



**BEFORE THE  
COMPETITION COMMISSION OF PAKISTAN**

**IN THE MATTER OF**

**All Pakistan Newspaper Society,  
All Pakistan Newspaper Society's Subcommittee on Cover Prices &  
All Pakistan Akhbar Farosh Federation**

**(File No. 06/Sec-3/CCP/08)**

Date of hearing: 3<sup>rd</sup> March 2009

Present: Maleeha Bangash, Member

Present for All Pakistan Newspaper Society: Arshad Zuberi the Editor for Business Recorder

Present for Sub-committee of All Pakistan Newspaper Society: Tanvir Tahir, the Executive Director of APNS

Present for All Pakistan Akhbar Farosh Federation: M. Abdullah Zafar, Marketing Manager and Tikka Khan, the Secretary General

**ORDER**

1. At issue in this case is firstly, whether the Minimum Cover Price Formula issued by the All Pakistan Newspapers Society (“**APNS**”) to all its members constitutes price fixing thereby violating Section 4(1) of the Competition Ordinance, 2007 (“**Ordinance**”). Secondly, whether the decision of Subcommittee on Cover Prices of APNS (“**Subcommittee**”) to set minimum prices and subsequent formula constitutes Newspaper price fixing thereby violating Section 4(1) of the

Ordinance. Lastly, at issue is whether the agreement of the All Pakistan Akhbar Farosh Federation (“**Akhbar Farosh**”) with APNS to ensure that no Newspaper violating the Minimum Price Formula constitutes a restrictive trading condition with regard to the sale of the Newspapers, thereby violating Section 4(1) of the Ordinance.

*I affirm.*

## I – UNDERTAKINGS

2. APNS was formed in 1953, and calls itself “a premier body of Newspaper publishers” or “representative body of Newspapers and magazines all over the country.” APNS is an association of Newspaper owners whose purpose is to “watch over, protect, preserve and promote the rights and interests of the Newspaper industry on matters directly or indirectly affecting their rights and interests.” APNS implements rules of conduct for member publications as well as the advertising agencies and also handles complaints of its members against non-payment by advertising agencies. APNS currently has 292 member publications from all over Pakistan and in many different languages<sup>1</sup>. Subcommittee is part of the Distribution, Wholesale and Retail Marketing Committee which are both headed by Arif Nizami, Editor of The Nation. APNS and its sub-committee acting on behalf of APNS are Undertakings as defined in Clause (p) of Section 2(1) of the Ordinance<sup>2</sup>.
  
3. Akhbar Farosh is an association of national Newspaper vendors who distribute Newspapers that are published and sold in Pakistan. Akhbar Farosh is further

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<sup>1</sup> APNS website <http://apns.com.pk/intro.html>

<sup>2</sup> Section 2(1)(p) of the Ordinance, “Undertaking” means any natural or legal person, governmental 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 of services and shall include an association of undertakings.

divided into 9 regional unions all over the country. Akhbar Farosh is an Undertaking as defined in clause (p) of Section 2(1) of the Ordinance.

## II - FACTUAL BACKGROUND

4. The Commission took *suo moto* action against APNS and its Subcommittee for setting the minimum price for all the Newspapers Vide letters dated April 29<sup>th</sup>, 2008 and May 2<sup>nd</sup>, 2008 and also against Akhbar Farosh for entering into an agreement on April 29<sup>th</sup>, 2008 with APNS whereby the Akhbar Farosh would not distribute any Newspaper whose cover price is below the minimum price level.
5. The letter dated April 29<sup>th</sup>, 2008 and the consequent press release of April 30<sup>th</sup>, 2008 stated that “APNS has decided a minimum cover price formula for Newspapers all over Pakistan at a meeting held on April 28<sup>th</sup>, 2008” and that “the agreed formula will be effective from May 1<sup>st</sup>, 2008.” The table below gives the minimum price guidelines.

Number of Pages	Price in Rupees
Up to 4 pages	4
Above 4 but less than 8	5
8 or above but less than 12	7
12 or more pages	9
Sunday Editions	12

6. The April 29<sup>th</sup>, 2008 letter goes on to state that “the Akhbar Farosh Federation Pakistan was consulted at a meeting held on April 29<sup>th</sup>, 2008 at Lahore” and that “the meeting was assured by the Akhbar Farosh Federation that no Newspaper violating the above formula would be distributed in the Akhbar Markets. It was also decided that all incentives in negation of the formula above will be curbed by Akhbar Farosh bodies all over Pakistan.”

7. The April 29<sup>th</sup>, 2008 letter also states that the Subcommittee meeting was attended by the following: Mr. Arif Nizami, Convenor, Mr. Jamil Athar, Senior Vice President, Mr. Imtihan Shahid, Vice President, Syed Sarmad Ali, Joint Secretary, Mr. Mujeeb-ur-Rehman Shami, Daily Pakistan, Syed Sajjad Hussain Shah, Daily Kainat/The Finance, Mr. Ilyas Shakir, Daily Qaumi Akhbar, Mr. Ishfaq Ullah Khan, Daily Express, Mr. Mehtav Khan, Daily Ausaf, Mr. Kashif Saeed, Daily Dawn.
8. The information in the April 29<sup>th</sup>, 2008 letter was published in numerous Newspapers including Business Recorder,<sup>3</sup> Daily Times,<sup>4</sup> Dawn,<sup>5</sup> and The News,<sup>6</sup> on April 30<sup>th</sup>, 2008. The information in the April 29<sup>th</sup>, 2008 letter was also publicized in other forms of media such as the internet and the television news programs.<sup>7</sup>
9. The letter dated May 2<sup>nd</sup>, 2008 circulated by APNS repeats the minimum cover price formula but also mentions that the formula applies to “*all Newspapers irrespective of their language/area are covered in the Minimum Price Formula.*” Lastly, the letter mentions “*any publication, if it so desires may fix its cover price higher than the above formula.*”
10. The Commission took notice of these announcements since the practice of recommending a minimum price for which Newspapers can be sold is tantamount to price fixing which *prima facie*, violates Section 4 of the Ordinance. The statement by Akhbar Farosh, *prima facie* could be deemed to be both a restrictive

<sup>3</sup> Newspaper to Cost More; <http://businessrecorder.com.pk/index.php?id=730325&currPageNo=2&query=&search=&term=&supDate=>

<sup>4</sup> APNS Announces New Minimum Cover Prices; [http://dailytimes.com.pk/default.asp?page=2008\04\30\story\\_30-4-2008\\_pg1\\_6](http://dailytimes.com.pk/default.asp?page=2008\04\30\story_30-4-2008_pg1_6)

<sup>5</sup> New Prices Of Newspapers; <http://www.dawn.com/2008/05/01/nat20.htm>

<sup>6</sup> APNS Decides Minimum Cover Price Formula For Newspapers; [http://www.thenews.com.pk/daily\\_detail.asp?id=109649](http://www.thenews.com.pk/daily_detail.asp?id=109649)

<sup>7</sup> [http://www.aaj.tv/news/National/102050\\_9detail.html](http://www.aaj.tv/news/National/102050_9detail.html);  
<http://www.indiantelevision.com/headlines/y2k8/may/may59.php>;  
[http://www.sfnblog.com/ownership\\_and\\_regulations/2008/05/minimum-cover-price-set-for-pakistani-Newspapers.php](http://www.sfnblog.com/ownership_and_regulations/2008/05/minimum-cover-price-set-for-pakistani-Newspapers.php); <http://www.allvoices.com/news/380748-apns-Newspapers>;  
[http://article.wn.com/view/2008/04/30/APNS\\_decides\\_minimum\\_cover\\_price\\_formula\\_for\\_Newspapers/](http://article.wn.com/view/2008/04/30/APNS_decides_minimum_cover_price_formula_for_Newspapers/)

trading condition and a supplementary obligation which, violates Section 4 of the Ordinance.

11. An enquiry under Section 37 of the Ordinance was initiated and a notice was issued to the APNS on May 26<sup>th</sup>, 2008 and a separate notice was issued to the Akhbar Farosh on August 6<sup>th</sup>, 2008, inviting therein the views of the respective parties on the matter.
12. APNS in its reply dated June 5<sup>th</sup>, 2008 stated that announcement made by APNS in its letter dated April 29<sup>th</sup>, 2008 is not a directive to its members rather it is a mere recommendation. It further stated that its prerogative not to distribute hence announcement / decision of not distributing Newspapers less than the minimum price is that of Akhbar Farosh. Excerpts from the letter are reproduced as under :

*“The announcements of April 29, 2008 and May 02, 2008 were made by APNS [and] are not a directive of the APNS to its members. The prerogative to fix prices lies with member publications, not with APNS. These announcements only reflect the decision taken by member publications on recommendations made to them by the APNS”.*

*“4) The Minimum Price Formula was devised by the APNS on the instructions of a majority of its members keeping in mind the increased cost of production of Newspapers due to increase in the prices of newsprint in the international market, fuel prices and other inputs and the demand of various Akhbar Farosh Unions for increasing prices and consequently commissions. Hawkers had impressed upon the APNS and its members that in these hard times where the cost of living and distribution had increased manifold, a livelihood cannot be earned on the commission then being received.*

*5) It is the prerogative of hawkers that are represented by Akhbar Farosh Federation, to distribute or not to distribute Newspapers for a certain commission. Consequently, the decision and announcement of not distributing Newspapers that sell for less than the minimum price, is that of the Akhbar Farosh Federation.”*

13. The Commission wrote a letter to Akbar Farosh on August 6<sup>th</sup>, 2008 seeking clarification on the status and existence of the agreement between APNS and the Akhbar Farosh. The Akhbar Farosh on September 26<sup>th</sup>, 2008 responded that the price formula was set by the APNS. The reply mentions that the statement made by Akhbar Farosh's that *“no Newspapers violating the price formula would be*

*distributed in the akhbar markets”* was made on the demand of APNS and to assure them of the support of the distributors in the matter.

14. The Commission also sent queries on August 6<sup>th</sup>, 2008 to various members of APNS to learn if the members had followed the APNS’ price recommendations. The Commission also requested the Newspapers to verify APNS’ claims that its members had requested the issuance of a cover price formula that would raise the minimum price for which their Newspapers could be sold collectively. Lastly the Newspapers were requested to send the Commission the minutes of the APNS meetings held on April 28<sup>th</sup>, and 29<sup>th</sup>, 2008 that were mentioned in the letter dated April 29<sup>th</sup>, 2008.
15. The Newspapers responses indicated that the majority of the papers implemented the price formula. The Newspapers also repeated the APNS claim that the formula was necessary due to the increase of newsprint prices and fuel prices as well as the devaluing of the rupee. The Newspapers also sent a copy of the minutes entitled the Report of the meetings of Sub-Committee on cover prices held on April 28<sup>th</sup> & 29<sup>th</sup>, 2008 and May 23<sup>rd</sup>, 2008.
16. The minutes revealed that the Subcommittee met on April 28<sup>th</sup> & 29<sup>th</sup>, 2008 to consider the request of Akhbar Farosh to increase cover price of Newspapers in view of the increase in fuel prices and the cost of living. Some members of the APNS were against the increase in prices as they thought that the APNS had no power to direct its members to charge a minimum price for Newspapers and that it would be legally questionable for APNS to do so. While other members stated that APNS must give into Akhbar Farosh’s demands as it plays an essential role in distributing Newspapers and an outright rejection may force them to disrupt the distribution of Newspapers. Those members also mentioned that the Newspapers themselves were having a hard time covering their costs with the current price structure, given the increase of newsprint prices and fuel prices as well as the

devaluing of the rupee. Notwithstanding the contrasting viewpoints, eventually the Subcommittee decided to implement a new price formula for its members.

17. The minutes also stated that the Akhbar Farosh representatives announced that Newspapers being sold below the price formula would not be distributed in the Akhbar markets.
18. The Inquiry Officer completed the Inquiry Report on January 29<sup>th</sup>, 2009 which concluded that the rationale given by all of the Undertakings *i.e.*, APNS, Subcommittee and Akhbar Farosh is unsatisfactory to justify the setting/fixing of a minimum price at which Newspapers could be sold. Therefore the Price Formula *prima facie* violates Section 4(1), in particular section 4(2)(a) of the Ordinance. The agreement between APNS and Akhbar Farosh *prima facie* violates Section 4(1), in particular section 4(2)(a) and 4(2)(g) of the Ordinance.
19. Based on the recommendations made in the Inquiry Report, the Commission initiated proceedings under section 30 of the Ordinance and a Show Cause Notice was issued to APNS on February 4<sup>th</sup> 2009, which is reproduced hereunder:

*All Pakistan Newspaper Society*

*04 February 2009*

*Show Cause Notice No. 36 of 2009*

***Subject: Show Cause Notice under Section 30 of the Competition Ordinance, 2007***

1. ***Whereas the ALL PAKISTAN NEWSPAPER SOCIETY is an undertaking (hereinafter referred to as “the undertaking”) as defined in Section 2(1)(p) of the Competition Ordinance, 2007 (hereinafter referred to as “the Ordinance”).***
2. ***Whereas the undertaking is an association of Newspaper Publishers in Pakistan established to “watch over, protect, preserve and promote the rights and interests of the Newspaper industry on matters directly or indirectly affecting [the] rights and interests” of the Newspaper industry;***
3. ***Whereas the Competition Commission of Pakistan (hereinafter referred to as “the Commission”) has taken suo moto notice from news published on 30 April 2008 in numerous Newspapers throughout Pakistan including The Nation, The Daily Times, The News, the Daily Jang, The Daily Express, The Daily Ummat, and The Business Recorder – that all the undertaking’s members conform to a minimum price guideline set by the letters dated April 29<sup>th</sup> 2008 and May 2<sup>nd</sup> 2008.***

4. **Whereas** upon taking suo moto notice against the undertaking an enquiry under section 37(1) of the Ordinance was initiated by the Commission that has concluded vide enquiry report dated 28 January, 2009 confirming prima facie violation of Section 4(1), in terms of clause (a) of subsection (2) of Section 4 of the Ordinance on the part of the Undertaking.
5. **Whereas** the undertaking, vide their letter dated April 29<sup>th</sup>, 2008 has decided to set a minimum cover price formula for Newspapers.

“The APNS has decided a minimum cover price formula for Newspapers all over Pakistan at a meeting held on April 28, 2008... The agreed formula will be effective from May 1, 2008.”

The table below gives the minimum price guidelines set by the undertaking;

Upto 4 pages	Rs. 4
Above 4 but less than 8	Rs. 5
8 or above but less than 12	Rs. 7
12 or more pages	Rs. 9
Sunday Editions	Rs. 12

6. **Whereas** the undertaking has also entered into an agreement with the All Pakistan Akhbar Farosh Federation (hereinafter referred to as “**Akhbar Farosh**”), that Newspapers not following the directive of the undertaking would not be distributed. The relevant text in the April 29 letter issued to all members is reproduced herein:

“The meeting was assured by Akhbar Farosh Federation that no Newspaper violating the above formula will be distributed in the Akhbar markets. It was also decided that all incentives in negation of the above formula will be curbed by the Akhbar Farosh bodies all over Pakistan.”

7. **Whereas** the agreement pertaining to fixing the minimum price at which the Newspapers can be sold has, prima facie, the object and effect of preventing, restricting, and reducing competition within the Newspaper industry i.e., the ‘relevant market’ in Pakistan as enumerated above;
8. **Whereas** it is the responsibility and obligation of the Commission under the Ordinance to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviour;
9. **Whereas**, in view of the foregoing, the Commission is satisfied that the undertaking has, prima facie, engaged in practices prohibited under the Ordinance, that have the object and effect of preventing, restricting and reducing competition within the Newspaper industry in Pakistan which, prima facie, constitutes a violation of sub-section (1) in terms of sub-section (2) clause (a) of Section 4 of the Ordinance;
10. **Now, therefore**, you, as the undertaking, are called upon to show cause in writing within fourteen (14) days of the receipt of this Show Cause Notice and to appear and place before the Commission, facts and material in support of its contention and avail the opportunity of being heard either in person or through an authorised representative **on 03 March 2009 at 11.00 a.m. at 19<sup>th</sup> Floor, Meeting Room, Saudi Pak Tower, 61-A, Jinnah Avenue, Blue Area, Islamabad,** as to why an appropriate order under clause (b) of Section 31 of the Ordinance may not be passed and a penalty

*at the rates prescribed in Section 38 of the Ordinance, may not be imposed upon you.*

11. *If no reply to the Show Cause Notice is received within the stipulated period or the undertaking fails to appear before the Commission on the appointed date, the Commission shall proceed in the matter as provided under the law on the basis of the facts and records available with it.*

20. Based on the recommendations made in the Inquiry Report, the Commission initiated proceedings under section 30 of the Ordinance and a Show Cause Notice was issued on February 4<sup>th</sup>, 2009, to the Subcommittee that made the decision to implement a minimum cover price formula. The Show Cause Notice issued to Arif Nizami, (Convener, Subcommittee on Cover Prices) is reproduced hereunder:

*Mr. Arif Nizami,  
Convener,  
Subcommittee on Cover Prices  
Distribution and Retail Marketing Committee  
All Pakistan Newspaper Society*

*04 February 2009  
Show Cause Notice No. 37 of 2009*

***Subject: Show Cause Notice under Section 30 of the Competition Ordinance, 2007***

1. ***Whereas*** Mr. Arif Nizami is an undertaking (hereinafter “***the undertaking***”) as defined in Section 2(1)(p) of the Competition Ordinance, 2007 (hereinafter referred to as “***the Ordinance***”) and is designated as Member for the All Pakistan Newspaper Society (hereinafter referred to as “***APNS***”) and as Convener in the meeting for the Subcommittee on cover prices;
2. ***Whereas*** the meeting of the Subcommittee on cover prices of APNS was held on 28 and 29 April 2008
3. ***Whereas*** the Competition Commission of Pakistan (hereinafter referred to as “***the Commission***”) has taken suo moto notice of news published on 30 April 2008 in numerous Newspapers throughout Pakistan including *The Nation, The Daily Times, The News, the Daily Jang, The Daily Express, The Daily Ummat, and The Business Recorder* – that all APNS members conform to a minimum price guideline set by the Undertaking, communicated through the letters dated 29 April 2008 and 2 May 2008;
4. ***Whereas*** upon taking suo moto notice against the undertaking an enquiry under Section 37(1) of the Ordinance was initiated by the Commission that has concluded vide enquiry report dated 28 January, 2009 confirming prima facie violation of Section 4(1), in terms of clause (a) of subsection (2) of Section 4 of the Ordinance on the part of the Undertaking.
5. ***Whereas*** APNS, vide their letter dated 29 April 2008, has decided to set a minimum cover price formula for Newspapers based on the decision made by you/the Undertaking and the fellow members of the Subcommittee on cover prices:

*“The APNS has decided a minimum cover price formula for Newspapers all over Pakistan at a meeting held on April 28, 2008... The agreed formula will be effective from May 1, 2008.”*

The table below shows the minimum price guidelines set by APNS;

Upto 4 pages	Rs. 4
Above 4 but less than 8	Rs. 5
8 or above but less than 12	Rs. 7
12 or more pages	Rs. 9
Sunday Editions	Rs. 12

6. **Whereas** based on the decision made by you/the Undertaking and the fellow members of the Subcommittee on cover prices, the APNS has also entered into an agreement, as defined in Section 2(1)(b) of the Ordinance, with the All Pakistan Akhbar Farosh Federation (hereinafter referred to as “**Akhbar Farosh**”), that Newspapers not following the directive of APNS would not be distributed, as stated in the 29 April 2008 letter issued to all members, salient text reproduced herein:

“The meeting was assured by Akhbar Farosh Federation that no Newspaper violating the above formula will be distributed in the Akhbar markets. It was also decided that all incentives in negation of the above formula will be curbed by the Akhbar Farosh bodies all over Pakistan.”

7. **Whereas** the agreement pertains to fixing the minimum price at which the Newspapers are to be sold has, prima facie, the object and effect of preventing, restricting and reducing competition within the Newspaper industry – i.e., the ‘relevant market’ – in Pakistan as enumerated above;
8. **Whereas** it is the responsibility and obligation of the Commission under the Ordinance to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviour;
9. **Whereas** in view of the foregoing the Commission is satisfied that the undertaking has engaged itself in practices prohibited under the ordinance, which has the object and effect of preventing , restricting and reducing competition within the Newspaper industry in Pakistan, which, prima facie, constitutes a violation of sub-section (1) in terms of sub-section (2) clause (a) of Section 4 of the Ordinance;
10. **Now, therefore**, you are called upon to show cause in writing within fourteen (14) days of the receipt of this Show Cause Notice and to appear and place before the Commission facts and material in support of your contention and avail the opportunity of being heard either in person or through an authorised representative on **03 March 2009 at 11.00 a.m. at 19<sup>th</sup> Floor, Meeting Room, Saudi Pak Tower, 61-A, Jinnah Avenue, Blue Area, Islamabad,** as to why an appropriate order under clause (b) of Section 31 of the Ordinance may not be passed and a penalty at the rates prescribed in Section 38 of the Ordinance, may not be imposed upon you.
11. If no reply to the Show Cause Notice is received within the stipulated period or the undertaking fails to appear before the Commission on the appointed date, the Commission shall proceed in the matter as provided under the law on the basis of the facts and records available with it.

The Show Cause Notices sent to the rest of the members of the Subcommittee were written on the same lines as the Show Cause Notice sent to Mr. Arif Nizami.

21. Based on the recommendations made in the Inquiry Report, the Commission initiated proceedings under section 30 of the Ordinance and a Show Cause Notice was issued on February 4<sup>th</sup>, 2009 to the Akhbar Farosh, which is reproduced hereunder:

*All Pakistan Akhbar Farosh Federation*

*04 February 2009  
Show Cause Notice No. 34 of 2009*

**Subject: Show Cause Notice under Section 30 of the Competition Ordinance, 2007**

1. **Whereas** the **ALL PAKISTAN AKHBAR FAROSH FEDERATION** is an undertaking (hereinafter referred to as “the **undertaking**”) as defined in Section 2(1)(p) of the Competition Ordinance, 2007 (hereinafter referred to as “the **Ordinance**”), comprising of hawkers that distribute Newspapers of the members of the All Pakistan Newspaper Society (hereinafter referred to as “**APNS**”);
2. **Whereas** the Competition Commission of Pakistan (hereinafter referred to as “the **Commission**”) has taken suo moto notice of news published on 30 April 2008 in numerous Newspapers throughout Pakistan – including The Nation, The Daily Times, The News, the Daily Jang, The Daily Express, The Daily Ummat, and The Business Recorder – that all APNS members price their Newspapers according a minimum price guideline;
3. **Whereas** upon taking suo moto notice against the undertaking an enquiry under Section 37(1) of the Ordinance was initiated by the Commission that has concluded vide enquiry report dated 28 January, 2009 confirming prima facie violation of Section 4(1), in terms of clauses (a) and (g) of subsection (2) of Section 4 of the Ordinance on the part of the Undertaking.
4. **Whereas** APNS sent two letters dated 29 April 2008 and 2 May 2008 informing its members that APNS has decided to set a minimum cover price formula for Newspapers.

*“The APNS has decided a minimum cover price formula for Newspapers all over Pakistan at a meeting held on April 28, 2008... The agreed formula will be effective from May 1, 2008.”*

*The table below gives the minimum cover price guidelines set by the APNS;*

<i>Upto 4 pages</i>	<i>Rs. 4</i>
<i>Above 4 but less than 8</i>	<i>Rs. 5</i>
<i>8 or above but less than 12</i>	<i>Rs. 7</i>
<i>12 or more pages</i>	<i>Rs. 9</i>

5. **Whereas** the undertaking has entered into an agreement as defined in Section 2(1)(b) of the Ordinance with the APNS that Newspapers not following the minimum cover price formula set by APNS would not be distributed by it. The agreement between the undertaking and the APNS was mentioned in the APNS letter dated 29 April 2008 letter that was issued to all members. The salient text is reproduced herein:

“The meeting was assured by Akhbar Farosh Federation that no Newspaper violating the above formula will be distributed in the Akhbar markets. It was also decided that all incentives in negation of the above formula will be curbed by the Akhbar Farosh bodies all over Pakistan.”

6. **Whereas** the information received by the Commission, and in terms of the Enquiry Report, it appears that the members of APNS either raised their prices or reduced the number of pages of their Newspapers on May 1, 2008.
7. **Whereas** the Commission sent two letters dated 6 August 2008 and 14 October 2008 to the Undertaking asking them to clarify their role in the APNS decision;
8. **Whereas** in both responses, the undertaking admitted supporting the APNS decision and acknowledged the agreement with APNS.
9. **Whereas** the agreement between the undertaking and APNS that enforces the decision of the APNS in fixing the minimum price at which the Newspapers can be sold, prima facie, imposes a restrictive trading condition with regard to the sale or distribution of Newspapers and has, per se, the object and effect of preventing, restricting, and reducing competition within the Newspaper industry i.e., the ‘relevant market’ in Pakistan;
10. **Whereas** the agreement between the undertaking and APNS whereby the undertaking enforces the decision of the APNS is, prima facie, a supplementary obligation, which by its nature or according to its commercial usage has no connection with the subject of the contract and has per se, the object and effect of preventing, restricting, and reducing competition within the Newspaper industry;
11. **Whereas** it is the responsibility and obligation of the Commission under the Ordinance to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviour;
12. **Whereas**, in view of the foregoing, the Commission is satisfied that the undertaking has, prima facie, engaged in practices prohibited under the Ordinance, that have the object and effect of preventing, restricting and reducing competition within the Newspaper industry in Pakistan which, prima facie, constitutes a violation of sub-section (1) in terms of sub-section (2) clause (a) and (g) of Section 4 of the Ordinance.
13. **Now, therefore**, you, as the undertaking, are called upon to show cause in writing within fourteen (14) days of the receipt of this Show Cause Notice and to appear and place before the Commission, facts and material in support of its contention and avail the opportunity of being heard either in person or through an authorised representative on **03 March 2009 at 11.00 a.m. at 19<sup>th</sup> Floor, Meeting Room, Saudi Pak Tower, 61-A, Jinnah Avenue, Blue Area, Islamabad**, as to why an appropriate order under clause (b) of Section 31 of the Ordinance may not be passed and a penalty at the rates prescribed in Section 38 of the Ordinance, may not be imposed upon you.

*14. If no reply to the Show Cause Notice is received within the stipulated period or the undertaking fails to appear before the Commission on the appointed date, the Commission shall proceed in the matter as provided under the law on the basis of the facts and records available with it.*

22. After the Show Cause Notices were issued, all three parties corresponded with the Commission. Based on the information received the Commission further investigated and analyzed the issues at hand.

### **III - ISSUES IDENTIFIED & ANALYZED**

23. The following Issues are identified and listed below:

- i. Whether APNS has entered into a horizontal agreement by issuing a Minimum Price Formula to all its member Newspapers thereby behaving as a cartel and whether that agreement has resulted in the prevention, restriction and reduction of competition in the relevant market;
- ii. Whether the decision of the Subcommittee to direct all its members to raise the minimum prices that their Newspapers could be sold has resulted in the prevention, restriction and reduction of competition in the relevant market.
- iii. And whether the Akhbar Farosh entered into a vertical agreement that prevents, restricts, and reduces competition in the relevant market by imposing a restrictive trading condition in the distribution of Newspapers.

#### **A. RELEVANT MARKET**

24. PRELUDE: The importance of Newspapers cannot be underestimated. Glancing at a brief history of Newspapers we see that for centuries, civilizations have used

print media to spread news and information to the masses. The Roman *Acta Diurna* appearing around 59 B.C. is the earliest recorded “Newspaper”. Julius Caesar wanting to inform the public about important social and political happenings ordered upcoming events posted in major cities. Written on large white boards and displayed in popular places like the Baths, the *Acta* kept citizens informed about government scandals, military campaigns, trials and executions. In 8<sup>th</sup> Century China, the first Newspapers appeared as handwritten newsheets in Beijing<sup>8</sup>.

25. APNS currently has 292 members and they consist of Newspapers from every region, language, and subject matter. APNS created one cover price formula and issued it to all its members without taking into consideration prospective market of each Newspaper. While all the Newspapers in Pakistan are not members of APNS, the largest share of the Newspaper market is currently owned by the members of APNS.

26. Relevant Market is defined in Section 2 subsection (1) clause (k) the Ordinance as:

“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’ characteristic, 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 the Competition are appreciably different in those areas;

27. To be able to determine the relevant market we have to consider whether the products can (i) Technically serve the same purpose (ii) they will do so in a way that is cost effective enough for sufficient customers to consider them realistic economic alternatives. However, when markets contain differentiated products, such as Newspapers, it may be difficult to define the market. That is because Newspapers are differentiated by language (Urdu/English), geographic region

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<sup>8</sup> Website of World Association of Newspapers, [www.wan-press.org](http://www.wan-press.org)

(national distribution/ local distribution), readership (content, political inclination, credibility). Another important factor is price sensitivity and this in turn is linked to the brand loyalty.

28. The Commission looked into the buying patterns and how customers responded to previous price rises through questioning a random sample of Newspaper readers. It became clear that certain Newspapers such as Dawn, The News, Business Recorder, Daily Times, Nation (English) and Jang, Nawa-i-waqt, Khabrain (Urdu) had specific readerships and had created a niche for themselves which had high brand loyalty. This brand loyalty influences the purchasing decision. Hence, the demand for such Newspapers is relatively price inelastic<sup>9</sup>. Switching costs were negligible since the Akhbar Farosh (distributors) carries the entire range of Newspapers.

29. A customer buys a Newspaper with the intention of getting information about local, national, international events. The Newspaper is one of many media available to a customer to obtain news and provides the combination of all news on the subjects of politics, finance, sports, entertainment and so on. Hence Newspaper is not only in essence an information dissemination product but also reflects on the habit of Newspaper reading first thing in the morning. This habit or ritual itself can not be underestimated in its importance as knowledge providing source to the average consumer. In the words of V.S.Naipaul, (Novelist)

“Newspapers are like serials. To understand them you have to take knowledge to them, the knowledge that serves best is the knowledge provided by the Newspaper itself.”

30. The possible substitutes for Newspapers having the same characteristics with respect to the language and contents could be the other forms of media including radio, television and internet. However, the other characteristics such as price

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<sup>9</sup> The price elasticity of demand measures the rate at which the quantity of a product sold changes when its price goes up or down.

affordability, immediate availability/easy access and morning ritual of Newspaper reading render these products technically not close substitutes to the Newspapers.

31. Based on the above analysis it has been determined that all Newspapers constitute the relevant product market. This is primarily because Newspapers, as shown in the analysis, are distinct and do not have reasonable substitutes in the market vis a vis the characteristic and the end use.
32. With regards to the relevant geographic market in this case, APNS, and Akhbar Farosh are both national associations that produce and distribute Newspapers throughout the country. The Commission has assessed that the conditions of the printing, and distributing (i.e. production and sales) of Newspapers in Lahore are sufficiently homogeneous to printing and distributing Newspapers in, Karachi, Multan, Peshawar, or Islamabad. Therefore, the relevant geographic market covers the whole of Pakistan.

#### B. APPLICATION OF SECTION 4

33. Section 4(1) of the Ordinance applies to agreements<sup>10</sup> entered into by an undertaking or decision made by an association of undertakings which have the **object or effect** of preventing, restricting or reducing competition within the relevant market. Relevant parts of the section 4 are reproduced hereunder:

Section 4: Prohibited agreements:-

(1) No undertaking or association of undertakings shall enter into an agreement or, in 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 of this Act.

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

- (a) fixing the purchase or selling price or imposing any other restrictive trading conditions with regards to the sale or distribution of any good or the provision of any service;
- (g) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which by nature

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<sup>10</sup> Section 2 (1)(b) of the Ordinance; “Agreement” includes any arrangement, understanding or practice, whether or not it is in writing or intended to be legally enforceable.

or according to commercial usage, have no connection with the subject of such contracts.

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

34. Section 4 of the Ordinance is similar to Article 81 of the Treaty of Rome, which is part of the EU Competition law<sup>11</sup>, and is in congruity with Section 1 of the Sherman Antitrust Act of the United States<sup>12</sup>.

35. This matter involves price fixing agreements at two levels specifically, two horizontal price fixing agreements and one vertical price fixing agreement. Both types of agreements involved in this case will be analyzed seriatim.

### C. HORIZONTAL AGREEMENTS

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<sup>11</sup> 1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices, which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
  - (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
  - (b) Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

<sup>12</sup> Section 1 of the Sherman Act, as set forth in 15 U.S.C. § 1 (1976 ed.), provides:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal ...”

36. Horizontal agreements are those that are entered into by the competitors at the same level of the production or distribution chain to co-operate with each other. They trigger the violation when competitors making agreements restrict competition amongst themselves<sup>13</sup>. This case involves two horizontal price fixing agreements (a) fixing of minimum cover price of Newspapers by APNS sub-committee (b) issuance of Minimum Cover Price Formula by APNS to its members. Both horizontal agreements involve the same issues and I will address these jointly.
37. The agreement reached among the participants of the Subcommittee meeting held on April 28, 2008 shows a collective action which requires all the member publishers to increase the price and reduce the number of pages of their Newspapers in conformity with the Minimum Price Formula<sup>14</sup>. Thus the decision made by the Newspaper publishers and their representative present in the meeting of the Subcommittee falls within the ambit of “agreement” mentioned in section 4(1) of the Ordinance.
38. The decision of Subcommittee was endorsed by APNS in its letters dated April 28<sup>th</sup>, 2009 and May 2<sup>nd</sup>, 2009. These letters were also used as press releases and explicitly conveyed the decision of APNS as an association, giving effect to the Minimum Cover Price Formula, which was agreed upon in the meeting of its Subcommittee. Therefore, the decision of APNS to fix the minimum price of Newspapers is a “decision of association of undertakings” within the purview of section 4(1) of the Ordinance.
39. Section 4(1) of the Ordinance states that the Agreement must have either the **object or effect** of preventing, restricting or reducing competition. The term

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<sup>13</sup> In the matter of Karachi Stock Exchange, Lahore Stock Exchange and Islamabad Stock Exchange (File No. 1/Dir(Inv) KSE/CCP/08) p. 24-25

<sup>14</sup> As stated in the Minutes of the meeting of sub-committee held on April 28<sup>th</sup> & 29<sup>th</sup> 2008

“object” mentioned in section 4(1) of the Ordinance does not refer to the subjective intention of the parties, but to the objective meaning and purpose of the agreement<sup>15</sup>. Contents of the minutes of the Subcommittee’s meeting on April 28<sup>th</sup>, 2008 and letters issued by APNS on April 29<sup>th</sup>, 2008 and May 2<sup>nd</sup>, 2008 reveal the objective intent of price fixing decision by APNS and its Subcommittee i.e. to reduce intra-brand and inter-brand competition in relevant market through the collective collusive behavior of its members. Under the auspices of the decision by the Subcommittee the prices of all the Newspapers would be increased uniformly instead of being determined by means of effective competition.

40. The Minimum Price Formula restricts the right of alienation of Newspaper owners, i.e. self determination of price, and it also creates an entry barrier. New entrants depending on distribution network of Akhbar Farosh will be compelled to sell their Newspapers at a higher price and will find it difficult to capture the targeted number of customers required for commercial success. The Minimum Price Formula will also threaten the sustainability of smaller Newspapers.

41. For a collusive horizontal agreement to be successful there must be a detection and monitoring mechanism to ensure that “cheating” does not occur. This classic “carrot and stick” approach has been the key for collusive price fixing to be successful. In the case under consideration both elements are seen. On the one hand, the “carrot” for the APNS is provided by the horizontal price fixing agreements yielding them higher prices/profits as well as eliminating competition. While on the other hand, the “stick” is provided by the agreement with Akhbar Farosh which ensures that the Minimum Price Formula is adhered to by all Newspapers, since those Newspapers which do not follow the formula will not be distributed. This monitoring mechanism or “stick” is being viewed as essential for the success of this agreement since,

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<sup>15</sup>Supra, footnote 13

“A collusive price cannot be expected to persist through sheer inertia. Each member of the colluding circle has an incentive to shade the price and thereby increase his profits<sup>16</sup>.”

42. Agreements having candid object to fix the price have been dealt with strict approach and declared illegal in jurisdictions with extensive jurisprudence on competition law. The European Union competition law specifically, Art 81(1) prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Essential element to constitute offence under article 81(1) is agreement which has as the **object or effect** of preventing, restricting or distorting competition. The European Court of Justice in the leading judgment of *Societe Technique Miniere V Maschinenbau Ulm GmbH*<sup>17</sup> has laid down that object and effect are not cumulative but alternative requirements indicated by the conjunction OR. First look at the object in its economic context, if it does not appear that the purpose was to prevent, restrict competition etc then, secondly, look at the effect.

43. If price fixing agreements are *prima facie* likely to have an object of preventing, restricting or reducing competition then there is no need to establish their effects<sup>18</sup>. The EU Commission guidelines<sup>19</sup> on the application of article 81(3) categorize certain restrictions as black-listed. These are such restrictions which constitute restrictions by object and “in the case of

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<sup>16</sup> Richard A. Posner, *Anti-trust Law*, 2<sup>nd</sup> Edition, The University of Chicago Press, Page 67

<sup>17</sup> Case 56/65, *Societe Technique Miniere c. Maschinenbau Ulm*, [1966] E.C.R. 337.

<sup>18</sup> *Societe Technique Miniere* [1966] E.C.R. 337; Case 26/76, *Metro c. Commission*, [1977] E.C.R. 1875; Case 258/78, *Nungesser c. Commission*, [1982] E.C.R. 2015; Case 262/81, *Coditel SA, Compagnie generale pour la dif- fusion de la television, et autres contre CineVog Films SA et autres*, [1982] E.C.R. 3381; Commission Decision of 24 June 2004 relating to a proceeding under Article 81 of the EC Treaty (In the matter of Belgian Architects’ Association) at para 92 quoting Court of Justice in Joined Cases 56 and 58/64 *Consten and Grundig* [1966] ECR 429; *see also* Court of Justice in Case C-235/92 P *Montecatini* [1999] ECR I-4539, paragraph 122.

<sup>19</sup> EU Commission - Competition Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08).

horizontal agreements restrictions of competition by object include price fixing, output limitation and sharing of markets and customers<sup>20</sup>.”

44. In the United States, price fixing and related cartel behavior is treated as illegal “per se”, meaning that practice of price fixing is unlawful regardless of the market power of the participants, their motive, or purported business justification. This principle was laid down in 1940 in the case of *United States v. Socony-Vacuum oil Co*<sup>21</sup>. The court held that “Under the Sherman Act a combination formed for the purpose and with the effect of raising depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se”. The court also made it clear that it is immaterial to determine market power for those who fix prices, “Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price fixing group were in no position to control the market, to the extent they raised, lowered or stabilized prices they would be interfering directly with the free play of the market forces”.

45. Even though over the years, a trend has also been noted in the judgments given by the U.S. Supreme Court, where the Court took a quick look to determine whether the strict rule of “per se” as opposed to a more lenient “rule of reason” should be applied. However, this exception only applies when the effect on price is indirect and such agreement increases economic efficiency<sup>22</sup>. Further U.S. Supreme Court has profusely held that certain agreements are so likely to be anti-

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<sup>20</sup> Einer Elhauge and Damien Geradin, at p 66-67, GLOBAL ANTITRUST LAW AND ECONOMICS, Foundation Press.

<sup>21</sup> *United States v. Socony-Vacuum oil Co*, 310 U.S. 150, “whatever economic justification particular price fixing agreement may be thought to have, the law does not permit an inquiry into their reasonableness. They all are banned”.

<sup>22</sup> *Broadcast Music V. CBS* 441 U.S. 1, 19-20 (1979) explains that per se rule against price-fixing is not to be taken literally i.e “price fixing in a literal sense is not price fixing in the anti-trust sense”. In deciding whether to apply the per se rule, the BMI Court said that “our inquiry must focus on whether the practice facially appears to be one that would always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to increase economic efficiency and render market more, rather than less, competitive”.

competitive and so unlikely to have pro-competitive effects that they are condemned “per se”, which means without any case by case inquiry into their net effect<sup>23</sup>. Horizontal agreements which have been held to be “per se” illegal include price fixing<sup>24</sup>, market division, output restrictions and boycotts.

46. APNS has continuously maintained that the formula was not obligatory for its members, however that makes no difference in determining whether the agreement is unlawful as was shown in the *U.S. v. National Association of Real Estate Boards* case. The court held that it was irrelevant that the rates schedule was non-mandatory.<sup>25</sup> The *Real Estate Board* Case is very similar to the case at hand. The Supreme Court stated that “an agreement, shown either by adherence to a price schedule or by proof of consensual action fixing the uniform or minimum price, is itself illegal under the Sherman Act, no matter what end it was designed to serve. **The fact that no penalties are imposed for deviations from the price schedules is not material.**<sup>26</sup> Subtle influences may be just as effective as the threat or use of formal sanctions to hold people in line.” In the APNS matter, there is more than just subtle influence....there as an explicit threat, even if the threat was never acted upon. Just the risk of Akhbar Farosh not distributing their papers is sufficient enough for most members to fall in line with the “recommended” price schedule.

47. Even if the Commission accepted the assertion of APNS that the price formula was just advisory in nature, it begs the question why APNS would even recommend to publishers how to price their products. The individual members

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<sup>23</sup> Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958); United States V. Topco Association, 405 U.S.596 at 607 (1972); Arizona V. MaricopaCounty Med. Soc’y, 457 U.S 332 at 344-45 (1982).

<sup>24</sup>United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940); Northern Pacific, 356 U.S. at 5; Maricopa, 457 U.S. at 345-48; Dagher, 126 S.Ct. at 1279.

<sup>25</sup> U.S. v. National Association of Real Estate Boards 339 U.S. 485 (1950)

<sup>26</sup> See Eastern States Lumber Assn. v. United States, 234 U.S. 600, 608 -609; American Column Co. v. United States, 257 U.S. 377, 411 ; Federal Trade Commission v. Pacific Paper Assn., 273 U.S. 52, 62 .

themselves would be in a much better position to determine the appropriate price of their Newspaper depending upon their own costs, brand loyalty and readership. The obvious answer is that this was done so that APNS members would not have to compete with each other in the market place.

48. APNS argued that the Minimum Price Formula determined by the Subcommittee raised the prices only to a reasonable level. The issue of whether reasonableness of the prices fixed by the defendants constituted a defence was squarely before the Supreme Court in the case of *United States v. Trenton Potteries Co (1927)*<sup>27</sup>. Justice Stone's response for the court seemed unequivocal "the aim and result of every price fixing agreement, if effective, in the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become unreasonable price of tomorrow."<sup>28</sup> It is not denied that many Newspapers may have felt the need to raise their cover price during 2008 due to economic factors that could have affected their cost but the problem arises when all the members of APNS decided to raise their prices unanimously.

49. In the light of the discussion in Para36 to 48 there is enough evidence to prove collusive behaviour of members of APNS. It is abundantly clear that sufficient information regarding the price fixing was shared among the members of APNS and publication of press release on the same day shows that Newspaper publishers did not act independently which if they had done so would not have been rational conduct and lastly decision of Minimum Price Formula was itself so complex that it is easy to deduce that such decision was a result of collusive agreement and not an independent decision of individual members. This kind of collusive behaviour only encourages inefficiency in the marketplace. Instead of Newspapers trying to

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<sup>27</sup> *United States v. Trenton Potteries Co*, 273 U.S. 392(1927)

<sup>28</sup> *Addyston Pipe & Steel Company et al., appts., v. United States*. 175 U.S. 211 (1899.)

produce a more economically efficient product, and improving the quality of their product, they are avoiding competition with each other in the market place. Eventually, the negative effects of such collusive behaviour and resultant inefficiency will be on the end consumer who will have limited choice of Newspapers and no price options in the relevant market.

#### D. VERTICAL AGREEMENTS

50. Now I will address the vertical agreements between buyers and sellers operating at different levels of the production or distribution chain and have the potential to violate competition law. Agreement between APNS and Akhbar Farosh to enforce the decision of minimum price for Newspapers is a vertical agreement for the resale price maintenance of the Newspapers. The APNS had a meeting with Akhbar Farosh on April 29<sup>th</sup>, 2008 in Lahore. The purpose of this meeting was to have an arrangement/understanding between both parties i.e. APNS and Akhbar Farosh to enforce the minimum cover price decision and also to seek assurance from Akhbar Farosh that none of the Newspapers will be distributed below the minimum price fixed. All the attendees of the meeting gave their consent to above mentioned decision by signing the document which purports to agreement within the purview of section 4(1) of the Ordinance.

51. Vertical price fixing agreements are differentiated from horizontal price fixing agreements because of their specific nature. Vertical price fixing agreements restrict the right of alienation and therefore involve common law theory of property rights<sup>29</sup>. Vertical agreements in the form of Minimum Resale Price Maintenance have been allowed only where they stimulate inter brand competition among manufacturers selling different brands of the same type of the product by reducing intra brand competition among retailers selling the same

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<sup>29</sup> Dr. Miles Med Co. V. John Park & Sons Co., 220 U.S. 373(1911)

brand<sup>30</sup>. However under the present circumstances price of Newspapers was fixed by APNS (publishers) acting in concert which was further supported by Akhbar Farosh (Distributors) by ensuring the compliance of their price fixing decision. Thus the vertical agreements between publishers and distributors have clear intent to eliminate inter brand competition by fixing the price of all the Newspapers in the relevant market.

52. The EU Commission has a stricter view of Vertical Price Fixing Agreements. Regulation 2790/1999 provides for a block exemption of certain categories of vertical agreements. However, pursuant to Article 4(a) of Regulation 2790/1999, a vertical agreement providing for minimum resale price maintenance is deemed a hard-core restriction<sup>31</sup>. Vertical restraints have been condemned for the reason that they cause negative effects<sup>32</sup> on competition which includes:

- i. foreclosure of other suppliers or other buyers by raising barriers to entry,
- ii. reduction of intra brand and inter-brand competition including facilitation of collusion amongst suppliers or buyers,
- iii. and above all, limitations on the freedom of consumers to purchase goods or services they may choose.

The EU Commission has concluded that the imposition by a supplier of minimum retail prices on its distributors has the object of restricting

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<sup>30</sup> *Leegin Creative Leather Products Inc. V. PSKS, Inc.*, 551 U.S. (2007)

<sup>31</sup> Commission Regulation No 2790/1999 on the application of Article 81(3) of the Treaty to categories of Vertical Agreement and Concerted Practices, O.J. 1999, L 336/21, Article 4 states that the exemption provided for in Article 2 shall not apply to vertical agreement which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object: (a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.....

<sup>32</sup> Commission Notice –Guidelines on Vertical Restraints, p 103, part VI, (2000/C 291/01)

competition. This position has been confirmed by the European Court of Justice (ECJ) in a series of judgments<sup>33</sup>.

53. The ECJ was seized with the issue of collusion among Newspaper publishers for resale price maintenance and selective distribution system in the case of *SA Binon & Cie V. SA Agence et Messageries de la Presse*<sup>34</sup>. It was advocated that the Newspaper market is very peculiar in its nature and requires extremely rapid system for their distribution in view of the very limited period during which they can be sold before they are out of date and returned to publishers unsold. It was also insisted that if price fixing is not accepted, then it is not possible to have an effective distribution system and the effect on diversity and freedom of press would be disastrous. However, the Court held that the “provisions which fix the price to be observed in contracts with third parties constitute a restriction on competition within the meaning of article 81(1)”.

54. In view of the foregoing discussion I conclude that the resale price maintenance agreement between APNS and Akhbar Farosh serves as a tool to monitor the collusive behavior of members. In the presence of resale price maintenance, it is easy to detect the cheating from any Newspaper publisher who deviates from the Minimum Price Formula. Resale price maintenance affects the competition in two ways. Firstly, it reduces intra-brand and inter-brand competition among the competing Newspaper publishers. It also has the effect of foreclosure of other small Newspaper publishers who can not afford to sell their Newspaper at a higher price and at the same time raises barriers to entry for new entrants. Secondly, resale price maintenance restricts the right of alienation of distributors who will be deprived of their right to determine the price according to free competition forces in the market. Lastly, resale price maintenance restricts the choice of consumers and their welfare. Hence the vertical agreement between APNS and Akhbar Farosh is void under section 4(3) of the Ordinance.

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<sup>33</sup> Case 161/84, *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis*, 1986 E.C.R. 353.

<sup>34</sup> Cases 243/83 *SA Binon & Cie V. SA Agence et Messageries de la Presse*, 1985 E.C.R. 2015

55. The Commission afforded all three Undertakings namely APNS, Sub-committee and Akhbar Farosh an opportunity to be heard on March 3<sup>rd</sup>, 2009. The hearing was presided by myself.

#### **IV - THE HEARING: RESPONSES RECEIVED**

##### **A. RESPONSE OF APNS**

56. APNS through its representative Mr. Arshad Zubeiri admitted that they did issue the Minimum Price Formula in their letters dated April 29<sup>th</sup>, 2008 and May 2<sup>nd</sup>, 2008. However, the said formula was meant to be just a recommendation to members and not mandatory in any way and hence not a directive. APNS admitted that the Subcommittee's decision to raise the minimum prices of Newspapers and the subsequent dissemination of that formula to all its members through the press releases was beyond the authority of Subcommittee.
57. APNS continuously asserted in the hearing that there is no agreement with the Akhbar Farosh to blacklist those members who do not adhere to the formula. However, this assertion of APNS cannot be accepted because the press release dated April 30<sup>th</sup>, 2008 and the document signed on April 29<sup>th</sup>, 2008 by the APNS and Akhbar Farosh clearly provides evidence of existence of agreement and hence representative of Akhbar Farosh admitted the existence of agreement during the hearing.
58. APNS also submitted a list of Newspapers that had not followed the Minimum Price Formula and were not penalized for it. Post hearing, the list of Newspapers submitted by APNS was perused and it emerged that many of the Newspapers on the list are not even members of APNS and hence they were not obligated to follow the Minimum Price Formula issued by APNS.

##### **B. RESPONSE OF SUBCOMMITTEE**

59. The representative of Subcommittee, Mr. Tanvir Tahir, stated that the cover price of the Newspapers was raised because the costs of the inputs had dramatically increased in the last year and also that several requests were made by the members of APNS and Akhbar Farosh to set a higher price for the Newspapers. He also asserted that the Subcommittee fixed the minimum price at a reasonable amount so that Newspapers would be able to recover their costs.
60. At the Hearing on March 3<sup>rd</sup>, 2009 the representative of Subcommittee **admitted** that the Subcommittee was not authorised to set Newspaper prices for its members and the issuance of the Minimum Cover Price Formula was **unlawful and unenforceable**.
61. The Subcommittee also supported the assertion of the APNS that there was no agreement with Akhbar Farosh to enforce the Minimum Price Formula for the Newspapers.

#### C. RESPONSE OF AKHBAR FAROSH FEDERATION

62. Contrary to the assertion of APNS and its Subcommittee the representatives from the Akhbar Farosh **admitted** that there was an agreement between APNS and the Akhbar Farosh not to distribute Newspapers that did not conform to the Minimum Price Formula. However, the representative of Akhbar Farosh stated that the agreement was never enforced. They also admitted that **the agreement is unlawful and unenforceable**.
63. The Akhbar Farosh reiterated during the hearing that they did not influence the price fixing decision of APNS and its Subcommittee however this assertion is not acceptable since their remuneration is a percentage of the cover price of

Newspapers. Higher cover prices in turn mean higher commission for them and therefore they do have a stake in the price level.

64. I appreciate the fact that during the course of hearing all the three Undertakings were forthcoming and had a reconciliatory approach. They admitted that they violated the Competition Ordinance however, they pleaded that their actions were an honest mistake and they expressed their willingness to make amends. I would like to point out that ignorance of law is no excuse for violating the law. However to encourage compliance of the law and keeping in view the approach of the respondents I am inclined to take a lenient view and not impose penalties for this violation. Further, I accept their written commitments on the following:

- i. Undertakings will retract their earlier price fixing decision;
- ii. Undertakings will not engage in such conduct in future which is violative of the Ordinance;
- iii. Finally, Undertakings will announce their commitments through a press release.

## V. COMMITMENTS

65. APNS submitted their commitments through its Secretary General, Muhammad Aslam Kazi, on March 12<sup>th</sup>, 2009. The APNS' Subcommittee for Cover Prices has submitted commitments through its representative Mr. Tanvir Tahir on March 24<sup>th</sup>, 2009. The commitments contain the following assurances:

*That, All Pakistan News Paper Association's ('APNS') sub committee on cover prices decision regarding fixation of minimum cover price formula for Newspapers all over Pakistan, taken at a meeting held on April 28 & 29, 2008, and subsequent press release dated April 29 & May 2, 2008, shall be deemed unenforceable and unlawful, inter se the parties, being in violation of Section 4 of the Competition Ordinance, 2007.*

*This violation is regretted by the APNS and it is admitted that it was beyond and against the mandate of the APNS to collusively fix Newspaper prices in a direct or indirect manner.*

*That, in future, we will ensure compliance of the Competition Ordinance, 2007, and in case of any misapprehension, would take the guidance/advice of the Commission, if required.*

*That, we will, issue a press release, and ensure its publication prominently and distinctly in all leading Newspapers, in particular, such Newspapers whose representatives were present in the meeting dated April 28<sup>th</sup> & 29<sup>th</sup> 2008, of the Subcommittee that decided the cover price formula after getting it approved from the Competition Commission of Pakistan (the 'Commission'), stating therein that, the decision taken in the meeting of sub committee of APNS on cover prices regarding fixation of minimum cover price formula for Newspapers all over Pakistan, was recommendatory in nature and not a directive, all the Newspaper can set their prices independently, and the **said decision was beyond the mandate/powers of the committee and unlawful and is hereby withdrawn.***

*That, we will not in future, direct or take any decision regarding fixation of minimum cover price formula for Newspapers all over Pakistan, or any other step, which is in violation of the Competition Ordinance, 2007.*

**66. The All Pakistan Akhbar Farosh Federation submitted their commitments on March 26<sup>th</sup>, 2009. The commitments contain the following assurances:**

*That, All Pakistan News Paper Association's ('APNS') sub committee on cover prices decision regarding fixation of **minimum cover price formula** for Newspapers all over Pakistan, taken at a meeting held on April 28 & 29, 2008, and subsequent press release dated April 29 & May 2, 2008, **shall be deemed unenforceable and unlawful**, inter se the parties, being in violation of Section 4 of the Competition Ordinance, 2007.*

*It was an **honest mistake** on part of APAFF to execute the agreement with APNS for enforcing the minimum cover price formula for the Newspapers. It was **not the intention of APAFF** to violate any provisions of the Competition Ordinance, 2007.*

*We ensure the Commission that we have never stopped distributing Newspapers, and hence have not followed the minimum cover price formula and never assisted APNS in enforcing its agreement in this regard.*

*That, in future, we will not enter into any agreement with any undertaking and/or follow the decision of any undertaking, or co-operate, or commit otherwise expressly, or impliedly in any matter **which amounts to fixation of the prices of Newspapers** in the relevant market, in violation of the Competition Ordinance, 2007.*

*That, we will continue to distribute Newspapers at the price determined by the respective Newspaper publishers themselves, and shall not enter into an agreement with its own members or any other undertaking or itself take decision or co-operate or follow the decision of any undertaking, which amounts to refusal to distribute any Newspaper, in violation of provisions of Competition Ordinance, 2007.*

*That, in future, we will continue to distribute Newspapers at the price determined by the respective Newspaper publishers themselves and shall not co-operate in any manner on decision or agreement inter se Newspaper publishers to fix the prices of Newspapers.*

*That, in future, we will ensure compliance of the Competition Ordinance, 2007, and in case of any misapprehension, would take the guidance/advice of the Commission, if required.*

## VI. THE DECISION

67. Since all the Undertakings have filed Commitments pursuant to Part IV of the Competition Commission (General Enforcement) Regulations, 2007, therefore, I have decided to take a lenient view in the instant matter by not imposing any penalty on the undertakings under the Section 38 of the Ordinance.

68. However, APNS and its Subcommittee are hereby directed to issue a press release containing the following information:

*The Minimum Cover Price Formula issued on April 29, 2008 and May 2, 2008 should not be considered a directive of APNS. APNS and any of its committees do not have the power to direct its members to fix a certain price for their respective Newspapers, nor can it enforce recommendations regarding cover prices of Newspapers. The formula was just recommendatory in nature. The individual Newspapers should set their Newspapers independently and that the decision to set minimum cover price is unlawful and therefore withdrawn.*

The press release should appear in all leading Newspapers within 7 days of the receipt of this order, failing which a penalty of Rs. 200,000 per day shall be recovered from APNS under Section 40 of the Ordinance, for the non-compliance of the Order of the Commission.

69. The Akhbar Farosh is hereby warned to continue to distribute Newspapers at the price determined by the respective Newspaper publishers themselves and not to cooperate in any manner on the decision of Newspaper publishers to fix the Newspapers prices.

70. All concerned parties i.e. APNS, Akhbar Farosh and the Subcommittee are warned that in case they are found guilty of violating the Ordinance in the future, major penalties under the law shall be imposed on them without any leniency.

71. It is so ordered.

(Maleeha Mimi Bangash)

Member

**Islamabad the April 23, 2009**