

COMPETITION COMMISSION OF PAKISTAN
Government of Pakistan

ENQUIRY REPORT

(Under Section 37(2) of the Competition Act, 2010)

**IN THE MATTER OF ALLEGED PRICE FIXING AND PROHIBITED AGREEMENT
BY RELIANCE PAINTS PAKISTAN WITH ITS DEALERS**

Qasim Khan | Zulfiqar Ali | Muhammad Fahad

Dated: November 2, 2016

BACKGROUND

1. The Competition Commission of Pakistan (hereinafter 'the **Commission**') received a formal complaint from M/s. Akzo Nobel Pakistan Limited (hereinafter 'the Complainant') against M/s. Reliance Paints Pakistan (hereinafter 'the Respondent') on 10th June, 2015.
2. The primary concerns raised in the Complaint were that the Respondent, a company engaged in the business of manufacturing and selling of paints, fixes the retail price at which its dealers may sell its product, restricts them to sell to dealers only authorized by the company and penalizes them in case of non-compliance with the above.
3. The Complainant backed its assertions with a printed flyer distributed by the Respondent to its dealers detailing all the restrictions mentioned above and the threat of retaliatory action in case of non-compliance (hereinafter 'the Notice').
4. A copy of the said flyer is being reproduced below for reference:



RELIANCE PAINTS® PAKISTAN



01-05-2015

Date: _____



اطلاع برائے ڈیلر حضرات

ریلائنس پینٹ کمپنی اپنے تمام ڈیلر حضرات کو مطلع کرتی ہے کہ بار بار کہنے کے باوجود کچھ ڈیلر حضرات ریٹ کی خرابی کا سبب بنتے رہے ہیں کمپنی نے ایسے تمام ڈیلر کے مال کی سپلائی بند کر کے بھی نوٹس لیا نیز جرمانہ بھی عائد کیا گیا لیکن کچھ فرق نہیں پڑا لہذا کمپنی نے اب فیصلہ کیا ہے کہ انوائس کا 8% ڈسکاؤنٹ یکم مئی سے ختم کر دیا جائے گا

جو ڈیلر حضرات کمپنی کے مقرر کردہ ریٹ پر مال فروخت کرتے ہیں ان ڈیلر حضرات کو ہر ماہ کہ 30 تاریخ کو جتنا مال کمپنی سے لیا ہوگا اس کا 8% ڈسکاؤنٹ دے دیا جائے گا۔

(1) پہلی شکایت پر کمپنی اس ڈیلر کا 8% ڈسکاؤنٹ 0% کر دے گی۔

(2) دوسری شکایت پر کمپنی اس ڈیلر کا سالانہ ڈسکاؤنٹ میں 5% کم کر دیا جائے گا۔

(3) تیسری شکایت پر اسکی ڈیلر شپ فوری طور پر ختم کر دی جائیگی۔

کمپنی اپنے تمام ڈیلرز حضرات سے گزارش کرتی ہیں کہ کمپنی کے مقرر کردہ ڈیلرز کے علاوہ کسی ڈیلر کو مال فروخت نہیں کرے گا۔

امید ہے کہ تمام ڈیلرز حضرات اپنے منافع اور کمپنی کے مفاد کیلئے کمپنی سے تعاون کریں گے۔

5. Under a suspicion of a violation of Section 4 of the Act from the information gathered thus far, the Commission initiated an Enquiry on August 12, 2015 under Section 37 (2) of the Act and appointed Mr. Qasim Khan (Deputy Director), Mr. Muhammad Fahd (Assistant Director) and Mr. Zulfiqar Ali (Management Executive) (hereinafter 'the Enquiry Committee') to carry out a detailed probe and report their findings to the Commission.

6. In the Enquiry phase, the Respondent was given an opportunity to explain its position with respect to the compliant. In addition it was asked to provide names and addresses of its dealers along with copies of agreement (s) under whose terms they operate and lastly any documentary record of action taken against any dealer(s) for violation of such terms

7. During the subsequent series of correspondence, the council of the Respondent denied having any dealers on the part of the company, calling them customers or shopkeepers instead. He also denied having any formal written agreement with them. He did however admit to a verbal understanding of terms and conditions between the parties and obliged with a written form of the same when requested by the Enquiry Committee. A copy of the same is being reproduced below for reference:

ZUBAIRI LAW ASSOCIATES

TAX CONSULTANTS, ACCOUNTANTS, ADVOCATES & AUDITORS

The terms & condition amongst the shop keepers are as under :-

1- MODE OF PAYMENT :-

Payment is received Rs. 2,000/= per week on sale of goods upto Rs. 20,000/=

2- DISCOUNT / COMMISSION

8 to 10 % OR depend upon the quantity and payment schedule.

3- RATE :-

As per Printed Price on goods/Article .

4- TRANSPORTATION :-

Provided by manufacturer upto the place of shop keeper.

We hope that the above will meet your requirement to complete the enquiry U/S 37(2) of the completion Act, 2010 and oblige.

Thanking you,

Your's Faithfully,
FOR : ZUBAIRI LAW ASSOCIATES


[ADVOCATE/ COUNSEL TO THE ASSESSEE]

8. The Enquiry Committee also requested information from the dealers of the Respondent. A copy of the letter sent to the dealers in this regard is being reproduced below for reference:



مورخہ 30 مئی 16

عنوان : ریلاننس کمپنی کے پینٹ کی فروخت کی بابت شکایات

کمپیٹیشن کمیشن آف پاکستان کو چند شکایات موصول ہوئی ہیں کہ ریلاننس پینٹ لمیٹڈ اپنے ڈیلر دکانداروں کو مجبور کرتے ہیں کہ وہ انکے پینٹ کو انکے طے شدہ قیمتوں پر فروخت کریں، ورنہ انکے خلاف ایکشن لیا جائے گا، اس معاملے کی تصدیق کے لیے ہمارے آپ سے درجہ ذیل سوالات ہیں۔

1. کیا آپ کا بنیادی کاروبار پینٹ کی فروخت ہے؟
2. آپ کن کمپنیوں کے پینٹ فروخت کرتے ہیں؟ فہرست وار وضاحت کریں۔
3. کیا ریلاننس پینٹ کی فروخت میں کمپنی کی جانب سے آپ پر کوئی خصوصی شرائط عائد ہیں؟ وضاحت کریں
4. کیا آپ نے کبھی ریلاننس کمپنی کا پینٹ طے شدہ قیمت سے کم پر بھی فروخت کیا ہے؟ اگر کیا ہے تو کیا ریلاننس کمپنی نے اسکو خلاف ورزی سمجھتے ہوئے اس پر کوئی ایکشن لیا؟؟
5. کیا کمپنی آپ کو پینٹ کی فروخت پر ڈسکانٹ دیتی ہے؟
6. کیا کمپنی نے کم قیمت پر پینٹ فروخت کرنے کی پاداش میں آپ کے خلاف کوئی ڈیلرشپ ختم کرنے کی یا ڈسکانٹ کی کٹوتی کی دھمکی یا ایکشن لیا ہے؟؟

۲. آپ سے التماس ہے کہ ادارہ کی جانب سے پوچھے گئے سوالات کے جوابات ترتیب وار اور مفصل انداز میں دیں اور اس بات کو یقینی بنائیں کہ مورخہ 6 جون 2016 تک ادارہ کو موصول ہوجائیں۔

آپکا مخلص



محمد قاسم خان

ڈپٹی ڈائریکٹر (سی اینڈ ٹی اے)
کمپیٹیشن کمیشن آف پاکستان

9. Only one of the dealers responded to the queries put forth by the Enquiry Committee and provided the following information:
- a. That its primary business is sale of paints
 - b. That it sells different types and brands of paints including those of the Respondent
 - c. That there is a condition from the Respondent to not sell below the prescribed price and the dealer adheres to the same
 - d. The dealer has never violated any such condition
 - e. The dealer has not received any discount from the Respondent
 - f. The dealer has never sold below the company prescribed price and the Respondent has no grievance in this regard.

UNDERTAKING

10. 'Undertaking' as defined under Section 2(1)(q) of the Act 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 production, supply, distribution of goods or provision or control of services and shall include an association of undertakings".

11. While assessing whether an entity is an undertaking for the application of Section 4, the key consideration is whether it is engaged in a commercial or economic activity in a given market. The Respondent is a private company engaged in the manufacturing and supply of paints in Pakistan and is therefore an undertaking in terms of Section 2(1)(q) of the Act.

RELEVANT MARKET

12. The definition of relevant market comprises two dimensions: the relevant product market, and relevant geographic market, which are defined under Section 2(1)(k) of the Act as:

[...] a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the product's characteristics, prices and intended uses.

[...] a geographic market comprises the area in which undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those areas.

13. In view of the above, there are several product markets for the purpose of this enquiry. The market for paints and the markets for each of the products related to paints that are supplied by the Respondent to its dealers comprise the relevant product markets in this instance. The geographic market consists of the entire region where the dealers carry and sell the Respondent's products namely Karachi and Interior Sindh.

ISSUE

14. In light of the above, following are the core issue to be addressed in the Enquiry Report:
- a. Whether the practice of the Respondent to force its dealers to not sell its product at a price below that it has prescribed, a violation of Section 4 of the Act?

- b. Whether the practice of the Respondent to request its dealers to not sell its product to other dealers who are not authorized dealers of the Respondent's products a violation of Section 4 of the Act?

ANALYSIS

A. Whether the practice of Respondent to force its dealers to not sell at a price below that it has prescribed a violation of Section 4 of the Act

15. Any agreements entered into by undertakings with respect to the production, supply or distribution of services that have the object or effect of preventing or restricting competition in the relevant market are prohibited under section 4 of the Act unless exempted under section 5. The relevant portions of section 4 are being reproduced below:

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 their object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5 of this Ordinance.

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

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

16. Section 2(b) of the Act defines an agreement as:

"agreement" includes any arrangement, understanding or practice, whether or not it is in writing or intended to be legally enforceable";

17. The foregoing definition gives a broad definition to the word agreement for the purposes of Competition Act in that an agreement does not have to be in

writing or even intended to be legally enforceable as long as it exists in the form of an understanding or practice.

18. In the case at hand, while there is no ostensible written agreement between the Respondent or its dealers binding them to sell at a prescribed price, a very clear understanding between the two regarding the same exists when taking into account the following factors:

a. In verbalizing the understanding mentioned above, the Respondent itself agrees to maintaining the re-sale price for its dealers as provided for in paragraph 7;

b. In correspondence with the dealers of the Respondent, only one response was received as reproduced in paragraph 8 and revealed that there is a price control list that the dealer has to adhere to and that the dealer cannot sell below the prescribed price without inviting the Respondent's grievance;

c. In a notice dated 1.5.2015 issued by the Respondent to its dealers, the Respondent admitted to having cancelled the supply of products and even fining dealers who did not adhere to the practice of selling the Respondent's products at its prescribed price. For those who continue to violate the understanding with regard to the maintenance of resale price, the Respondent threatened the following actions against them:

i. Elimination of the 8% monthly discount, on the total supply they procure, on report of a first violation

ii. Elimination of a yearly 5% discount on report of a second violation

iii. Elimination of dealership on report of a third violation

19. The aforementioned factors clearly demonstrate that even though not in writing, there exists an understanding between the Respondent and its dealers, whereby they are required to sell the Respondent's products at a prescribed price, failing which they have to face repercussions at the hands of

the Respondent. For the purposes of the Act, this understanding translates into an agreement between the Respondent and its dealers.

20. In order to further understand what constitutes the essential components of an agreement regarding 're-sale price maintenance', it would be helpful to take note of the approach adopted by the Competition Tribunal of South Africa in one of its landmark decisions concerning this subject: as long as it is clear to the re-seller that the price given by the supplier for re-selling is only recommendatory in nature and the same is also printed as recommended price on the product, there is no problem. If, however the supplier, requires the reseller to sell at a particular price and threatens sanctions or penalty in case of non-compliance, it would be found to have engaged in the practice of resale price maintenance. As detailed above, both these elements are found in the current matter as the dealers in this case have to abide by a certain price control list and are threatened with sanctions or penalty in case they don't abide by this expectation.
21. Now coming to the aspect of implications on competition, the Respondent sells on the basis of resale price maintenance to all its dealers. This restricts competition firstly in-between the retailers, as they cannot compete with each other on price; and secondly between Paint products of Reliance and its competing brands, as the retail price becomes inflexible and no discounts can be offered by dealers to consumers on Respondent's products as an incentive for sale.
22. Section 4(2)(a) when read with Section 4(1) & 4(2) of the Act is very clear, in that any agreement between undertakings that imposes any restrictive trading condition(s) and thereby have the object or effect of preventing, restricting or reducing competition within the relevant market is prohibited unless exempted under Section 5 of the Act. Since in the issue under scrutiny, the agreement culminated between undertaking i.e. the Respondent and its dealers imposed a

restrictive trading condition that the dealers or buyers of Respondent's supplies cannot sell those products below a price prescribed by the Respondent, and the same appears to restrict competition in the relevant market in light of the reasoning provided above, this action of the Respondent appears to violate Section 4 and in particular Section 4(2)(a) of the Act.

23. The assertion that resale price maintenance is a hard core violation of competition also finds resonance in various international jurisdictions. In this regard, it is noteworthy, that the spirit of competition law is the same throughout the world whether practiced in the developed world or the developing economies such as Pakistan. Article 101(1) of the treaty on the Functioning of the European Union restricts the imposition of a fixed or minimum sales price on the buyer whether the same is imposed through contracts or indirect methods. Similarly, for decades, maintenance of a minimum re-sale price has been seen in the U.S as a classical case of vertical restraint and prosecuted as a per se violation under Section 3 of the Clayton Act. Australia is another example that continues to treat 'retail price maintenance' as a per se violation. Among the relatively lesser developed jurisdictions, South African competition agency is a prime example where maintenance of a minimum re-sale price is prosecuted as a violation.
24. In the context of the foregoing, the agreement between the Respondent and its dealers with regard to maintenance of a minimum resale price in respect of the relevant product appears to entail a restrictive trading condition that restricts competition in the relevant market and therefore appears to violate Section 4(2)(a) of the Act.
25. The Respondent has neither applied for not been granted any exemption for the said agreement under Section 5 of the Act.

B. Whether the practice of the Respondent to request its dealers to not sell its product to other dealers who are not authorized dealers of the Respondent's products a violation of the Act?

26. Another allegation raised in the Complaint is that the Respondent has restricted the sale of its products to only company approved dealers. Regarding this aspect, the Respondent only made a request to its dealers, making this practice recommendatory in nature. As observed above, since even in case of a hardcore vertical restraint such as the resale price maintenance, when it is not made mandatory by the supplier, but only recommended, it ceases to be a violation. Considering that the practice of selling to other dealers by the authorized dealers does not invite any repercussions in the form of sanctions or penalties, the request of the Respondent in this regard does not warrant a scrutiny of the same for any potential anti-competitive effects and therefore does not appear to constitute a violation of the Act.

CONCLUSION

27. Based on paragraphs 9-10 Reliance Paints is an undertaking engaged in the manufacturing and sales of Paints.

28. Based on paragraphs 11-12 the relevant market comprises various types of paint products produced and sold by the Reliance Paints in the geographic area of Karachi and interior Sindh.

29. Based on paragraphs 14 through 24 the Respondent is prima facie involved in imposing a vertical restraint on its dealers by maintaining a minimum resale price that appears to be in contravention of Section 4(2)(a) of the Act.

The Respondent has neither applied for nor been granted an exemption under Section 5 of the Act in this regard.

30. In light of the foregoing, proceedings may be initiated against the Respondent under Section 30 of the Act.

Qasim Khan
Enquiry Officer

Zulfiqar Ali
Enquiry Officer

Muhammad Fahad
Enquiry Officer