Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 4942 OF 2010

Islamabad Feeds (Private) Limited and others

Vs

The Federation of Pakistan, etc.

PETITIONERS BY:	Barrister Aitzaz Ahsan, Sr. ASC.
RESPONDENTS BY:	Mr. Khalid Javed Khan, Attorney General for Pakistan, Mr. Saqlain Haider Awan, Mr. Farrukh Shahzad Dall, and Syed Mazhar Hussain Shah, Assistant Attorney Generals. Mr. Muhammad Munir Paracha, Sr. ASC and Mr. Nauman Munir Paracha, Advocate for CCP. Mr. Umer Javed, Registrar and Mr. Muhammad Usman, Senior Joint Director, Competition Commission of Pakistan.
DATE OF HEARING**:**	18.06.2021.

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*BABAR SATTAR, J.***-** Through this judgment this Court intends to decide the instant petition, W.P. No. 4989/2010 titled ***Kashmir Feeds (Private) Limited Vs. The Federation of Pakistan, etc.*** and W.P No. 5307/2010 titled ***Big Bird Poultry Breeders (Pvt.) Limited, etc. Vs. Federation of Pakistan, etc***. The Petitioners have sought a declaration that the Competition Act, 2010 ("**Competition Act**"), the Competition Ordinance, 2010, the Competition Ordinance, 2009 and the Competition Ordinance, 2007 (together, "**competition**

laws"), are all *ultra vires* the Constitution and devoid of legal authority having been promulgated by Parliament that lacked the legislative competence to do so. And further that the show cause notices issued to the Petitioners dated 26.10.2010 and 28.10.2010 ("**impugned SCNs**") suffer from jurisdictional defects and are liable to be set aside.

2. The facts very briefly are that the Petitioners are engaged in the sale of poultry products and are members of Pakistan Poultry Association ("**PPA**"). The Competition Commission of Pakistan ("**Commission**") ordered an Inquiry into the conduct of PPA and also took into custody documents relating to meetings conducted by members of PPA and decisions reached therein including fixing prices for products to be sold by members of PPA. On the basis of the Inquiry Report dated 08.07.2010, the Commission was satisfied that PPA had entered into prohibited agreements in breach of Section 4 of the Competition Act. It thus proceeded against PPA and imposed penalties on it, which are now pending adjudication before the Competition Appellate Tribunal. Meanwhile, the Commission issued the impugned SCNs to the Petitioners, who are all members of the PPA, in their capacity as undertakings individually liable for engaging in price fixing agreements in breach of section 4 of the Competition Act along with PPA.

3. Barrister Aitzaz Ahsan, Sr. ASC, appearing for the petitioners contended that Parliament had no authority to enact competition laws as regulation of competition was not listed as an item in the Federal Legislative List and consequently

Provincial Assemblies were empowered to enact such laws as opposed to Parliament. He contended that as a larger bench of the learned Lahore High Court had already found the Competition Act *intra vires* the Constitution. And he, in the interest of time, would only rely on arguments in support of his challenge to the *vires* of competition laws listed in the memo of the petitions as the matter was already pending in appeal before the august Supreme Court. He contended that even if competition laws were deemed to be *intra vires* the Constitution, as found by the learned Lahore High Court, the impugned SCNs still suffered from jurisdictional defects. His submissions regarding the additional defects that afflict the impugned SCNs have been summarized in the later part of the judgment where they have been addressed.

4. Mr. Khalid Javed Khan, learned Attorney General for Pakistan, appeared on behalf of the Federation and also furnished arguments in support of the actions of the Commission. He contended that the learned Lahore High Court had already held the Competition Act *intra vires* the Constitution and the Federation fully supported the opinion rendered by Honorable Justice Ayesha A. Malik. He submitted that Parliament was competent to legislate on the subject of competition in view of Article 151 of the Constitution read together with Item 58 of the Federal Legislative List. He took the Court through the legislative history of Article 151 and argued that where the Constitution itself placed a subject matter within the domain of the Parliament, the entries within the Federal Legislative List

ought not be read in a restrictive manner to circumscribe the jurisdiction so vested by the text of the Constitution.

5. The arguments of the learned Attorney General in relation to the legal competence of Parliament to promulgate competition laws have been summarized in the judgment of the learned Lahore High Court reported as ***LPG Association of Pakistan vs. Federation of Pakistan*** ***(2021 CLD 214***). It would serve no useful purpose to recapitulate the Federation's arguments as articulated by the learned Attorney General once again for purposes of this judgment. His arguments in support of the impugned SCNs and rebutting the challenge that they suffer from legal infirmity have been summarized in the latter half of this judgment where this Court's opinion in relation to such ch allenge has been expressed. Mr. Muhammad Munir Paracha, ASC, appeared on behalf of the Commission and also submitted written arguments in support of legal competence of Parliament to enact competition laws and the legality of actions taken by the Commission impugned in these petitions. The primary contention in the arguments submitted on behalf of the Commission was that undertakings are individually responsible for any conduct found in breach of a provision of the Competition Act and the mere fact that an association of undertakings is found to have engaged in anti-competitive conduct taking the form of a prohibited agreement provides no legal basis to excuse the culpability of individual undertakings through who are party to such prohibited agreement and give it effect.

6. These Petitions raise two broad questions that need to be addressed. One, did Parliament have the legislative competence to promulgate competition laws, including the Competition Act, 2010, pursuant to which the impugned SCNs have been issued? Two, do the impugned SCNs suffer from any other jurisdictional defect that renders this petition maintainable?

Legislative Competence of Parliament.

7. In order to determine whether the Parliament was competent to promulgate the Competition Act, we must consider the nature of restraints that Competition Act applies and whether the Federation or the Provinces are empowered by the Constitution to apply such restraints. For such purpose, we must undertake a two-tier analysis. We need to analyze the individual right to freedom of trade and business that Article 18 of the Constitution guarantees, the collective right to freedom of trade, commerce and intercourse that Article 151 of the Constitution seeks to uphold, and the balance that the Competition Act seeks to strike between the two. And then in view of the nature of federalism that our Constitution prescribes, we must consider whether application of restrains on an individual's freedom to enter into contracts and engage in business transactions falls within the bailiwick of the Federation or the Provinces.

8. Let us first state the obvious. The rule of law as prescribed by a written constitution comes with an inbuilt feature: the doctrine of limited powers. A written constitution enumerates the powers delegated to each branch of the State.

The exercise of public authority is legitimate to the extent that it does not exceed the power delegated by the Constitution and the law. Article 4 of the Constitution underlines this feature for us. It states the following:

> ***4. Right of individuals to be dealt with in accordance with law, etc.***
>
> *(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.*
>
> *(2) In particular:-*
>
> > *(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;*
> >
> > *(b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and*
> >
> > *(c) no person shall be compelled to do that which the law does not require him to do.*

The Constitution regulates the relationship between the citizen and the State. And the default position is that every citizen is at liberty to do what he/she is not prohibited from doing by the Constitution and the law. When the State interferes with the liberty of a citizen, it must do so in accordance with the Constitution and the law and only to the extent allowed.

9. Chapter 1 of the Constitution lists fundamental rights of citizens enumerated and guaranteed by the Constitution itself. Article 8 prohibits the State from abridging these fundamental rights and provides that any law inconsistent with fundamental rights is void to the extent of such inconsistency. The

Constitution simultaneously makes allowance for encumbering fundamental rights of a citizen to the extent essential to uphold competing rights of other citizens or to enable the State to pursue its legitimate interests in securing collective public interest. However, in pursuing such collective interest the State is under an obligation to pursue its legitimate interests through means that are least restrictive of the guaranteed fundamental rights of individual citizens.

10. Article 7 of the Constitution defines "the State" and the Parliament and a Provincial Assembly both qualify as the State. Even in the event that a law does not fall foul of Article 8 of the Constitution for abridging fundamental rights of citizens in an impermissible manner, it can still be void if promulgated by a legislature that is not empowered by the Constitution to enact a law or impose the restraint in question. This is where the question of legislative competence of the Federation versus a unit of the Federation becomes germane. In the instant petition, the challenge to the legality of Competition Act is based on the argument that it is not Parliament but Provincial Assemblies that are competent to regulate conduct of citizens and entities while indulging in trade and business as done by the Competition Act.

11. Article 18 of the Constitution declares the freedom to conduct lawful trade and business a fundamental right of the citizen in the following terms:

> ***18. Freedom of trade, business or profession.***
>
> *Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any*

lawful profession or occupation, and to conduct any lawful trade or business:

Provided that nothing in this Article shall prevent:-

(a) the regulation of any trade or profession by a licensing system; or

(b) the regulation of trade, commerce or industry in the interest of free competition therein; or

(c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, industry or service, to the exclusion, complete or partial, of other persons.

The right guaranteed by Article 18 is an individual right. It is further augmented by Article 9, which guarantees the right of the individual to liberty. Together, Articles 9 and 18 prohibit the State from interfering with the liberty of a citizen to engage in trade or business, subject to exceptions provided in Article 18. Sub-clauses of Article 18 qualify the liberty of the individual to indulge in trade and engage in business and sub-clause (b) authorizes the State to regulate such right in the interest of free competition. The Competition Act is the fetter that the State has put in place to regulate the liberty of the citizen to engage in trade or business freely. Once it becomes obvious that Competition Act is a fetter on the individual's liberty to conduct trade or business, Article 151 clarifies the legislative arm of State qualified to impose such fetter.

12. Article 151 of the Constitution provides the following:

151. Inter-Provincial Trade

> *(1) Subject to clause (2), trade, commerce and intercourse throughout Pakistan shall be free.*
>
> *(2) Majlis-e-Shoora (Parliament) may by law impose such restrictions on the freedom of trade, commerce or intercourse between one Province and another or within any part of Pakistan as may be required in the public interest.*
>
> *(3) A Provincial Assembly or a Provincial Government shall not have power to-*
>
> > *(a) make any law, or take any executive action, prohibiting or restricting the entry into, or the export from, the Province of goods of any class or description, or*
> >
> > *(b) impose a tax which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former goods or which, in the case of goods manufactured or produced outside the Province discriminates between goods manufactured or produced in any area in Pakistan and similar goods manufactured or produced in any other area in Pakistan.*
> >
> > *(4) An Act of a Provincial Assembly which imposes any reasonable restriction in the interest of public health, public order or morality, or for the purpose of protecting animals or plants from disease or preventing or alleviating any serious shortage in the Province of an essential commodity shall not, if it was made with the consent of the President, be invalid.*

Article 151 does multiple things simultaneously. In sub-clause (1), it sanctions the right to free trade, commerce and intercourse throughout Pakistan as a collective right and a feature of economic life across Pakistan. It also emphasizes that the territorial unit within which such right is to be enforced is not a locality or a federating unit, but the whole of Pakistan. Article

151(1), by emphasizing that freedom of trade, commerce and intercourse is to be upheld "throughout" Pakistan, signifies that providing for such right and feature of economic life in Pakistan is a federal subject as no one federating unit has the territorial competence to provide for the same. But it is Article 151(2) that provides explicit legislative authorization to Parliament to regulate freedom of trade, commerce and intercourse "between one Province and another or within any part of Pakistan". [The emphasis has been supplied.]

13. The heading of Article 151 can be slightly misleading as it mentions inter-provincial trade alone. But headings have no bearing on the interpretation of the text of a legal provision. Article 151(2) vests in Parliament not just the clear mandate to regulate trade, commerce and intercourse across provinces but also within any part of Pakistan. Thus, Article 151(1) declares free trade, commerce and intercourse to be a feature of the economy and a collective public right to be made available across Pakistan. And Article 151(2) clarifies that it is Parliament that is the competent legislative arm of the State endowed with the responsibility to provide for the same, being the legislative branch with the territorial competence to make provision for the same across provinces and within any part of Pakistan.

14. Sub-clauses (3) and (4) of Article 151 further highlight this legislative scheme by imposing explicit restrictions on provinces from taking actions that could interfere with the collective right to free trade, commerce and intercourse underwritten by Article 151(1). To understand the scope of

Article 151(2), we must consider the distinction between the individual right to free trade and business guaranteed by Article 18 and the collective right to free trade, commerce and intercourse declared by Article 151(1), with authority conferred on Parliament to balance these rights in exercise of its power under Article 151(2) read with clause (b) of Article 18.

15. Such balance is struck by the Competition Act that functions as a restraint on the individual's right to freely engage in trade or business, in the interest of "free competition", throughout Pakistan. At the risk of simplification, let us reiterate some basics. Laissez-faire economy is understood to be one where transactions between individuals and private groups are free from state intervention. A free-market economy, as a conceptual matter, based on the laissez-faire thought process, thus stands in contrast to a regulated market i.e. it is understood as an economy where exchange of goods and services between individuals is regulated by private negotiations between buyers and sellers unimpeded by state intervention. Free trade is the trade policy rooted in the idea of free market as applied to international trade.

16. With time there has grown the realization that the individual right and liberty to freely engage in trade and business could be employed in a manner that could interfere with free trade in the market as a whole. In order to strike the right balance between the individual right to freedom while engaging in business and the collective right to function in a market that supports freedom of trade, there emerged the public policy

doctrine of setting aside contracts that were found to unreasonably restrain trade. This common law doctrine of restraint of trade recognized that in pursuing self-interest, individuals could seek to conduct their business affairs such that unreasonably circumvented the right of other individuals to freely engage in business, which emphasized the need to strike the right balance between the competing rights of the individual, on one hand, to freely engage in business and trade without any interference from the state, and the collective right of members of the society to engage freely in trade without being unreasonably restrained by other individuals and entities.

17. The common law doctrine of restraint of trade curtailed the freedom of the individual to enter into contracts in a manner inimical to the freedom of trade of others engaging in business and was the precursor to competition laws or anti-trust legislation, that codified the law against restraint of trade. What competition law consequently does is that it places fetters on individual freedom to conduct business in a manner or enter into contracts that have the effect, in the immediate term or long-term, of limiting free competition in the marketplace as a whole. In view of the right to liberty and freedom of trade and business an individual is deemed to have the right not to deal with another individual if he/she so wishes, in conducting his/her business affairs, or freely negotiate price of goods and services, or purchase a business that one wishes to acquire without the state having a say in such matter. Competition law however acts as a fetter on such absolute freedom of the individual or entity.

18. In other words, the rule against price fixing, cartelization, abuse of dominant position or mergers of entities that could impede competition within the market are all restraints applied by law on the absolute freedom of business or trade of the individual undertaking. In applying such restraint on the freedom or liberty of the individual to conduct one's business affairs, competition law attempts to strike a balance in public interest between the right of the individual to freely conduct his/her business and the right of the community to conduct trade and commerce in a market where no one individual or entity has the ability to interfere with the freedom of trade or business of others. Thus, competition law is the regulation of the right of free trade and business of the individual in the interest of competition within the market.

19. Within our constitutional framework, Article 18 guarantees the right of the individual citizen to freely engage in trade and business, subject to the qualification in sub-clause (b) that such right can be regulated in the interest of competition. Article 151(1) then declares free trade, commerce and intercourse to be a collective right and feature of the marketplace throughout Pakistan. Article 151(2) specifies that Parliament is empowered to impose restrictions on free trade, commerce and intercourse between provinces and within any part of Pakistan. The words "within any part of Pakistan" signify that it has been left to Parliament to strike the right balance between the individual and collective right to free trade and

business throughout Pakistan and not just to regulate inter-provincial trade and business.

20. Once it is understood that Competition Act is a fetter on the individual right to freedom of trade and business guaranteed under Article 18, it follows naturally that the mandate to regulate such right reserved under sub-clause (b) of Article 18 has been vested in Parliament under sub-clause (2) of Article 151 read together with its sub-clause (1). Article 151(1) makes provision of freedom of trade, commerce and intercourse "throughout" Pakistan a federal subject. Trade refers to the activity of buying, selling or exchanging goods and services. Commerce includes the procedures employed for purpose of engaging in trade. Intercourse refers to the communication or dealings between individuals and groups.

21. Once it is understood that the freedom of trade, commerce and intercourse is to be guaranteed throughout Pakistan, a natural corollary is that only Parliament is vested with the territorial competence to discharge such obligation. There can be the contrary argument that each of the federating units can regulate Article 18 rights of individuals within their territories in the interest of free competition such that the cumulative effect is that of maintaining free trade, commerce and intercourse throughout Pakistan as required by Article 151(1). The clear text of Article 151(2) however leaves little room for such interpretation by explicitly vesting in Parliament the authority to regulate freedom of trade, commerce and

intercourse not just across provinces but also within "any part of Pakistan".

22. The history of our Constitution as well as its purposive interpretation also supports such textual reading that vests in Parliament the mandate to regulate freedom of trade and business in the interest of competition. Let us first reproduce the provisions of erstwhile Constitutions that were predecessors of parts of Article 151.

Government of India Act, 1935

Section 297:

*"297.—**Prohibition of certain restrictions on internal trade**—*

(1) No Provincial Legislature or Government shall—

a) by virtue of the entry in the Provincial Legislative List relating to trade and commerce within the Province, or the entry in that list relating to the production, supply, and distribution of commodities, have power to pass any law or take any executive action prohibiting or restricting the entry into, or export from, the Province of goods of any class or description; or

b) by virtue of anything in this Act have power to impose any tax, cess, toll, or due which, as between goods manufactured or produced in the Province and similar goods not so manufactured or produced, discriminates in favour of the former, or which, in the case of goods manufactured or produced outside the Province, discriminates between goods manufactured or produced in one locality and similar goods manufactured or produced in another locality.

(2) Any law passed in contravention of this section shall, to the extent of the contravention, be invalid.

1956 Constitution

*"**119. Inter-Provincial trade.** -No Provincial Legislature or Provincial Government shall have power-*

(a) to pass any law, or take any executive action, prohibiting or restricting the entry into, or export from the Province of goods of any class or description ; or

(b) to impose any taxes, cesses, tolls or dues which, as between goods manufactured or produced in the Province and similar goods not manufactured or produced, discriminate in favour of the former, or which in the case of goods manufactured or produced outside the Province discriminate between goods manufactured or produced in any locality and similar goods produced in any other locality;

Provided that no Act of a Provincial Legislature which imposes any reasonable restriction in the interest of public health, public order or morality shall be invalid under this Article if it is otherwise valid under the Constitution ; but any Bill for this purpose passed by the Provincial Assembly shall be reserved for the assent of the President, and shall not become law unless the President assents thereto.

1962 Constitution

142. Inter-Provincial trade.— (1) Subject to clause (2) of this Article, the Legislature of a Province shall not have power—

(a) to make any law prohibiting or restricting the entry into, or the export from, the Province of any goods: or

(b) to impose a tax which, as between goods manufactured or produced in the Province and similar goods not to manufactured or produced, discriminates in favour of the former goods or which in the case of goods manufactured or produced outside the Province, discriminates between goods manufactured or produced in any locality in Pakistan and similar goods produced in any other locality in Pakistan.

> *(2) No Provincial Law which imposes any reasonable restriction in the interest of the public health, public order or morality or for the purpose of protecting animals or plants from disease or preventing or alleviating any serious shortage in the Province of any essential commodity shall, if it was made with the consent of the President, be invalid by reason of this Article."*

23. Provisions of Government of India Act, 1935, the Constitution of 1956 and the Constitution of 1962 establish that sub-clauses (3) and (4) of Article 151 are holdovers of the preexisting framework that prohibited provincial legislatures from interfering with import and export of goods across provincial boundaries or imposing taxes in a manner discriminatory to goods produced outside the province. Sub-clauses (1) and (2) of Article 151 do not however have predecessors in the erstwhile constitutional frameworks. The legislative intent behind Article 151 has been analyzed by the learned Lahore High Court in ***Murree Brewery Company Limited v. Province of Punjab and 2 others*** ***(2017 PTD 283)*** and ***LPG Association of Pakistan***, by quoting from the speech of the then law minister, Mr. Abdul Hafeez Pirzada, who emphasized the need to ensure one economic system across the country and its provinces.

24. In the absence of sub-clauses (1) and (2) of Article 151, it could have been arguable that while the Constitution prescribed limits on the legislative competence of provincial legislatures while regulating free trade, commerce and intercourse, it still remained for them to regulate freedom of trade and business for purposes of Article 18(b) within their

respective territories while staying within the four corners of limits imposed by sub-clauses (3) and (4) of Article 151. But use of the words "throughout Pakistan" in sub-clause (1) of Article 151 and "any part of Pakistan" in sub-clause (2) of Article 151 creates clear legislative mandate for Parliament to regulate the marketplace comprising the entire Pakistan. Article 151(1) envisages Pakistan as one marketplace and Article 151(2) requires Parliament to regulate trade, commerce and intercourse across such marketplace and in any part thereof.

25. Let us reproduce here certain other provisions of the Constitution that help identify the nature of federalism envisaged therein:

> ***15. Freedom of movement, etc.***
>
> *Every citizen shall have the right to remain in, and, subject to any reasonable restriction imposed by law in the public interest, enter and move freely throughout Pakistan and to reside and settle in any part thereof.*
>
> ***25. Equality of citizens.***
>
> *(1) All citizens are equal before law and are entitled to equal protection of law*.
>
> ***141. Extent of Federal and Provincial laws.***
>
> *Subject to the Constitution, Majlis-e-Shoora (Parliament) may make laws (including laws having extra-territorial operation) for the whole or any part of Pakistan, and a Provincial Assembly may make laws for the Province or any part thereof.*
>
> ***142. Subject-matter of Federal and Provincial laws.***
>
> *Subject to the Constitution-*

(a) Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to any matter in the Federal Legislative List.

(b) Majlis-e-Shoora (Parliament) and a Provincial Assembly shall have power to make laws with respect to criminal law, criminal procedure and evidence.

(c) Subject to paragraph (b), a Provincial Assembly shall, and Majlis-e-Shoora (Parliament) shall not, have power to make laws with respect to any matter not enumerated in the Federal Legislative List.

(d) Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to all matters pertaining to such areas in the Federation as are not included in any Province.

149. Directions to Provinces in certain cases.

(4) The executive authority of the Federation shall also extend to the giving of directions to a Province as to the manner in which the executive authority thereof is to be exercised for the purpose of preventing any grave menace to the peace or tranquility or economic life of Pakistan or any part thereof.

235. Proclamation in case of financial emergency.

(1) If the President is satisfied that a situation has arisen whereby the economic life, financial stability or credit of Pakistan, or any part thereof, is threatened, he may, after consultation with the Governors of the Provinces or, as the case may be, the Governor of the Province concerned, by Proclamation make a declaration to that effect, and while such a Proclamation is in force, the executive authority of the Federation shall extend to the giving of directions to any Province to observe such principles of financial propriety as may be specified in the directions, and to the giving of such other directions as the President may deem necessary in the interest of the economic life, financial stability or credit of Pakistan or any part thereof.

In view of the above provisions, two features of the Constitution relevant for our present purposes are (i) the source of legislative authority, and (ii) the nature of our federalism.

26. Article 141 provides that it is Parliament that is competent to make laws for the whole of Pakistan. Article 142 states that "subject to the Constitution", Parliament is competent to make laws in relation to matters listed in the Federal Legislative Lists. Thus, the legislative competence of Parliament to promulgate a law can flow from the text of the Constitution itself or from the Federal Legislative List. The Constitution of Pakistan, like most written constitutions, predominantly comprises procedural provisions. It is for purposes of convenience that subjects in relation to which Parliament has the exclusive authority to frame laws are listed in the Federal Legislative List. This schematic arrangement is not in derogation of the fact that the source of all authority vested in the State is the text of the Constitution itself.

27. The language of Article 141 conferring on Parliament the authority to legislate for all of Pakistan gains relevance when read in conjunction with Article 151(1) that mandates the establishment of free trade, commerce and intercourse throughout Pakistan. As a federal constitution, our Constitution, as a matter of policy, places certain matters within the competence of the federating units, where it deems that fundamental rights of individuals and the collective public interest is best served by delegating authority to federating units. There are other areas where the need for uniformity and

cohesive action as a union overrides the interest of the federation served by the autonomy of its federating units and competition amongst them. Defense and national security, foreign policy, central currency are some such areas. And so is a unified economic marketplace, as evident from Article 151(1).

28. The Constitution does not envisage independent economies across federating units or competition between such units as the means to promoting the collective economic interest of Pakistan as a federation. Article 151 has already been discussed above. Article 149(4) vests in the centre the authority to issue directions to federating units to exercise executive authority in a manner that does not threaten the economic life of Pakistan or any part thereof. Similarly, Article 235 vests in the centre the right to declare a financial emergency in face of a threat to the financial life, economic stability or credit of Pakistan or "any part thereof". The mention of "any part" of Pakistan in Articles 149(4), 151(2) and 235 highlights how emphasis on uniformity in managing the national economy trumps the concern for autonomy of federating units highlighted elsewhere in the Constitution.

29. Pakistan is a federation and there is no gainsaying that giving effect to the scheme of provincial autonomy as envisaged by the Constitution is vital for the future of our federation. In order to further strengthen provincial autonomy, the 18th Constitutional Amendment enhanced the fiscal, administrative and legislative authority of the federating units: by erasing the concurrent legislative list; granting provinces greater control

over their natural resources and proceeds; enhancing the role of the Senate and the Council of Common Interests; and making it harder for the President to clamp emergency rule over a province and requiring that governors be residents of their respective provinces etc.

30. As a general matter of policy, the received wisdom is that devolution and decentralization of power is welcome given that wider distribution of power – while keeping in place sensibly sized administrative units – is the most effective means to prevent its abuse. Political theory suggests that devolving power and simultaneously building institutional capacities to effectively exercise it brings government closer to people and leads to citizen empowerment and more efficient and accountable service delivery. The Constitution, as amended through the 18th Constitutional Amendment, limits the legislative competence of Parliament, subject to the Constitution assigning certain functions directly to Parliament, including, *inter alia*, subject-matters listed in the Federal Legislative List. However, Parliament's ability to legislate in relation to matters enumerated therein or ancillary thereto, remains unfettered, as highlighted by Items 58 and 59 of the Federal Legislative List.

31. Our Constitution's legislative scheme and requirements related to devolution are as follows. The Parliament at the centre has the exclusive authority to legislate in relation to items included in Part I of the Federal Legislative List, and in consultation with the Council of Common Interests when it comes to matters listed in Part II of the Federal Legislative List.

All residuary power, including that in relation to items included in the erstwhile Concurrent Legislative List (which could be legislated upon by Parliament and the provincial assemblies both prior to the 18th Amendment), falls within the exclusive domain of provinces. But legislative subjects do not exist in isolated compartments. Despite abolition of the Concurrent List, the centre and provinces still retain overlapping legislative competence in innumerable matters.

32. There are at least two aspects of the legislative distribution of authority that need to be appreciated. One, the distribution of authority between the centre and provinces is for the advantage of all citizens of Pakistan and not the provinces or citizens of a particular province, as our Constitution does not endorse the concept of dual-sovereignty. Our provinces do not have independent constitutions. They do not confer citizenship on their residents. Their legislative assemblies do not have unlimited legislative competence. And they cannot create laws that undermine the fundamental rights of non-residents or afford preferential treatment to residents in a manner that breaches the constitutional promise of equality and freedom. And two, notwithstanding the division of authority between the Federal and provincial governments and the omission of the Concurrent Legislative List, there will always remain some common fields that will continue to be administered concurrently.

33. Any effort to unduly simplify the task of isolating the legislative powers of the centre and the federating units is futile. It is impossible to make a clean cut between powers of the

central and provincial legislatures. Irrespective of whether you substitute one list for two or provide for a hierarchy of jurisdictions, the overlap of subject matter is inevitable. This is why it is settled law that entries within legislative lists must be construed liberally. Consequently, despite omission of the Concurrent Legislative List, Parliament will be required to continue exercising legislative power derived from provisions of the Constitution itself and items included in the Federal Legislative List, including Items 58 and 59, that could very well be deemed an encroachment on the provincial domain by anyone with a policy preference for even greater autonomy of federating units.

34. The Parliament cannot usurp the legislative authority of provinces. But relinquishing the obligation to strike the right balance between individual rights of citizens and collective rights of the community when required to do so by the Constitution itself can also not be countenanced. In promulgating the Competition Act, Parliament has discharged an obligation ascribed to it by Article 18(b) of the Constitution read together with Article 151(1) and 151(2). Article 151(2) provides explicit textual mandate to Parliament to impose fetters on the freedom of individuals to indulge in trade, commerce and intercourse, which is what the Competition Act does by prescribing which business activities fall foul of the law and are prohibited, and freedom to indulge in them curtailed, in the interest of maintaining a free market throughout Pakistan.

35. As a historical matter, sub-clauses (1) and (2) of Article 151 were introduced after the bitter experience of East Pakistan breaking free and becoming an independent country. The events of 1971 counselled in favour of loosening central control and delegating power and authority to federating units to empower them further. But at the same time, these events also emphasized the need to address economic deprivation and maintain uniformity in the standard of life across various units of the federation. It is not for the judicature to debate the wisdom of policy choices made by the legislature. But it is apparent from provisions of the Constitution, as aforesaid, that one of the means chosen to strike a balance between interests of uniformity and autonomy within our federal structure was to ensure that the entire Pakistan became a single and unified economic marketplace.

36. Such textual, historical and purposive reading of the Constitution leaves no room to imagine that the Constitution might have left up to provincial legislatures to frame their own regimes to regulate and maintain competition within their territories, which together with a federal competition regime focused exclusively on inter-provincial trade, commerce and intercourse, would automatically discharge the requirement prescribed by Article 151(1). If the rationale of a competition regime were to ensure that conditions of trade and commerce are free and uniform across the market that such regime regulates, distributing the power to achieve such end amongst five different legislative authorities would make no logical sense.

This is why Article 151 (read together with Articles 141 and 142) delineates free trade, commerce and intercourse throughout Pakistan as a federal subject.

37. The competition regimes entrenched in the United States or European Union can be of no real help in interpreting the provisions of our Constitution. But the structure of such regimes can help explain the rationale behind the policy choices made by framers of our Constitution in conferring on Parliament and not provincial legislatures the authority to frame competition regimes. The Commerce Clause in the US Constitution vests in Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes". The power vested in the US Congress is for regulation of commerce "among the several States", in contrast with Article 151(1) and (2) of our Constitution which vests such power in Parliament in relation to the whole of Pakistan and any part thereof.

38. In ***Gibbons v Ogden*** (22 U.S. 1), the US Supreme Court held while interpreting the Commerce Clause that it entails, "*the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution... the only commercial activities which were immune from federal power, and reserved for state or local regulation, were those which were completely within a state, and which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of*

the general powers of the government." In ***United States v. Wrightwood Dairy Co*** (315 U.S. 110), the US Supreme Court upheld federal price regulation of intrastate milk commerce while holding that, "*the commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce*..." The significance of the Commerce Clause was enumerated by the US Supreme Court in ***Gonzales v. Raich*** (545 U.S. 1) thus:

> "*The Commerce Clause emerged as the Framers' response to the central problem giving rise to the Constitution itself: the absence of any federal commerce power under the Articles of Confederation. For the first century of our history, the primary use of the Clause was to preclude the kind of discriminatory state legislation that had once been permissible. Then, in response to rapid industrial development and an increasingly interdependent national economy, Congress "ushered in a new era of federal regulation under the commerce power," beginning with the enactment of the Interstate Commerce Act in 1887 and the Sherman Antitrust Act in 1890*."

39. In terms of the US Constitution and also Section 51 of the Constitution of Australia (as explained in ***Wragg v New South Wales*** [1953] HCA 34), the federal power to regulate is limited to interstate commerce, which then requires the constitutional courts in such jurisdictions to determine the legality of exercise of authority by federating units to determine

whether such actions bear directly or indirectly upon interstate trade and commerce. Unlike US and Australian Constitutions, Article 151(1) of our Constitution uses the words "throughout Pakistan" and Article 151(2) vests in Parliament the authority to regulate trade, commerce and intercourse "within any part of Pakistan" apart from across provinces, which leaves no textual basis to conclude that Parliament is not allowed the authority to regulate trade intrastate so long as it doesn't affect trade interstate.

40. European Union also has a well-developed competition regime. Despite the fact that Europe comprises independent sovereign states, for the European Union to emerge as one economic market and for the competition regime to be effective across such market, it has not been left to each nation state to frame its own competition regime. European Union has a centralized competition regime and the efficacy of such regime is contingent on the ability of a central regulator to ensure that independent nation states comprising the European Union do not adopt measures that seek to protect products and services produced within their territories or discriminate against products and services produced by other states. European Union is not a federation. But in order for EU to emerge as a common economic market, the sovereign states comprising the union have entered into a treaty to put in place a uniform and centrally enforced competition regime.

41. If the raison d'etre of a competition regime is to guard against parochially-driven economic protectionism or other

business or trade actions capable of thwarting free competition across the marketplace, experience from other jurisdictions suggests that the effective model is to have a unified regime and implementation authority for the entire marketplace. It is therefore not surprising that the framers of our Constitution elected to emulate such model while drafting Article 151(1) and (2). Article 151 does not distinguish between inter-provincial and intra-provincial trade, placing the former within the domain of the centre and the latter within the jurisdiction of the provinces. Instead, regulation of trade, commerce and intercourse throughout Pakistan and any part thereof has been assigned to Parliament as a federal subject.

42. The assignment of the power and responsibility to regulate freedom of trade, commerce and intercourse to the centre does not take away from the fact that after the 18th Constitutional Amendment our Constitution militates strongly in favour of devolution and assignment of greater power and authority to the provinces. Merely because our constitutional design treats the whole of Pakistan as one economic marketplace wherein the rules for engaging in trade and commerce are required to be uniform in view of Article 151, does not undermine the obligation to devolve administrative, financial and political authority to the provinces as provided in the Constitution (or to local governments under Article 140A of the Constitution).

43. While the judgment of the learned Lahore High Court in ***Imrana Tiwana vs Province of Punjab*** ***(2015 C L D 983)***

was later overturned by the august Supreme Court, it includes useful commentary on the concept of federalism and devolution of powers. It noted that:

> *"81. The theory of fiscal federalism provides guidelines for assigning expenditure and regulatory functions across different tiers or spheres of government. The basic argument proposed by the literature on fiscal federalism is that functions are provided most efficiently "by the jurisdiction having control over the minimum geographic area that would internalize benefits and costs of such provision" (Frey and Eichenberger 1999)[68]. Put more simply, functions should be allocated to a tier of local government whose boundaries are defined by the area in which citizens enjoy the benefits of the provision. For example, the benefits of national defense and foreign policy are enjoyed by all citizens and hence the function should be assigned to the federal government. On the other hand, the benefits of street lighting are only enjoyed by households living in a street and their visitors and may be assigned to a neighborhood council. This is also called the decentralization theorem (Oates 1972[69])…*
>
> "82. *There is a consensus that decentralized provision is inefficient for functions that result in inter jurisdictional spillovers and entail economies of scale. Spillovers arise when non-residents enjoy the benefits or bear the costs of provision by a local government. The case where a district government sets up factories that dump waste water in the neighboring district is an example of negative spillovers. However, if the same factories create employment for workers residing in the neighboring districts this is an example of positive spillovers. Negative spillovers create a problem because they have created costs for a jurisdiction that has no political or contractual control over the extent of the provision. Positive spillovers are an issue because the citizens of the neighboring district are enjoying a benefit for which they are bearing no cost. Therefore the presence of spillovers provides a justification for centralizing functions in high-tier governments or establishing institutions that can*

> *coordinate between different local governments. The principle is that the function should be assigned to a jurisdiction whose boundary includes all citizens who benefit or lose from the provision of a function with spillovers. The larger the spillovers the higher the tier to which the function needs to be assigned (Mookherjee 2015, Shah 1999, Oates 1972).”*

44. Even from the standpoint of fiscal federalism and the doctrine of spillover, as highlighted by the learned Lahore High Court, so long as the Constitution envisages the whole of Pakistan as the marketplace within which the benefit of free trade, commerce and intercourse is to be available to all citizens, as has been done by Article 151, it makes sense for the Parliament to be endowed with the power and responsibility to undertake such regulation and guard against the possibility of spillovers which could not be ruled out if each province were vested with discretion to regulate competition within its territorial boundaries as it deemed fit.

45. In view of the above, this Court finds that 18(b) and 151(1) and (2) read together with Article 141, 142 and Entry 58 of the Federal Legislative List identify Parliament as the competent legislature to promulgate a law to regulate trade, commerce and intercourse across provinces and within any part of Pakistan. And further that the Competition Act is a law that applies fetters on the individual right to engage in trade and business in the interest of competition in order to provide for free trade, commerce and intercourse throughout Pakistan. In view of such finding, there is no need to rely on any other item of the Federal Legislative List to find further support for

Parliament's legislative competence to promulgate the Competition Act.

Jurisdictional Competence of the Impugned SCNs.

46. Having determined that Parliament is competent to promulgate competition laws and the impugned SCNs do not lack legal authority for having been issued under a void law, let us consider the argument that the said SCNs suffer from other jurisdictional defects as well.

47. The first argument of Barrister Aitzaz Ahsan, Sr. ASC, was that even if the Competition Act were deemed a valid piece of legislation, the impugned SCNs were based on an Inquiry ordered on 15.12.2009, which concluded on 08.07.2010 and relied on documents of PPA dating back to 2007, and consequently even if the SCNs were issued after promulgation of the Competition Act, they were based on an Inquiry Report that had been issued prior to the entry into force of the Competition Act. His contention was that the impugned SCNs sought to retrospectively apply provisions of the Competition Act to actions of the petitioners from a time when such law was not in place.

48. Mr. Khalid Javed Khan, the learned Attorney General, submitted on behalf of the Federation that through section 62 of the Competition Act, the Parliament had validated all actions taken, instruments issued and proceedings initiated by the Commission on or after 02.10.2007, when the Competition Commission Ordinance, 2007, was first promulgated, and that

the learned Lahore High Court had considered the scope of section 62 in ***LPG Association of Pakistan*** and concluded that it cured the actions, instruments and proceedings of the Commission of any alleged legality due to gaps and lack of continuing existence of a competition law in Pakistan between 02.10.2007 when the Competition Commission Ordinance, 2007, was first enacted and 06.10.2010 when the Competition Act was finally promulgated.

49. The learned Lahore High Court in ***LPG Association of Pakistan*** addressed the issue of actions and proceedings of the Commission suffering from legal infirmity due to lack of continuous existence of a competition law in place in Pakistan after 02.10.2007 in the following terms:

> "*71. The Act was promulgated on 06.10.2010 and came into force at once. The 2010 Ordinance lapsed on 18.08.2010, hence there is a gap of 50 days between the lapse of 2010 Ordinance and the promulgation of the Act. There is no savings section or continuation of earlier proceedings, actions and orders under the Repeals and Savings Section of the Act. The validation section of the Act is section 62 which deems to validate everything from 02.10.2007, which is the date of promulgation of the 2007 Ordinance. The Petitioners argue that section 62 is merely a validation clause and does not save or revive or continue orders, actions or proceedings. They argue that a repeal without a saving section will quash all proceedings, orders and actions because they have not been saved. The AGP argued that section 62 is not just a validation simplicitor it is a declaration by the legislature to give continuity to all actions, orders, proceedings under the Ordinance and then the Act. He argued that it should not be read strictly as a validation clause but rather as a declaration by Parliament, with the intent to save all actions and decisions and give*

continuity from 02.10.2007 to the decisions, actions and exercise of power by the CCP. Essentially the AGP argued that the intent of the legislature should be considered as was done in the Nawaz Khokhar Case.

72. In the Nawaz Khokhar Case a seven member bench of the august Supreme Court of Pakistan considered the successive promulgations of the Ehtesab Ordinances in the following terms:-

> *The next contention of the learned counsel for the private appellants in the above cases is, that Ordinance XX having repealed and replaced Ordinance CXI, the proceedings pending on the date of repeal of Ordinance CXI, could not be saved and continued under Ordinance XX in the absence of a specific clause in the repealing Ordinance saving the proceedings pending under Ordinance, CXI. It is contended by the learned counsel for the private appellants that section 28 of the Ordinance XX which repealed Ordinance CXI, Ordinance VII and Ordinance XI, did not specifically save the proceedings which were pending under Ordinance CXI and therefore, all proceedings pending under Ordinance CXI came to an end with the repeal of Ordinance, CXI, and the same could not be continued or saved under Ordinance XX. In support of this contention, reliance is placed by the learned counsel on Government of Punjab v. Zial Ullah Khan 1992 SCMR 602 and Muhammad Arif v. State 1993 SCMR 1589.*
>
> *Before considering the above contention, it may be stated here that if any Ordinance stands repealed under the Constitution, the consequences of repeal are provided under Article 264 of the Constitution. However, if a law is repealed by a subsequent Act, the consequences flowing from such repeal are to be determined with reference to the provisions of Section 6 of the General Clauses Act. The contention of the learned counsel for the private appellant is, that Ordinance XX while repealing Ordinance CXI, though contained a saving clause, did not provide for continuation of the proceedings pending under*

Ordinance CXI, which shows that the Legislature did not intend to keep the pending proceedings alive under Ordinance XX. Repeal of Ordinance CXI, by Ordinance XX was not a case of simple repeal but it was a case of simultaneous repeal and re-enactment of a legislation, and therefore, besides consequences mentioned in section 6 of the General Clauses Act, section 24 of the General Clauses Act were also attracted. Ordinance XX was a verbatim reproduction of Ordinance CXI. Ordinance CXI, was still enforced when it was repealed by Ordinance XX. It may also be mentioned here that Ordinance XX was finally converted into a permanent legislation when the Legislature passed it as Act IX of 1997. It is, therefore, quite clear to us that although Ordinance CXI, was a temporary legislation but the Legislature intended to provide continuity to its provisions by first repealing it by Ordinance XX and then converting the later into an Act of Legislature by passing it as Act IX of 1997. (Emphasis added)

….

75. While looking at the vires of a statute all effort must be made to protect the statute and preserve the intent of the legislature. There is always a presumption of its constitutionality and a more liberal interpretation can be given in order to uphold the vires of the statute. A statute must be construed to preserve its intent, ut res magis quam pereat. The legal maxim requires courts to make legislation operative, given reasonable intendment and construction. The meaning of this maxim that a deed should never be avoided where the words may be applied to make it good, requires that every effort be made by the court to find a meaning capable of interpretation to uphold the vires of the law because it is better for a law to have effect than be void. This maxim is a rule of construction which requires the Court to give effect to the law and not destroy it, so if two constructions are possible, the court should always adopt that construction which will uphold the law and not the one which will render the law a nullity.

Reliance is placed on Sardar Farooq Ahmad Khan Leghari and others v. Federation of Pakistan and others (PLD 1999 SC 57) and Lahore Development Authority through D.G and others v. Ms. Imrana Tiwana and others (2015 SCMR 1739).

76. We are therefore of the opinion that by giving supremacy to the intent of the legislature, the Nawaz Khokhar Case has sufficiently addressed the issue of continuity. However, in the cases before this Court, section 62 of the Act provides for the intent of the legislature in the clear words of a deeming provision. Although the Petitioners have attempted to distinguish the Nawaz Khokhar Case on account of the express repeal by Ehtesab Ordinance No.XX of the Old Ehtesab Ordinance No.CXI and section 31 of the Ehtesab Act, 1997, and have also relied on cases to urge the effect of the expiry of an Ordinance, we find that Section 62 of the Act is distinguished as the intent of the legislature is evident from the statute itself, that by giving continuity to the actions, proceedings, decisions and orders initiated by the CCP, the legislature has not decided any dispute or settled any issue, it has merely given continuity, to correct the lapse of there being no savings clause in the Ordinances. Hence section 62 of the Act removes the flaw by creating the legal fiction of continuity which gives legal cover to the proceedings, show cause notices and orders challenged before us. As such the Petitioners rights under the Act if any, to challenge the proceedings or orders before CAT or any legal forum remain intact and no prejudice is caused to them."

50. The learned Lahore High Court has dealt comprehensively with the gaps in the enforcement of competition law since 02.10.2007 and found that section 62 of the Competition Act cures any infirmity in actions taken by the Commission since 02.10.2007 due to lack of continuity of competition laws. This Court agrees with the opinion of the

learned Lahore High Court and finds that the impugned SCNs do not suffer from any jurisdictional defect on the basis that the Inquiry Report, in view of which the impugned SCNs have been issued, was issued in exercise of authority vested in the Commission under the Competition Commission Ordinance, 2010 and not under the Competition Act.

51. The rule against retrospective application of law is rooted in fundamental fairness. The law is a sum total of the rules that must be complied with and in accordance with which citizens are required to order their affairs. The Petitioners are alleged to have acted in collusion with one another and with PPA, of which they are members, in order to fix the sale price of goods they deal in, which is tantamount to entering into a prohibited agreement as defined under section 4 of the Competition Act. The definition or scope of prohibited agreements as first defined under the Competition Commission Ordinance, 2007, has not changed in any material fashion in subsequent competition laws, including under the Competition Act.

52. The allegation against the Petitioners is that as members of PPA they entered into prohibited agreements in breach of section 4 of the Competition Act. The argument of the Petitioners is not that they are being charged with conduct that did not amount to prohibited agreements since the introduction of competition law for the first time in the form of Competition Commission Ordinance, 2007. They do not claim that they are alleged to have engaged in conduct not illegal at the relevant

time and consequently the impugned SCNs seek to apply provisions of competition law, as it now exists, to a period when entering into such agreements was not prohibited. The Petitioners are merely seeking to benefit from gaps in continuing application of competition laws. But as already stated, such infirmity has been cured by the legislature in terms of section 62 of the Competition Act and the impugned SCNs do not suffer from any jurisdictional defect on this score.

53. The second argument of Barrister Aitzaz Ahsan regarding jurisdictional infirmity of the impugned SCNs was that the Commission has already proceeded against PPA on the basis of the Inquiry Report and found it liable for fixing sale prices in breach of section 4 of the Competition Act, and the Commission was not competent to issue the impugned SCNs rooted in the same set of facts as such action falls foul of Article 13 of the Constitution that provides protection against double punishment, and also against Section 11 of the Code of Civil Procedure, 1908, as the Commission has already proceeded against PPA and was subsequently rendered *functus officio* in relation to the matter.

54. The learned Attorney General submitted to the contrary that the Petitioners had not been prosecuted or punished for any offense under the Competition Act and therefore to the extent that they are ultimately found to be in breach of charges levelled in the impugned SCNs once such charges are adjudicated, the regulatory penalties, if any, imposed would not be in breach of Article 13 of the Constitution. He further contented that for the principle of *res judicata* to be attracted for purposes of Section

11 of CPC, the issue in question must be directly and substantially the same issue as adjudicated between the same parties in a previous suit. He contended that the Petitioners and PPA were independent undertakings in terms of section 2(q) of the Competition Act and consequently the principle of *res judicata* was not applicable in the present case.

55. In the instant petitions, the impugned SCNs have been issued to juristic persons who fall within the definition of "undertaking". Section 2(q) of the Competition Act, 2010 defines an undertaking as follows:

> *"(q) "undertaking" means any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association of undertakings;"*

According to this definition, PPA falls within the definition of undertaking for being an association of undertakings. The Petitioners are the undertakings that are members of such association and thus qualify as independent undertakings within their own right.

56. Section 4 of the Competition Act prohibits undertakings from entering into prohibited agreements and also an association of undertakings from doing the same in the following terms:

> *"**4. Prohibited Agreements**.--(1) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings, shall make a decision in respect of the production, supply,*

distribution, acquisition or control of goods or 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.

(2) Such agreements include, but are not limited to,-

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

(b) dividing or sharing of markets for goods or services, whether by territories, by volume of sales or purchases, by type of goods or services sold or by any other means;

(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;

(d) limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of any service; or

(e) collusive tendering or bidding for sale, purchase or procurement of any goods or services;

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

(g) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(3) Any agreement entered into in contravention of the provision in subsection (1) shall be void.

57. Merely because the Commission has proceeded against the association of undertakings of which the Petitioners are members does not mean that any proceedings against individual undertakings, in order to determine whether or not such undertakings are in breach of their obligations under section 4 of the Competition Act, are in breach of section 11 of the CPC. Each undertaking that acts in breach of a provision of the Competition Act is liable for its own conduct. Merely because regulatory action has been initiated against an association of undertakings does not bar the Commission from adjudicating the culpability of individual undertakings that constitute such association for acting in breach of provisions of the Competition Act.

58. The Competition Act defines "undertaking" to include an association of undertakings as a legal entity independent of its members. Section 4 then separately addresses undertakings and an association of undertakings and directs them not to engage in prohibited agreements. The legislative intent behind section 4 read together with section 2(q) of the Competition Act is unambiguous: it aims to hold an undertaking as well as an association of undertakings independently liable for entering into prohibited agreements. Merely on the basis that the Commission previous proceeded against PPA – the association of undertakings of which the Petitioners are members – the Petitioners cannot preempt or defeat proceedings initiated to adjudge whether or not they are individually liable for acting in breach of section 4 of the Competition Act.

59. The third argument of Barrister Aitzaz Ahsan challenging the jurisdictional competence of the impugned SCNs was that it was discriminatory and against prior practice of the Commission. The argument re discrimination was twofold: one, that not all members of PPA had been issued SCNs; and two, in proceedings in the past against other associations of undertakings, the Commission had only proceeded against the association and even when found in breach of provisions of the Competition Act, elected not to proceed against individual members of such association.

60. The learned Attorney General contended that the issuance of the impugned SCNs reflected application of mind by the Commission. The Commission had not mechanically issued SCNs to all members of PPA. But that it only issued SCNs to such members of PPA against whom a *prima facie* case was made out in terms of section 37 of the Competition Act in view of the materials collected during the Inquiry conducted by the Commission.

61. The Competition Act has put in place a competition regime that is fairly new to Pakistan. Just because the Commission has exercised its discretion in relation to other associations in a certain manner in the past or practiced leniency in view of section 39 of the Competition Act does not mean that it is bound by such exercise of discretion for all times to come, regardless of the facts of each case and the conduct of undertakings in questions. Article 25 of the Constitution merely requires that public authorities treat like cases alike. The

determination of whether or not the Petitioners have acted in breach of section 4 of the Competition Act is yet to be made. Through the impugned SCNs the Commission has provided the Petitioners an opportunity to explain their conduct. The fact that in the past the Commission has not elected to proceed against both an association of undertakings and individual members of such association is no basis to conclude that the impugned SCNs suffer from a jurisdiction defect. Section 4 of the Competition Act, read together with section 2(q), vests in the Commission the clear statutory mandate to proceed against undertakings as well as the association of undertakings that they are members of, severally.

62. This Court also agrees with the contention of the learned Attorney General that issuance of SCNs to select members of an association in view of the *prima facie* case made out against them in the opinion of the Commission does not make out an argument for discrimination. In doing so the Commission has discharged its obligation under section 37 of the Competition Act. In the event that the Commission had issued SCNs to all association members without application of mind and without taking into account the role of individual members in view of the material before it, such exercise of authority by the Commission might have been open to the charge of not being just, fair and reasonable for purposes of section 24A of the General Clauses Act.

63. The Competition Act vests in the Commission the authority to determine in the first instance whether or not the

infringement of a provision of the statute is made out. This Court has come to the conclusion, for the reasons stated above, that the impugned SCNs do not suffer from any jurisdictional defect. As the challenge in these petitions relates to the impugned SCNs and not any regulatory order issued by the Commission, the question of legality and competence of the Competition Appellate Tribunal constituted under Section 43 the Competition Act is not in contention in the instant petitions and this Court has expressed no opinion in relation thereto. These petitions are accordingly liable to be **dismissed** for not being maintainable.

(BABAR SATTAR)
JUDGE

Announced in the open Court on **16.09.2021.**

JUDGE

Approved for reporting.

Saeed.