is a settled principle of interpretation of law that the statute as a whole should be read in harmony, however, additions and subtractions cannot be made to individual sections or forced connections between disparate sections imputed where plainly none are intended in order to tailor the provisions of a law to suit the requirements of any party. Accordingly, each of the Sections 30 and 37 are to be read separately and independently of the other in accordance with the obvious intent of the law – Section 37 merely specifies one distinct route to initiate proceedings under Section 37 without excluding any other manner in which the Commission may be satisfied to proceed .

The relevant provisions of each section are reproduced below:

> ***"30. Proceedings in cases of contravention.-*** *(1) Where the Commission is satisfied that there has been or is likely to be, a contravention of any provision of Chapter* ***II,*** *it may make one or more of such orders specified in section 31 as it may deem appropriate. The Commission may also impose a penalty at rates prescribed in section 38, in all cases of contravention of the provisions of Chapter II…"*
> ***"30(2)*** *Before making an order under sub-section (1), the Commission shall – (a) given notice of its intention to make such order stating the reasons therefore to such undertaking as may appear to it to be in contravention…."*
>
> ***"37. Enquiry and studies.-*** *(1) The Commission may, on its own, and shall upon a reference Made to it by the Federal Government, conduct enquiries into any matter relevant to the purposes of this Ordinance.*
>
> *(2) Where the Commission receives from an undertaking or a registered association of consumers a complaint in writing of such facts as appear to constitute a contravention of the provisions of Chapter* ***II,*** *it shall, unless it is of opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by prima facie evidence, conduct an enquiry into the matter to which the complaint relates…"* (Emphasis added)

Section 30 deals with proceedings whereas sub-section (1) and (2) of Section 37 deal particularly with enquiry. The law itself draws distinction between proceedings and enquiry. Under Section 28 of the Ordinance, relating to functions and powers of the Commission with respect to initiation of proceedings and conducting enquiry are distinctly provided in sub-clauses (a) and (c) of sub-section (1) of Section 28. Similarly, this distinction is also reflected from the language used in Section 33(1). The Sections are reproduced below, in their relevant parts, for ease of reference:

> ***"28. Functions and powers of the Commission.-*** *(1) The functions and powers of the Commission shall be:*
>
> *(a) to initiate proceedings in accordance with the procedures of this Ordinance and make orders in cases of contravention of the provisions of the Ordinance;…*
>
> *(c) to conduct enquiries into the affairs of any undertaking as may be necessary for the purposes of this Ordinance;…"*
>
> ***"33. Powers of the Commission in relation to a proceeding or enquiry.-*** *(1) The Commission shall, for the purpose of a proceedings* ***or*** *enquiry under this Ordinance, have the same powers as are vested in a civil court under the Code of civil Procedure, 1908 (Act V of 1908), while trying a suit, in respect of the following matters, namely:…"* (Emphasis added)

That the scope of Section 30 is distinct from Section 37 (1) and (2) is further illustrated by the essentials required for each. For initiating proceedings and passing an order under Section 30, the Commission must be 'satisfied that there has been or is likely to be, contravention of Chapter-II'. On the other hand enquiry under Section 37(1) allows the Commission to conduct enquiries 'on its own' or 'upon a reference made to it by the Federal Government' and under Section 37(2). The language of sub-section (1) and (2) of Section 37 is such that it negates the same to be mandatory. Whereas the former uses the word '*may'*, the use of the word *'shall'* in the latter is followed by excluding certain matters which are in the discretion of the Commission, hence diluting the effect of *'shall'* into *'may'*. Accordingly, the argument that Section 37 is a necessary prerequisite to Section 30 seems even more redundant.

It is further noted that both the respective sections are part of Chapter IV, which relates to the function and the powers of the Commission. In the scheme of the

Chapter, Section 30 is placed earlier. While it is true that Section 37 is dependent on Section 30 for the purposes of initiating proceedings, the reverse is not the case. Section 30 is an independent and stand alone provision and finds no mention of Section 37 in its contents.

It needs to be appreciated that Section 37(2) aims at giving protection to the complainant more than against whom the complaint is filed. It caters for a situation where a complainant may seek redress if no action is taken upon his complaint and puts an obligation on the Commission to reach a determination with respect to the complaint – whether the same calls for further action or not. However, Section 37 cannot be interpreted so as to limit the scope of Section 30 or to put fetters on the powers of the Commission by creating procedural hiccups.

(f) The Counsel seems to incorrectly believe that the procedure for initiating proceedings under Section 30 is to first conduct enquiry and studies under Section 37 (1) and (2) and if they find that there is a prima facie case, it must be shown by the Commission that it is necessary in the public interest to commence proceedings. This has led to the Counsel's argument that notice under Section 30 is specifically covered under Section 37 (4). We find this argument is totally mis-founded and misconceived; and in our view it emerges from a total misunderstanding of the scheme of the entire Ordinance.

As stated previously, Section 30 and 37 are entirely independent provisions. While conducting an enquiry under Section 37, Section 37 (4) requires that apart from establishing a *prima facie* case, the Commission must form an opinion based on the findings of an enquiry that it is in public interest to initiate proceedings under Section 30. However, the reverse of this is not true; proceedings under Section 30 are not subject to any such limitation.

In this respect, attention is drawn to Sections 29 and 30 of the Securities and Exchange Commission of Pakistan Act 1997, which addresses investigation and proceedings by the Securities and Exchange Commission of Pakistan ("**SECP**") and powers of the SECP with respect to the same. It has been held that it is not mandatory for the Commission to conduct investigation in each and every case (2002 CLD 1583).

Accordingly, the Commission was under no requirement to first conduct enquiry under Section 37 and to show that it was in the interest of public to begin proceedings before initiating the same under Section 30. The allegation against the Commission for being "*extremely lax in issuing SCN as it did so seven (7) months after taking suo moto notice*" is worth commenting. The paradox is that the Commission has to face the allegations *inter alia* for either being 'lax' or else acting in an 'unholy haste'. In our view the seven months time to examine plethora of documents recovered from forcible entry for the purposes of initiating proceedings under Section 30 for violation of Section 4 of

the Ordinance is only reasonable. However, it may also be relevant to add that even in developed jurisdictions cartel probe/assessment may take years.

(g) With respect to objections against the exercise of powers under Section 34 of the Ordinance, it must be noted that the power provided to the Commission is that to 'enter and search**'** the premises and does not empower the Commission to conduct 'raids' as incorrectly alleged by Counsel for Member Undertakings. Further, there is nothing novel about the Commission exercising such powers as this provision is similar to Section 30 of Securities and Exchange Commission of Pakistan Act, 1997. Even otherwise, with some variations, the competition laws of Europe (including the United Kingdom), Canada and Singapore all envisage a similar power to their respective enforcement authorities; the Competition Commission of the European Union has the power to demand written information, enter premises and demand company information and seek oral, explanations all without the need to obtain a warrant.

It is our considered opinion that the scope of the Section 34 has been misunderstood by Counsel. Accordingly, we consider it necessary at this point to briefly discuss the dimensions of the said section. In its relevant parts, it has been reproduced below:

> ***"34. Power to enter and search premises.-*** *(1) Notwithstanding anything contained in any other law for the time being in force, the Commission shall have the power to authorize any officer to enter and search any premises for the purpose of enforcing any provision of this Ordinance…"* (Emphasis added)

Section 34 provides an in-built mechanism of how this power to enter and search the premises is to be exercised. First, the officer to enter and search premises must be authorized by the Commission. Sub-section (2) of Section 34 suitably arms the Commission to effectively exercise its function by providing under sub-section (1) for example, the power to have full and free access to any place or documents, the power to make a copy of any/all documents, the power to impound and retain any document, even where the information exists on the hard disk of computer. In case of such an action, full co-operation is required by the undertaking whose premises is being searched, which if denied without 'reasonable cause', will cause the deliberation process envisaged under Section 35 of the Ordinance to be invoked; which has its own set of procedures and restrictions.

The Commission does not need to satisfy the threshold of the presence of '*prima facie'* evidence as maintained by the counsels. Instead, the provision reads that "*Notwithstanding any thing contained in any other law for the time being in force*" the Commission is empowered to authorize 'any officer to enter and search any premises for the purpose of enforcing any provision of this Ordinance.

The opinion of the Counsel, namely, that the existence of *prima facie* evidence is a necessary prerequisite to the authorization of the power to enter and search premises, if accepted, would render this provision superfluous; if the Commission has *prima facie* evidence, there would be no need to enter and

search premises at all as it would then have the necessary basis to initiate proceedings under the Ordinance.

Moreover, 'identification of violated provision' is again not a pre-condition for authorization of power to enter and search premises and the Learned Counsel is mistaken in its view that failure of identification would lead to a 'fishing expedition'. The relevant part of Section 34 reads that the Commission may exercise its power under this section for the purpose of '*enforcing any provision of this Ordinance*'; therefore, the provision may be enforced where it is the Commission's opinion that doing so will be useful in proceeding under the Ordinance.

Detecting cartels and protecting consumers from anticompetitive practices is certainly part of the enforcement of the Ordinance. Carrying out an inspection and search for such purpose is clearly for the purposes of enforcing the provisions of the Ordinance. In light of the above, since the power to search and enter the premises under Section 34 was duly exercised, there is no deficiency or legal impropriety in the same and hence, arguments by the Counsel that the authorization of the same by the Commission renders the whole procedure *void ab initio* and that the documents recovered from the same are not admissible, hold no ground. The ground of inadmissibility of documents is discussed in the following paragraph.

(h) With regard to the inadmissibility of documents in evidence and the principle of 'fruits of a poisonous tree', it is noted that the legality of exercise of the Commission's power under Section 34 has already been discussed above; i.e. that the Commission exercised the said power in accordance with the provisions of law and there was no irregularity or illegality in this respect. Proceeding accordingly, it necessarily follows that all documents recovered during exercise of the same power, would be permissible in evidence, and the principle of 'fruit of a poisonous tree', as stated by Counsel, would not apply in the case at hand.

Without prejudice to what has been stated above, the Supreme Court of Pakistan has held that even where there is any irregularity in recovering certain material, evidence in the form of documents recovered or obtained from a party could be examined or relied upon, as long this is relevant and reliable (PLD 1992 SC 96). The Supreme Court of Pakistan at PLD 1992 SC 96 at page 101(D) has stated as follows:

> *"…if a piece of evidence is otherwise relevant and pertinent for the decision of an issue, it would be an untenable argument that notwithstanding the fact that it was a genuine and otherwise reliable it should not be made use of because in the process employed for the collection of the material an irregularity or for that matter an illegality was committed."*

Applying this principle to the case at hand, as long as the Agreement and other documents recovered are relevant and reliable, even on the assumption that the

exercise of power under Section 34 of the Ordinance was lacking in some respect, the documents may be used against the Undertaking and its Members.

With respect to the Counsel's argument regarding 'fruits of a poisonous tree', it needs to be noted that under Islamic jurisprudence, and as recognized by the Supreme Court of Pakistan, such a principle is not recognized. The Honourable Court has held at PLD 1992 SC 96 at page 101(E) and (F):

> *"We are conscious that in some jurisdictions such a liberal attitude in favor of a wrong committed or otherwise a wrongful act or a wrong doing is permissible-in Islamic dispensation it is impermissible. In Islamic law, philosophy and jurisprudence, no one can be permitted to reap the benefit of wrongful gain. The fair deal principle, namely, in order to seek justice one must be fair and should do justice, is highly pronounced in Islam."*

Accordingly, in light of the above, even if it is assumed that there existed procedural irregularities (which in our view did not exist), in recovering the documents, there is no principle which would bar the Commission from using the documents against the Undertaking, and this is an inherent feature of Islamic jurisprudence, because the parties concerned cannot be allowed to continue to reap benefits it is reaping due to a wrongful act.

(i) With respect to the provisions and application of Section 34 (6) of the Ordinance, the text of the same reads as follows:

> *"(6) Any accounts, documents or computer impounded and retained under sub-section (2) and (3) shall be signed for by the Commission or an authorized officer."*

As is evident from a plain reading of the above, it is clear that the only requirement set by the said provision is that the Commission or authorized officer are required to sign for the material impounded and retained by it, as a result of exercising its power under Section 34. However, the documents recovered were only photocopies made from the original files, and the original files were duly returned to the Undertaking. Hence, strictly speaking, there was no 'impoundment'.

The Counsel seems to have mixed two sub-sections of Section 34 (i.e. Sub-section (6) and clause (e) of sub-section (2)) to arrive at the ground that it is mandatory for the officers to prepare and sign an inventory of any documents seized. Whereas the former provision requires signatures for documents recovered, the latter provision requires preparation of inventory. For ease of reference, clause (e) of sub-clause (2) of Section 34 has been reproduced below:

> *"(2) For the purpose of sub-section (1), the Commission*
> *(e)* ***may*** *make an inventory of any article found in any premises or place to which access is obtained under clause (a)."* (Emphasis added)

Clearly, the word 'may' makes the provision discretionary in nature and not mandatory. Even otherwise, a copy of the list of documents, in the form of an inventory, signed by one of the authorized officers was provided during the hearing. The copy of this document, as per the record of the Commission, was also furnished to the officers of the Undertaking, in proceedings initiated prior to these proceedings. Hence, the provision of the prepared inventory is incontrovertible. Accordingly, this ground is also not tenable.

(j) The objection regarding failure to provide for constitution of Appellate Bench under the rules and regulations is entirely misconceived. The Ordinance itself clearly provides under Section 41(2) that the Commission shall constitute Appellate Bench comprising not less then two Members to hear appeals under sub-section (1). Furthermore, Section 41(1) also provides that no Member shall be included in the Appellate Bench who has participated or has been involved in the decision being appealed against. The modality as to how such decision shall be taken and become effective is also addressed under Section 41(3). The form in which the appeal is to be filed and other related matters are prescribed under the Competition Commission (Appeal) Rules, 2007 in terms of Section 41(5) of the Ordinance. Hence, where the Ordinance itself provides for constitution of Appellate Bench it is irrelevant whether rules or regulations address such aspect. This objection too, has no merit at all.

(k) Learned Counsel has also submitted that we cannot adjudicate this case because the same has already been adjudicated and decided by the Lahore High Court in *DG Khan Cement v Monopoly Control Authority* (2006 CLD 1237). However, this argument cannot be maintained as the decision in *DG Khan Cement* has no effect on the current proceedings. It is noteworthy that the said case was dismissed on the ground that evidence presented was insufficient as a matter of law, to conclude whether or not the appellant was in breach of the appropriate provision of the 1970 Ordinance. The said case was premised on a different set of allegations and for a distinct/different time period. The judgment

laid down the principle that "conscious parallelism is not in itself sufficient to lead to or permit an inference that a price fixing agreement or cartel exists". The onus on the Monopoly Control Authority to establish that an agreement of the nature specified in Section 6(1) of the 1970 Ordinance exists in order to attract deeming provisions thereof was not duly discharged.

(l) With respect to the argument that the Agreement cannot be used as a basis for the issuance of the SCN, on grounds of not being a prohibited agreement and that it was never implemented and/or effective after promulgation of the Ordinance, the definition of the term 'agreement' needs to be examined at the outset. This has been defined in clause (b) of sub-section 1 of Section 2 of the Ordinance as follows:

> *"agreement" includes <u>any arrangement, understanding or practice whether or not it is</u> in writing or <u>intended to be legally enforceable</u>;* (Emphasis Added)

As observed in the Bank's Order, passed by the learned single member of the Commission:

> *"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."*

From a plain reading of the definition, it needs to be appreciated that any action by an association of undertakings that reflects an understanding between its members, when acted upon by a member it constitutes an 'agreement' between the association and the member, as defined in clause (b) of sub-section 1 of Section 2.

Clause 4 of the Agreement states that '*Each member's capacity for calculating monthly quota will be on the basis of the attached annexure "A"'*. Further, Clause 5, in its relevant parts, states that '*During the period the agreement is in force, no…capacity expansion shall be allowed to any member unit for quota purposes…*' Finally, Clause 6 in its relevant parts states that '*The Chairman's decision regarding fixation of monthly quota shall be binding on all members…*' The said annex, Annex A to the Agreement, reveals that each Member's production capacity has been capped and this capacity is much less than the actual capacity that the individual Member is in fact capable of producing.

It is relevant to point out that sub-section (2) of Section 4 of the Ordinance, provides a non-exhaustive list of agreements that may be considered 'prohibited' for the purposes of the Ordinance. In its relevant parts Section 4 has been reproduced below:

> *"Such agreements include but are not limited to-*
> *(a)fixing the purchase or selling price or imposing any other restrictive trading conditions with regards to the sale or distribution of any good 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 of providing any services;*
> *(3)Any agreement entered into in contravention of the provision in sub-section (1) shall be void."*

Agreements that fix prices or the quantities of production are considered as more serious offenses. Such agreements are treated as having the object of preventing, restricting or reducing competition. As rightly held earlier by the Commission in the Banks' cartelization case:

> *"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*

Agreements that 'by their very nature' restrict competition are treated as having that object. Under the E.C. jurisprudence, for example, "an agreement which has as its object the restriction of competition, it is unnecessary to prove that the agreement would have an anticompetitive effect in order to find an infringement of Article 81(1)." In our considered view - and there is no doubt in our minds - that such agreements fall within the purview of 'prohibited agreements' as envisaged by Section 4 of the Ordinance.

In light of the above, there is no doubt in reaching the conclusion that Member Undertakings and the Undertaking itself entered into an agreement to fix output at certain agreed rates (Clauses 4, 5 and 6 of the Agreement). This in itself is violative of Section 4(1) of the Ordinance and expressly included in the prohibited agreement category in terms of Section 4(2)(c) of the Ordinance.

As for continuity of the Agreement, we have examined the relevant documents recovered during the inspection of the Undertaking's office. (As per the record copies of the relevant documents were also provided to the parties concerned). Upon review, it is clear that the 'monitoring arrangement' for cement dispatches was set out in the Agreement with the objective to ensure compliance with the Agreement. We are of the considered view that the 'monitoring arrangement' continued to remain fully in place in subsequent years even after the promulgation of the Ordinance on October 02, 2007, hence the Agreement also continued, even after the promulgation of the Ordinance - as is evident from the facts discussed below:

(i) Letter of APCMA dated 14 May 2003 addressed to all Member Undertakings indicates the intent and purpose of monitoring arrangement with Riaz Ahmed & Company. It clearly states that the consultancy is for the purpose of monitoring/verification of cement dispatches. The quota fixed in Clause 4 of the Agreement, as per its Annex A, was to be ensured by monitoring the dispatches and in terms of Clause 7 of the Agreement, the sole intent for entering into the Agreement is to maintain the desired and targeted price level. This view finds support from Clause 11 of the Agreement, which envisages establishing of 'price monitoring committees'. It is clear that export remains outside the purview of the Agreement.

(ii) The minutes of meeting dated 18 May 2005 of the Undertaking wherein it has been stated that 'the House unanimously agreed to keep the monitoring arrangement in place beyond June 30, 2005'.

(iii) Correspondence of the Undertaking with some Member Undertakings showing the existence of marketing arrangement under the Agreement in the following years; for example, the letter dated 6 May 2006 addressed to Mustehkum Cement Limited, inviting the company to become a Member of the Undertaking and join the marketing

arrangement under the Agreement; letter dated 16 October 2006 of Bestway Cement Ltd to Mr. Shehzad Ahmed Secretary of the Undertaking titled "Agreement for Marketing Arrangements –Capacity Fixation" also shows the existence of the marketing arrangement in the year 2006.

(iv) The minutes of meeting dated 15 October 2007 of the Undertaking wherein it has been stated that 'it is not possible for the industry to contribute for the continuation of the services of Riaz Ahmad & Company for Voluntary Verification of data being provided to the Government by individual members of the Industry. Therefore, the members agreed to discontinue the services of Riaz Ahmad & Company beyond the close of the current financial year i.e. June 30, 2008 till decided otherwise.' In view of the clear intent to monitor dispatches as provided for under the Agreement, the purported 'voluntary verification of data' to be provided to the Government by the Undertaking is either an afterthought or a cover to continue the Agreement. Importantly, this document was furnished by the Undertaking to the Commission subsequent to the inspection/entry, with the intent to derail the Commission's focus. In any case, assuming this 'voluntary verification data' was for the purpose of providing information to the Government, it could very well be in addition to the real intent and purpose for which Riaz Ahmad & Company was being retained and does not negate the continuity of the Agreement.

(v) The invoices raised by Riaz Ahmad & Company Chartered Accountants' dated 18 March 2008 and 19 February 2008 in respect of monitoring and dispatches also support the continuity and existence of the Agreement during such period.

(vi) The Undertaking's letter dated 29 May 2008 to Riaz Ahmad and Company stating, *'please consider this letter as one month notice and discontinue the assignment (verification of cement dispatches) with effect from June 30, 2008.'* While this does not rule out the possibility of re-appointment of Riaz Ahmad & Company or appointment of another firm to continue the monitoring, in our considered view, the continuity and existence of the Agreement till 30 June 2008 stands clearly established in the relevant facts and circumstances of the case.

Additionally, fixing of quota of dispatches was not only agreed upon between the Member Undertakings the data reveals that this was in fact acted upon, in

terms of the Agreement and the effect was thus that output was restricted. As per the Agreement, the cement companies were allocated quotas of dispatches based on their existing capacities in the year 2003 and it was provided in Clause 5 of the Agreement that new capacities would be considered on merit for the purpose of quota allocation. On examining the actual dispatches of cement companies in the year 2003, it has been observed that the actual dispatches closely match with the allocated quotas. By using the same capacity based allocation of quotas method the year-wise cement dispatches of each Member Undertaking from year 2003 to year 2008 have been analyzed and it has been observed that the percentage share of each Member Undertaking in the total cement dispatches very closely matches with the percentage share of Member Undertaking in the total production capacity of all the Member Undertakings, demonstrating the fact that the Agreement was in existence and was being implemented effectively in the years under review. Graphical representation of data reflecting this in somewhat stark fashion is given in **Annex-A**. Source of data is the Undertaking itself, which provided detailed information regarding year-wise dispatches (excluding exports) during the proceedings. There are, of course, some deviations in the case of a few Member Undertakings, but those are not substantial. This is understandable since the global experience is that the implementation of cartel agreements almost invariably exhibits some deviations/violations.

Counsel for Member Undertakings has also argued that even otherwise, the ‘decision’ is not in respect of ‘production, supply, distribution, acquisition or

control of goods'. In this respect the words 'production', 'supply', 'distribution' and 'control' are examined according to their dictionary meanings. The word 'production' means 'an act of producing' where 'produce' means to 'make, manufacture, create' (Penguin English Dictionary at page 544); 'supply' means 'the amount of goods produced or available at a given price' (Black's Law Dictionary Eighth Edition at page 1480); 'distribution' means 'the act or process of apportioning or giving out' (Black's Law Dictionary Eighth Edition); and 'control' means 'to exercise restraining or directing influence over; to regulate; retrain; dominate; curb; to hold from action; overpower; restrict; The ability to exercise a restraining or directing influence over something…' (Black's Law Dictionary (6th Edition) at page 329). Accordingly, there is little room for the argument that the Undertaking has not entered into an agreement in respect of 'production, supply, distribution and control' of the goods i.e. cement in terms of definition of 'goods' under Section 2(1)(f) of the Ordinance which reads as follows:

> *"goods" include any item, raw material, product or by product which is sold for consideration.*

Counsel for Member Undertakings has further argued that some Member Undertakings were not provided with a copy of the Agreement or that they were unaware of such an Agreement being in place. However, it is noted that by being a member of an association, an undertaking is deemed to have accepted its constitution and to have empowered the association to undertake obligations on its behalf. Consequently, even where a member has not expressly approved an anti-competitive agreement concluded by the association but has not

expressly opposed it, the member may be held to have acquiesced to the agreement ([1980] ECR 3125); *Van Landewyck SARL and others v the Commission*.

Section 4(1) further requires that the decision must also have the 'object or effect' of 'preventing, restricting or reducing competition'. The word 'object' as appears in Section 4, as observed by the single member of the Commission in the Banks Order, does not refer to "*the subjective intention of the parties when entering into the agreements, but the objective meaning and purpose of the agreement considered in the economic context in which is to be applied.*" Agreements that 'by their very nature' restrict competition are treated as having that object. Under the E.C. jurisprudence, for example, "an agreement which has as its object the restriction of competition, it is unnecessary to prove that the agreement would have an anticompetitive effect in order to find an infringement of Article 81(1)."

Similarly, in the U.S., agreements that 'by their very nature' restrict competition are referred to as "naked" restraints, i.e., naked in the sense that the restraint "does not accompany any significant integration of research and development, production or distribution," and they are condemned under per se rule, i.e., without inquiring into their effects. The definition of naked restraint offered here speaks of the "objectively intended purpose" of increasing price or reducing output. This phrase is used to indicate two things; first, the objectively measured and likely consequence of the restraint is more important than the

defendants' actual state of mind. The purpose of the rule identifying naked restraints is to enable relatively expeditious assessments of restraints, and as a general matter this is best accomplished by avoiding inquiries into the defendants' actual state of mind. Indeed, the defendants' state of mind is not even the determinative factor; a restraint might be naked even though it is well intended. Since the Agreement clearly restricts each Member Undertaking's capacity quotas and dispatches, it may be viewed as a naked quantity fixing agreement for achieving targeted prices and there is no need to prove its effect; as the anti-competitive effect shall be presumed. It may be relevant to add that in *Lombard's Club case* the European Commission observed to the effect that it is not necessary for undertakings to reach an agreement to fix an exact price. There can be a cartel even if there's merely a discussion as to target values or ideal prices between competing undertakings.

Counsel for the Member Undertakings have submitted that the Agreement was never implemented and/or that it was never effective after the promulgation of the Ordinance and that even otherwise, it expired in June 2005, before the promulgation of the Ordinance, and therefore, it should not be relied upon. It is important to appreciate, in this regard, that the prohibition contained in Section 4 of the Ordinance pertains to 'entering' into a prohibited agreement and the implementation of the same is not required to be established for the purposes of violation being committed.

Even otherwise, it would be relevant to refer to illustration (g) of Article 129 of the Qanun-e-Shahadat Order (Order X of 1984), which has been reproduced below:

> *"129. Court may presume existence of certain facts. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course to natural events, human conduct and public and private business, in their relation to the facts of the particular case.*
>
> *Illustrations*
>
> *The Court may presume—*
> *…(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it…"*

Accordingly, in order to give strength to the argument that the Agreement was never implemented and/or that it was never effective after the promulgation of the Ordinance, the Counsel is required to present evidence to the contrary. Failing this, the Article 129 presumption, as stated above, will be effective.

Since the Counsel has not provided any such evidence to show that the Agreement is either no longer in existence or that it had ended before promulgation of the Ordinance, accordingly Commission can apart from determining its continuity after promulgation of the Ordinance as discussed above, even presume existence of certain facts in light of the documents available on record.

Moreover, the Supreme Court of Pakistan has held that:

> *"There is a presumption that a state of affairs that existed continued unless it can be rebutted by producing proof to the contrary…The burden of proof of disproving it was on the respondent…"* (1971 SC 585 at page 632 (Q)

Accordingly, the burden of proof of showing that the Agreement was either never implemented or since execution became ineffective on any date thereafter, rests with the Member Undertakings and the Undertaking itself, and not the Commission. Until such evidence is provided, the Agreement shall be deemed to be effective at least till June 30, 2008as also otherwise stands established in terms of what has been discussed above.

(m) With respect to the argument vis-à-vis non-applicability of Section 4 of the Ordinance to agreements executed prior to the promulgation of the Ordinance, it is first important to understand the prohibition contained in Section 4 (1). The Section has been reproduced below:

> ***"4. Prohibited agreements:-*** *(1) No undertaking or association of undertakings shall enter into an agreement or, in 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 Act."*

As for the application of Section 4(1) of the Ordinance to the Agreement i.e., 'no undertaking or association of undertakings shall enter into an agreement'. Counsels for Member Undertakings have argued that the Ordinance does not cover agreements that were executed prior to the promulgation of the Ordinance

and merely remain in force afterwards. The way in which Counsels have presented arguments with respect to the restrictive and selective reading of the said provision, is rather disappointing. The Preamble to the Ordinance reveals that it was promulgated for the following objectives: (i) to provide for free competition in all spheres of commercial and economic activity; (ii) to enhance economic efficiency; and (iii) to protect consumers from anticompetitive behaviour. The term *competition*, while not defined in the Ordinance and rightfully so, refers to business rivalry, and the most obvious manifestations of rivalry are the number of players in any market and the lack of cooperation among them. Rivalry is the catalyst that is expected to force market players to maximize product output and minimize costs and to take all other reasonable cost-reducing or product improving innovation measures to enhance economic efficiency.

At this point, it may be useful to examine the scope and ambit of the word ‘enter’ and the term ‘enter into’. It has been held that the connotation of the word ‘enter’ is sufficiently wide to cover even cases where the entry is continued or retained (*Kowtha Suryanarayan Rao v Bank of Hondustan Ltd* (1953) 23 Comp Cas 168 (Mad)). In its ordinary dictionary sense the word ‘enter’ has been defined as to ‘become a member of; enroll; come on stage’ (the Penguin English Dictionary at page 246). The term ‘enter into’ has been defined as ‘to engage in’; ‘be part of’; ‘take part in’; ‘become a party to’; ‘to participate in; take an active role or interest in…’

It is interesting to note that when the term ‘enter’ is used in isolation, it may connote a relatively restrictive interpretation, however, when this is coupled with the term ‘into’, the scope is considerably enhanced to include situations of participation in a pre-existing event. In fact the term ‘into’ has been defined as ‘continuing to the midst of’ (the Penguin English Dictionary at page 384). Accordingly, the term as is used in the said section must necessarily include the continuance of an agreement as well.

By concluding that the term ‘enter into’ excludes agreements that were in fact executed prior to the promulgation of the Ordinance, would obviously defeat the very purpose for which the Ordinance was promulgated. In the very least, the term was included to enhance the scope of the Section rather that to restrict it.

(n) With respect to the argument, with regard to the retrospective operation of the Ordinance, it may be stated that in our view there is no dispute with respect to the retrospectivity of the law itself; instead, the question at issue is the applicability of the Ordinance to the case at hand.

Since the Agreement was executed in 2003, no doubt exists in stating that it was executed at the time when the 1970 Ordinance was in force. However, in our considered view, if subsequent to the promulgation of the Ordinance, the Undertaking continues the breach in any way, as in the present case it is detailed above, the breach shall be one that is continuing and subsisting, renewed on

every single day i.e. a continuing cause of action. Hence, the question of retroactive application does not arise.

32. In examining whether the Undertaking has continued the breach after the promulgation of the Ordinance, the dates of execution or expiration of the Agreement are not at issue. In fact, if the effects of the understanding between the Member Undertakings can still be felt, even for one day after the promulgation of the Ordinance, it may be presumed that the Agreement has continued, and the provisions of the Ordinance may therefore be invoked.

33. In this regard, the observation made by Supreme Court of Pakistan in *Khan Asfandyar Wali v Federation of Pakistan* reported at PLD 2001 SC 607 at page 903, is relevant, wherein retrospectivity of the National Accountability Bureau Ordinance 1999, in respect of its applicability to a default committed prior to the promulgation of the Ordinance was examined and the Honourable Court held as under:--

> *"The mere fact that at the time of entering into an agreement no punishment was prescribed for default in payment of loan or bank dues, as the case may be, cannot possibly mean that the duty of the defaulter to re-pay the loan/dues also expired. The duty still remains. It continues till the loan/dues are re-paid as required under the agreement. Therefore, non-payment of loan/dues in terms of the agreement within the contemplation of section 5(r) is a continuing breach of duty or obligation, which itself is continuing if duty to re-pay the loan/dues as aforesaid continues from day to day and the non-performance of that duty/obligation from that point of view must be held to be a continuing default in the repayment of loan. Therefore, if it is continuing, there is a fresh starting point of limitation every day as the wrong continues. Viewed from this angle, there is no limitation*

and no question of retrospectivity involved as long as the duty remains undischarged."

34. Therefore, viewing the situation in light of the above, the nature of the breach under any section of the Ordinance, and in this case particularly under Section 4 of the Ordinance, is not the breach which is committed once and for all. It is a continuous breach. Thus, on every occasion the breach occurs and recurs, it constitutes an act or omission, which continues and is therefore a fresh act.

35. Notwithstanding the above, it is relevant to consider whether Section 4 of the Ordinance is caught by clause (1) of Article 12 of the Constitution. Since discussion on Article 12 in the above context falls within the fourth category of constitutional issues i.e. *"that the subject matter is outside the field in which particular court is competent to act."* stated in the *Akhtar Ali* case and subsequently approved in Pir Sabir Shah.

36. Article 12 of the Constitution states as follows:

> *"12. Protection against retrospective punishment.*
> *(1) No law shall authorize the punishment of a person:-*
> *(a) for an act or omission that was not punishable by law at the time of the act or omission; or*
> *(b) for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed."*

37. The said Article does not deprive the legislature of its power to give retrospective effect to an enactment, which the legislature is competent to act. In

the *Khan Asfandyar Wali* (at page 904) case Article 12 was stated to provide as follows:

> *"It merely provides that no law shall authorize the punishment of a person for an act or omission that was not punishable by law at the time of the act or omission or for an offence by a penalty greater than, or of a kind different from the penalty prescribed by law for that offence at the time the offence was committed."*

38. Seen in this perspective, the Agreement, although it may have constituted breach of certain provisions of the 1970 Ordinance, is also a breach committed after the promulgation of the Ordinance, whereby the offence of 'Prohibited Agreements' was created. As stated above, as the Agreement continued, it was in the nature of a continuous wrong, which was converted into an offence prospectively i.e. in a case where such breach continued even after the promulgation of the Ordinance and not retrospectively.

39. It necessarily follows that the penalty that will apply in this case will be the one that is prescribed under the same ordinance, under which the breach occurred i.e. the Ordinance and not the 1970 Ordinance. In other words, it is a case where the punishment is prescribed in relation to the breach of a continuing prohibition, which continued, even after the coming into force of the Ordinance. The argument submitted by the Undertaking that the Commission has sought to impose penalties that either did not exist or and greater than those prescribed by the 1970 Ordinance, cannot thus be maintained. Accordingly, under no circumstances, can such an application of the law be termed as 'retrospective' in operation or in violation of Article 12.

40. Having addressed the objections taken by the parties concerned we are of the considered view that the Undertaking and the Member Undertakings are guilty of cartelization in terms of Section 4 of the Ordinance.

41. The question now is the quantum of penalty. Among cartels, cement industry is termed as one of the 'most pathological'. Cartelization is one of the most egregious forms of anticompetitive practice and prosecuting cartels is one of the most difficult tasks entrusted to competition agencies. The problem with detecting cartels is 'collecting incontrovertible evidence' owing to its secretive nature. It is a rarity to find documented evidence, that too in the form of an executed agreement.

42. Globally, cement industries are most susceptible to scrutiny of competition agencies as often they are alleged to collude as a cartel either by fixing price, dividing markets by territory allocation or by customers among competitors, or by output restriction - thus adversely affecting consumers and other businesses. To quote Adam Smith when people of the same trade meet, "*the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.*" Cartel as rightly observed in one of the earlier Orders of the Commission by the Single Member is:

> … *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.* (Emphasis added)

43. In a horizontal cartel as in the present case, the Agreement whether termed collaboration or cooperation is in effect a conspiracy amongst competitors and is bound to impact adversely the consumers. The 'triple C factor' (conspiracy amongst competitors against consumers) in our view would invariably exist in all such cartels.

44. One cannot ignore the fact that in Pakistan the cement sector has a long history of cartelization. The first one emerged in 1992, when re-construction and re-habilitation work was started after the destructive floods in 1992. At that time, the Monopoly Control Authority (**MCA**) undertook an in-depth investigation; examined distribution system, pricing patterns, capacity utilization and cost structure. MCA concluded that a cartel had been formed and made recommendations to the Economic Coordination Committee of the Federal Cabinet (ECC). The recommendations were approved and State Cement Corporation's units were directed to open their retail shops at important points in major cities and to sell the cement at the rate recommended by MCA and approved by the ECC.

45. In 1998, another instance followed; this time MCA took action against the cement cartel. The Price of cement was raised by all cement manufacturers in October 1998 through collective action - from Rs 135 a bag to Rs 235 per bag. MCA enquiry revealed that none of the input costs had gone up. The authority passed orders to revert to the previous price level levied a fine and directed the

manufacturers to operate at optimum capacity utilization. MCA's order was stayed by the High Court. The Government then intervened and compromised with the cement manufacturers obliging MCA to withdraw.

46. The third instance was in June 2003 when cement prices were increased overnight, across the board, by Rs.35 per bag. MCA issued show cause notices to 18 cement manufacturers, and after hearings spread over a two year period directed all cement companies to reduce prices by a specific amount in the case. The cement manufacturers filed appeals in the Lahore, Sind and Peshawar High Courts. Between November 2005 and April 2006, while MCA's case was sub judice and the government had facilitated the cement manufacturers by lowering excise duty, there was another spiral of cement prices reaching around Rs 350 per bag in April 2006. The proceedings concluded in favour of the cement manufacturers. As stated earlier, the Lahore High Court laid down the principle that "conscious parallelism is not in itself sufficient to lead to or permit an inference that a price fixing agreement or cartel exists" and owing to insufficiency of evidence the cement manufacturers wriggled out. Perhaps, had the Agreement been recovered earlier the outcome of the proceedings would have altogether been different.

47. We then witnessed the government subsidizing cement imports, apparently as a short term measure to reduce cement prices. Even though the prices came down gradually over the next 6 months, from Rs 353 to Rs 195 in January 2007, in February 2007 they rose, quite suddenly, by Rs 60, to a new high of Rs 255 per

bag. Hence, such measures are not sustainable. In fact it is a costly and eventually useless intervention to rectify the market.

48. Following the sharp increase in cement prices in February, 2007, the Government also asked MCA to inquire into the reasons for this price increase. MCA constituted an inquiry committee that inter alia conducted detailed hearings in the matter during which statements on oath of twelve CEOs of cement companies were also recorded (in addition to written statements received from ten of these companies). All CEOs claimed that they were acting independently and competing with other cement companies; that they were not engaged in any collusive conduct to determine prices or production/supply quotas. Cartelization in any shape or form was denied. The inquiry did not reveal any "conducive evidence to indicate that the price hike in February 2007 was the result of cartelization". It was, however, suggested in the inquiry report that "such direct evidence can only be found through physical search of premises of APCMA….." which MCA could not conduct due to "the limitations of the 1970 law".

49. Interestingly, Commission's snapshot study for determining the reasons for the cement price hike during March, 2008 expressed the "point-in-time" view that this price hike "could be the result of change in sector fundamentals affecting demand and supply dynamics and due to commercial reasons" but that the Commission could not "rule out the possibility that this across-the-board, simultaneous price increase may have arisen from collusive behavior of the incumbent cement manufacturers".

50. Instances from other jurisdictions may also serve as a useful guide: In 2003 European Commission levied 187 million euros fine on Lafarge (world's biggest cement maker) for participating in a cartel and for being a habitual offender. In Argentina five cement companies operated a cartel during 1981-99, until caught and fined $107 million, the largest fine levied by the country's competition regulator. In Korea, in September 2003, the competition authority levied surcharges (fixed fines) of $22 million on seven companies in addition to $428,000 on the Korea Cement Manufacturers Association. In 2003, the German cartel office imposed a combined fine on six cement firms in the sum of €660m after an inquiry into how prices were being set by them. Similarly, the same year in Romania, three cement companies, viz. Lafarge Romcim, Holcim and Heidelburg's subsidiary Carpat cement were fined 27 million euros or six per cent of their turnover. The probe found that they had inflated prices by as much as 38 per cent. The list is endless. Recently, in 2008 The European Commission raided several major cement companies' offices on suspicion of illegal cartel activity. Such companies that were searched included Paris-listed Lafarge, world's biggest cement maker, Swiss-based Holcim the second biggest, and Mexico's Cemex. In a most recent cartel case of ***Car Glass Producers November, 2008,*** the European Commission imposed fines totaling almost 1.4 billion Euros (the highest fine ever for a cartel as whole) on four companies. The Commission also imposed the highest cartel fine ever on individual undertaking Saint-Gobain for being a repeat offender thus increasing the fine by 60% i.e. (€ 896,000,000).

51. In the developing world the statistics are poorer not because cartels are less common but more because either the enforcement agencies are less equipped to deal with such violations or else the law is not effective enough.

52. We recall that when forcible entry into the offices of the Undertaking i.e. APCMA (not cement companies) was ordered there was a lot of hue and cry in the media against such action. The Undertaking condemned the "raid" by the Commission, alleging that this measure had "demoralized the business houses of the country", that it had sent a very negative signal to the business community and that it had shattered their confidence. It was also emphasized that cement sector is contributing Rs 30 billion to the national exchequer in form of direct taxation and protests were lodged at various levels of the Government.

53. We are of the considered view that if we want to progress and enhance economic efficiency and protect consumers from anticompetitive behaviour we will have to come hard on habitual cartel offenders. Deterrence is a must! It is quite clear that the Member Undertakings and the Undertaking itself are habitual offenders – cartelization has always been an offence (for the period in question, be it under the previous law or the existing Ordinance). It was, is and shall remain a '*serious offence*' in any competition regime. The infringement in this sector is not only habitual but carries a wide ranging impact on consumers and the general public. The economy as a whole, and the consumer, in particular, have long suffered as a consequence of the "near criminal"

conspiracy by the cement manufacturers who could not possibly have been fully cognizant regarding their egregious conduct and the violation of law being committed by them. In fact, to the contrary, there appears to have been active concealment of such agreement/practice.

54. The facts regarding the contribution to the national exchequer may be true. The cement sector may be doing well, whether or not as a whole it measures up to international benchmarks of productive efficiency since a cartel invariably succeeds in sustaining inefficient producers who continue to exist and be a burden on economy. The point that needs to be emphasized at this stage - as best observed by Joseph Stiglitz, one of the most cited economists, -is: "*strong competition policy is not just a luxury to be enjoyed by rich countries, but a <u>real necessity</u> for those striving to create democratic market economies*". The Chairman, Competition Commission UK, in one of his recent speeches while addressing the aspect whether safeguarding financial stability should override concerns about restrictions on competition in these "interesting times", i.e. of financial crises, raised the question: "*Do we retreat? or Do we advance?*" stating further: "*what we must not do is to retreat on the principles of the competition*".

55. Moreover, none of the undertakings concerned opted or sought for leniency which was expressly offered vide Commission's letter dated November 05, 2008 to all parties concerned. The insistence of the parties to hold collective hearings at one place and at the same time, despite the Commission's effort to

hold such hearings where the undertakings are registered is difficult to rationalize - if they, in fact, operate independently and not as a collusive club. This appears symptomatic of how the cartel members watching over each other's shoulders to ensure no one falls out of line. Otherwise, ordinarily we would have expected a few leniency applications. It is interesting to point out that the inception of cartelization in this industry coincides with the establishment of the association in 1992. Also, while the likely financial benefit derived from this infringement is difficult to estimate, it is likely to have contributed substantially to the profitability. In any event, it is evident that the consumers' surplus was converted into producers' surplus for more than a decade. Hence, the more we condemn - the less it is.

56. While the circumstances clearly call for no leniency and imposition of the highest penalty, we also feel that the necessary deterrent effect would be achieved and the interests of justice served even if a somewhat lesser penalty is imposed. Therefore, instead of 15% of turnover (the highest level) we are hereby imposing a penalty of 7.5% of turnover in the case of each Member Undertaking based on last annual accounting statements (except in the case of Gharibwal Cement where it is based on the accounting statements for the year 2006, 2007 since no sale occurred in 2007, 2008).

Amount of the penalty to be recovered from Cement Companies @ 7.5% of the Turnover

S.No	Units	Net sales in Rupees	Amount of Penalty in Rupees	Rounded Figure in Millions
1	**Al-Abbas**	1162403000	87,180,225	87

2	**Askari (Wah)**	3,100,756,513	232,556,738	233
3	**Askari (Nzm)**	2,492,615,015	186,946,126	187
4	**Attock**	4,991,451,000	374,358,825	374
5	**Bestway**	7,487,162,751	561,537,206	562
6	**Cherat**	3,013,752,000	226,031,400	266
7	**D.G. Khan**	12,445,996,000	933,449,700	933
8	**Dadabhoy**	378,585,000	28,393,875	28
9	**Dandot**	556,149,275	41,711,196	42
10	**Dewan (Merged entity of Dewan Cement & Dewan Hattar Cement)**	4,598,002,000	344,850,150	345
11	**Fauji**	3,545,902,000	265,942,650	266
12	**Fecto**	2,320,837,000	174,062,775	174
13	**Gharibwal**	521,716,000	39,128,700	39
14	**Kohat**	1,375,972,754	103,197,957	103
15	**Lucky**	16,957,879,000	1,271,840,925	1,272
16	**Maple Leaf**	7,815,829,000	586,187,175	586
17	**Pioneer**	4,853,764,000	364,032,300	364
18	**Flying**	158,298,146	11,872,361	12
19	**Pakistan Cement**	5,395,057,000	404,629,275	405
20	**Mustehkam Cement**	987,919,000	74,093,925	74
		84160046454	6,312,003,484	6,352

57. It is noteworthy that Dewan Hattar Cement Limited, Dewan Cement Limited and Al-Abbas Cement are successor to Saadi Cement, Pakland Cement and Essa Cement respectively who were the originally signatories to the Agreement. Flying Cement, Pakistan Cement and Mustehkum Cement joined APCMA and became part of the Agreement from the year 2006 onwards and have been accordingly penalized. Dadabhy Cement claim not to be a member of APCMA any longer albeit they were issued the SCN based on their adherence to the Agreement – accordingly they have been fined. As for the Undertaking (APCMA), despite its reprehensible leading role in the cartel, we are constrained to impose a maximum of the fixed penalty in the sum of Rs.50 million only. It is also pertinent to note that in developed jurisdiction another important principle has been laid down that is, an undertaking facilitating or

contributing to the cartel in any manner can be penalized for cartelization, notwithstanding whether an undertaking is directly part of the cartel formation or not. Therefore, if any firm/undertaking has been involved in facilitating the subject cartel, we hereby direct the relevant department of the Commission to initiate proceeding in accordance with law under the Ordinance against such undertaking. In this regard, reference is made to the ***Organic Peroxides*** EU case decided in 2008 which imposed a penalty of 1000 Euros on a consultancy firm.

58. We must add that the Commission pursuant to announcement of the decision by erstwhile Islamabad High Court provided yet another opportunity to all undertakings which were issued the SCN to make any additional submissions if so desired vide its hearing notice dated 03-08-2009. It was disappointing to note that the petitioner/parties concerned despite having clear direction by the Honourable Lahore High Court Lahore in its order dated 10-08-2009 requiring the petitioner to 'enter appearance' before the Commission, raised one or the other plea for seeking adjournment. Since all parties have been heard and given ample opportunity to represent their case through appearance and submission in writing, no merit was found in granting further adjournment. In fact, it was pointed out to the parties that the Learned Judge of the Lahore High Court required the 'Commission to conclude the proceedings' and the Commission was only restrained from passing an adverse order against the petitioner. This restraint imposed on the Commission, once again has been lifted by the Honourable Lahore High Court, Lahore on 24-08-2009.

59. As mentioned in para-29 above, on behalf of the Undertaking and some of the Member Undertakings appearance was made before us on 25-08-2009 and an undated letter was submitted signed by the counsel of the Undertaking and others. Nothing further was added in relation to the pending application or arguments thereon.

60. In view of the above, this order is hereby passed and signed by us on August 27, 2009 at Islamabad. The show cause notices and applications are disposed off in terms of this Order.

KHALID A. MIRZA
(Chairman)

RAHAT KAUNAIN HASSAN
Member (Legal)

Islamabad the August27, 2009

Note:

"By the order of the Hon'ble Lahore High Court, Lahore taking of adverse action by the Commission pursuant to this order is restrained till the next date of hearing i.e. 29.09.2009."