

**COMPETITION COMMISSION OF PAKISTAN**

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**ENQUIRY REPORT**

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

**IN THE MATTER OF ALLEGED INFRINGEMENT OF SECTION 4 OF COMPETITION  
ACT, 2010 BY DIAMOND PAINTS INDUSTRIES (Pvt.) LIMITED AND ITS DEALERS**

**Qasim Khan | Maliha Quddus | Amir Zaman | Aqsa Suleman**

**Dated: 9<sup>th</sup> January, 2018**

## **BACKGROUND:**

1. The Competition Commission of Pakistan (the “Commission”) is mandated under the Competition Act, 2010 (the ‘Act’) to ensure free competition in all spheres of commercial and economic activities to enhance economic efficiency and to protect consumers from anti-competitive behavior.
2. Chapter II of the Act expressly prohibits practices by undertaking(s) which involve agreements between undertakings or decisions adopted by association of undertakings which have the object or effect of preventing, restricting or reducing competition within the relevant market.
3. Under Section 28(a) of the Act, the Commission is empowered to initiate proceedings in accordance with the procedures of the Act and make orders in cases of contravention of the provisions of the Act. Pursuant to Section 28(c) of the Act, the Commission’s functions include conducting enquiries into the affairs of any undertaking(s) as may be necessary for the purposes of the Act.
4. The Commission received a copy of an agreement from an anonymous source. The agreement is titled "Agreement for Retail and Wholesale Rate Fixing" (‘the Agreement’) and was ostensibly undertaken between M/s Diamond Paints Industries (Pvt.) Limited (‘Diamond Paints’) and its dealers based in the city of Multan (‘the dealers’). The agreement appears to have been signed on 11.04.2016.
5. A perusal of the agreement shows that a meeting was held between Mr. Asad Muneer, General Manager, Diamond Paints and ten dealers of Diamond Paints based in Multan. The agenda of the meeting is stated to be 'rate fixing'.
6. In order to assess the nature and extent of possible contraventions of the Act and to gather concrete evidence thereof, it was deemed important to conduct an “Enter and Search” inspection of premises of Diamond Paints simultaneously in Lahore and Multan.

7. The Commission authorized a team of officers under Section 34 of the Act to enter and search premises of Diamond Paints and to look for evidence of any possible violation of section 4 of the Act. The authorization of the Commission is attached as **Annex-A**. The team of officers of the Commission, duly authorized by the latter, conducted the inspection of Diamond Paints premises located at Lahore and Multan on 10 January, 2017 and impounded relevant documents and records.
8. Original copy of the Agreement purportedly between Diamond Paints and its dealers in Multan was impounded during the Search & Inspection of the Diamond Paints' Multan office. The title of the agreement is “معابده برائے ریٹیل اینڈ ہول سیل ریٹ فکسنگ” (Copy of original agreement impounded is placed as **Annex-B**).
9. The Commission in its meeting held on 27-01-2017 decided to conduct an enquiry under Section 37(1) of the Act and appointed an enquiry committee comprising Deputy Directors Qasim Khan, Maliha Quddus, Amir Zaman, and Management Executive Aqsa Suleman to investigate the matter for any possible violations of the Act, and to submit a report to the Commission.
10. Diamond Paints and its dealers raised the following concerns with respect to the constitution of an enquiry in this matter:
  - a. The power to conduct an Enquiry under Section 37 of the Act is solely exercisable by the Commission as defined in the Act itself. Yet the Notice bears no signature from any member of the Commission.
  - b. No evidence of any delegation has been provided and may be provided for the sake of completeness.
  - c. The Commission is incomplete in terms of number of its members and essentially non-functional.

11. With regard to the foregoing concerns, it is neither the mandate nor the prerogative of the Enquiry Committee to address the same.

**UNDERTAKINGS:**

12. Section 2(1)(q) of the Act defines an 'undertaking' as follows:

*“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”*

13. Diamond Paints Industries Pvt. Limited was established in 1982 and has 28 company owned stores throughout Pakistan as well as 414 dealer locations. It has a team of around 400 individuals and a network that distributes to over 1500 decorative and industry dealers nationwide.<sup>1</sup> Diamond Paints being a private limited company engaged in the manufacturing and supply of paints and related products in Pakistan is an undertaking in terms of Section 2(1) (q) of the Act.

14. Diamond Paints enters into agreement with individual paint dealers in Multan, who are then allowed to sell its products. Each of the Dealers buying directly from Diamond Paints for onward sales in the market, by virtue of being involved in the provision of goods and services therefore falls under the definition of an undertaking as per Section 2(1)(q) of the Act. A list of all such dealers is provided below:

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<sup>1</sup> <http://www.diamondpaints.com/about-diamond-paints/who-we-are/>

- i. Arain Paints Multan
- ii. Gulzar Paints Multan
- iii. Madina Paints Multan
- iv. Bismillah Paints Multan
- v. Haji Sattar & Sons Multan
- vi. Hamza Paints Multan
- vii. Al Masoom Paints Multan
- viii. Nadeem Brothers Multan
- ix. Majid Paints Multan and
- x. Al Maqsood Traders

**RELEVANT MARKET:**

15. Section 2(1)(k) of the Act defines a relevant market 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.”*

16. As per this definition, a relevant market comprises two dimensions: a relevant product market, and a relevant geographic market. Since paints and all the related products that Diamond Paints sells to its dealers for supplying to the end users are distinct and not substitutable in terms of their characteristics and intended usage, each of them comprises a product market for the purpose of this enquiry.

17. With regard to the Geographic market, the agreement in question applies only to the region of Multan, thus making the conditions for competition different in Multan than other regions where Diamond Paints is doing business. Based on the foregoing and for the purpose of this enquiry therefore, the relevant market consists of markets for all types of paints and its related products being supplied by Diamond Paints within the Jurisdiction of Multan.

**ISSUE:**

18. The primary issues to address in the enquiry are:

- a. Whether the dealers of Diamond Paints in Multan entered into a price fixing arrangement in prima facie violation of Section 4 of the Act.
- b. Whether Diamond Paints is part of the Agreement and fixing of Maximum Discount On Retail Price of the Products in the Relevant Market an act of Minimum Resale Price Maintenance (hereinafter 'Minimum RPM').
- c. If Diamond Paints has indulged in Minimum RPM, whether it is a prima facie violation of Section 4 of the Act.

**A. Whether the dealers of Diamond Paints in Multan entered into a price fixing arrangement in prima facie violation of Section 4 of the Act.**

19. In their correspondence with the Enquiry Committee, Diamond Paints and its retailers have submitted that the latter were not forced, but in fact entered the agreement of their own volition. In the reply on behalf of Gulzar Paint House, Al-Masoom Paint House and Bismillah Hardware and Paint Store, it is stated and the same is being reproduced below:

*“The Agreement was entered into keeping in mind recent actions of some dealers of offering discounts on their own to each other, and thus, undermining the benefits of a*

*no-wholesale policy. In order to keep a balance between these two competing interests, the Agreement involved a proposed corrective measure by some of the Dealers to ensure that competition and consumer interests remained paramount in the market. This is why the discount percentages mentioned in the Agreement exist.”*

20. As per an excerpt from a reply on behalf of Nadeem Brothers Paint House:

*“As a prelude, it must be noted that Diamond Paints for the purposes of distribution and sale has multiple dealers rather than any wholesalers for its paint products; a methodology which is in line with its existing company policy. Against this background, it is to be understood that recently some of the dealers, on their own accord, and without any direction from Diamond Paints, initiated internal discount offerings to each other which in essence perpetuated a wholesale culture. It was with the aim to counter these practices that the Agreement was entered into by some of the Dealers to make sure that competition and consumers interests are protected.”*

21. In the reply on behalf of Madina Paint House, Hajji Sattar & Sons, and Majid Paint House, it goes as far as stating that,

*“The Agreement was entered into by and between the Dealers of Diamond Paints and Diamond Paints was not a party to, or the driving force behind the execution of the Agreement.”*

22. Lastly in Diamond Paint's reply, we find the following statement:

*“It is vital that the learned Commission understands that DPL neither encouraged its dealers to enter into the Alleged Agreement nor was it a part of the same.”*

23. If the foregoing statements are taken on face value, it is safe to assume that as far as the dealers are concerned, they were not hapless participants to the Agreement, but did so of their own free will and even took the initiative.

24. It has also been submitted by the dealers of Diamond Paints that the title of agreement 'Agreement for retail and wholesale rate fixing' is misleading and the spirit or the essence of the Agreement is neither price fixing nor does it lead to any distortion of competition in

the market. In a paper<sup>2</sup> titled 'how do cartels operate' written by Joseph E Harrington Jr., Professor of Business Economics and Public Policy at Wharton School, University of Pennsylvania, the term 'price' has been described in the context of collusion or cartelization on the basis of 100s of such cases examined by the Author. The same is being reproduced below verbatim:

*“What it means to “collude in price” varied greatly across the cartels examined. The members of the lysine cartel viewed one market for lysine – the global market – and thereby coordinated on a single price. The citric acid cartel had only two prices – a regular price and a discounted price for select large customers. At the other end of the spectrum, the electrical and mechanical carbon and graphite products cartel instituted a sophisticated pricing rule which, in principle, allowed for many different prices depending on the particular characteristics of the product and the buyer.*

*One property that was common to all of the cartel examined was that the collusive (though not necessarily actual) prices were the same for all cartel members. A second feature common to several cartels was that they would agree to a “target” (or “recommended”) price and a “floor” (or “minimum” or “bottom”) price which was lower than the target price.”*

25. From the above, it follows, that price fixing does not only entail agreeing on a fixed price by the participants concerned, but can also include an arrangement of a certain minimum price with respect to a particular target price. In the instant matter, the target price already exists in the form of a price provided for in the company issued rate list whereas the floor price is agreed upon in the agreement in the form of a 20% discount on the list price. The agreement between the dealers in respect of retail sale therefore appear to have all the features that exist in a particular type of collusive arrangement.
26. The action of the dealers to enter an arrangement, wherein they agreed upon setting a price floor with respect to sale of the relevant product therefore appears to be an action of fixing the purchase or selling price of the product, which has the object of restricting or reducing competition within the relevant market, in prima facie violation of Section 4(2)(a) of the Act.

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<sup>2</sup> <http://assets.wharton.upenn.edu/~harrij/pdf/fnt06.pdf>



**B. Whether Diamond Paints is part of the Agreement and if so Whether fixing of Maximum Discount On Retail Price Of the Products in the Relevant Market an act of maintaining Minimum RPM And a Prima Facie Violation Of Section 4 of the Act:**

27. The pertinent part of Section 4 of the Act reads as follows:

*“Prohibited agreements. — (1) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings, shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5.*

*(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;”*

28. As the Agreement reads, there was a meeting on 07.04.2016 at a restaurant in Multan Cantt presided over by Mr. Asad Munir, General Manager, Diamond Paints and attended by the following dealers of Diamond Paints in Multan: Haji Abdul Rauf (Arain Paints Multan), Mr. Gulzar Din (Gulzar Paints Multan), Mr. Rana Irfan (Madina Paints Multan), Mr. Tahir Abbas (Bismillah Paints Multan), Haji Majid (Haji Sattar & Sons Multan), Mr. Nadeem Ansari (Hamza Paints Multan), Mr. Muhammad Irfan (Al Masoom Paints Multan), Mr. Malik Shaukat (Nadeem Brothers Multan), Mr. Majid Shahzad (Majid Paints Multan) and Mian Javed (Al Maqsood Traders).

29. The terms agreed upon with respect to the retail and wholesale aspects of business for the dealers are as provided in the following sections of the agreement:

For Retail:

ریٹیل:

Overall Enamel (23%) = 1200/- روپے فی گیلن اور باقی تمام ڈائمنڈ کی پروڈکٹس پر ریٹ لسٹ پر زیادہ سے زیادہ 20% ڈسکاؤنٹ ملے پایا ہے۔ جو دکاندار اس سے زیادہ ڈسکاؤنٹ دے گا وہ خلاف ورزی کا مرتکب پایا جائے گا۔

For Wholesale:

ہول سیل:

ڈائمنڈ پینٹس کی تمام پروڈکٹس پر دکاندار سے دکاندار کا آپس کا لین دین 25% سے زیادہ نہیں ہوگا۔ اور کوئی بھی دکاندار اپنی مرضی سے ملتان ریجن کے کسی علاقہ میں ہول سیل نہیں کریگا۔ اگر کسی بھی علاقہ میں ہول سیل کرنی ہے یا اپنا Sub-Dealer بنانا ہے تو پہلے کمپنی کے زونل مینجر سے مشاورت اور اجازت لینا ضروری ہوگی۔ نیز اگر کوئی بھی Sub-Dealer اس Rate Fixing کی خلاف ورزی کرتا ہے تو اس کا لین ڈیلر اس خلاف ورزی کا ذمہ دار ٹھہرایا جائے گا۔

Terms and Conditions:

۲۔ دوسری دفعہ اس معاہدہ کی خلاف ورزی کرنے پر کمپنی اس ڈیلر کے ساتھ کام کرنا بند کر دے گی اور اس کا سالانہ سیل ٹارگٹ جو بھی ہوگا وہ باقی تمام ڈیلر حضرات پر ان کی استطاعت کے مطابق تقسیم کر دیا جائیگا جو اس کو پورا کرنے کے پابند ہوں گے۔ اگر کوئی ڈیلر اس ڈیلر کے حصے والا ٹارگٹ پورا نہیں کرے گا تو اس کو سالانہ ڈسکاؤنٹ نہیں دیا جائے گا۔

شرائط و ضوابط:

تمام ڈیلرز کی باہمی مشاورت سے Price Fixing کی خلاف ورزی پر درج ذیل شرائط و ضوابط ملے پائیں ہیں۔

۱۔ پہلی دفعہ ریٹ فلکسنگ کی خلاف ورزی پر -/50,000 روپے بطور جرمانہ عائد کیا جائے گا۔ جس کے چیک آج تمام ڈیلر حضرات نے علیحدہ علیحدہ جمع کروا دیئے ہیں۔ اگر کوئی ڈیلر اس معاہدہ کی خلاف ورزی کرتے ہوئے پکڑا گیا تو اس کا جمع شدہ چیک مالیتی -/50,000 روپے کیش کروا کر تمام ڈیلر حضرات کو کھانا کھلایا جائے گا جس کا بل اس رقم مبلغ -/50,000 روپے سے ادا کر کے بقیہ تمام ڈیلر حضرات میں مساوی طور پر تقسیم کی جائیگی۔

30. As per the terms and conditions reproduced above, A dealer is bound to sell Overall Enamel at a price no less than Rs. 1200/- or a 23% discount on the price quoted in the rate list issued by Diamond Paints (hereinafter 'list price'- See Annex-C). Regarding all other

products, a dealer is required to sell them within the threshold of a 20% discount on the list price.

31. The clause titled 'wholesale' limits the dealings between dealers to 25% of the product quantity they carry. Furthermore, if a dealer wishes to conduct wholesale business or appoint a sub-dealer then it can only do so after consultation with and on obtaining the Company's Zonal Manager's permission. If a sub-dealer is found to be in violation of what is termed as 'rate fixing' then its main dealer would be held responsible for such a contravention.
32. For a first time breach of the 'terms and conditions' defined in the agreement, the violator would be liable to pay a penalty of PKR, 50,000, part of which would go towards treating other dealers to lunch/dinner, while the remaining part would be distributed among them on equal basis. For a second breach, the violator would have a revocation of its dealership arrangement with Diamond Paints and its annual sale targets would be distributed among the remaining dealers.
33. The clause titled 'evidence of violation' notes that ordinarily the proof of violation would be a dealer receipt bearing the signature and stamp of the pertinent dealer as against any oral complaints. In case of absence of such bill or receipt, the concerned customer's statement would have to be made directly before the Company staff to be treated as evidence.
34. As per the agreement, for ascertaining a violation, a 'price fixing committee' was constituted with the mutual consent of all dealers involving Mr. Haji Abdul Rauf (Arain Paints, Multan), Mr. Tahir Abbas (Bismillah Paints, Multan) and Zonal Manager of Diamond Paints. The agreement was to take effect on 15.04.2016 and was signed and stamped by the concerned dealers on 11-04-2016.

35. In order to seek some clarifications regarding the 'retail' and 'wholesale' clauses of the agreement, Letters were written, by the Enquiry Committee to the dealers( copy of letters sent to dealers attached as **Annex-D** ) to which responses were received from most of them.

36. Some of the common grounds adopted by the dealers in their replies are summarized below:

- a. The term price fixing used in the Agreement is a misnomer and there is actually no element of price fixing and no harm to competition;
- b. The Agreement is signed between certain dealers with no involvement of Diamond Paints;
- c. The Agreement was motivated due to the fact that some dealers were dealing with each other and had instituted their own discount system; The Agreement places certain conditions on wholesale.

37. Diamond Paints, in its reply dated 08-03-2017,(**Annex-E**) said the following about the Agreement:

*“The Alleged Agreement bears signatures of certain individual dealers. As a corporate entity, DPL never authorized any attendance at said meeting with dealers, however considering that dealers deal with their supplier paint manufacturers often it would not be illegal per se for a company employee to meet with dealers. However, DPL denies knowledge of its representatives attending any such meeting. Further DPL denies that it has ever authorized any agreement being entered into with an anti-competitive object or effect.”.*

38. Based on the above, if one is to assume that the involvement of Diamond Paints for the purpose of the Agreement is limited to its employees based in the Multan region with the head office unaware of any such activity in the regional office, it is important to understand that there exist scenarios where the action of an employee and/or a company are treated as one and the same.

39. Since the basic principles of competition law are the same throughout the world and most countries including Pakistan have drawn inspiration from some of the earliest established regimes such as Europe and the United States, reference may be had to the Competition

Agency of New Zealand's approach toward the involvement of a company's employee(s) on behalf of a supplier in various matters including the issue of Minimum RPM.

*“Anything done by a person acting on behalf of the supplier (for example, an employee) is said to have been done by the supplier.”<sup>3</sup>*

40. In the instant matter, more than one employee appear to have entered into or at least facilitated an agreement that has procedural requirements and punitive action incorporated in its terms and conditions that can only be executed by Diamond Paints management and/or staff in Multan, where conditions such as termination of a dealership agreement with the Company can only be done on the business's behalf as against an action done in personal capacity for individual purpose by an employee and so it appears that for the very purpose of the Agreement, the two are not to be distinguished from one another.

41. Furthermore and very importantly the Enquiry Committee deems it essential to present the following facts in order to appreciate the involvement of Diamond Paints in the subject Agreement:

- a. An original copy of the Agreement in question was impounded from Diamond Paint's Multan office during the Search and Inspection carried out by the CCP's team on January 10, 2017.
- b. The stamp paper bearing the Agreement has been issued in the name of Diamond Paints and specifically mentions the name of a person who is found to be an employee of Diamond Paints as per its employees database (from the impounded software **Annex-F**)
- c. The Agreement signed and stamped by the dealers' states explicitly that the meeting was presided by Mr. Asad Munir, General Manager, and Diamond Paints.
- d. Lastly but most importantly, the implementation and policing of the Agreement hinges on the participation of Diamond Paints for the following reasons:

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<sup>3</sup> <http://www.comcom.govt.nz/business-competition/fact-sheets-3/resale-price-maintenance-2/>

- i.** The clause titled 'Wholesale' states that consultation with and permission of Zonal Manager, Diamond Paints is required prior to conducting any wholesale business and the appointment of sub-dealer.
- ii.** The proof of any violation of the Agreement is the customer receipt bearing the concerned dealers' signature and stamp or in the event of unavailability of the same, the requirement is for the affected customer to make a direct statement before the company staff.
- iii.** Under the clause titled 'Terms and Conditions' the punishment for a second time violation of the agreed upon terms is to come in the form of Diamond Paints ceasing to do business with the former and re-distributing its sales target among the remaining dealers.
- iv.** Lastly, as per clause 4 under the title 'the scope or evidence of violation' a price fixing committee was formed for ascertaining a violation. This committee comprised not just the dealers but also the zonal manager of Diamond Paints.

42. From the above, it follows that the tasks of enforcement of the Agreement or any action in the event of a violation of the same rest almost entirely with Diamond Paints, with little to none in the hands of dealers in this regard.

43. Having provided circumstantial evidence pertaining to the involvement of Diamond Paints in the Agreement, With regard to its submission and that of its dealers that the Agreement was a dealers' initiative lacking any coercion from the former, reference may be had to the paper titled 'The Law and Economics of Resale Price Maintenance'<sup>4</sup> where the various ways in which Resale Price Maintenance ('RPM') manifests itself, are explored. As described therein, one of the ways in which RPM comes about is at the behest of the retailers where utilizing their monopsony power, they make use of RPM to support a cartel at the retail level. While the retailers may not have monopsony power in the case at hand, the main inference to draw from this is that for RPM to exist, the impetus may not necessarily come from the suppliers' end, but could also very well be a buyers' side

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<sup>4</sup> <https://link.springer.com/content/pdf/10.1023/A:1007774803225.pdf>

initiative. The submissions made by the dealers and Diamond Paints that the agreement was a measure proposed by the dealers that they entered of their own volition, whether correct or not, is therefore not a valid justification for nonexistence of Minimum RPM.

44. Regardless of where the impetus for the Agreement came from, the circumstantial evidence provided above regarding Diamond Paint's involvement in the Agreement in **para 41**, clearly shows how the Agreement's existence and implementation is pre-dominantly incumbent upon Diamond Paint's involvement even when restricted to the region of Multan.

45. Before proceeding on with the discussion of Whether fixing of Maximum Discount On Retail Price Of the Products in the Relevant Market an act of maintaining Minimum Resale Price, it is important to understand what constitutes RPM, what are its main features and when does it come about.

46. As per an Organization of Economic Cooperation and Development (OECD) publication<sup>5</sup> RPM is described as follows:

*“RPM specifies the final price that retailers charges consumers. Variants of this restriction include specifying only a price ceiling or a price floor. Practices that encourage the maintenance of resale prices but that do permit price competition, e.g., non-binding “recommendations” for a retail price or a price floor, and recommended prices advertised by the upstream firm, are generally not considered to be RPM.”*

47. If we dissect the foregoing definition, we see that 1) RPM specifies the final price that a retailer charges a consumer, 2) Variants of this restriction include specifying a price ceiling or a price floor and lastly 3) any practices that encourage the maintenance of resale prices, but are non-binding in nature, generally do not constitute RPM.

48. With respect to the third aspect of the definition provided above, it would be helpful to take note of the approach adopted by the Competition Tribunal of South Africa in one

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<sup>5</sup> <http://www.oecd.org/competition/abuse/1920261.pdf>

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.<sup>6</sup>

49. In the matter at hand, the provision of maximum discount on resale price is not a mere recommendation but a binding clause. If any retailer is found in violation of this clause, it has to offer penalty for a first time offense and lose dealership rights with the Company if found guilty of a second offense.

50. Now we look at the following definition of RPM by **New Zealand's competition regime** but which is the same in spirit as the description of RPM given in **para 46**.

*“Resale Price Maintenance occurs when a supplier of goods enforces, or tries to enforce, a minimum price at which the reseller must on-sell those goods.”<sup>7</sup>*

51. From the above definition, a mere attempt by a supplier of goods to enforce a minimum specified price tantamount to Minimum RPM. In other words for an occurrence of Minimum RPM, it is not necessary to actually determine whether such enforcement has been actually carried out, since a mere attempt on the part of the supplier to try and enforce it is all that should exist for the same to be found.

52. From the discussion carried out above in light of the terms and conditions in the Agreement, there is absolutely no doubt that the enforcement of the Agreement hinges upon action by Diamond Paint's representatives on its behalf. It has also been argued above that when an employee or any other person is acting on a suppliers' behalf, the two are to be treated as indistinguishable with regard to that act.

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<sup>6</sup> [http://www.cc.gov.pk/images/Downloads/enquiry\\_reports/reliance\\_paints\\_2\\_nov\\_2016.pdf](http://www.cc.gov.pk/images/Downloads/enquiry_reports/reliance_paints_2_nov_2016.pdf)

<sup>7</sup> <http://www.comcom.govt.nz/business-competition/fact-sheets-3/resale-price-maintenance-2/>



53. Based on the above, it appears that, by virtue of the Agreement Diamond Paints has tried to enforce a maximum discount on the list price of the products in the relevant market, beyond which any dealer(s) or reseller(s) must not on-sell those goods.
54. The very next question we need to explore is whether the enforcement of a 20% maximum discount on the list price of products found in the relevant market the same as setting a minimum resale price for their onward sales.
55. Competition regime of New Zealand goes on to actually explain as to what is 'specified price' for the purpose of RPM. It is important to note that as per the explanation provided therein 'specified price' is a broad term that includes among other things 'a maximum percentage discount on a recommended retail price' which is exactly the restriction found to exist in the agreement under question. Even otherwise, it is not hard to decipher the same, given that setting a maximum discount defines a certain threshold below which an item cannot be sold. Setting a maximum discount limit on the list price is then essentially nothing other than a different way of defining a price floor which as per **para 24 and 25** is just a variant of the RPM restriction.
56. By trying to enforce a specified price in the form of a maximum percentage discount on the list price of the relevant products for their re-sale in the Multan region and in light of the discussion carried out from **paras 38 through 55**, Diamond Paints appears to have indulged in the practice of imposing a Minimum RPM restriction.
57. Also by having done so, in terms of the definition of an 'agreement' as per Section 2(1)(b) of the Act, which states:

*“Agreement' includes any arrangement, understanding or practice, whether or not it is in writing or intended to be legally forcible.”*

Diamond Paints has effectively entered an agreement which imposes Minimum RPM on its dealers.

**C. If Diamond Paints has indulged in Minimum RPM, whether it is a prima facie violation of Section 4 of the Act.**

58. Given that Diamond Paints appears to have entered into an agreement of Minimum RPM, the very next question is whether the same amounts to a violation of any of the provisions of the Act.

59. In Pakistan, Section 4 of the Act clearly prohibits any undertaking or association of undertakings to enter into any agreements with respect to production, supply, distribution, acquisition or control of goods that have the object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under Section 5 of the Act. Such agreements include but are not limited to restrictive trading conditions with regard to the sale or distribution of any goods.

60. RPM is generally prohibited in almost all OECD countries, subject to a few exemptions, mostly for books, newspapers and medicaments. Some countries though do have a procedure for authorizing the practice if the beneficial effects can be shown to outweigh the detrimental ones.<sup>8</sup>

61. In Australia, RPM is treated as a per se offence irrespective of whether it has any impact on competition as it is prohibited under the Trade Practices Act, 1974 ('TPA').<sup>9</sup> New Zealand has also retained the per se treatment of RPM. The European Union while acknowledging the potential efficiencies from vertical restraints in its Vertical Restraints Block Exemption Regulation and Guidelines of Vertical Restraints that took effect in 2010 has nevertheless retained the 'hard core' designation for RPM.

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<sup>8</sup> <http://www.oecd.org/competition/abuse/1920261.pdf>

<sup>9</sup> Ibid

62. Michael Edmund Jacobs, Experienced litigator on high-stakes, complex antitrust and consumer matters, a former advisor to Chile's competition enforcement authority, in his paper<sup>10</sup> titled ' Legal Treatment of Vertical Restraints' has said the following about RPM:

*“RPM is a vertical restraint that limits intrabrand price competition—i.e., competition between resellers of the same manufacturer’s product—by restricting the price at which retailers may sell that product. This practice may take many forms, ranging from agreements that directly control the retailer’s transaction prices to policies that do so indirectly by, for instance, limiting sales only to resellers that follow the manufacturer’s suggested retail prices. The procompetitive benefits of RPM may include the strengthening of interbrand competition by eliminating free-rider problems at the retail level that result in the suboptimal provision of presale advice or other services, or by guaranteeing a margin at the retail level to encourage the promotion of a manufacturer’s product. In other circumstances, however, the practice can result in serious anticompetitive harms, such as the facilitation of manufacturer and retail cartels, the restoration of an upstream firm’s ability to exercise market power, and even, in the context of interlocking relationships, the elimination of both intrabrand and interbrand competition.”*

63. While the foregoing suggests that RPM may also have pro-competitive benefits, which is why some Competition Jurisdictions such as the United States have only very recently started treating the matter of RPM under the rule of reason and that too with a lot of controversy between various competition authorities at the state and federal level, there are circumstances where the practice of RPM can result in serious anticompetitive harm. One such situation has been described as where an RPM arrangement ends up facilitating a manufacturer or retail level cartel.

64. In the instant case no arguments have been furthered by Diamond Paints regarding any pro-competitive benefits of entering the RPM arrangement, as it has maintained its stance of not being involved in the Agreement. With regard to any reasoning provided by the dealers as motivation behind the Agreement, it does not apply to the specific case of RPM - a vertical price restraint, as the action of the dealers falls under and has been evaluated by the Enquiry Committee for a collusive or cartel arrangement violation.

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<sup>10</sup> <http://www.fne.gob.cl/wp-content/uploads/2012/10/Legal-Treatment-of-Vertical-Restraints.pdf>

65. In the matter at hand, the Minimum RPM arrangement reached between Diamond Paints and its dealers has ended up facilitating what appears to be a retail level cartel among the dealers and is therefore ostensibly a restrictive trading condition with the very object of preventing restricting or reducing competition within the relevant market.
66. Diamond Paints, by imposing a restrictive trading, in the form of an RPM arrangement with its dealers that appears to have facilitated a downstream cartel, has *prima facie* violated Section 4(2)(a) of the Act, and for which it has neither sought nor been given an exemption under section 5 of the Act.

### **CONCLUSION:**

67. Based on the discussion in **paras 19-26**, it appears that the dealers by agreeing on a price floor for onward sales of the relevant products have entered a price fixing Agreement in *prima facie* violation of Section 4(2) (a) of the Act.
68. Based on discussion in **paras 27-66**, it appears that Diamond Paints has effectively entered into a Minimum RPM arrangement with its dealers, thereby introducing a restrictive trading condition that appears to facilitate a downstream cartel with the object or effect of restricting competition in the Relevant Market in *prima facie* contravention of Section 4(2) (a) of the Act.

**RECOMMENDATION:**

69. In view of the preceding findings, it is proposed that proceedings under Section 30 of the Act may be initiated against Diamond Paints and its dealers for their respective prima facie violations of Section 4 of the Act.

Qasim Khan

Enquiry Officer

Maliha Quddus

Enquiry Officer

Amir Zaman

Enquiry Officer

Aqsa Suleman

Enquiry Officer