



BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF
SHOW CAUSE NOTICES ISSUED TO

- i). M/s. Diamond Paints Industries (Pvt) Limited
- ii). M/s Aarain Paint and Hardware Store,
- iii). M/s Al-Masoom Paint House
- iv). M/s Bismillah Hardware & Paint Store
- v). M/s Gulzar Paint House, vi). M/s Haji Sattar & Sons
- vii). M/s Madina Paint House, viii). M/s Majid Paint House
- ix). M/s Nadeem Brothers Paint House, x). M/s Al-Maqsood Traders
- xi). M/s Hamza Paint House

(File No.101/Diamond Paints/C&TA/CCP/2016)

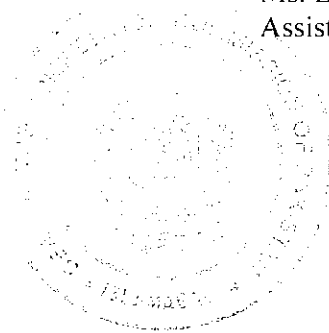
Date(s) of Hearing: 13-03-2018
02-04-2019
14-05-2020

Commission: Ms. Shaista Bano 
Chairperson

Ms. Bushra Naz Malik
Member

Assisted by: Mr. Noman Amin Farooqi
Legal Advisor

Ms. Laila Leghari
Assistant Director (Legal)



Present:

M/s Diamond Paints Industries (Pvt.) Limited Mr. Waqqas A. Mir
Barrister-at-Law
Axis Law Chambers

Mr. Hassan A. Niazi, Advocate
Axis Law Chambers

Ms. Yumna Baloch, Advocate
Axis Law Chambers

M/s Aarain Paint and Hardware Store

M/s Al-Masoom Paint House

M/s Al-Maqsood Traders

M/s Bismillah Hardware and Paint Store

Mr. Asad Abbas Butt
Advocate High Court

M/s Gulzar Paint House

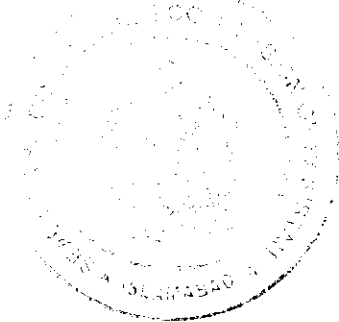
M/s Haji Sattar & Sons

M/s Hamza Paint House

M/s Madina Paint House

M/s Majid Paint House

M/s Nadeem Brothers Paint House



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ORDER

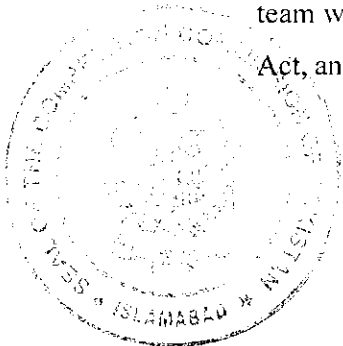
1. This order shall dispose of the proceedings arising out of Show Cause Notice Nos. 1 to 11 of 2018 dated 7 February 2018 (hereinafter the 'SCNs') issued under Section 30 of the Competition Act 2010 (the 'Act') to M/s Diamond Paints Industries (Pvt.) Limited (hereinafter 'Diamond Paints'), M/s Arain Paints Multan, M/s Gulzar paints Multan, M/s Madina Pints Multan, M/s Bismillah Paints Multan, M/s Haji Sattar & Sons Multan, M/s Hamza Paints Multan, M/s Al Masoom Paints Multan, M/s Nadeem Brothers Multan, M/s Majid Paints Multan and M/s Al Maqsood Traders (collectively to be referred as the 'Dealers') by the Competition Commission of Pakistan (the 'Commission'), for *prima facie* violation of Section 4 of the Act.

FACTUAL BACKGROUND

2. The Commission received copy of an agreement from an anonymous source bearing the title "Agreement for Retail and Wholesale Rate Fixing" ('the 'Agreement') and was ostensibly undertaken between Diamond Paints and its dealers based in the city of Multan. The agreement appears to have been signed on 11 April 2016.
3. Based on the contents of the agreement, it was noted that on 11 April 2016 a meeting was held at a restaurant in Multan and was presided by Mr. Asad Muneer, General Manager, Diamond Paints and the ten other dealers. The agenda of the meeting was set as "rate fixing". In order to dig deeper into the matter to assess nature and extent of possible contraventions of the Act 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. On the 10 January 2017, the duly authorized teams of the Commission undertook simultaneous Search & Inspection of Diamond Paint's premises in Lahore and Multan.

A. ENQUIRY AND SHOW CAUSE NOTICES:

4. Search & Inspection of the Multan office of Diamond Paints yielded an original copy of the aforementioned Agreement entered between Diamond Paints and its dealers. The title of the agreement is "معاهدبرائے ریٹیل اینڈ بولسپلر ریٹ فکسنگ". In the light of this an enquiry team was formulated to probe into the matter and deduce any possible violations of the Act, and to submit a report to the Commission. The enquiry was concluded vide Enquiry



Report dated 9 January 2018 (hereinafter the '**Enquiry Report**'). The conclusions and recommendations of the Enquiry Report are as follows:

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.*

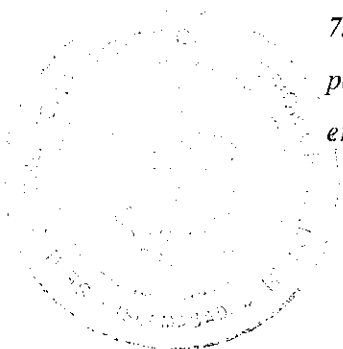
RECOMMENDATION:

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.*

5. Based on findings of the Enquiry Report, the Commission decided to initiate proceedings under Section 30 of the Act and issued SCNs to Diamond Paints and its dealers containing alleged violations and directions to submit a written reply before the Commission and to avail an opportunity to be heard. The relevant parts of the SCN to Diamond Paints are reproduced herein below:

6. **AND WHEREAS**, in terms of the Enquiry Report in general and paragraphs 16-17 in particular, the 'relevant market' in terms of Section 2(1)(k) of the Act has been identified as the markets for all types of paints and its related products being supplied by the Undertaking within the territorial jurisdiction of Multan;

7. **AND WHEREAS**, in terms of the Enquiry Report in general and paragraphs 27-57 in particular, the Undertaking appears to have effectively entered into an arrangement with the dealers which imposes an obligation



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for Minimum Resale Price Maintenance (RPM) on its dealers for the sale of its products in the relevant market;

8. AND WHEREAS, *in terms of the Enquiry Report in general and paragraphs 58-66 in particular, it appears that the Undertaking's arrangement with its dealers for Minimum RPM appears to have the object and effect of preventing, restricting, or reducing competition within the relevant market, which prima facie is in violation of clause (a) of subsection (2) of Section 4 read with subsection (1) of Section 4 of the Act;*

9. AND WHEREAS, *the Commission is mandated under the Act to ensure free competition in all spheres of commercial and economic activity, to enhance economic efficiency and to protect consumers from anti-competitive behavior including prohibited agreements under Section 4 of the Act.*



6. The relevant parts of the SCN issued to the dealers is reproduced herein below:

6. AND WHEREAS, *in terms of the Enquiry Report in general and paragraphs 27-57 in particular, the Undertaking appears to have effectively entered into an arrangement with other the dealers which imposes an obligation for Minimum Resale Price Maintenance (RPM) on its dealers for the sale of DPI products in the relevant market;*

7. AND WHEREAS, *in terms of the Enquiry Report in general and paragraphs 19-26 in particular, the Undertaking along with the other dealers appears to have effectively agreed on maintaining the Minimum Resale Price Mechanism for onward sale of the products manufactured by DPI in Multan;*

8. AND WHEREAS, *in terms of the Enquiry Report in general and paragraphs 19-26 in particular, such a price fixing arrangement is a prima facie violation of clause (a) of subsection (2) of Section 4 read with subsection (1) of Section 4 of the Act;*

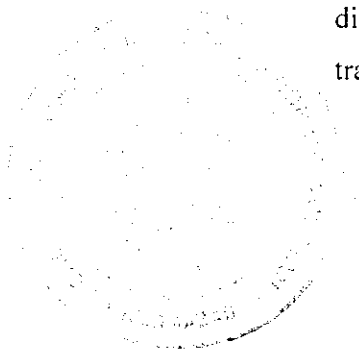
9. AND WHEREAS, *the Commission is mandated under the Act to ensure free competition in all spheres of commercial and economic activity, to*

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enhance economic efficiency and to protect consumers from anti-competitive behavior including prohibited agreements under Section 4 of the Act.

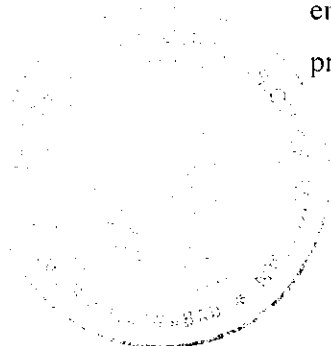
B. WRITTEN REPLY TO THE SHOW CAUSE NOTICES AND HEARINGS:

7. In response to the SCN, Diamond Paints through its legal counsel, submitted their written reply vide letter dated 3 March 2018. The preliminary legal objections are summarized as follows:
 - a. There is a procedural irregularity, as the Commission is incomplete in terms of the Members and is essentially non-functional. The mandatory requirement of Section 14 that a Commission does not exist if the members are less than five. Hence, in the light of the statute the absence of this mandatory requirement prevents the Commission to proceed.
 - b. The search and inspection under Section 34 was conducted under an illegal and null authorization, as it fails to conform the basic pre requisites. The search authorization fails to meet the criteria of disclosing adequate reasons under the Act as well as section 24-A of General Clauses Act 1897.
 - c. The instant matter on which the Commission has taken an action is an' *intra provincial matter*' as per entry 27 of the federal legislative list of the constitution of Pakistan. Therefore, it falls outside the jurisdiction of the Act.
8. The written reply filed on merits and facts of the case by the Legal Counsel of the Diamond Paints is summarized as follows:
 - a. Diamond Paints has no exclusive dealerships and does not operate a separate wholesale network. They deny the presence of any resale price maintenance scheme, any price communicated to the dealers is a recommended price. The dealers were not selling on a fixed price, each of them were selling on separate prices. The dealers are given an estimated yearly targets, with their consent and hence, their performance is assessed on that basis, to determine their eligibility for incentives, credit limits and discounts. The aim of dealing with the dealer's directly eliminates the likelihood of having a middle-man and promotes transparency,



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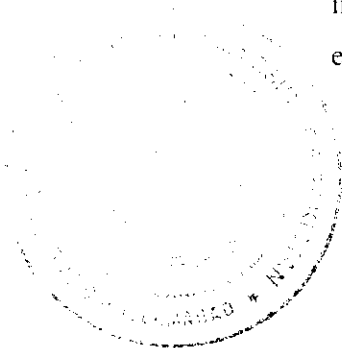
- b. Attention is also drawn to CCP's own letters dated 17 June 2015 and 11 January 2016, wherein the CCP sought information regarding Diamond Paints business structure. CCP later based on the information provided by Diamond Paints CCP in its letter dated 11 January 2016 noted that "please be informed that based on the current information provided by you the existing dealers are treated as customers. Therefore, the provisions of Competition Act, 2010 are not attracted". This important fact has not been referred in the enquiry.
- c. Diamond paints denies entering into the agreement dated 7 April 2016('the **Agreement**'). They reject the allegation of entering, sanctioning or implementing the said agreement. The meeting held by the dealers were not attended by Diamond Paints nor the agenda or conclusion of that meeting.
- d. In the light of Article 75 of the Qanun-e-Shahdat order 1984 proof of documents is by primary evidence. And as per Article 73 it is the document itself produced for inspection of the court. As a corporate entity Diamond Paints has not authorized, signed or approved that agreement. Diamond Paints only enters into agreements through their duly authorized persons. The Enquiry Report has failed to establish through primary evidence that Diamond Paints was party to the Agreement.
- e. The search and seizure was illegal thus documents extracted cannot be relied upon. The law of agency and contract especially with regards to competition matters require certain prerequisites to be met before agent's action can be attributed to the principal. The chain of authorization does not exist in the current scenario as Diamond Paints is unaware of any of their employees attending any such meeting.
- f. Diamond Paints reject the reference made in Paragraph 38 of the Enquiry Report regarding the actions of an employee treated same as those of the company. The Commission relied on a statement made by the Competition Agency of New Zealand where they state that, anything done by a person acting on behalf of employer is said to have done by them. However, in the instant matter mere presence of an employee that too is disputed does not equate to acceptance of an



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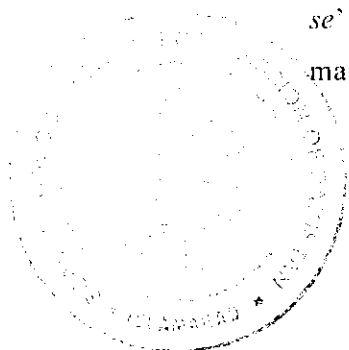
agreement. And no employee could act on "behalf" as there has been no prior knowledge on part of Diamond Paints.

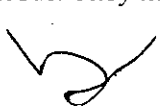

- g. The presence of the agreement at the premises reflects nothing. As it was entered into without any authorization by Diamond Paints and was signed solely by the dealers. An employee of Diamond Paints keeping a copy of the said agreement at their premises does not suffice to place the blame on them. Also the evidence is not admissible, as it was not recovered in the presence of two independent witnesses as per the law of the land.
- h. It is common practice in Pakistan a stamp paper could be obtained in the name of the employer/Diamond Paints without being authorized to do so. Also, merely obtaining stamp paper does not mean that an agreement has been entered into by Diamond Paints. It may also be a possibility that spare stamp papers were present on the Diamond Paints premises as they are present at several corporate entities. The essential feature to prove a contract or agreement is to prove its contents, thus, the stamp paper is merely an accessory. Diamond Paints rejects that they had provided authorization to obtain stamp paper with an object to enter into any anti-competitive agreement.
- i. Diamond Paints has distanced itself from the conduct of its employees mentioned in the Enquiry Report. Mr. Tariq Khan, the Zonal manager has a history of misrepresenting the company's stance to dealers and also habitually involved in obtaining stamp papers in the name of Diamond Paints. Because of this Tariq Khan was terminated from his employment. The conduct of Mr. Mohsin Raza, Area manager of Diamond Paints, was also suspicious. The impugned agreement was entered into on 11 April 2016 and on 21 September 2016 he resigned from his job and subsequently on 10 January 2017 the Search & Inspection was conducted by the Commission in Multan from where the copy of the impugned agreement was found. Mr. Mohsin Raza right after the impugned agreement was concluded decided to quit and go to work for a competitor of Diamond Paints. Clearly both these former employees seem to have kept copies of the agreement on Diamond Paints premises, with an intention to frame the latter. There is no law that states that Diamond Paints' employees attending a meeting where an agreement is executed makes Diamond



Paints a party to that agreement. Dealers and company executives meet frequently in order to discuss matters of legitimate business interest

- j. Diamond Paints denies being involved in any wrongdoing, as it has not complied with any terms of the impugned agreement. An agreement solely by the dealers for the dealers is being wrongly associated with Diamond Paints. Diamond Paints has not complied with the agreement as it has not imposed any penalties on any dealers, in response to paragraph 41(d) of the enquiry report Diamond Paints rejects the allegation as they have never “*enforced, supervised or penalized anyone under the agreement*”.
- k. Diamond Paints denies being part of the impugned agreement but states that even if this was the case, the agreement still does not fall in the ambit of Section 4 of the Act, as it does not meet the essential elements. The relevant product market has not been defined properly. The Enquiry Report has defined the relevant market incorrectly as the market for all types of paints and related products being supplied by the Respondents. The correct test is the “reasonable interchangeability of use”. To analyze this a good approach is to look at the relative cross price elasticity of demand. The inability to approach this matter properly is fatal to the notice and findings of the enquiry report. Not determining the relevant product market creates ambiguity and the Commission cannot move forward to determine the criteria under Section 4. The lack of focus on products of other manufacturers especially when prices of Diamond Paints products are raised and its impact on demand of products of other manufacturers raised questions on the findings of the enquiry report. There is absence of market survey and seems like an attempt to rope in Diamond Paints for liability. It is also worth noting that the dealers are not just selling Diamond Paints products exclusively, but also of several other manufacturers.
- l. It is settled that horizontal agreements amongst competitors for fixing of prices are presumed to have their object or effect of restricting competition. Whereas, vertical arrangements of this sort have pro-competitive effects and therefore ‘*per se*’ rule does not apply. Therefore, regarding the presence of the resale price maintenance (“RPM”) the Commission bears a heavy onus of proof. They must

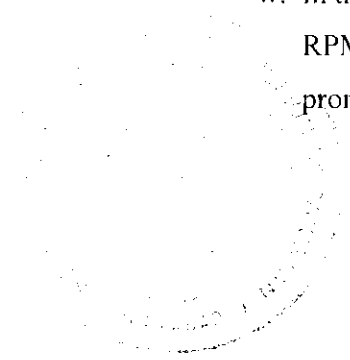
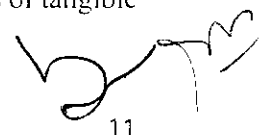


prove that the anti-competitive effects are outweighed by the pro-competitive effects.

- m. The Enquiry Reports takes a misleading impression from the title of the agreement. The title to an agreement much like its recitals does not give conclusive evidence of its contents as determined by national and international law. Despite this there is not vertical price fixing.
- n. The Enquiry Report has randomly selected the jurisdictions of Australia and New Zealand to support their stance. This selective picking is in contravention with the principle of fairness in purview of Article 25 of the Constitution of Pakistan. Even in the US since 2007, matter of RPM is determined in the light of the '*rule of reason*'.
- o. Diamond Paints relies on the *Pakistan Bank Association Order 2007*, wherein it was decided that decision of an association of undertakings reflects an understanding when a member acts upon it, this results in the presence an agreement between association and the member, element of action is absent in the instant matter.
- p. In the *Jute Mills Order 2010*, Agreement was a practice that took place over a long period of time. Agreement included meetings, deliberations and continuous contact for a substantial period of time. This is the distinguishing feature from the present case as the Enquiry Report has gathered insufficient evidence
- q. In *Bayer A.G. v. E.C. Commission [2001] 4 C.M.L.R .4*, when there is no actual agreement the court also looks at tacit acquiescence. There must be evidence of concurrence. There must be alignment of the wholesalers conduct with the demands put forward by the other party in agreement. The evidentiary burden to be satisfied to show a concurrence of will or tacit acquiescence is immense which the Enquiry Report has failed to provide.
- r. Diamond Paints has relied on the doctrine of public distancing and submitted that the Commission must establish the presence of the meeting also there is no signature on the agreement by any employee/officer of Diamond Paints.

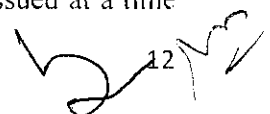
- s. The same principle regarding burden of proof was reiterated in the case of *Monsanto v. Spray—Rite*. “Antitrust plaintiff should present direct or circumstantial evidence that reasonable tend to prove that the manufacturers and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.” The Commission has failed to dispose the burden.
- t. For the agency argument, Diamond Paints has taken the line of reasoning that there is no apparent authority created by employer-employee relationship and acquiesce can only be presumed if a long time has elapsed which is not present in the present case. Diamond Paints has not ratified the agreement even to reflect the slightest form of implied authority.
- u. Setting minimum price enhances competition by promoting inter-brand competition. The European Commission’s Vertical Guidelines have accepted the same as well as in the United States. As this encourages retailers/dealers to invest in” *tangible or intangible services or promotional efforts that aid the manufacturer’s position in the market against rival manufacturers*”. Therefore any assumption by the Commission against the anti-competitive nature of RPM, is incorrect.
- v. Both in the EU and the US, an efficiency defence in favor of RPM taken is the deterrence of ‘free-riders’. A more fancier show room with trained knowledgeable employees might attract people, that retailer has spent a lot to provide a level of service to consumers on the other hand a retailer that spend little on substantial services, and has a bigger margin of profit could benefit from this by giving discounts and still making profits. The high-service retailers lose sales to the discounter, lowering its services that otherwise the consumer would prefer. These factors have been ignored by the Enquiry Report and thus, a liability is denied.
- w. In the case of *Leegin Creative Leather Products v. PSKS* it was determined that RPM should be governed by rule of reason. Its pro-competitive effects include promotions of inter brand competition, distributors compete on basis of tangible



or intangible services or promotional efforts, consumers are given more options and prevention free-riding.

- x. Diamond Paints has also requested that if the Commission adopts a *per se* approach to the matter then it must be allowed to proceed with filing of an exemption application.
9. The dealers through their counsel have made the following submissions vide letter(s) dated 27 February 2018:
- a. That Diamond Paints does not have a wholesale policy and the agreement was made between the dealers to deal with the ongoing practice by some dealers to offer discounts by taking advantage of no-wholesale policy. As Diamond Paints does not have distributor system, hence some dealers decided to make some pricing guidelines. This was solely done by the dealers to address violations by other dealers.
 - b. Diamond Paints has never fixed prices, whereas the agreement does not have the object or effect of preventing competition in the relevant market. The price competition has not been curtailed by the agreement as no set retail or wholesale price has been fixed. The dealers are free to sell paint at a price in accordance with demand in the market. Diamond Paints imposes different conditions of different dealers solely based on performance. This acts as a catalyst to enhance competition.
 - c. The dealers seek leniency under Section 39 of the Act from the Commission as they have not acted or enforced the impugned agreement. They have also expressed the intention to submit any undertaking deemed appropriate by the Commission to address its concerns and to refrain from any agreement, understanding or practice that would infringe competition policy in future. Furthermore, they are also willing to assist the Commission regarding improvements to be made in wholesale through proper distribution network. They are also willing to file for an exemption as per the rules of the procedure.
 - d. They have taken the preliminary objection regarding the composition bench being incomplete and thus the Enquiry Report and SCN were issued at a time

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when the Commission was nonfunctional. The instant case is an *intra provincial matter*” as per entry 27 of the federal legislative list of the constitution of Pakistan. Therefore, it falls outside the jurisdiction of the Act. The collection of evidence has been in contravention to the rules of Qanoon-e-Shahadat Order, 1984 and the Code of Criminal Procedure.

e. During the hearings the counsel for dealers referred to the definition of “undertaking” and appraised that his clients do not fall within in the definition of undertaking(s). He further said that his clients are neither in the business of distribution nor involved in the business of supplying. Even otherwise, his clients did not know anything about this law and any act(s) if done only under ignorance of law. He further objected to the Enquiry team which has not been properly constituted.

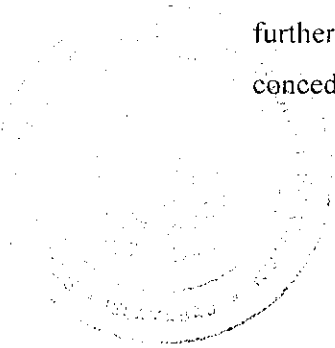
10. On 13 March 2018 hearing was conducted in the matter. In the reply to the SCN, Distributors of Diamond Paints took the plea that they will file Leniency application under Section 39 of the Act. During the hearing the Bench inquired about that Leniency application however, counsel failed to satisfactorily address the query. The Counsel appearing on behalf of Diamond Paints was asked whether the General Manager of Diamond Paints informed the company about execution of the impugned agreement in question? The Counsel stated that the impugned agreement was neither authorized by Diamond Paints and nor was the company is a signatory to it. It had also not granted any approval nor any authorization with respect to signing of and execution of the impugned agreement. The allegation that the Diamond Paints’ General Manager presided over the dealers meeting was also denied. Diamond Paints said that it does not have any agreement with its dealers and it is not involved in price fixing arrangement. The said act was committed by the dealers of their own accord. Diamond Paints treats dealers as customers and are given certain sales targets. The company was never communicated about the agenda of the meeting as the meeting was informal while agreement was signed by ten (10) dealers only. Furthermore, the Counsel denied the fact rather submitted that the said prices are recommended prices in nature and not the final/authorized one and some dealers are doing wholesale business. The Counsel of Diamond Paints was also asked to explain that the stamp paper used to write the agreement was issued in the name of Diamond Paints, whether any approval was given

in this regard? In response, the Counsel stated that the company never issued any approval or any authorization for issuance of any stamp paper. Regional General Manager Mr. Tariq Khan did the same on his own and he has already been terminated for this malpractice. The Counsel further submitted that Diamond Paints terminated the services of the General Manager and the Regional Manager who purportedly were involved in the instant matter. Upon inquiring the appointment and termination process, the Counsel stated that they will submit all the relevant documents in due course. The Counsel of the Diamond Paints raised legal objection regarding quorum of the Commission and its Search and Inspection powers.

11. Mr. Noman A. Farooqi, Legal Advisor to the Commission made submissions with reference to the legal objections raised by Diamond Paints. He submitted that although in terms of the Section 14(1) of the Act, the Commission is considered to be of five members. However, at the same time, the Legislature in all its wisdom has allowed the Commission to delegate any or all of its powers under Section 28 (2) of the Act. This means that the statutory quorum of 5 Members as provided in Section 14(1) is not mandatory and the functional quorum may vary. He further submitted that under Section 41 of the Act, an appeal is provided before the Appellate Bench of the Commission against the Order of a Single Member or authorized officer. Foregoing, also strengthens the view that the legislature has not made it mandatory for the Commission to take every action by full strength as prescribed under Section 14(1) of the Act. He further submitted that although under Section 24(3) of the Act, the minimum quorum for a meeting is prescribed to be three members, however, we cannot ignore the provisions of sub-section (7) of Section 14 of the Act, wherein it is categorically provided that no act or proceedings of the Commission by reason of absence of a Member or existence of any vacancy among its Members or defect in the constitution thereof. In support of his submissions he relied upon **National Electric Power Regulatory Authority vs Faisalabad Electric Supply Company, 2016 SCMR 550**. Accordingly, the objection raised by Diamond Paints in this regard is not well founded. With reference to the legislative competence he submitted that the Commission **In the Matter of Show Cause Notice issued to Karachi Stock Exchange decided vide Order dated 29 May 2009**, while relying on **Akhtar Ali Parvez vs. Altafur Rehman, PLD 1963 (W.P.) Lahore 390** and **Pir Sabir Shah vs. Shad Muhammad Khan, Member Provincial Assembly N.W.F.P., PLD1995 SC 66**, held that the Commission is not the proper

forum to decide questions as to the constitutionality of the then Competition Ordinance, 2007. It was observed that the Commission must proceed on the assumption that its existence is legal and valid until a court of competent jurisdiction decides or directs to the contrary. Accordingly, this assertion made is also not tenable and the objection raised in this regard must be turned down. He also referred to the **Order dated 14 December 2009 in the matter of Show Cause Notices issued to Jamshoro Joint Venture Limited and LPG Association of Pakistan**, wherein the Commission while relying on **Chempak (Pvt.) Ltd. v Sindh Employees' Social Security Institution (Sessi) reported in 2003 PLC 380** and **Federation of 31 Pakistan v. Aitzaz Ahsan reported as PLD 1989 SC 61**, observed that until a law is finally held to be ultra vires for any reason it should have its normal operation. Hence, the subject proceedings be continued. Further, with reference to the objection raised by Diamond Paints on the authorization for the Search and Inspection carried out under Section 34 of the Act, that no reasoning was mentioned in the authorization is also not tenable for two reasons. had they been aggrieved from the Order of search and inspection they should have preferred an appeal in terms of Section 42 of the Act. However, no such appeal was preferred. Secondly, they failed to substantiate their objection as the Search and Authorization contains all the required information necessary in terms of Section 24 of the General Clauses Act. Hence, this objection is also not tenable.

12. On 02 April 2019, after receipt of further/additional documents from Diamond Paints, another hearing in the matter was convened. The Counsel appearing on behalf of the Dealers referred to the definition of 'undertaking' and submitted that the dealers are not undertakings as the distribution of products is one step higher than selling. He further argued that consumer had other (paint brands) choices so competition in this case is not disturbed. He raised objections as to the definition of relevant market in the Enquiry Report. The Counsel appearing on behalf of Diamond Paints argued that they do not have a systematic network as they fix sale targets for the retailers. They raised objections regarding the definition of relevant market. The Counsel appearing on behalf of Diamond Paints further submitted that the documents submitted by Diamond Paints vis-à-vis the termination of the General Manager and Regional Manager were sufficient to absolve Diamond Paint of any responsibility towards illegal actions taken by them. He further submitted that the agreement was not signed by Diamond Paints and even if we concede without prejudice, no violation of Section 4 of the Act took place.



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13. Subsequent to the hearing, Diamond Paints vide their letter dated 22 April 2019 submitted the following documents:

- (i). The resignation of Mr. Mohsin Raza who left the company on 21 September 2016 and joined the competitor "Nippon Paint". This reflects malice on part of the former employee.
- (ii). They also provided termination letter dated 20 September 2017 of Zonal Sales Manager, Mr. Tariq Khan based on grounds of serious misconduct.

Since, the adjudication bench was re-constituted, therefore another hearing in the matter was held on 14 May 2020. The Counsel for the Dealers reiterated their submissions from the previous hearing and also referred to their written reply filed. He further submitted that his clients i.e. the Dealers are not aware about the application of the Act and that the Agreement was in violation of any law, hence, any act done by them is primarily because of ignorance of law. Diamond Paints submitted that it does not have a systematic dealer network as they fix sale targets for the retailers and no agreement was signed by Diamond Paints and even if we concede without prejudice to the foregoing argument, no violation took place. Objection to incorrect determination of relevant market in the Enquiry Report was reiterated. There is no involvement of Diamond Paints as the dealing between the shopkeepers and consumers and even inter se the shopkeepers is beyond the control of Diamond Paints. The Counsel also argued that one of the employees of the company had been terminated for using the stamp paper(s) and was also found involved in other illegal activities. He further said that Diamond Paints, if allowed may file an application for Exemption for compliance. He also stressed that the Dealers are not generally aware about the implications of the Act and he undertook that company would arrange a training session for their employees and dealers and also requested if Commission could assist in this respect.

14. ISSUES AND ANALYSIS

15. On careful review of the Enquiry Report, the SCN and the submissions made in the subject proceedings before us, the substantive issues in the instant matter, for analysis and deliberation are as follows:



Constitutional:

- a) Whether the Competition Act, 2010 is *ultra vires* the Constitution, and beyond the legislative competence of the Federal legislature?

Procedural:

- b) Whether the Commission cannot proceed in the matter due to lack of quorum in terms of Section 14 (1) of the Act?

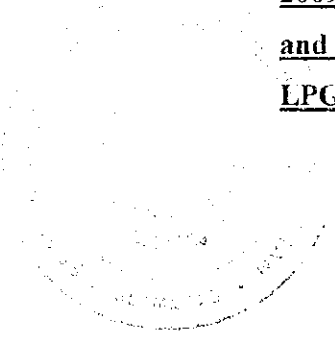
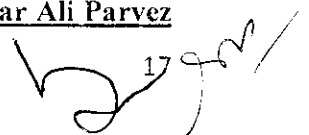
Factual and Legal:

- c) Whether the relevant provisions of the Competition Act, 2010 were followed in proceedings against Diamond Paints?
- d) Whether the parties to the proceedings in the instant matter are undertakings of clause (q) of subsection (1) of Section 2 of the Act?
- e) What is the relevant market for the purposes of the instant matter?
- f) Whether Diamond Paints entered into an 'Agreement' for the fixing of price?
- g) If Diamond did entered into an Agreement – does it violate section 4 of the Competition Act, 2010?
16. In the subsequent paragraphs all the issues in seriatim are deliberated upon in light of the law and the evidence made available on the record.

- a) *Whether the Ordinance is ultra vires the Constitution, and beyond the legislative competence of the Federal legislature?*

17. With reference to the first objection taken by the Counsel on behalf of Diamond Paints, we are in agreement with the submissions made in Para 11 above, i.e., the Commission in many of its earlier decisions i.e. Order dated 10 April 2008 in the matter of Banks' cartelization and Order dated 18 March 2009 In the matter of Floor Pricing by Stock Exchanges, which were subsequently followed in the Order dated 29 May 2009 In the matter of Karachi Stock Exchange (G) Ltd. abuse of dominance case and Order dated 14 December 2009 in the matter of Jamshoro Joint Venture & LPG Association of Pakistan, while relying on while relying on Akhtar Ali Parvez

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vs. Altafur Rehman, PLD 1963 (W.P.) Lahore 390 and Pir Sabir Shah vs. Shad Muhammad Khan, Member Provincial Assembly N.W.F.P., PLD1995 SC 66, it was held that the Commission is not the proper forum to decide questions as to the constitutionality of the then Competition Ordinance, 2007. It was observed that the Commission must proceed on the assumption that its existence is legal and valid until a court of competent jurisdiction decides or directs to the contrary. Even otherwise, it is a settled principle of interpretation that unless a law is declared ultra vires by the Court of competent jurisdiction, it should have its normal course. Consequently, this assertion made is also not tenable and the objection raised in this regard is hereby turned down. We are also in agreement with the Order dated 14 December 2009 in the matter of Jamshoro Joint Venture & LPG Association of Pakistan, wherein the Commission while relying on Chempak (Pvt.) Ltd. v Sindh Employees' Social Security Institution (Sessi) reported as 2003 PLC 380 and Federation of 31 Pakistan v. Aitzaz Ahsan reported as PLD 1989 SC 61, observed that until a law is finally held to be ultra vires for any reason it should have its normal operation. Hence, the objection raised by Diamond Paints in this regard is turned down.

b) Whether the Commission cannot proceed in the matter due to lack of quorum in terms of Section 14 (1) of the Act?

18. Another objection which is raised is that the Quorum of the Commission is not complete in terms of Section 14 (1) of the Act, therefore, owing to the defect in the quorum the proceedings are not maintainable.
19. In order to address this issue, we deemed it appropriate to discuss the history of the provision and the actions taken by the Commission thereunder. The Competition Law in Pakistan was introduced through the Competition Ordinance, 2007 (the '2007 Ordinance'). Under Section 12 of the 2007 Ordinance; the Commission was established, provision in its relevant parts is reproduced herein below:

12. Establishment of Commission. — (1) There is hereby established a Commission to be called the Competition Commission of Pakistan.

20. The composition of the Commission is provided in Section 14 of the 2007 Ordinance, in the following words:

14. *Composition of Commission.— (1) The Commission shall consist of not less than five and not more than seven members:*

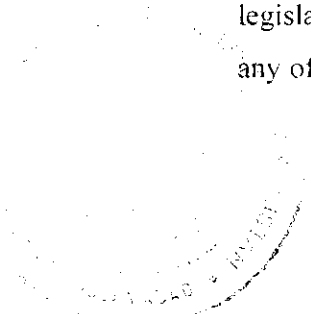
21. Provided that the Federal Government may increase or decrease the number of Members, from time to time, as it may consider appropriate. In addition, the Legislature in all its wisdom has specifically provided through subsection (7) of Section 14 that no proceedings shall be invalid because of a vacancy or defect in constitution. The provision, for ease of reference, is reproduced herein below:

(7) No act or proceeding of the Commission shall be invalid by reason of absence of a member or existence of any vacancy among its members or defect in the constitution thereof.

22. It is relevant to highlight that in 2007 Ordinance as well as 2009 and 2010 Ordinance and the 2010 Act, the legislature in all its wisdom has allowed the Commission to delegate any or all of its powers and functions to its Members and Officers. The provision is Section 28(2) and is reproduced herein below for ease of reference:

28 (2) The Commission may, subject to such conditions as it may think fit to impose, delegate all or any of its functions and powers to any of its Members or officers as it deems fit.

23. From the above, it can be conveniently gauged that the intention of legislature is to keep the Commission functional and for this reason the powers are given to the Commission under the statute to delegate any or all of its functions and powers. On 15 March 2010; when the Quorum and composition of the Commission was complete in terms of Section 14 (1) of the 2010 Ordinance i.e. 5 Members; the Commission, in pursuance of its powers under Section 28(2) of the 2010 Ordinance delegated certain functions and powers to its Officers and Members which were notified in the Gazette of Pakistan, Extra Ordinary dated 15th March 2010 vide S.R.O. 176(I)/2010. On 19th June 2019 again when the Quorum of the Commission was of five Members; the previous delegation of powers was revised and the notification for delegation of powers was approved under Section 28(2) of the 2010 Act and was notified vide S.R.O. No. 1128 (I) /2019 and is also available on the website of the Commission. It is also relevant to highlight that the Commission is performing various functions i.e. advocacy, research, enforcement and adjudication, which are detailed in under Section 28 & 29 of the 2010 Act, however, the legislature in all its wisdom has not provided for any quorum to be present to perform any of the said functions. It is relevant to highlight that under Section 41 of the Act, it



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is provided that an appeal can be filed against the Order of a single Member or an authorized officer. In addition of the above, reference can also be made to the provisions of Section 14(7) of the 2010 Act, which was available in 2007, 2009 and 2010 Ordinances as well that *'no act or proceeding of the Commission shall be invalid by reason of absence of a member or existence of any vacancy among its members or defect in the constitution thereof'*.

24. A similar objection was raised before the Appellate Tribunal in appeal by Colgate Palmolive reported as **2019 CLD 254**, where the same issue was addressed. The Appellate Tribunal held that in the light of section 14(7) of the Act no act or proceeding of the Commission would be rendered invalid by reasons of the number of members present. Foregoing in view, this objection having no force is also turned down.

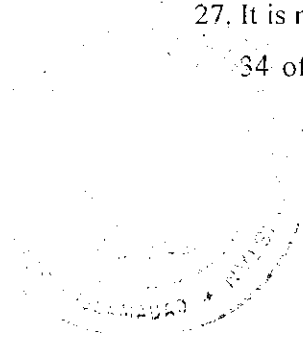
c) Whether the relevant provisions of the Competition Act, 2010 were followed in proceedings against Diamond Paints?

25. Another objection which is raised by Diamond Paints is that the date of the Enquiry must pre date the search and inspection. In this regard, we deem it appropriate to refer to the provisions of Section 34 of the Act and Section 37 of the Act and would analyze the same in juxtaposition with each other. The provisions of Section 34 in its relevant parts is reproduced herein below:

34. Power to enter and search premises.- (1) *Notwithstanding anything contained in any other law for the time being in force, the Commission, for reasonable grounds to be recorded in writing shall have the power to authorize any officer to enter and search any premises for the purpose of enforcing any provision of this Act.*

26. Plain reading of the aforesaid provision leaves no room for any pre-condition i.e. initiation of an enquiry or proceedings. The Commission may at any time for the reasons to be recorded may carry out the search and inspection of any premises for the purposes of enforcing any provision of the Act. The foregoing interpretation is made based on the settled principle of interpretation of statutes i.e. plain and ordinary meaning must be given to the words used in a statute, reference is made to **Baz Muhammad Kakar and others v. Federation of Pakistan and other, reported as PLD 2012 SC 923.**

27. It is noteworthy that the Commission authorized a search and inspection under Section 34 of the Act subsequent to receiving a copy of the impugned Agreement from an



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anonymous source. The Commission in order to assess the nature and possible contraventions of the Act authorized the search and inspection in the instant matter. Hence, any allegations made by Diamond Paints with reference to derogation from the framework provided under the Act is baseless and is hereby turned down.

d) Whether the parties to the proceedings in the instant matter are undertakings of clause (q) of subsection (1) of Section 2 of the Act?

28. The Counsel appearing on behalf of the Dealers, during the hearing, has submitted that in his clients does not come in the definition of undertaking(s) as provided under Section 2(1)(q) of the Act; as his clients are neither in the business of distribution nor involved in the business of supplying.

29. In order to address this issue, we deem it appropriate to refer to the definition of 'undertaking' as provided in Section 2(1)(q) of the Act, which for ease of reference is reproduced herein below:

“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”

30. The above definition has been interpreted in a number of earlier decisions of the Commission, we would like to refer to one of the most recent decisions of the Commission i.e. **Order dated 15th December 2017, in the matter of Show Cause Notice issued to Utility Stores Corporation of Pakistan (Pvt.) Limited**, reported as **2018 CLD 292**, wherein while interpreting the provisions of Section 2(1)(q) of the Act, the Commission held as follows:

*28. While interpreting the definition of an 'undertaking' we are guided by the judgment of the August Supreme Court reported as **Zahid Iqbal v. Hafiz Muhammad Adnan and others, 2016 SCMR 430**, wherein while interpreting the provisions of section 27 of the Punjab Local Government Act, 2013, it was held that "Courts do not legislate but interpret the statutes according to their ordinary and plain meaning and do not import and or supply words or provisions from any other law, no matter how laudable and desirable it may appear to be". We are also guided by a judgment of the Indian Supreme Court reported as **London Rubber Co. Ltd., v. Durex Products Limited, AIR 1963 SC 1881**, wherein it was observed that "the duty of the Court is to give full effect to the language used by the Legislature. It*

has also no power either to give the language a wider or narrower meaning than the literal one, unless the other provisions of the Act compel it to give such other meaning." With the foregoing in view, we now proceed with interpreting the definition of 'undertaking' under clause (q) of subsection (1) of section 2 of the Act, in the subsequent paragraphs.

29. A bare perusal of the definition of an 'undertaking' leaves no doubt that it is divided in two parts. The first part of the definition takes within its folds the types of entities that can possibly exist i.e. an individual, a company, a firm, an association of undertakings, governmental entities, sector-regulators, a body corporate established under the Provincials or the Federal laws of Pakistan, a cooperative society and any other entity regardless of its legal status and the way in which it is financed. Whereas the second part focuses on the nature of activity which is performed by them be it directly or indirectly i.e. production supply distribution of goods or provision or control of services. The most important part of the second limb of the definition is that the legislature within its wisdom by using the words 'in any way' (emphasis added), has made it clear that there is no condition on the legal entity to engage in commercial or economic activity to fall within the purview of 'undertaking' for the purposes of the Act. If any legal entity or natural person is engaged in any way in the production, supply, distribution of goods or provision or control of services, the said undertaking would fall within the purview of the term 'undertaking'.

31. Keeping in view the above interpretation, we now would analyse the objection made on behalf of Dealers. It is relevant to highlight that the no such objection was raised in their written reply and they have also not objected to Para (14) of the Enquiry Report, where they are termed as 'undertaking'. In terms of the provisions of Section 2(1)(q) of the Act, the only requirement envisaged by the legislature is that the entity is "*the nature of activity which is performed by them be it directly or indirectly i.e. production supply distribution of goods or provision or control of services*". It is admitted by them that they purchase the products from Diamond Paints and then sell it off to various customers. In nutshell the Dealers are providing the paint to the consumers and hence, are engaged in the supply of goods from the manufacturer to the consumers. Hence, based on the above discussion, there remains no doubt that the Dealers are all, individually, undertakings within the meaning of Section 2(1)(q) of the Act.

32. As far as Diamond Paints is concerned, the same was established in 1982 with 28 company owned stores throughout Pakistan along with 414 dealers' locations. It is a private limited company engaged in the manufacturing and supply of paints and related products in Pakistan. Hence, it falls within the definition of an undertaking under section

2(1)(q). This finding of the Enquiry Report in paragraph (13) was not disputed in their submissions. Hence, this objection has been addressed and is turned down.

e) What is the relevant market for the purposes of the instant matter?

33. The Dealers as well as Diamond Paints have raised objections over the determination of relevant market in the Enquiry Report. In order to address this aspect, we deem it appropriate to refer to the definition of 'relevant market' provided in Section 2(1)(k) of the Act, which for ease of reference is produced herein below:

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

34. Careful perusal of the above definition reveals that there are two components of the relevant market i.e. product market and geographic market. The product market is to be defined from the perspective of consumers while keeping in view the characteristic of the product/services and its substitutability. Whereas, the geographic market is to be approached from the perspective of the undertakings providing similar products/services and the conditions of competition in neighboring geographic areas.

35. In order to determine the relevant market, the two dimensions will be addressed one after the other. The relevant product market determined in the enquiry report was paints and all the related products that Diamond Paints sells to its dealers for supplying to the end customer, though these products are not substitutable in terms of their characteristics and intended use each one of them is a distinct product market on its own. This finding of the Enquiry Report was challenged by Diamond Paints as mentioned above. The non-application of the '*reasonable interchangeability of use*' test by determining the cross-price elasticity of demand. The Enquiry Report has restricted the product market to the products of Diamond paints only. However, several other paint manufacturers operate in Pakistan. An in-depth analysis of the test would be provided in this order to respond to the submission of Diamond Paints. Each type of paint and its

related product would be discussed in the following section. There are over 150 paint manufacturers operating in Pakistan and in order to determine the relevant product market in line with the correct test each type of paint or its related product supplied by every paint manufactures that is involved in their production would be a separate product market. As the consumer would switch to use the product of another undertaking based on the interchangeability and intended use of the product.

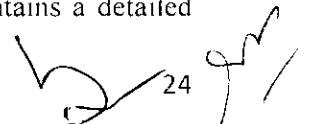
36. Before proceeding further, we deem it appropriate to refer to earlier Orders i.e. **In the matter of show cause notice issued to M/s Wateen Telecom Limited, reported as 2019 CLD 188** and, **In the matter of Show Cause Notice issued to NFC Employees Co-Operative Housing Society Ltd (reported as 2019 CLD 164** .In the former while dealing with ambiguity regarding determination of relevant product market, held as following:

21. The Commission in the instant proceedings is also of the considered view that there exists no justifiable reason to distinguish between the markets for ATV and DTV services, both forming an integral part of pay TV services as a whole. The Commission is also fortified in its view that DTV is merely a further development of ATV technology and therefore neither of them constitute a separate relevant product market from a competition point view.

22. Moreover, in terms of market players, all pay TV operators build up the relevant market of "pay TV services". Therefore, the provision of packages of TV programmers to final users by operators of satellite FTTH/IPTV digital platforms as well as analogue based cable operators or analogue TV providers through HFC, are all classified as the same relevant market for the provision of pay TV services as consumers are provided with a very similar service for the same intended use (regardless of the applied technology) with a slight variation in price, quality and characteristics.

37. In the latter Order i.e. **2019 CLD 164** the former Order i.e. **2019 CLD 188** was endorsed. Relevant product market is that the consumers are provided with a very similar service for the same intended use, though there could be minute differences in price and characteristics. The above referred precedent of the Commission contains a detailed

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analysis based on the concept of demand side substitution i.e. consumer's perspective. To attach coherence to the instant matter considering the submissions of Diamond Paints, it would be unreasonable to impose an invariable justification for paint and its related products of all types.

- (a). Exterior paint and primer: The paint companies that are involved in the manufacturing of this type of paint are Diamond Paints, Nelson Paints Industries, Allied Paints Industries and Black Horse Paints substitutable based on their intended use and conform to the demand side substitution requirement hence this is relevant product market of its own. Within the head of Exterior paints there are separate types of paints such as, weather defender and super gloss paints however, they have all been encompassed in one single category of exterior paint.
- (b). Interior Paint and Primer: The paint companies that are involved in the manufacturing of this type of paint are Diamond Paints, Nelson Paints Industries, Allied Paints Industries and Black Horse Paints etc. are substitutable based on their intended use and conform to the demand side substitution requirement hence this is relevant product market of its own. Within the head of Interior paints there are separate types of paints such as, water based, soft acrylic soft metallic etc. All these types of paint fall into one category and though the consumer may choose between the several types based on price factors yet the end motive is to use it internally.
- (c). Wood /timber Paints: The paint companies that are involved in the manufacturing of this type of paint are Diamond Paints, Berger Paints, Brighto Paints, Dulux Paints etc. These substitutable based on their intended use and conform to the demand side substitution requirement hence this is relevant product market of its own as they are used to paint wooden objects primarily.
- (d). Industrial paints: The paint companies that are involved in the manufacturing of this type of paint are Diamond Paints, Berger Paints, Asian Paints, Rainbow paints etc. These substitutable based on their intended use and conform to the demand side substitution requirement hence the relevant product market is of its own.

38. This entire discussion intersects at this very point that, with regards to the distinct nature or intended use of each type of paint product constitutes as its own relevant product

market. Therefore, the paint or related products for exterior operate separately from the products used to paint wood, resulting in a total of “04” relevant product markets for the purposes of the instant matter. The consumer that intends to purchase a specific type of paint would not purchase something else. Hence, killing the element of substitutability.

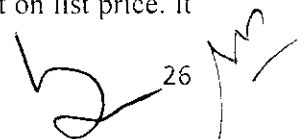
39. To address the relevant geographic market the applicable paragraph 17 from the Enquiry Report is reproduced below;

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

40. In this Order this determination of the Enquiry Report would be altered. As the definition in section 2(1)(k) suggests that the conditions for competition must be sufficiently homogenous. Diamond Paints is an established undertaking operating since 1982 with 28 company owned stores nationwide. Hence, as the undertaking operates at different locations in the country with their head office located in Lahore. Any dealership agreements or distribution wouldn't be possible without seal of approval from the executive management at the head office. The conditions for trade are set by single entity based in Lahore, while their products are distributed under similar conditions throughout Pakistan. The conditions of competition in Multan are not distinct from conditions of competition in any other part of the country. The legal framework with reference to the manufacturing and supply of relevant product remains the same throughout Pakistan. Therefore the relevant geographic market extends to whole of Pakistan.

f) Whether Diamond paints entered into an 'Agreement' for the fixing of price?

41. As per the terms and conditions of the Agreement. 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 (hereinafter '**list price**') issued by Diamond Paints. Regarding other products, a dealer is required to sell them within the threshold of a 20% discount on list price. It



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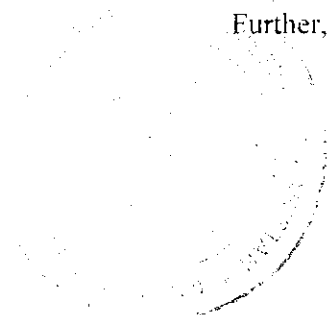
is crucial to analyse the concept of “Resale Price Maintenance” (“RPM”) refers to agreement or practice whereby a manufacturer and its distributors agree that the distributor will sell the manufacturer’s or the supplier’s product at a certain price, **at or above a floor** (minimum resale price maintenance) or **at below a price ceiling** (maximum resale price maintenance).

42. The clause titled ‘wholesale’ limits the dealings between dealers to 25% of the product. Dealers could Sub deal or sell in wholesale only after permission from the Zonal Manager of Diamond Paints. If a sub-dealer is found to be in violation of what is termed as ‘rate fixing’ a breach of the ‘terms and conditions’, the dealer would pay PKR 50,000 as penalty whereas a second breach would trigger a revocation of the dealership and its annual sale targets would be distributed among the remaining dealers. Also price fixing committee was constituted with the mutual consent of all dealers with the Zonal Manager of Diamond Paints also made part of the committee. The agreement was signed on 11 April 2016 to take effect on 15 April 2016. Also price fixing committee was constituted with mutual consent of all dealers and the three member committee also consisted of the Zonal Manager of Diamond Paints.

43. Diamond Paints has further submitted that they have distanced themselves from the conduct of their employees, Area Manager Mohsin Raza and Zonal Manager Tariq Khan. It is correct that the termination letter of Mr. Tariq Khan dated 20 September 2017 was provided to the Commission attached to their letter dated 22 April 2019. However despite Mr. Mohsin Raza’s conduct he wasn’t terminated rather he was allowed to resign. However, these steps taken by Diamond Paints are appreciated and reflect their inclination towards distancing themselves from such *malicious* practices of their employees.

44. In the light of these sections of the Agreement where a bar on quantity is set and also along with price fixing. It is vital to distinguish the role of Diamond Paints with regards to these. It is important to note that the search and inspection was carried out by the Commission of Diamond Paints Head Office as well as the Zonal Office at Multan. No document or evidence was recovered from the Head Office with reference to the instructions similar to the ones under review. It was only in the Multan Zonal Office the document and agreement with the Dealers and called into question was impounded. Further, Diamond Paints terminated the services of the Zonal Sales Manager who was

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a member of the price fixing committee of the Dealers and they also provided the Commission evidence i.e. termination letter of Mr. Tariq Khan former Zonal Manager dated 20 September 2017. Enough evidence is made available on the record to reach a conclusion that Diamond Paints, as an undertaking, never took part in the price fixing arrangement with its dealers.

g) *Whether the Agreement dated 11 April 2016 is in violation of section 4 of the Act?*

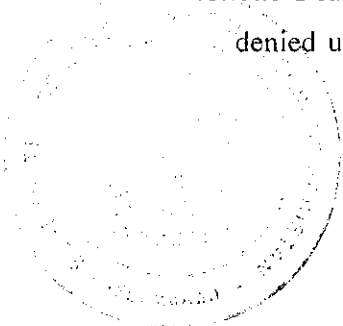
45. Now coming to address the most crucial aspect of the matter i.e. whether the Agreement dated 11.04.2016 is in violation of Section 4 or not, we need to analyze the said agreement and the facts surrounding it thoroughly.

46. The Agreement naming "*Retail and Wholesale Rate Fixing*" was signed between the Dealers of Diamond Paints in their presence on 07 April 2016 at Multan (the '**Agreement**'). The Agreement was recovered from the regional office of Diamond Paints at Multan during the Search and Inspection conducted by the officers of the Commission. However, we cannot ignore the fact that the simultaneously a search and inspection of the head office of Diamond Paints was also carried out. However, no such material was recovered from head office which may point towards any such arrangement instigated on behalf of Diamond Paints towards its Dealers. We also cannot ignore the fact that the relevant staff was terminated and removed from Diamond Paints on the pretext that no illegal activities can be tolerated.

47. As regards, the existence of Agreement inter se the Dealers, they have conceded that they executed the Agreement with their free will and this is clearly mentioned in their written reply. In this regard, we deem it appropriate to refer to Article 114 of the Qanun-e-Shahadat Order 1984, which for ease of reference is produced herein below:

"The word "estoppel" means the rule of evidence or doctrine of law which precludes a person from denying the truth of some statement formerly made by him, or the existence of facts which he has by words or conduct led others to believe in. If a person by a representation induces another to change his position on the faith of it, he cannot afterwards deny the truth of his representation."

48. The Dealers have already admitted that they signed the agreement. now it cannot be denied under the principle of "*estoppel*". Although, the Agreement was impounded



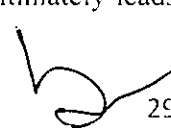

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from the Regional Office of Diamond Paints, however, the same is not corroborated with any directions issued from Head office to Dealers. The Commission has not received any further evidence relating to this. Noteworthy facets of the agreement were; fixation of maximum discount percentage, fixation of percentage quantity exchanged between the dealers and the requirement of permission from zonal manager of the company to create sub-dealer at any area/location. The agreement also stated that main dealer of Diamond Paints will bear the consequences if the sub-dealer violates any of the clauses of the agreement. The said agreement involves two important aspects (i). Horizontal Agreement and (ii). Vertical Agreement.

49. Horizontal Agreement: Horizontal agreement for the purpose of this case means the agreement signed between the Dealers of Diamond Paints. Keeping in view the principle of "*estoppel*", the agreement seized during Search and Inspection by the officers of the Commission is prohibited in terms of Section 4(1) of the Act. Indian court, in the matter of "*Afzauddin Ansary vs. State of West Bengal*", reported in (1997) 2 Crimes 53 Cal., observed that a man may lie but a document will never lie and the relevant portion of the above decision is quoted below:

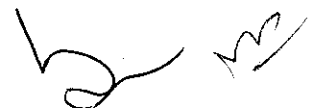
"20. A well-known dicta has been laid down not only by the apex Court of our country but also by the Privy Council that a man may lie but a document will never lie. It is a well-known adage that one swallow does not make a summer but it is a case where one swallow makes a summer. The question arises in this way as it gyrates the whole issue where the evidence as to recognition is a subsequent creation by the machination of the Ansaries. Exhibit-5 the copy of the general diary book projects an unnatural shadow about recognition of any one of the appellants before us. A silence has been maintained in the said exhibit where none of the names of the appellants found their room in the general diary book."

50. In above mentioned case law, the court is of the view that if the oral statement contradicts of what the documentary evidence is; the court of law will reply on the documents. The legal maxim defined in the said case law defies the presence of *malafide* intent of person in terms of lying or backing out from his previous statement or action. Another aspect of presence of horizontal agreement is that the fixation of discount percentage mention in "*Retail clause*" of the agreement. It says that the maximum 20% discount on rate list can be given to the customer. By fixing maximum percentage if the discount means fixing the minimum ceiling of the price of the paint, ultimately leads

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towards Minimum Resale Price maintenance (RPM). In this regard, we deem it appropriate to refer to the following jurisprudence:

51. The issue, whether fixing or prescribing minimum resale price by an undertaking or association of undertaking has been addressed in various international jurisdictions, which are discussed below:
52. In Continental T.V., Inc. v. GTE Sylvania Inc. (1977), The court further noted that per se treatment is appropriate only for 'conduct that is manifestly anticompetitive' i.e. conduct that would always or almost tend to restrict competition and decrease output. In relation to the matter at hand, the court concluded that behaviour would be construed transgression of the Sherman Act only if it was an unreasonable restraint on trade that would diminish competition and promote inefficiency. In State Oil v Khan (1997) benefit of restriction in each individual case involving vertical maximum price fixing. The court concluded that the vertical maximum price fixing is not per se unlawful, but simply it should be evaluated under the rule of reason (i.e. there must be sufficient economic justification), which can effectively identify situations in which it amounts to anticompetitive conduct.
53. Furthermore, in the case of Leegin Creative Leather Products, Inc. v. PSKS, Inc. (2007). The court cited evidence from the economic literature that vertical minimum price agreements are rarely anticompetitive and can often function to increase intra-brand competition. Nevertheless, the court acknowledged that in some cases vertical price minimums might facilitate manufacturer's cartels, but it held that instance, where price agreements are abused for anticompetitive purposes, can be determined on a case-by-case basis under the rule of reason. In the US, as a result of Khan and Leegin decisions, all RPM arrangements are now reviewed under the Sherman Act using the rule of reason standard. It is noted that Leegin did not, however, exempt RPM agreements completely from antitrust scrutiny under the Sherman Act.
54. Comparable to Section 4 of the Competition Act 2010, the Article 101 TFEU¹ comprises four elements, each of which must be satisfied in order for the prohibition to be infringed. Any secret agreement or understanding between competitors that fix prices,



limits output, shares markets, customers or sources of supply, or involve other cartel behaviors such as bid-rigging, will almost inevitably be regarded as an agreement restricting competition within the meaning of Article 101. If a business's practice, agreements or other trading terms have sufficient effects on competition in the marketplace, then they may be caught by the Article 101(1) prohibition. If so, any restrictive provisions are unenforceable under Article 101(2) – and in serious cases, the parties may risk fines – unless they meet the exemption criteria of Article 103.

55. With regards to RPM in general a hard stance is taken against RPM it is considered a so-called 'hardcore restriction'. Where RPM is included in an agreement, that agreement is presumed to restrict competition and thus fall within the scope of Article 101(1) TFEU, which prohibits agreements that have as their object or effect the restriction of competition. The Commission's Guidelines on Vertical Restraints define RPM as "agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum resale price or a fixed or minimum price level to be observed by the buyer. "For contracts containing RPM the restriction quite straightforward however, RPM could also be achieved through indirect means such as, fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level, making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries and so on and so forth.

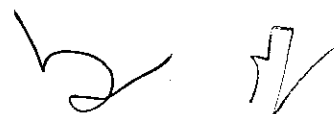
56. As an exception to the prohibition set out in Article 101(1) TFEU, Article 101(3) TFEU provides that the prohibition contained in Article 101(1) may be declared inapplicable under certain conditions where the agreement at issue leads to countervailing competitive benefits or efficiencies under Article 101(3) TFEU. Although theoretically RPM can be justified under Article 101(3) TFEU, in practice, convincing competition authorities that the pro-competitive effects of RPM outweigh the anti-competitive effects. In effect, RPM is treated as a *per se* (or "by object" in terms of Article 101 TFEU) infringement, at least with respect to minimum prices. Article 4(a) of VABER excludes agreements that cause a "restriction of the buyer's ability to determine its sale price" from the regulation's purview. That leaves such agreements amenable to review

under Article 101(1) which prohibits agreements that “*directly or indirectly fix purchase or selling prices.*” Recommending a resale price or requiring resellers to respect a maximum resale price is sometimes permitted. Specifically, maximum RPM is allowed up to 30% market share threshold, provided that the result is not fixed or minimum sale price due to pressure or incentive from the supplier. In **Volkswagen AG vs. Commission (2003)**, the manufacturer who issued circulars and warnings to dealers urging them not to deviate from non-binding recommended resale price was not liable for price fixing. However, in **Nathan – Bricolux OJ (2001)**² the European Commission found that setting maximum prices in conjunction with prohibiting discounts and rebates was equivalent to fixing of resale prices. The burden to show a non-binding nature of such recommendations may vary on a case-by-case basis. The European commission’s enforcement policy toward minimum RPM has traditionally received stricter connotation. In 2007, with the US Supreme Court’s seminal *Leegin* judgment (wherein the court abolished the century-old *per se* rule on vertical price fixing), the European Commission issued Guidelines on Vertical Restraints virtually endorsing the “rule of reason” analytical approach. Nevertheless, vertical restraints entailing price floor or minimums remain subject to the quasi-conclusive presumption of illegality.

57. Above mentioned maxim and the existence of RPM corroborates the existence of horizontal agreement signed between the dealers of Diamond Paints to fix the prices and to hamper the competition in the market, which is not denied by any of them.

58. **Vertical Agreement:** Vertical agreement for the purpose of this case means the agreement signed between the Diamond Paints and the Dealers. There are many aspects impliedly indicating the presence of vertical agreement ultimately violating the provisions of Section 4 of the Act. Facts validating the presence of vertical agreement are discussed as follows:

(a). **Recovery of Document:** During Search and Inspection conducted by the officers of the Commission, the copy of the Agreement was seized from the Regional Office of Diamond Paints at Multan which implies to the fact that the Diamond Paints was aware of and a party to the agreement.

Two handwritten signatures in black ink, one on the left and one on the right, appearing to be initials or names.

- (b). Stamp Papers: The stamp paper is considered to be a legal document. It is always verified on the back side of paper with name, signature and stamp of the person to whom it may be issued. The stamp paper on which the Agreement was written and signed is issued on the name of **Diamond Paints (Pvt.) Limited and Aarain Paints and Hardware Store** and signed by Area Manager of Diamond Paints.
- (c). Whole Sale: If we look into the 'Whole sale' clause of the Agreement, it state that on all products of Diamond Paints, dealers will be able to make interchangeable transaction upto 25% only. It shows that the Diamond Paints is *quota fixing* its dealers up to 25% of the stock only which is an anticompetitive activity. In the same clause it is said that no dealer can extend its whole sale to any other region of Multan or they need to seek the Zonal Manager's permission to create the *sub-dealer* for further whole sale in any region. Which is again an anticompetitive activity on the part of Diamond Paints.
- (d). Indirect Restrictions: Diamond Paints through this Agreement forcing its dealers to restrict their investment indirectly by fixing the price, quota and region for whole sale of the products of Diamond Paints. Even to the extent that if the sub-dealer violates the terms of Rate fixings, it will be considered the violation on part of main dealers of the Diamond Paints.

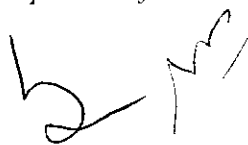
59. One of the important factors to look into while analyzing the parts of Agreement as an issue to this case; the "*Penalty clause*" for rate fixing under the head of "Terms and Conditions". Every dealer submitted the cheque amounting to PKR. 50,000/- during this meeting to be encashed on 1st time violation of Rate fixing. 2nd of further violation will result into cancellation of dealership by Diamond Paints permanently, and the annual target of that specific dealer will be distributed among other remaining dealers as per their business and market share. These "Terms and Conditions" implies its benefit in both directions; vertically as well as horizontally. But since the Commission couldn't find any corroborating evidence to this Agreement, neither any directions to abide by the agreement were issued for the dealers from the Head Office of Diamond Paints. It is more likely that to capture more market share and equal profits, the dealers are mutually agreeing to those terms and conditions of price fixing.

60. It is also relevant to highlight that the Dealers have made submissions before us that they were not aware of the Act and any or all the actions with reference to the Agreement were done by them due to ignorance of law. Here we would like to refer to the Order dated 16 August 2010 in the Matter of Show Cause Notice issued to Ace Group of Industries, wherein while relying on Ahmad Bakhsh and 3 others vs. Managing Director, (Superintending Engineer) WAPDA Electric Supply Company, Multan, reported as 1995 PLC 536, it was held that plea of ignorance cannot be accepted as a valid justification or defense, at all.

61. The Dealers as mentioned above entered into the arrangement voluntarily further the request for leniency by them, in the reply, begs for attention. As leniency is requested if the parties accept that they were at fault, leniency is leniency from the penalty. A brief account of the Competition (Leniency Regulations) 2013 is produced here. The leniency applied for in the instant matter is after the issuance of SCN. Under Regulation 3 of the Leniency Regulations Commission may grant total immunity from financial penalties to an undertaking if it is the first to provide evidence to the Commission regarding a prohibited activity that the Commission already does not possess or provide assistance and cooperation throughout the determination or investigation of a prohibited activity, however in the instant matter it is more likely to fall under the ambit of Regulation 4, that is reduction of financial penalty. As per Regulation 4 (b) (ii) an undertaking can benefit from reduction in penalty after initiation of proceedings under Section 30 of the Act but before the Commission passed any Order Pursuant to Section 30. The procedure to make a formal application is set under Regulation 5, by admitting fault and violation of Section 4. In terms of Article 113 of the Qanun-e-Shahadat:

113. Facts admitted need not be proved: No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may in its discretion, require the facts admitted to be proved otherwise than by such admissions.



62. In view of the foregoing, we are of the considered view that leniency requested on part of the Dealers is an admission and the execution of the Agreement stands proved in terms of the admission made by the Dealers.

63. In light of above-mentioned facts, it is clear that Diamond Paints is not a party to the Agreement, hence no violation of Section 4 of the Act is done on part of Diamond Paints. The Dealers, on the other hand, were part of the meeting and the admitted this fact in reply of show cause notices along with their signatures as proof on the agreement. Violation of Section 4 of the Act stands proved on part of Dealers through execution of the Agreement in violation of Section 4 of the Act.

REMEDIES/ ORDER

64. Foregoing in view, we hereby hold that M/s Arain Paints Multan, M/s Gulzar Paints Multan, M/s Madina Paints Multan, M/s Bismillah Paints Multan, M/s Haji Sattar & Sons Multan, M/s Hamza Paints Multan, M/s Al Masoom Paints Multan, M/s Nadeem Brothers Multan, M/s Majid Paints Multan and M/s Al Maqsood Traders, individually and collectively have violated the provisions of Section 4 of the Act by entering into the Agreement dated 07 April 2016 for fixing the price of Paints, which has the object of preventing, restricting or reducing competition within the relevant market and is to be condemned *per se* is illegal and violative of Section 4 of the Act.

65. In terms of Section 38 of the Act, the Commission is empowered to impose such financial penalties upon the contravening party(s), as deems fit in the circumstances which may be up to 75 million or 10 % of the annual turnover of undertakings concerned. In the instant matter we cannot ignore that the Dealers have filed the Leniency Request and have surrendered themselves before the Commission. Further, no conclusive proof is available on the record that the Dealers have actually acted upon the said agreement, the execution whereof was not denied. Therefore, by taking lenient view, this one time, we are not imposing any penalty on the undertakings mentioned in Para 61 above.

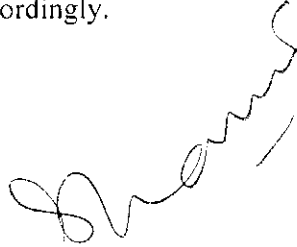
66. We, however, direct the Registrar of the Commission to circulate Urdu transcript of this Order along with the English Version amongst all the Chambers of Commerce across Pakistan and Paint Manufacturers for education of their dealers. Further, The Registrar


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is directed to communicate the directions of this Bench to the concerned to conduct an advocacy session, initially, for the training of the Diamond Paints personnel and the Dealers vis-à-vis the Competition Act, 2010.

67. In terms of the above, the SCNs are hereby disposed of.

68. Ordered accordingly.



(Ms. Shaista Bano)
Chairperson



(Ms. Bushra Naz Malik)
Member

ISLAMABAD THE 6TH DAY OF JULY 2020