

Judgment Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Muhammad Shafi Siddiqui, CJ
Mr. Justice Jawad Akbar Sarwana

Constitution Petition No. D – 4449 of 2021

Pakistan Stock Brokers Association v. Pakistan Stock Exchange
Limited and Another

Petitioner : Pakistan Stock Brokers Association,
Through Mr. Zahid F. Ebrahim Advocate.

Respondent No.1 : Pakistan Stock Exchange Limited,
through Mr. Jam Asif Mehmood
Advocate.

Respondent No.2 : Securities and Exchange Commission of
Pakistan, through Raja Qasit Nawaz
Advocate.

Dates of Hearing : 15.08.2024, 23.09.2024, and 03.10.2024

Date of Judgment : 21.10.2024

J U D G M E N T

JAWAD AKBAR SARWANA, J.: This Constitution Petition challenges the eligibility criteria for the selection of securities eligible for trading in Deliverable Futures Contract (DFC) and Cash Settled Futures Contract (CSF) Markets (hereinafter referred to as “the Futures Eligibility Criteria” or “FEC” interchangeably), specifically Criteria 4(i) of FEC, amending the Pakistan Stock Exchange (“PSX”) Regulations for the enhancement of Futures Market of PSX, as prescribed by the Respondent No.1, Pakistan Stock Exchange Limited (“PSX”) under Section 7(e) of the Securities Act (“SA”), 2015 and the Eligibility Notice dated 17.06.2021 issued by the PSX in pursuance thereof. References to “PSX” may be read as appropriate in its context.

2. The Petitioner, Pakistan Stock Brokers Association (“PSBA”), a company incorporated under Section 42 of the Companies Act, 2017, has prayed for the following reliefs against Respondent No.1, PSX, and Respondent No.2, the Securities & Exchange Commission of Pakistan

(“SECP”) in writ jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan:

- i. Declare that the Eligibility Notice dated 17.06.2021 to extent of Criteria 4(i) is illegal, as it was never submitted to the public for comment and even otherwise has been made in contravention of the Constitution and thus void ab-initio, and of no legal effect;
- ii. Direct the Respondent Nos.1 and 2 to immediately withdraw the Criteria 4(i) of the Eligibility Notice dated 17.06.2021 and all actions taken in pursuance thereof;
- iii. Suspend the removal of entities from the approved list of eligible securities as a consequence of the Criteria 4(i) of the Eligibility Notice dated 17.06.2021;
- iv. Suspend the operation of the Criteria 4(i) of the Eligibility Notice dated 17.06.2021;
- v. Permanently restrain the Respondent Nos.1 and 2 from acting on the basis of Criterion 4(i) of the Eligibility Notice dated 17.06.2021;

....”

3. Learned Counsel for Petitioner submitted that while PSX was competent to frame PSX Regulations under SA, 2015, there was a rider insofar as the framing of such Regulations was concerned, which rider was binding on PSX. Learned Counsel relied upon Section 7(3) of the SA, 2015, arguing that powers to amend/modify the PSX Regulations concerning Chapters 13 and 14 of the Rule Book of PSX could only be exercised subject to the condition of its previous placement of such amendments/modifications to the PSX Regulation (proposed) to be published on the website of SECP along with the rationale for eliciting public opinion thereon for a period of not less than seven days starting from the date of its placement on the website. Counsel further submitted that the PSX Regulations, which were placed online by the Respondents on 19.10.2020, were not identical to those which were eventually approved, and, hence the impugned Criteria 4(i) of the FEC of the Regulations which was not mentioned in the proposed regulations uploaded online on the website of PSX and introduced for the first time in the regulations, which PSX and SECP were enforcing did not fulfil the criteria as required in terms of Section 7(3) of SA, 2015. Counsel also contended that the mandatory test of effectiveness for amendment/modification of such Regulations was inbuilt as the powers could only be exercised if such conditions were

met. Learned Counsel further objected to Criteria 4(i) of FEC on the grounds that, notwithstanding that it never appeared on the website, it was contrary to fundamental rights under Article 4 of the Constitution of the Islamic Republic of Pakistan, as the members of the Association are being deprived from dealing with the securities on account of contest of enforcement of legal rights of such companies to agitate their grievance against the Commission before a Court of law. Therefore, Petitioner challenged the vires of Criteria 4(i) of FEC as being unconstitutional.

4. Counsels for the Respondents at the outset have challenged the maintainability of the Petition because the Petitioner is not an aggrieved person under Article 199 of the Constitution of the Islamic Republic of Pakistan. Both Counsel contended that the Petitioner is pleading the case of those companies whose securities have been removed from the Futures Market by PSX due to the amendment to the PSX Regulations under challenge by the Petitioner, but such companies in question (removed from the Eligibility List by PSX)¹ had neither approached any Court of Law nor pleaded any rights under the Constitution nor filed any complaint before the SECP. Counsel further contended that PSX was a private entity with no nexus with the federal government and that the latter had no shareholding in PSX. Therefore, the Petition was also not maintainable against PSX on this score. Counsel further argued that the Petitioner and those companies impacted by the Regulations had recourse to the machinery provided under the SA, 2015, including appeals to challenge the notification/orders of PSX/SECP, yet no one initiated any such action. Counsel for Respondent No.1, PSX, further argued that the securities in question were not ordinary securities traded on the PSX but were altogether different in nature as these dealt with amendments/modifications of the Futures Market. The purpose of the amendment to the PSX Regulations was to mitigate the exposure of

¹ The companies in question mentioned in the Petition in paragraph 9 of the Petition were HASCOL and UNITY. This was also corroborated in Respondent No.2/SECP's Parawise Comments in paragraph 15.

risk in the Futures Market to the general public, et. al., for the protection of investors, including stock brokers in the Futures Market, and, for the proper administration of securities exchanges. He contended that the aforesaid purpose was compromised when a company whose securities were being traded in the Futures Market of companies obtained a stay order from the Court against any inquiry/investigation initiated by the Commission, and securities of such company continued to be traded in the Futures Market. Criteria 4(i) made such a company's securities in the Futures Market ineligible to trade, and they would have to be removed from the Eligibility List of PSX. The modus operandi facilitated the above-mentioned objective of introducing the amendment to the PSX Regulations. Hence, the proposed Criteria 4(i) of FEC was necessary. With regard to the amendment/modification to the PSX Regulations, Counsel for Respondent No.2, SECP, contended that the requirement of Section 7(3) of SA, 2015 stood complied in terms of Regulations 1xli.A, 13 and 14 of the PSX Regulations, which were duly published online. But, the FEC was not part of the Regulations and did not require compliance. It was framed separately by PSX. The FEC, being a stand-alone component of the PSX Regulations, was not subject to the rigours of Section 7(3) of SA, 2015. He argued that PSX was at liberty to amend/notify the FEC and the Eligibility List on an as-and-when basis, as part of its powers under the SEC as a course of normal and routine matters, and was not liable to invite public comments in relation to such criteria. Therefore, he contended that the Petition was liable to be dismissed.

5. The Deputy Attorney General for Pakistan was also present and on notice on 22.10.2021, 23.11.2021 and 26.04.2023, but when this Petition was taken up for hearing, and during the course of hearing of this Petition submitted that Raja Qasit Nawaz Khan, learned advocate for Respondent No.2/SECP, would submit arguments on behalf of the Federation conceding that this lis did not involve any substantial questions as to the interpretation of constitutional law and rather concerned the determination whether the subject content of Criteria

4(i) of the FEC could be declared to be unconstitutional. We align with the Deputy Attorney General, and no one has opposed his stance.

6. We have heard learned Counsels and perused the material in the Petition.

7. The Petition raises primarily three issues to be decided by this Court: (a) Whether FEC is a part of the PSX Regulations; (b) if the answer to (a) is in the affirmative, then did Criteria 4(i) of FEC meet the test for introducing amendments to the PSX Regulations under SA, 2015; and, finally, (c) whether the content of Criteria 4(i) of FEC in the PSX Regulations is ultra vires of the Constitution of the Islamic Republic of Pakistan. In order to address these three issues, it would be prudent first to set out the timeline of the alleged coming into force of the new regulations. Thereafter to identify the relevant laws and finally to turn to decide the above issues.

8. Before we proceed with taking up each of the three (3) issues, (a) to (c) framed by us above to decide the fate of the Petition filed by PSBA, we would like to address the challenge of maintainability of the Petition raised by the Respondents. At the outset, PSBA has challenged the vires of the SA, 2015 under Article 199 of the Constitution of the Islamic Republic of Pakistan, and given the background of the controversy and its involvement submitted by the Petitioner, we are not convinced that PSBA, on account of being a Section 42 Company, cannot be an aggrieved person. Counsel for Respondents contended that PSX was a private entity and relied on the pattern and category of shareholding of PSX as published in its Annual Report of 2023. They argued that the Federation had no shareholding, hence no writ could be sustained against it. The Respondent No.1/PSX was established under the Stock Exchanges (Corporatization, Demutualization and Integration) Act, 2012, regulated by Respondent No.2/SECP, and given the challenge raised by PSBA against PSX, this factor alone in the facts and circumstances of the case, alone could not oust the jurisdiction of this Court under

Article 199. Furthermore, PSBA raised its challenge arising from the actions of a statutory body corporate, the Respondent No.2/SECP, itself created by the Federation of Pakistan for the beneficial regulation of capital markets, superintendence and control of corporate entities and for matters connected therewith and incidental thereto. The powers and functions and finance of SECP and as the chief regulator have nexus with the Federation. The majority of SECP's members of the Policy Board and the entire management of SECP are civil servants, too. As such, Respondents' Counsels contention challenging the maintainability of the Petition based on the non-governmental composition of PSX, was neither here nor there. The final argument by Respondents Counsel as to the maintainability of this Petition was on the grounds of an adequate alternate remedy available to PSBA under Section 33 of the Securities & Exchange Commission of Pakistan Act, 1997 and Section 161 of SA, 2015. The matter at hand did not squarely fall within the subject matter of appeals against the final decision of the Commission under Section 161 of SA, 2015 and an Order of the Commission under Section 33 of the SECP Act, 1997. Therefore, we found this Petition maintainable under Article 199 of the Constitution of the Islamic Republic of Pakistan and continued with its hearing and decision herein.

Timeline

9. On 19.10.2020, PSX notified the public that it was proposing to carry out amendments to the PSX Regulations in relation to the Enhancement of Futures Market of PSX. PSX invited all concerned to submit their comments by 26.10.2020. It is pertinent to note here that PSX attached two Annexures (consisting of 14 pages), namely, Annexures "A" and "B". Annexure "A" consisted of amendments to Chapters 2, 13 and 14 of the PSX Regulations, whereas Annexure "B" consisted of amendments to the old "Uniform Criteria for selection of securities eligible for trading in DFC and CSF contract markets" and replacing it with and introducing the EFC. At this point, Criteria 4(i) was not mentioned in Annexures "A" and "B". The extract of the PSX

notification dated 19.10.2020 and selected provisions from the two annexures are reproduced hereinbelow.

“PAKISTAN STOCK EXCHANGE LIMITED

...

PSX/N-1151 NOTICE October 19, 2020

SOLICITATION OF PUBLIC COMMENTS

PROPOSED AMENDMENTS TO PAKISTAN STOCK EXCHANGE LIMITED (PSX) REGULATIONS IN RELATION TO FUTURES MARKET OF PSX

This is to inform the public that the PSX, in exercise of power conferred upon it under section 7 of Securities Act, 2015, is proposing to carry and amendments to PSX Regulations in relation to Enhancement of Futures Market of PSX. . .

...

In view of the above, the proposed amendments to PSX Regulations and revised Futures Market Criteria for selection of securities eligible for trading in DFC and CSF Contract markets along with rationale thereof are attached herewith as **Annexure A & B**, respectively.

In terms of Section 7(3) of the Securities Act, 2015, all concerned are invited to provide written comments on the proposed amendments, either in hard form or through email at comments.rad@psx.com.pk latest by **Monday, October 26, 2020**.

ABBAS MIRZA
GM & Acting Chief Regulatory Officer.”²

“Annexure A”³

Proposed Amendments to PSX Regulations in relation to Future Market of PSX

Chapter 2: INTERPRETATION AND DEFINITIONS⁴

EXISTING REGULATIONS	PROPOSED AMENDMENTS	RATIONALE
1xxxi. Uniform Criteria means the eligibility criteria for selection of eligible securities for trading in the different trading segments as prescribed by the Exchange duly approved by the Commission; <u>NEW INSERTION</u>	1xxxi. Uniform Criteria Means the eligibility criteria for selection of eligible securities for trading in the different trading segments as prescribed by the Exchange duly approved by the Commission;	Presently, the uniform criteria are prescribed for DFC, CSF, and MTS eligible securities. It is proposed that the criteria for DFC & CSF eligible securities may be segregated from MTS as MTS is a leverage product

² Extract of PSX Notice dated 19.10.2020, available on page 77 of the Petition.

³ Extract of pages 1 to 6 of “Annexure A” available on pages 79-89 of the Petition.

⁴ Extract of page 1 of “Annexure A” available on page 79 of the Petition.

	<p>xli. A. Futures Eligibility Criteria:</p> <p><u>means the eligibility criteria for selection of eligible securities for trading in the Deliverable Futures Contract Market and Cash Settled Futures Contract Market as prescribed by the Exchange and duly approved by the Commission;</u></p>	<p>inherently different from the exchanged traded futures contracts.</p> <p>In addition, we have not seen any international jurisdiction having same criteria for futures and margin trading securities.</p> <p>The criteria of DFC and CSF be named as "Futures Eligibility Criteria (FEC)".</p>
...

Chapter 13: DELIVERABLE FUTURES CONTRACT MARKET REGULATIONS

EXISTING REGULATIONS	PROPOSED AMENDMENTS	RATIONALE
13.1. DEFINITIONS
...
<p>13.3. ELIGIBILITY OF SECURITIES⁵</p> <p>13.3.1. The Securities eligible for trading in the Deliverable Futures Contract Market shall be determined. . under the Uniform Criteria.</p> <p>13.3.2. . . .</p>	<p>13.3. ELIGIBILITY OF SECURITIES</p> <p>13.3.1. The Securities eligible for trading in the Deliverable Futures Contract Market shall be determined by the Exchange every quarter six month in accordance with the requirements prescribed for final review and notice period under the <u>Uniform Futures Eligibility Criteria.</u></p>	<p>PSX proposes a quarterly review instead of interim review and final review.</p> <p>In each quarter, a stock may be added or excluded from the upcoming list of contract based on the eligibility criteria.</p> <p>Open contract on the excluded stocks shall remain available for market till their respective expiry periods.</p>

Chapter 14: CASH SETTLED FUTURES CONTRACT MARKET REGULATIONS

EXISTING REGULATIONS	PROPOSED AMENDMENTS	RATIONALE
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⁵ Extract of page 3 of "Annexure A" available on page 83 of the Petition.

<p>14.2. TRADING⁶</p> <p>14.2.3. ELIGIBILITY OF SECURITIES</p> <p>(a) The Securities eligible for trading in the CSF Market shall be determined. . under the Uniform Criteria.</p> <p>(b) . . .</p>	<p>14.2 TRADING</p> <p>14.2.3. ELIGIBILITY OF SECURITIES</p> <p>(a) The Securities eligible for trading in the CSF Market shall be determined and implemented by the Exchange every quarter six month in accordance with the requirements prescribed for final review and notice period under the Uniform Futures Eligibility Criteria.</p>	<p>PSX proposes a quarterly review instead of interim review and final review.</p> <p>In each quarter, a stock may be added or excluded from the upcoming list of contract based on the eligibility criteria.</p> <p>Open contract on the excluded stocks shall remain available for market till their respective expiry periods.</p>
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“Annexure B”⁷

AMENDMENTS TO UNIFORM CRITERIA FOR SELECTION OF SECURITIES ELIGIBLE FOR TRADING IN DFC AND CSF CONTRACT MARKETS

PROPOSED FUTURES ELIGIBILITY CRITERIA		RATIONALE															
<p>FUTURES ELIGIBILITY CRITERIA FOR SELECTION OF SECURITIES ELIGIBLE FOR TRADING IN DELIVERABLE FUTURES CONTRACT (DFC) AND CASH SETTLED FUTURES CONTRACT (CSF) CONTRACT MARKETS</p>		<p>Uniform Criteria are proposed to be replaced with the Futures Eligibility Criteria for DFC and CSF Contract Markets.</p>															
<table border="1"> <thead> <tr> <th data-bbox="570 1526 878 1593">BASIS OF SELECTION</th> <th data-bbox="878 1526 1252 1593">PROPOSED CRITERIA</th> </tr> </thead> <tbody> <tr> <td data-bbox="570 1593 878 1701">1. Maximum Number of Securities</td> <td data-bbox="878 1593 1252 1701">. . .</td> </tr> <tr> <td data-bbox="570 1701 878 1768">2. Listing History</td> <td data-bbox="878 1701 1252 1768">. . .</td> </tr> <tr> <td data-bbox="570 1768 878 1835">3. Trading History</td> <td data-bbox="878 1768 1252 1835">. . .</td> </tr> <tr> <td data-bbox="570 1835 878 1903">4. Free Float</td> <td data-bbox="878 1835 1252 1903">. . .</td> </tr> <tr> <td data-bbox="570 1903 878 2145">5. Investigation/ enquiry⁸</td> <td data-bbox="878 1903 1252 2145">Securities against which any investigation/enquiry has been concluded with adverse findings of mismanagement shall not be eligible.</td> </tr> <tr> <td data-bbox="570 2145 878 2239">6. Defaulters' Segment</td> <td data-bbox="878 2145 1252 2239">. . .</td> </tr> <tr> <td data-bbox="570 2239 878 2319">7. Exchange Traded Funds</td> <td data-bbox="878 2239 1252 2319">. . .</td> </tr> </tbody> </table>	BASIS OF SELECTION	PROPOSED CRITERIA	1. Maximum Number of Securities	. . .	2. Listing History	. . .	3. Trading History	. . .	4. Free Float	. . .	5. Investigation/ enquiry ⁸	Securities against which any investigation/enquiry has been concluded with adverse findings of mismanagement shall not be eligible.	6. Defaulters' Segment	. . .	7. Exchange Traded Funds	. . .	<p>The point-wise rationale for proposed changes in existing criteria are provided below:</p> <ol style="list-style-type: none"> 1. PSX aims . . . 2. [No comments] 3. The increase in trading . . . 4. As the position limits in . . . 5. [No comments] 6. [No comments] 7. <u>Inclusion of ETFs:</u>
BASIS OF SELECTION	PROPOSED CRITERIA																
1. Maximum Number of Securities	. . .																
2. Listing History	. . .																
3. Trading History	. . .																
4. Free Float	. . .																
5. Investigation/ enquiry ⁸	Securities against which any investigation/enquiry has been concluded with adverse findings of mismanagement shall not be eligible.																
6. Defaulters' Segment	. . .																
7. Exchange Traded Funds	. . .																

⁶ Extract of page 6 of “Annexure A” available on page 89 of the Petition

⁷ Extract of pages 7 to 14 of “Annexure B” available on pages 91-105 of the Petition.

⁸ Extract of page 7 of “Annexure B” available on page 91 of the Petition

*** End of Proposed Amendments

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8. According to the documents available on record, on 21.03.2021, the Regulator, SECP, wrote to PSX, approving amendments to PSX Regulations, which were attached as “Annexure-I”. Annexure-I included contents of both Annexures “A” and “B” along with a comparative table identifying which amendments and modifications made to the PSX regulations were approved by SECP as is, those which were not and finally, those proposals which were approved with amendments by SECP. Once again, the entire PSX Regulations approved by SECP included the FEC.

“Securities and Exchange Commission of Pakistan⁹
Securities Market Division
Policy, Regulation and Development Department

No.SMD/SE/2(254)/2014

May 21, 2021

...
Mr. Farrukh H. Khan
Chief Executive Officer
Pakistan Stock Exchange Limited
Karachi

Subject: Amendments to PSX Regulations relating to Futures Market

Dear Sir,

This is with reference to the Pakistan Stock Exchange Limited’s (PSX) earlier communications in relation to the subject matter.

In this regard, I am directed to communicate that the Securities and Exchange Commission of Pakistan, in exercise of its power conferred by Section 8 of the Securities Act, 2015, hereby approves amendments to PSX Regulations as per comparative enclosed as “Annexure-I” in relation to the futures market.

PSX is advised to arrange publication of the aforementioned amendments in the PSX Regulations in the official gazette of Pakistan in terms of Section 8(5) of the Act and provide a copy of the gazette notification to the SECP for record. The approved amendments shall take effect from the date of this letter.

...

Regards,

(Oneeb Ahmed)
Assistant Director

Cc: Chief Regulatory Officer, PSX

⁹ Extract of SECP Notice dated 21.05.2021 available in Part-II on page 221 of the Petition.

“Securities and Exchange Commission of Pakistan¹⁰
 Securities Market Division
 Policy, Regulation and Development Department

Annexure-I

Existing Provisions	PSX Proposed Amendments	Text Approved by the Commission		
<p>Chapter 2: INTERPRETATION AND DEFINITIONS 1xxxii. Uniform Criteria</p> <p>means the eligibility criteria for selection of eligible securities for trading in the different trading segments as prescribed by the Exchange duly approved by the Commission;</p> <p><u>NEW INSERTION</u></p>	<p>Chapter 2: INTERPRETATION AND DEFINITIONS 1xxxii. Uniform Criteria</p> <p>Means the eligibility criteria for selection of eligible securities for trading in the different trading segments as prescribed by the Exchange duly approved by the Commission;</p> <p><u>xli. A. Futures Eligibility Criteria:</u></p> <p><u>means the eligibility criteria for selection of eligible securities for trading in the Deliverable Futures Contract Market and Cash Settled Futures Contract Market as prescribed by the Exchange and duly approved by the Commission;</u></p>	<p>As proposed by PSX</p>		
<p>...</p>	<p>...</p>	<p>...</p>		
	<p>FUTURES ELIGIBILITY CRITERIA FOR SELECTION OF SECURITIES ELIGIBLE FOR TRADING IN DELIVERABLE FUTURES CONTRACT (DFC) AND CASH SETTLED</p>	<p>FUTURES ELIGIBILITY CRITERIA FOR SELECTION OF SECURITIES ELIGIBLE FOR TRADING IN DELIVERABLE FUTURES CONTRACT (DFC) AND CASH SETTLED</p>		
<p>...</p>	<p>FUTURES CONTRACT (CSF) CONTRACT MARKETS</p>	<p>FUTURES CONTRACT (CSF) CONTRACT MARKETS</p>		
<p>...</p>	<p>BASIS OF SELECTION</p>	<p>PROPOSED CRITERIA</p>	<p>1. Criteria</p>	<p>1. ... 2. ...</p>

¹⁰ Extract of “Annexure-I” of SECP’s Notice dated 21.05.2021 available in Part-II from pages 223 to 249 of the Petition.

	1. Maximum Number of Securities	...	3. ... 4. Securities of companies in the list after step (3), not complying with the following conditions, to be ineligible: (i) No investigation / inquiry has been concluded against the company with adverse findings of mismanagement or the company has not obtained stay order from court against any enforcement action or inquiry / investigation initiated by the Commission. (ii) ...
	2. Listing History	...	
	3. Trading History	...	
	4. Free Float	...	
	5. Investigation / enquiry	Securities against which any investigation / enquiry has been concluded with adverse findings of mismanagement shall not be eligible.	
	6. Defaulters' Segment		
	7. Exchange Traded funds		
	...		
		2.

8. It is pertinent to note that it was SECP who, vide its letter addressed to PSX, introduced Criteria 4(i) to the FEC and not PSX. When we asked Counsels for Respondents if PSX also sought solicitation of public comments on SECP's version of the amended Chapters 2, 13 and 14, along with FEC, they replied in the negative. This position (that SECP's amended version was not notified with any further call for comments from the general public) is corroborated by SECP's letter of 21.05.2021 itself, which directed PSX to arrange publication of the amended PSX Regulations as approved by SECP in the Official Gazette of Pakistan in terms of Section 8(5) of the SA, 2015, and provide to the SECP for the record, a copy of the Gazette Notification.

9. It is unknown if PSX arranged publication of SECP’s amended Chapters 2, 13 and 14 along with FEC as per SECP’s letter dated 21.05.2021. Neither the Petitioner nor Respondents placed a copy of such publication. However, it transpired that PSX on 17.06.2021 notified all TRE Certificate Holders about the amended FEC duly approved by SECP on 21.05.2021. Yet PSX notice dated 17.06.2021 did not mention Chapters 2, 13 and 14 of the PSX Regulations in this particular notice. It was nobody’s case that the SECP approved PSX Regulations in their entirety were not published. An extract of PSX notice dated 17.06.2021 is reproduced herein below.

“PAKISTAN STOCK EXCHANGE LIMITED ^[11]

...

PSX/N-740 NOTICE June 17, 2021

FOR ALL TRE CERTIFICATE HOLDERS

FUTURES ELIGIBILITY CRITERIA FOR SELECTION OF SECURITIES ELIGIBLE FOR TRADING IN DELIVERABLE FUTURES CONTRACT (DFC) AND CASH SETTLED FUTURES CONTRACT (CSF) MARKETS

Pakistan Stock Exchange Limited (PSX) is pleased to inform that it has introduced a new “**Futures Eligibility Criteria for Selection of Securities Eligible for Trading in DFC and CSF Markets**” in lieu of **Uniform Criteria**. . .with prior approval of the Securities and Exchange Commission of Pakistan.

The newly approved criteria are attached herewith as **Annexure A** for your information.

...

The newly approved list of eligible securities for trading in DFC and CSF Markets is attached herewith as **Annexure B**.

...

Jawad H. Hashmi
General Manager, Trading & TREC Affairs.”

“Annexure A”¹²

FUTURES ELIGIBILITY CRITERIA FOR SELECTION OF SECURITIES ELIGIBLE FOR TRADING IN DELIVERABLE FUTURES CONTRACT (DFC) AND CASH SETTLED FUTURES CONTRACT (CSF) MARKET

A. CRITERIA 1. ...

¹¹ Extract of page 1 of PSX Notice dated 17.07.2021, available on page 107 of the Petition.

¹² Extract of pages 2 and 3 of “Annexure A” available on pages 109-111 of the Petition.

	<p>2. ...</p> <p>3. ...</p> <p>4. Securities of companies in the list after step (3), not complying with the following conditions, to be ineligible:</p> <p>(i) No investigation/inquiry has been concluded against the company with adverse findings of mismanagement or the company has not obtained stay order from court against any inquiry/investigation initiated by the Commission;</p> <p>(ii) Securities of listed asset management companies, mutual funds, brokerage houses and companies whose principal activity includes short term investment/trading in securities shall not be eligible.</p> <p>5. ...</p>
B.
C.
D. REVIEW FOR CRITERIA	The Exchange may review and change the eligibility criteria as and when required with prior approval of the Commission and notify the change in it, if any, to the market participants.

“Annexure B”¹³

The list of eligible securities for trading in DFC and CSF-Markets, as per new eligibility criteria are as under:

...

Page 4 of 4”

(a) Whether FEC is a part of the PSX Regulations

10. PSX draws power to formulate, amend and modify regulations under Section 7 of the SA, 2015. The relevant sub-sections of Section 7, which empower PSX to carry out amendments to the PSX in the subject matter of this Petition, i.e. Sections 7(1)(b), (e), (f) are reproduced as follows:

“Section 7. Regulations of securities exchange.—(1) Without limiting the generality of sub-section (4) of section 5, the regulations of securities exchange, may make provision—

(a) ...

¹³ Extract of page 4 of “Annexure B” available on page 113 of the Petition.

- (b) with respect to the development of risk management system, including control measures and safeguards with respect to large exposures, and matters connected therewith;
- ...
- (e) with respect to the eligibility, admittance and conduct of TRE certificate holder;
- (f) with respect to listing and delisting of securities. . . .”

11. Reference to “Futures Eligibility Criteria” or “FEC” turned up for the first time in the PSX proposed PSX Regulations in the definitions clause, 1xli.A, and Regulations 13.3.1 and 14.2.3 of the PSX Regulations. The proposed “FEC” replaced the old (repealed) “Uniform Criteria”. The “Futures Eligibility Criteria” or “FEC” defined in the definition clause, 1xli.A of the PSX Regulations was defined “as prescribed by the Exchange and duly approved by the Commission”. The definition clause did not specify any criteria for FEC. Regulations 13.3.1 and 14.2.3 too, merely referred to it in terms of describing FEC to apply to DFC and CSF Markets, respectively. Thus, FEC is clearly mentioned in the PSX Regulations, and the power to regulate the “eligibility criteria” is derived from Section 7 of SA, 2015. This cannot mean by any stretch of the imagination that FEC is stand-alone and outside the statutory scope of Section 7 of SA, 2015. Additionally, the connection between the PSX Regulations and FEC does not end there.

12. The FEC is also mentioned in the publication of the notice of the new PSX Regulations, which was published by PSX. On 19.10.2020, PSX sought public comments regarding the proposed PSX Regulations and FEC. Respondent Counsel for PSX conceded that the PSX Regulations were notified to the public in their entirety on 19.10.2020 and included the notification of FEC, albeit sans Criteria 4(i) of the FEC. If the Respondent Counsels arguments are to be believed, then it made no sense for PSX to exhibit the proposed PSX Regulations marked as “Annexure A” and the proposed “FEC” marked as “Annexure B” in its the public notice. Moreover, PSX also solicited comments on both the annexures. The Respondent Counsels arguments that FEC is not part of the PSX Regulations are also difficult

to digest because the PSX itself cross-referenced the PSX Regulations and the FEC in its cover notice in Section 7 of SA, 2015. Therefore, in our view, the FEC cannot be separated from PSX Regulations, and both have statutory force as per Regulations 7 of SA, 2015; both must be framed within the context of SA, 2015, and PSX is not at liberty to unilaterally amend the FEC on an as-and-when basis.

13. Given the above reasoning, we find in the affirmative that FEC is part and parcel of the PSX Regulations and is regulated by statute under Section 7 of SA, 2015. We cannot accept Respondents' submissions that the component of the FEC falls outside the domain of Section 7 of SA, 2015, and it is not part of the PSX Regulations.

(b) If the answer to (a) above is in the affirmative, then did Criteria 4(i) of FEC meet the test for introducing amendments to the PSX Regulations under SA, 2015

14. The framework of SA, 2015 provides that the regulations framed by PSX are statutory in nature and must be framed within the contours of the parent statute as stated therein. PSX and SECP have relied on Sections 7(1), 7(3), 8(3) and 8(5) of SA, 2015 to justify the proposed amendments to the PSX Regulations. To this extent, the PSX Regulations may be issued in terms of Regulation 7, which includes, inter alia, subject matters listed in Section 7(1)(a) to (z) following the procedure required for their circulation before they come into force as laid down under Section 7(3). In case of any deviation from such procedure, PSX must seek approval from the SECP for any waiver from solicitation of such amendments from the public under Section 7(4).

15. As already discussed earlier, the subject matter of the PSX Regulations, which included the FEC, was well within the subject-area powers of PSX. No issue has arisen regarding the applicability and framing of FEC under Section 7(1) of SA, 2015; however, parties differ regarding the legality of the procedure adopted for proposing the regulations and its coming into force. Petitioner Counsel contended that on 19.10.2020, when PSX solicited public comments on the PSX

Regulations and the FEC, Criteria 4(i) of the FEC, which was eventually published in PSX Regulations vide Notice dated 17.06.2021, was not mentioned in the PSX Regulations of 19.10.2020. Therefore, as Criteria 4(i) of the FEC was never submitted to the public for comments, it was not a valid enactment, issued in violation of SA, 2015 and liable to be struck off. The Respondents Counsel defended such an assertion on the ground that the FEC was not part of the SA, 2015. We have already dismissed this defence as discussed above. However, there is another aspect of the background to the amendment to the FEC of the PSX Regulations, introducing Criteria 4(i) to the FEC, which has not been addressed as yet. This is that Criteria 4(i) of the FEC was introduced by SECP and not PSX and that SECP scrutinized the PSX regulations and the FEC in their totality, giving the go-ahead on 21.05.2021 vide letter of even date to PSX to publish Annexure-I, which included the duly approved versions of both the PSX Regulations and the FEC, including amendments made by the SECP, i.e. Criteria 4(i) of FEC, without soliciting public opinion on the draft regulations. This defence was neither mentioned in the Respondents' Written Replies nor articulated by the Respondents' Counsels during submissions except that the Respondents' Counsels submitted that under Section 8 of SA 2015, no solicitation was required on amendments proposed by SECP to securities exchange's proposed regulations.

16. It is apparent that Criteria 4(i) of FEC was introduced by SECP and it was not part of the version of the FEC published for public scrutiny by PSX. Therefore, the question arises if SECP was also bound to seek public scrutiny of its insertion of Criteria 4(i) in the FEC? It can be seen from the scheme of SA, 2015 that PSX itself is to be regulated by the SECP and that PSX and its securities brokers are obligated to comply with the regulations of that exchange which have been duly approved by the SECP. Section 8 of SA, 2015, which deals with the approval of regulations or amendments to regulations of securities exchange, is reproduced herein below.

“Section 8. Approval of regulations or amendments to regulations of securities exchange.— (1) No regulation of a securities exchange or any amendment whether by way of rescission, substitution, alteration or addition to a regulation shall have effect unless it has the approval in writing of the Commission.

(2) A securities exchange shall submit or cause to be submitted to the Commission for its approval the regulations and every amendment thereto that require approval under subsection (1), together with explanations of their purpose and likely effect, including their effect on the investing public, in sufficient detail to enable the Commission to decide whether to approve them or refuse to approve them.

(3) The Commission shall, by notice in writing served on the securities exchange, give its approval or refuse to give its approval to the regulations or amendment of the regulations, as the case may be, or any part thereof.

(4) The Commission may give its approval under sub-section (3) subject to requirements that shall be satisfied before the regulations or amendment of the regulations or any part thereof take effect.

(5) Subject to the approval of the Commission under sub-section (3) all regulations or amendments to the regulations made by the securities exchange shall be notified in the official Gazette and shall take effect from such date as may be specified in the notification.”

17. On a plain reading of Section 8, SA, 2015, no provision can be found for a second solicitation from the public if SECP amends a proposed regulation. There is nothing in Section 8 of the SA, 2015, empowering SECP to solicit public opinion when SECP itself proposes an amendment to the proposed regulations submitted by the securities exchange to SECP for approval from SECP. SECP’s scrutiny under Section 8 of SA 2015, of the proposed regulations is limited to either approving them or rejecting to approve them. To put it differently, Section 8 gives SECP only two options when approving the proposed regulations, i.e., either (i) to approve them, or (ii) to refuse to approve them. There is no third option available to SECP under Section 8, i.e. for example, enabling SECP to approve the securities exchange proposed amendments after SECP itself amends it. No such (third) option is expressed under Section 8 of SA, 2015. This is relevant to the case at hand because PSX never presented Criteria 4(i) to SECP in the present case. Criteria 4(i) was SECP’s proposal to PSX proposed PSX Regulations. Accordingly, Criteria 4(i) was not subject to approval by SECP in the manner provided under Section 8, i.e., to decide whether to approve it or refuse to approve it. Therefore, Section 8 did not apply and could not have applied to the case at hand, when SECP introduced Criteria 4(i) of FEC and thereafter approved the PSX

Regulations. Accordingly, SECP in its letter dated 21.05.2021, could not have directed PSX, under Section 8(5) of SA, 2015, to immediately proceed to arrange the publication of the amendments attached as “Annexure-I”. The direction to PSX under Section 8(5) in SECP’s letter dated 21.05.2021 was contrary to the provisions of Section 8 of SA, 2015.

18. Given the above, when SECP itself amended the proposed amendment submitted by PSX to SECP, it could have made such an amendment only under Section 169 of SA, 2015, and not Section 8. While Section 169 of SA, 2015 enabled SECP to introduce Criteria 4(i) of FEC in the proposed regulations submitted by PSX, SECP’s action was subject to SECP following the modus operandi set out in Section 169 (4) and (5) i.e. soliciting public opinion on SECP’s proposed Criteria 4(i) of FEC first and after that eventually getting the PSX Regulations embedded with Criteria 4(i) of FEC published in the official Gazette. Section 169 states as follows:

“Section 169. Power of the Commission to make regulations.— (1) In addition to the powers conferred by any other provision under this Act, the Commission may make regulations for carrying out the purposes and provisions of this Act and for the due administration of this Act.

(2) Without prejudice to the generality of sub-section (1), the Commission may make regulations for or with respect to

(a) . . .

(b) . . .

. . .

(g) the class or classes of securities that may be traded by securities broker and the terms and conditions governing trading in securities by securities broker;

. . .

(l) the registration, operation and regulation of quotation and trade reporting systems;

. . .

(bb) preemptive measure and actions for market monitoring and surveillance, promoting level playing field for investors and public at large;

. . . and;

(kk) all matters or things which by this Act are required or permitted to be prescribed or which are necessary or expedient to give effect to this Act.

(3) For the avoidance of doubt, the powers of the Commission to make regulations under this section are in addition to and not in derogation of any other power of the Commission to make regulations under any provision of this Act or any other Act.

(4) Before any regulations are made or amended under this Act the Commission shall publish a draft of the regulations in the official Gazette

and place it on its website, for eliciting public opinion on the draft regulations, for a period of not less than fourteen days starting from the date of its placement on the website.

(5) Every regulations made or amended by the Commission shall be published in the official Gazette and shall come into effect on such date as may be specified in the notification.”

19. Counsel for SECP did not submit any publication of PSX Regulations after SECP had introduced Criteria 4(i) of FEC to the PSX Regulations. Once SECP introduced a new provision, i.e., Criteria 4(i), to the FEC, SECP triggered the precondition of public notice under Section 169(4) of SA, 2015. SECP’s contribution to PSX’s proposed regulations of introducing Criteria 4(i) to the FEC constituted making or amending a regulation under SA, 2015, which mandated the publication of such amendment by SECP. Therefore, it appears that SECP miserably failed to meet the statutory condition set out in Section 169(4) of SA, 2015, i.e. eliciting public opinion on its (SECP’s) draft versions of the PSX Regulations, which included Criteria 4(i) of the FEC.

20. Given the above discussion, we find in the negative that Criteria 4(i) of FEC met the test for introducing amendments to the PSX Regulations under SA, 2015. We find in favour of the Petitioner that Criteria 4(i) is illegal and unlawful, made in contravention of SA, 2015, and thus of no legal effect.

21. As a consequence of our above-mentioned finding of law, the Eligibility Notice dated 17.06.2021 issued by PSX at the material time suspended by this Court’s Interim Order dated 15.07.2021 removing entities from the approved list of eligible securities on account of Criteria 4(i) of FEC is found to be not in accordance with the law, and set aside. PSX should issue its Eligibility Notices as per the SEC 2015 and its rules and regulations as they stand in force today. We may clarify that law-compliant Eligibility Notices issued every quarter may be arguably standalone and could be made subject to certain conditions. We mention one such condition while deciding the third and final (last) issue in this writ petition (as set out immediately herein below). Still, these conditions must be within the contours of law. As

far as the impugned Eligibility Notice dated 17.06.2021 is concerned, it cannot be sustained and is liable to be set-aside.

(c) whether the content of Criteria 4(i) is ultra vires of the Constitution of the Islamic Republic of Pakistan

22. While this bench has concluded that Criteria 4(i) of the FEC was illegal and the Eligibility Notice dated 17.06.2021 is liable to be set aside for the reasons stated hereinabove, another issue which we must address is the constitutionality of the content of Criteria 4(i) of the FEC of the PSX Regulations. For removal of doubt, it may be noted that in deciding this issue (c), references to “Criteria 4(i) of the FEC” means the reference to that part of the specific phrase mentioned in Criteria 4(i) which begins from the disjunctive “or”, i.e. “or the company has not obtained stay order from court against any enforcement action or inquiry / investigation initiated by the Commission.”

23. The FEC set out in the PSX Regulations and introduced by the SECP, as discussed hereinabove, inserted a fresh eligibility criteria, i.e. Criteria 4(i), concerning the listing and delisting of securities of certain companies in the Futures Market for TRE certificate holders / securities brokers / public. Specifically, Criteria 4(i) of FEC introduced a situation in the PSX Regulations restraining the TRE certificate holder / securities brokers / public from dealing with a company's securities, which company was hit by Criteria 4(i). Although Criteria 4(i) of the FEC drafted and introduced by SECP is not happily worded (framed with a double-negative), it essentially stated that if a company obtains a stay order from the Court against any inquiry/investigation initiated by the SECP/Commission, the securities of such company would still be ineligible for trade in the Futures Market, which includes both the DFC and CSF Markets. This ineligibility would continue irrespective of whether the company has obtained a stay order against such inquiry/investigation being carried out by the SECP/Commission. Respondents' Counsels justified this penal provision, which restricted the right of due process, limited the opportunity of a fair and proper trial and indirectly obstructed access to justice to a company on the

grounds that the Futures Market of the PSX was based on a 90-day (quarterly) cycle with the PSX having a clear, transparent and identifiable criterion for eligibility. He contended that the TRE Certificate Holders / securities brokers / public had come to rely upon and trust PSX criteria for eligibility during the 90-day (quarterly) maturity cycle of the concerned securities in the Futures Market of DFC or CSF due to the certainty it offered for the 90-day (quarterly) period. Counsel contended that the Futures Markets, which required predictability and certainty, could not be beholden to a stay order obtained from the Court of Law, which may either suspend or protract and delay the announcement of the SECP/Commission's decision on an inquiry and investigation until such Court of Law finally decides the fate of the interim stay order subjecting stakeholders to risk involved in the trade of the securities of such company beyond the 90-day (quarterly) period with no finality of the investigation and inquiry being conducted by the SECP/Commission. Counsel argued that the entire situation put the Futures Market at risk, which should be avoided. Hence, the restriction of ineligibility of securities of companies on account of obtaining a stay order nullifying such stay order and reducing it to a cipher was in the nature of a reasonable classification permissible under the Constitution of the Islamic Republic of Pakistan.

24. We cannot accept Respondents' Counsel submissions in light of the plethora of judgments which run counter to the arguments advanced by Respondents. These are well-summarized by a five-member full bench of the Supreme Court of Pakistan in Raz Muhammad Kakar and Others v. Federation of Pakistan through Ministry of Law and Justice and others, PLD 2012 SC 923, 983 in paragraph 56 of the said Judgment, which paragraph is reproduced herein below.

"Paragraph 56. It is established that on the one hand, by limiting the power to punish for the offence of contempt of Court in terms of section 4, the powers of judicial review of the superior courts as provided in Articles 184(3) and 199 of the Constitution have been made ineffective, and on the other hand, the Fundamental Right of access to justice of the citizens would be frustrated if the judgment passed by a Court of competent jurisdiction cannot be implemented. The right of access to courts and justice has been dilated upon in a large number of cases. In the case of Sharaf Faridi v.

Islamic Republic of Pakistan (PLD 1989 Karachi 404) after referring to the cases of Syed Abul A'la Maudoodi v. Government of West Pakistan (PLD 1964 SC 673) and Ms. Benazir Bhutto v. Federation of Pakistan (PLD 1988 SC 416) it has been held that the right of access to justice to all is a well recognized inviolable right enshrined in Article 9 of the Constitution. This right is equally found in the doctrine of "due process of law". The right of access to justice includes the right to be treated according to law, the right to have a fair and proper trial and a right to have an impartial Court or Tribunal. In the case of Government of Balochistan v. Azizullah Memon (PLD 1993 SC 341), it has been held that provisions under scrutiny deny the right of access to Courts and justice. This by itself is an infringement of Fundamental Rights which provide that every citizen shall be entitled to equal protection of law and will not be deprived of life or liberty save in accordance with law. An examination of Articles 9 and 25 read collectively does not permit the Legislature to frame a law, which may bar right of access to the Courts of law and justice. The right of access to justice is internationally well recognized human right and is now being implemented and executed by granting relief under the Constitutional provisions. In the case of Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324) it has been held that the right to have access to justice through an independent Judiciary is a Fundamental Right as held in the case of Sharaf Faridi (supra). In Liaqat Hussain's case (supra) the Court relying upon the cases of Azizullah Memon and Al-Jehad Trust held that the right to have access to justice through the forums as envisaged by the Constitution is a Fundamental Right. In Mehram Ali's case (supra) a Full Bench of this Court while examining the vires of the various provisions of the Anti- Terrorism Act, 1997 has held that the right of "access to justice to all" is a fundamental right, which right cannot be exercised in the absence of an independent Judiciary providing impartial, fair and just adjudicatory framework i.e. judicial hierarchy. The Courts/Tribunals which are manned and run by Executive Authorities without being under the control and supervision of the High Court in terms of Article 203 of the Constitution can hardly meet the mandatory requirement of the Constitution. The same principle has been highlighted in the cases of Al-Jehad Trust v. Federation of Pakistan (1999 SCMR 1379), Khan Asfandyar Wall v. Federation of Pakistan (PLD 2001 SC 607), Rauf B. Kadri v. State Bank of Pakistan (PLD 2002 SC 1111). In the matter of: Reference No.2 of 2005 by the President of Pakistan (PLD 2005 SC 873), Muhammad Nadeem Arif v. Inspector-General of Police, Punjab (2011 SCMR 408), Shahid Orakazi v. Pakistan through Secretary Law (PLD 2011 SC 365), All Pakistan Newspapers Society v. Federation of Pakistan (supra) and Watan Party v. Federation of Pakistan (PLD 2012 SC 292)."

25. In Lahore Development Authority through D.G. and Others v. Ms Imrana Tiwana and Others, 2015 SCMR 1739, 1769, the Supreme Court of Pakistan based on principles articulated in the past judgments of the Supreme Court, as listed in paragraph 66 of the Imrana Tiwana case, summarised the following framework for a constitutional court to declare laws unconstitutional:

- I. There is a presumption in favour of constitutionality and a law must not be declared unconstitutional unless the statute is placed next to the Constitution and no way can be found in reconciling the two;
- II. Where more than one interpretation is possible, one of which would make the law valid and the other void, the Court must prefer the interpretation which favours validity;

- III. A statute must never be declared unconstitutional unless its invalidity is beyond reasonable doubt. A reasonable doubt must be resolved in favour of the statute being valid;
- IV. If a case can be decided on other or narrower grounds, the Court will abstain from deciding the constitutional question;
- V. The Court will not decide a larger constitutional question than is necessary for the determination of the case; The Court will not declare a statute unconstitutional on the ground that it violates the spirit of the Constitution unless it also violates the letter of the Constitution;
- VI. The Court is not concerned with the wisdom or prudence of the legislation but only with its constitutionality;
- VII. The Court will not strike down statutes on principles of republican or democratic government unless those principles are placed beyond legislative encroachment by the Constitution;
- VIII. Mala fides will not be attributed to the Legislature.”

(Paragraph 65)

26. It is clear as night and day that the SECP/Commission, with the introduction of Criteria 4(i) of the FEC in the PSX Regulations to the extent of the company obtaining a stay order from court against inquiry/investigation initiated by the Commission, constituted an attempt by SECP to negate and nullify the order(s) of a Court granting a stay of the inquiry/investigation being carried out by the SECP/Commission and impeded the right of due process of law, zeroing out the court orders and the right to access to justice. From a content perspective, to achieve its objective, SECP could have considered introducing some qualifications or remarks similar to those set out in Regulation 20 of the Companies (Registration Offices) Regulations, 2018, to be mentioned in the PSX Eligibility Notice for situations contemplated in Criteria 4(i) of the PSX Regulations. However, SECP did not go down this route. Thus, the provision of law impugned by the Petitioner also amounts to an infringement of Fundamental Rights under Articles 9 and 25 as per paragraph 56 of the Baz Muhammad Kakar case (ibid.).

27. Furthermore, applying the principles articulated in the Imrana Tiwana case (ibid.), impugned Criteria 4(i) of the FEC of the PSX Regulations¹⁴ is also found unconstitutional. We have placed the

¹⁴ As already mentioned in paragraph 22 above, when deciding issue (c), references to “Criteria 4(i) of the FEC” means the reference to the specific phrase mentioned in Criteria

impugned Criteria 4(i) next to the Constitution, and there is no way to reconcile the two, notwithstanding that the impugned Criteria (4(i) also violates both the spirit and letter of the Constitution. Consequently, the contents of Criteria 4(i) of the FEC to the extent of ousting securities of companies which obtain a stay order from a court against any inquiry/investigation initiated by the Commission to be ineligible for trading in the Futures Market is ultra vires of Articles 9 and 25 of the Constitution read in the light of the cases cited in the Baz Muhammad Kakar case (ibid.) and applying the principles laid down in the Imrana Tiwana case (ibid.). The impugned Criteria 4(i) of the FEC of the PSX Regulations is hereby struck down as unconstitutional.

28. The Petition, along with all pending applications, is allowed in the above terms.

Dated: 21.10.2024

J U D G E

CHIEF JUSTICE

4(i), i.e. "or the company has not obtained stay order from court against any enforcement action or inquiry / investigation initiated by the Commission."