BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF
SHOW CAUSE NOTICE ISSUED TO

M/S DEL ELECTRONICS (PVT.) LIMITED
AND
M/S HAIER PAKISTAN (PVT.) LIMITED

Date of Hearings:	For DEL Electronics (Pvt.) Ltd. September 03, 2020 For Haier Pakistan (Pvt.) Ltd. September 09, 2020 May 27, 2021 January 18, 2022
Commission:	Ms. Rahat Kaunain Hassan **(Chairperson)** Mujtaba Lodhi **(Member)**
On behalf of: **M/S DEL ELECTRONICS (PVT.) LIMITED**	HAIDERMOTA & CO. ADVOCATES
M/S HAIER PAKISTAN (PVT.) LIMITED	H & M ADVOCATES AND CORPORATE CONSULTANTS

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ORDER

1. This order shall dispose off proceedings initiated by the Competition Commission of Pakistan (the **'Commission'**) *vide* Show Cause Notice Nos. 36 and 37 of 2019, both dated 16 October 2019 (the **'SCNs'**), issued to M/s DEL Electronics (Pvt.) Limited ("**DEL**" or "**Respondent No. 1"**) and M/s Haier Pakistan (Pvt.) Limited ("**Haier**" or "**Respondent No. 2"**) (Respondent No. 1 and Respondent No. 2 shall collectively be referred to as the "**Respondents**" or "**Undertakings**", where the context of this Order permits) for *prima facie* contravention of Section 4 of the Competition Act, 2010 (the **'Act'**).

FACTUAL BACKGROUND

2. Brief facts of the case are that a general market survey was conducted by a team of the Commission's officers to look into the business practices of electronic appliance dealers. During the course of the survey, some price control circulars of the Respondents were found. Four circulars of Respondent No. 2 dated 14 February 2017 and 15 February 2017 pertained to the imposition of a fixed price list for products and the imposition of penalties on some dealers for failing to adhere to the fixed price list(s). For Respondent No. 1, two similar circulars were found dated 23 January 2017 and 30 January 2017 whereby dealers were penalized for selling appliances below the prices fixed by Respondent No. 1.

3. Following the discovery of the above circulars, a working paper was submitted by the Cartels and Trade Abuses Department to the Commission in its meeting held on 21 December 2017, after consideration of which the Commission resolved to initiate an enquiry under Section 37(1) of the Act into the alleged contravention of Section 4 of the Act by "*electronic appliance manufacturers, distributors/dealers and their respective trade associations*" and to form an enquiry committee for this purpose with the powers of the Commission delegated to it under Section 28(2) of the Act (the "**Enquiry Committee**").

4. In the aforesaid Commission meeting, it was also resolved that two teams comprising of certain officers of the Commission were authorized to conduct a search and inspection under Section 34 of the Act of the premises of the Respondents at (i) Haier's main office located at 4-B, Q-Block, Old College Road, M.M. Alam Road Extension, Gulberg II, Lahore and (ii) DEL's main office located at Dawlance Center, 7/4, Civil Lines-9, Dr. Zia Uddin Ahmed Road, Karachi (the "**Search and Inspections**"). The said teams were also authorized to exercise any and all powers under Section 34(2) of the Act. The Search and Inspections were carried out on 26 February 2018 where a number of documents including electronic data was impounded and handed over to the Enquiry Committee.

5. The Enquiry Committee finalized its enquiry report on 18 September 2019 (the **'Enquiry Report'**). The main findings of the same are reproduced below for ease of reference:

Concerning Respondent No. 1/DEL:

"*65. Based on the findings of paragraph 57 it appears that DEL through its Price Control Policy had imposed a restrictive trading condition barring its dealers from selling refrigerators and split ACs below a certain price (Clause 1). This is reinforced by clauses such as 'bad mouthing or comparing DEL products with other brands (Clause 4) and selling refrigerators and split ACs at fix price even with package deals (Clause 5). Failure to adhere to clauses of the Price Control Policy would attract fines or suspension of dealership. Therefore, these clauses appear to be in violation of sub clause (a) of subsection (2) read with subsection (1) of Section 4 of the Act.*

66. Based on the findings of paragraph 58 DEL appears to be involved in the fixing and imposition of labor rates for fitting of split AC's (Clause 8) which is prima facie a restrictive trading condition in terms of sub clause (a) of subsection (2) read with subsection (1) of Section 4 of the Act.

67. Based on the findings of paragraph 59 it appears that DEL is engaged in setting rates for stabilizers (Clause 9) and prohibiting the provision of any gift items other than those provided by the company (Clause 7). This is a prima facie restrictive trading condition in terms of sub clause (a) of subsection (2) read with subsection (1) of Section 4 of the Act."

Concerning Respondent No. 2/Haier:

"*61. Based on the findings of paragraph 40 it appears that Haier has entered into the practice of resale price maintenance through its Price Control Policy whereby under Clause 2.1 dealers are prohibited from selling Haier products below the company's fixed priced* [sic]. *This is further reinforced by clauses which restrict dealers from giving quotations below the fixed price (Clause 2.3), quoting the fixed price and asking the potential customer to check the market (Clause 2.4), selling to a customer under oath (Clause 2.5), applicability of fix price on package deals (Clause 2.8) and selling to a friend/acquaintance below fix price (Clause 2.9). Not adhering to the Price Control Policy would entail in the form of fine or suspension of dealership contract (Clause 4). This restricts competition by containing customers from the right of bargain during purchase process, constituting, prima facie violation of sub clause (a) of subsection (2) read with subsection (1) of Section 4 of the Act.*

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62. *Based on the findings of paragraph 41 Haier appears to be involved in the fixing and imposition of labor rates for fitting of split AC's (Clause 2.10) which is prima facie a restrictive trading condition in terms of sub clause (a) of subsection 2 read with subsection (1) of Section 4 of the Act.*

63. *Based on the findings of paragraph 42 Haier appears to be engaged in the practice of restricting its dealers from providing customers giveaways and/or discounts on allied products including: stabilizers, circuit breakers, time delay breakers and stands for fridges (Clause 2.7). Haier in the dealership agreement warned its dealers of fines in case of discount or giveaway offer of such items. This practice is prima facie restrictive trading condition in terms of sub clause (a) of subsection (2) read with subsection (1) of Section 4 of the Act."*

6. In light of the findings of the Enquiry Report, the Enquiry Committee, therefore, recommended that the Commission may consider initiating proceedings against the Respondents under Section 30 of the Act. Considering the findings of the Enquiry Report and the recommendations of the Enquiry Committee, the Commission resolved in its meeting held on 25 September 2019 that proceedings be initiated against the Respondents under the provisions of Section 30 of the Act for *prima facie* violations of Section 4 of the Act.

7. As mentioned above, accordingly, SCNs were issued to the Respondents on 16 October 2019. The relevant portion of the SCNs are reproduced below for ease of reference:

For Respondent No. 1/DEL:

"7. ***WHEREAS**, in terms of the Enquiry Report in general and paragraphs 43-57 in particular, the Undertaking appears to imposed* [sic] *restrictive trading conditions through different clauses of 'Dawlance Price Control Policy' which have the object or effect of preventing, restricting or reducing competition within the relevant market is, prima facie, in violation of subsection (1) of Section 4 read with sub clause (a) of subsection (2) of Section 4 of the Act; and*

8. ***WHEREAS**, in terms of the Enquiry Report in general and paragraph 58 in particular, the Undertaking pursuant to clause 8 of the 'Dawlance Price Control Policy' appears to be involved in the fixing and imposition of labor rates for fitting of split AC's, which prima facie, in violation of subsection (1) of Section4 read with sub clause (a) of subsection (2) of Section 4 of the Act; and*

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9. ***WHEREAS**, in terms of the Enquiry Report in general and paragraph 59 in particular, the Undertaking pursuant to clause 7 & 9 of the 'Dawlance Price Control Policy', appears to prohibit the provision of gift items other than provided by the Undertaking and setting rates for stabilizers. This practice is, prima facie, in violation of subsection (1) of Section 4 read with sub clause (a) of subsection (2) of Section 4 of the Act..."*

For Respondent No. 2/Haier:

"7. ***WHEREAS,** in terms of the Enquiry Report in general and paragraphs 21-40 in particular, the Undertaking appears to have entered into an arrangement of resale price maintenance through different clauses of its Price Control Policy which imposes restrictions on competition, which is, prima facie, in violation of subsection (1) of Section 4 read with clause (a) of subsection (2) of Section 4 of the Act; and*

8. ***WHEREAS,** in terms of the Enquiry Report in general and paragraph 41 in particular, the Undertaking pursuant to clause 2.10 of the Price Control Policy, appears to be involved in the fixing and imposition of labor rates for fitting of split AC's, which prima facie, in violation of subsection (1) of Section 4 read with clause (a) of subsection (2) of Section 4 of the Act;*

9 ***WHEREAS**, in terms of the Enquiry Report in general and paragraph 42 in particular, the Undertaking pursuant to clause 2.7 of the Price Control Policy, appears to be engaged in the practice of restricting its dealers from providing giveaways and/or discounts on allied products. This practice is, prima facie, in violation of subsection (1) of Section 4 read with clause (a) of subsection (2) of Section 4 of the Act..."*

8. The summation of the SCN/hearing proceedings and responses submitted/arguments made by the Respondents are recorded separately for each Respondent/Undertaking herein below.

A. SCN Proceedings against and Submissions of Respondent No. 1/DEL

9. The first opportunity of hearing was provided by the Commission and the hearing was initially scheduled for 7 November 2019. However, Counsel on behalf of Respondent No. 1/DEL sought an adjournment and requested for time to file the written reply to the SCN via its letter dated 29 October 2019, which was granted by the Commission via letter dated 1 November 2019. Further extension in time was sought by Counsel via correspondence dated 21 November 2019 (granted by Commission via letter dated 26 November 2019) and the written reply was filed on 15 December 2019.

10. Subsequent to the filing of the written reply, four more opportunities of hearing were provided to Respondent No. 1 out of which only one was availed by Respondent No. 1 where its Counsel appeared before the Commission on its behalf on 3 September 2020 (Counsel on behalf of Respondent No. 1 had sought adjournments prior to the said date).

11. After the above hearing, Counsel on behalf of Respondent No. 1 filed additional/summation of its arguments in writing dated 16 September 2020 and additional information as requested by the Bench on 17 September 2020 and 16 October 2020 respectively, which pertained to:

i. Its list of authorized dealers/distributors
ii. Copies of judgments relied upon
iii. Data on its sales to Dealers; and
iv. Copies of price control circulars/policies of other undertakings in the market.

12. Respondent No. 1's submissions (taking into account both oral and written) are briefly summarized below:

i. In November 2016, Dawlance became a wholly owned subsidiary of Arcelik Anonim Sirketi, Turkey (Arcelik) and the new management voluntarily decided to discontinue the Dawlance Price Control Policy, which was implemented by the previous management. While placing reliance on the Commission's *M/s Diamond Paints Order*, emphasis was laid on the Commission's lenient view already taken towards undertakings who distanced themselves from employees involved in anti-competitive practices. The ledgers had also been provided to the Enquiry Committee (annexed to the Enquiry Report as Annex D6) and a summation of the penalties/fines imposed were provided:

Period	Fine (PKR Million)
1 July 2013 – 30 June 2014	7.4
1 July 2014 – 30 June 2015	6.0
1 July 2015 – 30 June 2016	6.5
1 July 2016 – 30 June 2017	4.1
1 July 2017 – 31 December 2017	0.4

ii. DEL fully cooperated with the search and inspection team, took several measures to promote the awareness of competition law including the introduction and implementation of the Competition Law Compliance Program and has maintained a compliance-oriented approach.

iii. The Price Control Policy was applicable on all dealer categories, i.e., super exclusive dealers, exclusive dealers and normal dealers, and only applicable on

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selected models of refrigerators and air-conditioners, thus, no mechanism to control prices on the entire product range of DEL.

iv. The Price Control Policy was only introduced on the demand of dealers, particularly small and medium sized dealers, to promote and sustain healthy competition as larger dealers would offer discounts at no profit for long periods of time, hence, ousting the small and medium sized dealers from carrying any DEL products. The effect of the same would be (a) the creation of a monopoly of larger dealers resulting in the curtailment of distribution of DEL products, (b) larger dealers would be able to exploit the consumer without providing any discounts and adoption of predatory pricing practices and (c) it would affect the provision of after sale service to consumers.

v. Concerning the free-rider problem, the Price Control Policy was applicable only on select products (as stated above), which were more technical and complex and subject to innovation/technological developments, which is why customers generally needed guidance when purchasing the same. Hence, dealers were requested to have knowledgeable staff and to invest in appropriate showrooms and provide product demonstrations. The concern was that people may go to these well-serviced dealers and then obtain the same product at a lower price offered by another dealer where such services were not provided, in particular, considering that the items were generally high priced. Thus, the Policy increased inter-brand competition on services, there is already vigorous price competition between Dawlance and its competitors; and intra-brand competition concerning provision of better services amongst dealers.

vi. Therefore, the said Policy allowed DEL to maintain the maximum number of dealers in the market allowing customers to easily access the retail point, reduce search cost and obtain the best pre-sale and post-sale services. It also encouraged dealers to invest in service quality, including employing human resource having technical know-how concerning products and to protect against free-rider issues, where dealers cut costs in the provision of quality service.

vii. Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**" or "**Treaty**") corresponds to Section 4 of the Act. The European Commission in its Guidelines on Vertical Restraints states that Article 101 prohibits only those agreements which appreciably restrict or distort competition however exempts those agreements which confer sufficient benefits to outweigh the anti-competitive effects. The Guidelines further state that the *"objective of Article 101 is to ensure that undertakings do not use agreements in this context, vertical agreements-to restrict competition on the market to the detriment of consumers"* and that *"there*

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is no presumption that vertical agreements concluded by undertakings having more than 15% market share automatically infringe Article 101(1)". Paras 106 and 107 of the Guidelines were also cited that provide nine justifications where any vertical restraints often have positive effects, including solving a free-rider problem. Reference was also made to the Guidelines on the Application of Article 81(3) (now Article 101) of the Treaty, which provides a 2 part assessment procedure where the first step is to assess whether an agreement between undertakings is capable of affecting trade and has an anti-competitive object or effects and/or the second step is to determine the pro-competitive benefits produced by the agreement and whether the same outweighs any anti-competitive effects.

viii. Reference was also made to the US Supreme Court case of Leegin Creative Leather Products Inc versus PSKS Inc 127 US 2705 (the "**Leegin Case**"), wherein it was also held that retail price maintenance does not always tend to restrict competition and each case should be assessed on its own facts.

ix. Other undertakings in the market are also implementing the same/similar pricing policies/rpm practices.

B. SCN Proceedings against and Submissions of Respondent No. 2/Haier

13. After issuance of SCNs, the then Counsel on behalf of Respondent No. 2 (Counsel was subsequently changed during proceedings) frequently requested for extensions to file its written response to the SCN, which was finally filed on 9 January 2020, after which four hearing opportunities were provided to Respondent No. 2, out of which the Respondent No. 2 availed two (adjournment requests were sought by Respondent No. 2 on several occasions). After the first hearing held on 9 September 2020, the Respondent No. 2 also submitted its supplementary written reply dated 21 November 2020. Another hearing was then held on 27 May 2021.

14. During the SCN proceedings, the Bench had directed Respondent No. 2 to submit additional information, which was also communicated in writing via the Commission's letter dated 12 October 2020 concerning provision of the list of its authorized Dealers, the amount of penalty imposed, the duration of the policy and any other material supporting its contentions. Throughout the SCN proceedings, Counsel on behalf of Respondent No. 2 sought time to submit the said information. In this regard, through its letter dated 11 June 2021, the Respondent No. 2 stated *inter alia* that it was in the process of filing an Exemption Application and would be willing to return the penalty amount charged to its dealers (albeit on the condition that the Commission passes a favourable order) and requested for more time to share the information in this regard.

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15. Briefly, the submissions made on behalf of Respondent No. 2 (taking into account both oral and written arguments) are as follows:

i. The relevant market is not properly defined as each appliance can be further divided into separate segments and the relevant market should include Respondent No. 2's competitors. The conditions of competition are not homogenous across Pakistan.

ii. Fixing of labor rates is to ensure that only qualified personnel are tasked to install split ACs and does not limit competition. The mandate of the Commission is also aimed at enhancing economic efficiency, hence, said imposition of rates ensures smooth functioning of all sold goods.

iii. Restriction of giveaways is to ensure dealer performance as the cost of such products has to be borne by the dealer and giveaways result in poor after sale services due to reduced profit margins.

iv. Reference made to the Leegin case, wherein the procompetitive justifications were highlighted for a manufacturer's use of RPM and it was asserted that a rule of reason standard should be applied.

v. Reference was also made to *Case T-17/93 Matra Hachette SA versus Commission of European Communities* and *Case 243/83 SA Binon & Cie versus SA Agence et messageries de la presse (1985)* which state that any agreement is capable of satisfying the conditions in Article 101(3) of TFEU. Comparison of Article 101 of the TFEU was made to Section 4 of the Act, which provides that no agreement shall be entered into restrictive of competition unless exempted under Section 5 of the Act, hence, the Enquiry Committee was to assess the RPM arrangement while taking into account the provisions of Section 9 of the Act. A comparative table of Article 101(3) of the TFEU and Section 9 of the Act was provided in this regard and it was stated that any of the conditions of Section 9 need only be established. Hence, even an arrangement such as price-fixing can be granted an exemption under the Act.

vi. Various benefits were also provided for the imposition of RPM including allowing new entrants to penetrate the market, thus, stimulating inter-brand competition, to eliminate the risk of free-riding and introduction of new products. It was also stated that the main objective is to impose a price floor to restrain downstream price competition in order to foster service competition. Reliance to this extent was placed on *Continental TV Inc versus GTE Sylvania Inc 433 US 36 1977.* It was then stated that these benefits satisfy the standard set under Section 9(1) of the Act.

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vii. Citing *United States versus Colgate & Co 250 US 300*, it was also mentioned that, in any case, there exists no agreement *inter se* between the Respondent No. 2 and its dealers.

viii. With regard to the documents/information directed to be provided by the Bench, the same were denied to be provided being against the principle of Double Jeopardy under Article 13 of the Constitution of the Islamic Republic of Pakistan, 1973 (the "**Constitution**"), i.e., that no person shall, when accused of an offence, be compelled to be a witness against himself. Any documents/information would therefore self-incriminate the Respondent No. 2.

ix. It was also contested that the Enquiry Committee had not discharged their responsibility and that the entire enquiry was a mere fishing expedition in contravention of *National Feeds Ltd versus Competition Commission of Pakistan 2016 CLD 1688* (the "**National Feeds case**").

x. Other undertakings in the market are also taking part in RPM practices.

xi. The following commitments were also made:

a. That the Haier Price Control Policy was enforced from 2018 till issuance of the SCN and that the same has been discontinued.

b. The Respondent No. 2 is ready and willing to comply with any or all directions issued in pursuant of Section 31(b) of the Act and shall remain compliant with the provisions of the Act.

c. The Respondent No. 2 is willing to file an exemption application.

Islamabad High Court Proceedings & Subsequent Hearing on Application

16. Subsequent to the last correspondence dated 11 June 2021, the Counsel on behalf of Respondent No. 2 approached the Honourable Islamabad High Court in its writ jurisdiction in *Haier Pakistan (Pvt.) Ltd versus Competition Commission of Pakistan WP No. 2348 of 2021* where the Court passed a stay order through its Order dated 1 July 2021 stating that the Commission may continue the SCN proceedings, however, "*no final order will be passed till the next date of hearing.*" In the Court proceedings, the Respondent No. 2's main ground was, *inter alia*, that a certain application concerning cross-examination of witnesses and a request to obtain a copy of the study/survey report had not been decided by the Commission. Moreover, that the Respondent No. 2 was being forced to pay the penalty.

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17. During the Court proceedings, the Commission submitted, as per its response dated 14 September 2021 to Respondent No. 2 that it had not received any application/letter dated 21 June 2021 from Respondent No. 2. The Commission also stated, in its letter dated 22 September 2021, that, in any case, it is willing to schedule another hearing to hear the matter and should be informed by 27 September 2021 (to which the Respondent No. 2 did not respond).

18. The Islamabad High Court disposed off the matter via its Order dated 8 October 2021, remitting the matter to the Commission along with sharing a copy of the instant petition and the annexes as supplementary material to the application filed by Respondent No. 2 with the observation that the Commission "*will decide the application within a reasonable time in accordance with law*". For ease of reference, the following excerpts are reproduced below:

> "2. *Given that CCP in adjudicating such application can consider and decide any questions of jurisdiction by any jurisdictional defect affecting the notices issued by CCP in its capacity as an investigator, it would be just and fair if the matter is remitted to the CCP.*
>
> 3. *Let the office send a copy of instant petition along with its annexures to be considered by CCP as supplementary material to the application filed by the petitioner already pending before it. It is expected that Competition Commission will decide the application within a reasonable time in accordance with law.*
>
> 3.[sic] *Disposed off.*"

19. Subsequently, in compliance with the Islamabad High Court's Order, two opportunities of hearing were provided to the Respondent No. 2 to hear its arguments on the said application (and any other submissions the Respondent No. 2 desired to make), out of which the Counsel on behalf of Respondent No. 2 appeared before the Commission on 18 January 2021 (after seeking an adjournment). Briefly, the following submissions were made by the Counsel (taking into account both oral and written arguments):

i. A meaningful 'opportunity of hearing' be provided to Respondent No. 2.

ii. That cross-examination of the Enquiry Committee officers be allowed and that they be summoned for such purpose. In this regard, the Counsel on behalf of Respondent No. 2 cited Section 33 of the Act stating that the Commission was a 'court' and bound by the laws of evidence and that the proceedings before the Commission are judicial in nature.

iii. That the following documents/information be provided:

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a. Authorization/delegation of powers by the Commission under Section 28(2) of the Act in favor of the Enquiry Committee to define the relevant market and to carry out a survey;
b. A copy of the survey report/findings, if any;
c. Any analysis of consumers and the perspective/statement of consumers, if any, recorded by the Enquiry Committee;
d. The Order of the Commission under Section 30(1) of the Act.
e. Determination of the Commission under Section 37(4) of the Act. In this connection, the National Feeds case was cited stating that any enquiry cannot be a fishing expedition and must be initiated with reasons.

20. At the conclusion of the said proceedings, the Bench once again provided an opportunity to the Counsel on behalf of Respondent No. 2 to put forward any other points that it may wish to make/share, to which the Counsel responded that it had only been directed to argue on the Application and had nothing further to add.

21. We acknowledge the cooperation and able assistance provided by Counsel on behalf of Respondent No. 1. However, we wish to record our disappointment with respect to the conduct of Respondent No. 2 during the proceedings, wherein, it has been 'blowing hot and cold', as evident from the record.

22. We will first address the Application submitted by Respondent No. 2.

C. Additional Application (dated 21 June 2021) of the Respondent No. 2

Meaningful Opportunity of Hearing

23. Some relevant facts as per the record, by way of background, are that the Respondent No. 2 has had a total of six opportunities of hearing provided to it by the Commission throughout the course of the proceedings, out of which it availed 3 opportunities, i.e., on 9 September 2020, 27 May 2021 and 18 January 2022, and has also submitted two main written replies (dated 9 January 2020 and 21 November 2020 respectively) to the SCN.

24. The arguments on behalf of Respondent No. 2 were concluded in the first two hearings. The Bench had also, time and again, requested the Respondent No. 2 to provide some additional information, specified in the Factual Background above. After these hearings, the Application in question was allegedly filed, containing grounds/issues that had never been brought up before in the first two hearings and neither in its main replies to the SCN. The Commission's position as submitted before the Court and as per record is that it had not received the same initially and after becoming aware of the same during the Court

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proceedings, it was willing to provide yet another opportunity to Respondent No. 2 to argue on the contentions made in the Application.

25. We note from the record that there was also a change of counsel during the SCN proceedings, thus, more time was sought by Respondent No. 2 to present its arguments before the Commission. Also, the Respondent No. 2 has itself requested numerous adjournments/sought more time and has had ample opportunity to represent itself before the Commission, as evidenced by the brief timeline below:

Date/Period	**Facts**
16 October 2019	SCN issued – initial date fixed for hearing 7 November 2019
21 November 2019	Initial adjournment requested by Respondent No. 1 and time to file written reply to SCN.
25 November 2019 16 December 2019 18 December 2019	Respondent No. 2 sought more time to file written reply to SCN.
10 January 2020	1st Reply to SCN filed by Respondent No. 2.
June-August 2020	Hearings adjourned on request of Respondent No. 1
2 September 2020	Respondent No. 2 requested to adjourn the hearing.
9 September 2020	1st Hearing conducted – Bench requested submission of additional information
12 October 2020	Letter sent by CCP requesting Respondent No. 2 to submit additional information
16 October 2020	More time requested by Respondent No. 2 to submit information
9 November 2020	Counsel changed for Respondent No. 2, requested more time to submit information.
23 November 2020	2nd Reply to SCN filed by Respondent No. 2 (supplementary written reply dated 21 November 2020)
23 April 2021	CCP letter with new hearing date scheduled and directed to submit additional information.
29 & 30 April 2021	More time sought to submit information/adjournment of hearing request.
27 May 2021	2nd Hearing conducted, proceedings concluded – Bench once again directed to submit additional information within three (3) days, i.e., by Monday, 31 May 2021 (as third day was falling on a Sunday).
11 June 2021	Respondent No. 2 stated that it was willing to file an exemption application and return the penalty amounts to its dealers (albeit on the condition of the Commission passing a favourable order) and requested more time to submit information.

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3 July 2021 – 8 October 2021	CCP informed by Respondent No. 2 about initiation of IHC proceedings, which was disposed in terms of Order dated 8 October 2021.
16 December 2021	CCP Hearing Notice to Respondent No. 2 for 6 January 2022
04 January 2022	Adjournment request from Respondent No. 2
18 January 2022	Hearing subsequent to the IHC Order

In the given background, it is evident that the Respondent No. 2 had more than sufficient opportunity to argue and present its case. The Application, on this ground, is only an afterthought and a delaying tactic, particularly, the belated stage at which it was filed, i.e., after the hearing was concluded on merits.

26. Review of the supplementary material placed before the Bench also reveals some factual inconsistencies made by Respondent No. 2, which are briefly summarized as follows:

i. In para 10 of the Petition – Hearing on the matter was held on 9 September 2020… the adjudicating members never allowed the authorized representative to complete his submissions. On the contrary and in disregard to the statutory provisions of Section 30(2)(b) of the Act started interrogating the authorized representative and pressurizing him to file commitments and provide additional material to substantiate the case…pressurized to file an undertaking that they have committed the offence and return the penalty imposed on dealers…

ii. In para 15 of Petition – That the Petitioner, while re-agitating the objections raised earlier, supplied the information vide letter dated 27 May 2021.

iii. In paras 17 & 18 – Respondent No. 1 filed an application dated 21 June 2021, which was not responded to, hence, the instant petition.

27. For the purposes of factual clarity and consistency, we observe certain facts as per record with respect to the above:

i. Another opportunity of hearing was provided on 27 May 2021 after the hearing on 9 September 2021.

ii. The Bench, under the Act, can lawfully inquire into or direct the Respondent No. 2 to provide additional material.

iii. As for attributing pressure, it seems preposterous as the Commission is in no position to exercise such duress. As per Respondent No. 2's letter dated 11 June 2021, copied to its Counsel, the offer to refund the penalty amount to its dealers was made conditional upon the Commission to pass a favourable order.

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iv. The Commission is not in receipt of any letter dated 27 May 2021 by Respondent No. 2. In any case, for argument's sake, the complete information was not provided as ledger entries were left out.

v. The Application was never received by the Commission as per record and the Commission only became aware of the same subsequent to the initiation of the Court proceedings.

28. It may also be pertinent to note that the remaining grounds in the Petition mainly relate to matters/precedent that remained to be adjudicated upon by the Commission. The enquiry officers are not charged with deciding matters of law such as whether or not RPM arrangements are a *per se* violation or should be considered under the rule of reason. Such adjudicatory/legal issues were yet to be decided by the Commission.

Cross-Examination

29. With regard to the contention that Respondent No. 2 may be allowed to cross-examine the officers of the Enquiry Committee, in the Lahore High Court judgement of LPG Association of Pakistan versus Federation of Pakistan **2021 CLD 214**, it was unanimously held that the Commission was established to carry out the "*administrative function of the executive to ensure economic efficiency and promote consumer welfare and in doing so it discharges quasi-judicial functions with the sole objective to regulate anti-competitive behavior.*" Hence, it is not a 'court' under Article 175 of the Constitution. Moreover, Justice Ayesha Malik further observed that while hearing cases, the Commission is "*not bound by the formal laws of evidence and procedure.*"

30. Furthermore, it must be understood that the enquiry stage is a simple fact-finding mission where the Enquiry Committee is not deciding any matter, but only collecting materials for ascertaining whether a *prima facie* case is made out and serves as the investigative arm of the Commission. The officers of the Enquiry Committee themselves do not provide any personal statements on oath as 'witnesses' or record their own statements as evidence. Any conclusion/analysis of the Enquiry Committee in the Enquiry Report are based on actual documents/evidence collected from an undertaking's own premises or provided by the undertaking itself. The Enquiry Report also includes analysis of the market, where required, which is again, based on current market conditions and information that is generally publicly available or shared with government agencies. Any alleged 'incriminating' material or findings are shared with the undertaking-respondent in the form of an enquiry report where the undertaking-respondent has an opportunity to rebut the same before the Commission by clarifying the same or presenting its own set of facts.

31. Another important distinction is that the enquiry officers concerned have not independently been called as the witnesses of the Respondent No. 2 or the Commission, and the order of

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examinations beginning with the examination-in-chief, cannot be complied with as per the provisions of the Qanun-e-Shahadat Order, 1984 (the "**QS Order**"), in particular Article 132 and 133 thereof. Importantly, in our understanding, the proceedings under the Act are not adversarial but inquisitorial in nature. The Commission itself cannot be considered to be an 'adverse party' (in this instance) for the purposes of the provisions of the QS Order, in particular Article 133 thereof. In this connection, we find support from the case of *Rehana Ahson and another versus Zulfiqar Mohammad 2021 CLC 901*, although pertaining to a property dispute, it aptly describes the principle of cross-examination as "*The essence of cross-examination is that it is the interrogation by the advocate of one party to a witness called by his adversary with the object either to obtain admissions from such witness favourable to his cause or to discredit him. Since it is settled that the right of cross-examination belongs to an adverse party, therefore, a party who does not hold that position should not be allowed to take part in the cross-examination*". The Sindh High Court also cited several dictionary definitions of an 'adverse party' as, *inter alia*, "*a party whose interests are opposed to the interests of another party to the action.*" Given the Commission's adjudicatory function, it, therefore, does not have any 'opposed interests' against the Respondent No. 2.

32. As for the argument that Commission is a 'Court' and the nature of proceedings are 'judicial' with reliance on Section 33 of the Act, we are of the view that the Commission is conferred with certain powers of a Civil Court to the extent of the matters specified therein. Such similar provision is present in other various regulatory body statutes including the Securities and Exchange Commission Act, 1997, the Pakistan Telecommunication (Re-Organization) Act 1996 and the Customs Act 1969. In this connection, the Supreme Court of Pakistan also observed in *Khawaja Imran Ahmed versus Noor Ahmed and another 1992 SCMR 1152* that the Code of Civil Procedure 1908 is not generally made applicable to the proceedings under the Sindh Rented Premises Ordinance 1979 and only certain powers of the Civil Court have been given under Section 20 of the Ordinance in respect of a) summoning and enforcing the attendance of any person and examining him on oath, (b) compelling production or discovery of documents, (c) inspecting the site, and (d) issuing commission for examination of witnesses or documents.

33. Hence, the inclusion of Section 33 of the Act does not make the Commission a 'court' bound strictly by the laws of evidence. Importantly, we reiterate the Lahore High Court ruling in the *LPG Association of Pakistan* case above that the Commission is not a 'court'. Similarly, for Section 33(2) of the Act, any proceedings shall only be a 'judicial proceeding' within the meaning of Sections 193 (punishment for false evidence) and 228 (intentional insult or interruption to public servant sitting procedure) of the Pakistan Penal Code, 1860.

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34. In light of the above, we are of the considered view that cross-examination of the enquiry officers is neither applicable nor warranted in the instant matter.

Provision of Further Information; Initiation of the Enquiry and SCN Proceedings

35. As already mentioned in detail in the 'Factual Background' above, a general survey was conducted of the market. All details concerning the same and any analysis of the Enquiry Committee has been duly shared with the Respondents in the form of the Enquiry Report along with all its annexes. The Commission, subsequently, in its meeting held on 21 December 2017 resolved to initiate an enquiry under Section 37(1) of the Act into the alleged contravention of Section 4 of the Act by "*electronic appliance manufacturers, distributors/dealers and their respective trade associations*" and to form an enquiry committee for this purpose with the powers of the Commission delegated to it under Section 28(2) of the Act. Section 37(4) of the Act merely refers to the Commission forming its own opinion to initiate proceedings under Section 30 of the Act. Hence, upon completion of the Enquiry Report in September 2019, considering the findings of the Enquiry Report and the recommendations of the Enquiry Committee, the Commission resolved in its meeting held on 25 September 2019 that proceedings be initiated against the Respondents under the provisions of Section 30 of the Act for *prima facie* violations of Section 4 of the Act.

36. For ease of reference, the relevant excerpts of the minutes of the said Commission meetings related to the Commission's decisions to initiate the enquiry and issue the SCNs (as requested by Respondent No. 2) are reproduced below:

Commission Meeting held on 21 December 2017 (Initiation of Enquiry):

> "*It was **RESOLVED THAT** that* [sic] *pursuant to the provisions of section 37(1) of the Act, an enquiry be conducted into the alleged contravention of the Section 4 of the Competition Act, 2010, by electronic appliance manufacturers, distributors/dealers and their respective trade associations.*
>
> ***IT IS FURTHER RESOLVED THAT** enquiry committee comprising of the following officers be constituted to conduct the aforesaid inquiry with the powers of the Commission delegated to it under section 28(2) of the Act.*
>
> *i) Maliha Quddus, Deputy Director (C&TA)*
> *ii) Irfan-ul-Haq, Assistant Director (C&TA)*
> *iii) Aqsa Suleman, Management Executive (C&TA)*"

Commission Meeting held on 25 September 2019 (Issuance of SCNs):

> "*It was **RESOLVED THAT** in the interest of the public at large proceedings be initiated against Haier Pakistan (Pvt.) Limited and DEL Electronics (Pvt.)*

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Limited, formerly Dawlance Electronics (Pvt.) Limited, under provisions of Section 30 of the Competition Act, 2010 (the "Act"), for prima facie violation of Section 4 of the Act."

37. Moreover, there seems to be a misconceived notion as to what is the mandate of the Commission. The Commission is not merely a consumer protection regulatory body. Competition issues of any sector in the economy are within the Commission's mandate and it is entrusted to protect consumers from anti-competitive behaviour. The consumer here is not just the end consumer but also includes any/all business entities engaged in the supply chain. The Act itself is a scheme of competition regulation aimed at improving the economic welfare of the nation as a whole; by deterring a wide range of anti-competitive practices that affect both trade and commerce across Pakistan.

38. As far as the *National Feeds* case is concerned, it would suffice to mention that the Honourable Supreme Court has held in CCP versus National Feed Ltd **CP No. 2119 to 2123 of 2016** [unreported] that "*we don't think the impugned judgement could create any obstacle or impediment in its way either to call for information or to inquire into any matter required to be inquired into under the Act.*" For ease of reference, the relevant portion is reproduced below:

> "*A look at the concluding paragraph of the impugned judgement reveals that the hands of the Commission have not been tied. It could proceed under Section 37(1) or (2) of the Act. It could also proceed under Section 36 of the Act, even if no complaint in writing has been filed by an undertaking or registered association of the consumers. When the Commission can proceed under the provisions mentioned above, we don't think the impugned judgement could create any obstacle or impediment in its way either to call for information or to inquire into any matter required to be inquired into under the Act.*"

39. In light of the above, the Application of the Respondent No. 2 is disposed off and we now revert to the main Issues on merits.

DELIBERATION ON ISSUES

40. In light of the written submissions, arguments and evidence presented by the Undertakings, and the contents of the SCNs and the Enquiry Report, the following main issues arise in determining whether the Undertakings are in violation of Section 4 of the Act:

I. *Whether the Relevant Market has been correctly defined in the Enquiry Report?*

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II. *Whether the Respondents have violated the provisions of Section 4 of the Act in terms of price fixing/resale price maintenance?*

D. Issue I – Definition of the Relevant Market

41. The Enquiry Report states, in para 19, that Haier and DEL operate in the 'upstream market', i.e., the market for manufacturing, distribution and marketing of home appliances, which are sold to dealers who operate in the 'downstream market'. The Enquiry Report has identified that the Respondents use the traditional dealership model as well as other distribution channels for sale of their products. The Enquiry Report has excluded the other distribution channels pertaining to online portals, banks on lease, online stores, hypermarket chains such as Metro stores, from the scope of the enquiry and, thereby, the definition of the 'relevant market', as sales of products, during the enquiry period, was limited through such channels compared to sales through the dealership network. The Enquiry Report has regarded the dealership network as a main source of targeting end consumers including industrial and corporate clients. Hence, the relevant product market was delineated to be the market for distribution of home appliances between:

i. Haier and its dealers, and
ii. DEL and its dealers.

42. As for the relevant geographic market, the Enquiry Report has identified (in para 20) that electrical appliances of the Respondents are supplied to dealers located all over the country. The subject price control policies are also stated to have been implemented on all dealers irrespective of where those dealers are located. Moreover, as conditions of competition were found to be homogenous across the country, therefore, the relevant geographic market was stated to be the whole of Pakistan.

43. As stated above, the Respondent No. 2 disputed the definition of the relevant market in the Enquiry Report, stating that it is not correct, as it would include the products manufactured by Respondent No. 2 as well as its competitors operating in Pakistan. Furthermore, it was also argued that there exists separate relevant markets for each type of home appliance and the same can be divided into different segments, for example, appliances like air conditioners, refrigerators, deep freezers, television sets and washing machines all fall in separate product categories and are not comparable with one another. The Respondent No. 2 further contended with respect to the relevant geographic market that marketing conditions for each type of home appliance are not homogenous across Pakistan and are capable of being affected by multiple factors including local weather conditions and distance from factory to the city of sale. Hence, various relevant geographic markets also exist in Pakistan for different home appliances.

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44. We have examined the Enquiry Report and the contentions of the Respondent No. 2. The Commission has held time and again that defining the 'relevant market' is not material for the application of Section 4 of the Act. Under Section 4, the emphasis is on the restrictive activity or prohibition being carried out through, *inter alia*, the form of an 'agreement', which may have the object or effect of "preventing, restricting or reducing" competition. In this regard, we refer to the Commission's order *in the matter of Amin Brothers Engineering et al* (the "**PESCO Order**"), wherein it was held that:

> "*...the rationale behind having a relevant market when dealing with competition issues must be kept in mind. In competition law, distinction must be made between unilateral anti-competitive conduct (abuse of dominance in Section 3 cases) and multilateral anti-competitive conduct (collusion in Section 4 cases)... in cases of collusion, market power is irrelevant. What is relevant is the agreement to collude. Therefore, the identification of a relevant market in cases of collusion is merely for the purposes of reference, and is not a requirement for establishing an anti-competitive action.*"

45. In particular, in cases where the very object/nature of the prohibited conduct is anti-competitive, there is no need to assess market definition or evidence of actual competitive harm. In this regard, we find the judgement of the US Supreme Court in *FTC versus Indiana Federation of Dentists 476 US 447 (1986)* instructive, wherein the association claimed that the decision of the FTC was wrong as matter of law because the FTC had not defined the relevant market. The Supreme Court held that a restriction requires some competitive justification even in the absence of a detailed market analysis and that the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition. However, the Court ruled that the finding of such adverse effects obviated the need for an inquiry into market power, which it termed as a mere "*surrogate for detrimental effects*".

46. In any case, the issue is not whether the relevant market has been defined but whether it has been defined correctly. In this regard, the relevant product market for Respondent No. 2 would, as stated in the Enquiry Report, include all its products across its dealer network as, under Clause 2.1 of its pricing policy, no dealer is allowed to sell any of its products below the 'promise price' and Respondent No. 2 has itself admitted in its response to the Enquiry Committee (annexed as Annex H-3 to the Enquiry Report) that the price control policy is standardized and applied "*across the board for all categories of dealers*". Hence, all Respondent No. 2's products are focal products in this regard.

47. The Respondent No. 1 has not contested the issue of 'relevant market'. Nevertheless, we note that concerning the relevant product market for Respondent No. 1, the evidence also indicates that the RPM conditions were imposed only on two products, i.e., refrigerators

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and split air-conditioners, across its dealer network (see generally para 46 of the Enquiry Report).

48. While the substitutability aspect may not have been addressed in the Enquiry Report, however, the Respondent No. 2 has not explained how the products are not substitutable or how, by not addressing this aspect, the same has prejudiced the determination in this regard, when it has itself admitted that the RPM condition is applicable on all its products. Moreover, dividing the products further into individual product segments does not seem to serve any meaningful purpose.

49. As far as the relevant geographic market is concerned, the Commission does not agree with the contentions of the Respondent No. 2 for the reason that the Respondents' products are already being sold all over Pakistan and the RPM arrangement is also circulated across their dealership network all over Pakistan, as admitted by the Respondents themselves. The Respondents are already competing in various cities and they regard all manufacturers of the relevant products as their competitors irrespective of their location.

50. The relevant geographic market has been defined under Section 2(1)(k) of the Act as:

> "*A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the competition are sufficiently homogenous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciable differing in those areas*".

Emphasis, therefore, has been placed on conditions of competition being 'sufficiently homogenous'. In *Case T-229/94 Deutsche Bahn AG v. Commission [1997] ECR II-1689*, which case pertained to *inter alia* an infringement of Article 86 of the Treaty, the applicant argued that the European Commission had wrongly defined the relevant market. The geographic market was the whole of Germany. The ECJ held that:

> *"92. In as much as the applicant submits that the Commission's definition of the geographical market is undermined by the difference in the competitive situation, it is sufficient to state that the definition of the geographical market does not require the objective conditions of competition between traders to be perfectly homogeneous. It is sufficient if they are 'similar' or 'sufficiently homogeneous' and, accordingly, only areas in which the objective conditions of competition are 'heterogenous' may not be considered to constitute a uniform market."*

51. Although buying patterns may differ based on locality, the Commission finds merit in the findings of the Enquiry Committee that market conditions across the country are

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sufficiently homogenous. Therefore, the Commission holds that the relevant geographic market is correctly defined by the Enquiry Report and it comprises of the whole of Pakistan.

E. Issue II - Whether the Respondents have violated Section 4 of the Act in terms of price fixing/resale price maintenance?

(i) Definition of Resale Price Maintenance, its Historical Context and its Treatment in Other Jurisdictions:

52. The instant matter concerns the implementation of price control policies by the Respondents and fixation of minimum prices. The policies under consideration are implemented at vertical level between manufacturers and dealers, hence, an arrangement between two parties i.e., the Respondents and the respective dealer. Such arrangement is commonly known as a RPM arrangement, which generally occurs at different levels of the supply chain and consists of characteristics such as mandatory conditions imposed by suppliers to not sell a product below a certain price, sell the goods at a certain price, agreed discount or at no discounts at all. This may be done either by means of a threat, promise or agreement or due to a refusal to supply or any other means of discrimination against consumers/retailers because of the supplier's pricing policy[1].

53. The Respondents have consistently argued that their RPM arrangements be treated and considered under the '*rule of reason*' applied under US antitrust law or consideration be given to any efficiencies in consonance with the approach of the European Commission under Article 101(3) of the TFEU. Although the Commission is not bound by international precedent and the same is merely persuasive, in order to clarify the treatment of RPM arrangements under Section 4 of the Act, it seems fruitful to first understand the history/treatment of RPM arrangements in other jurisdictions.

EU & UK

54. RPM is defined in the Guidelines on Vertical Restraints (the "**EU Guidelines**") 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*"[2].

55. RPM arrangements have been historically treated as a hardcore restriction in the European Union ("**EU**") and the United Kingdom ("**UK**") and continues to be treated as an arrangement that has an object of restricting competition to this day (see generally: **Case**

[1] Price Maintenance, Competition Bureau of Canada (2018)
Retrieved from: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_03210.html

[2] At Para 48

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AT.40428 Guess (2018) and *Case No. 50565-6 Digital pianos, digital keyboards and guitars: anti-competitive practices (2020)*).

56. Some of the earlier landmark decisions of the European Court of Justice ("**ECJ**") on RPM arrangements are briefly discussed to re-emphasize the strict treatment of RPM arrangements in Europe. It was held by the ECJ in *Vereeniging van Cementhandelaren versus European Communities Case 8/72 (1972)*, wherein Vereeniging van Cementhandelaren (Cement Dealers' Association) (hereinafter referred to as the VCH) had notified to the Commission certain agreements/decisions including a pricing agreement/policy for sale of cement, that:

> *"18 Article 85(1) [of the Treaty expressly identifies agreements which 'directly or indirectly fix ... selling prices or any other trading conditions' as incompatible with the Common Market.*
>
> *21 In fact the fixing of a price, even one which merely constitutes a target, affects competition because it enables all the participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be.*
>
> *22 This prediction is all the more reliable because the obligation to make a demonstrable profit in every case is limited to the provisions concerning 'target prices' and those provisions must in addition be considered within the framework of the internal rules of the applicant association as a whole which are characterized by strict discipline in conjunction with inspections and penalties."*
> (emphasis added)

57. In *SA Binon & Cie vs SA Agence et messageries de la presse Case 243/83 (1985)*, a number of questions on the interpretation of the then Articles 85 and 86 of the Treaty were referred to the ECJ for preliminary ruling including whether it was compatible with Articles 85 and 86 of the Treaty that a distributor reserves the right to fix prices and compels retailers to respect the prices laid down. In this regard, the ECJ held in Para 44 thereof that "*provisions which fix the prices to be observed in contracts with third parties constitute, of themselves, a restriction on competition within the meaning of Article 85(1) which refers to agreements which fix selling prices as an example of an agreement prohibited by the Treaty.*" However, the Court also recognized that the Commission may, in considering an application for exemption under Article 85(3), examine whether, in a particular case, such an arrangement may be justified.

58. In *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgalli Case 161/84 (1986)*, the ECJ was referred a question which dealt with an agreement between a franchisor and franchisee wherein the franchisee was obliged to regard prices suggested by the franchisor

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as recommended retail prices without prejudice to the franchisee's freedom to fix her own prices. In this regard, the Court held, at para 25, that "*although provisions which impair the franchisee's freedom to determine his own prices are restrictive of competition, that is not the case where the franchisor simply provides franchisees with price guidelines, so long as there is no concerted practice between the franchisor and the franchisees or between the franchisees themselves for the actual application of such prices.*" Hence, any fixing of prices was regarded automatically as restrictive of competition, however, recommended prices or price guidelines may be subject to an effects-based analysis.

59. In *SPRL Louis Erauw-Jacquery versus La Hesbignonne Case 27/87 (1988)*, the ECJ was once again referred a question concerning an agreement, in which the breeder fixed the selling price for seeds, i.e., whether the same fell within the scope of Article 85 (1) of the Treaty. In this regard, the ECJ held at para 15 that "*it must be pointed out that Article 85 (1) of the Treaty expressly mentions as being incompatible with the common market agreements which 'directly or indirectly fix purchase or selling prices or any other trading conditions'. According to the judgment of the national court the plaintiff in the main proceedings concluded with other growers agreements identical to the contested agreement, as a result of which those agreements have the same effects as a price system fixed by a horizontal agreement. In such circumstances the object and effect of such a provision is to restrict competition within the common market.*"

60. Under English Common law, there was a considerable body of RPM litigation beginning in the 1900s, where either price fixing agreements or contracts stipulating price fixing provisions were challenged as constituting an obvious restraint of trade. However, English Courts of that period prioritized freedom of contract over freedom of trade, hence, largely decided cases to uphold the contract[3]. Nevertheless, over time, UK has consistently adopted EU's approach to RPM arrangements, in particular, after the promulgation of the Competition Act 1998, which specifically prohibits RPM arrangements.

61. One of the first landmark RPM cases is the Competition and Markets Authority decision ("CMA", formerly known as the Office of Fair Trading) in *Replica Football Kits Decision No. CA98/06/2003 (2003)*, where a number of sportswear retailers had entered into price-fixing agreements in relation to replica football kits, infringing the provisions of the Competition Act 1998. Here, at para 494, the CMA, citing EU case precedents in this regard, held that "*it is settled law that agreements which fix resale prices or horizontal price-fixing agreements have as their object the restriction of competition. The OFT considers that minimum resale prices, agreed in a series of related vertical agreements, have the same aims as a price-fixing system fixed by a single horizontal agreement.*"

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[3] Apostolakis, Ioannis (2016) *Resale price maintenance and the limits of Article 101 TFEU: reconsidering the application of EU competition law to vertical price restraints.* Source: https://theses.gla.ac.uk/7101/1/2016apostolakisphd.pdf

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Interestingly, the price fixing agreements were initiated by suppliers during the football season/tournaments as retailers wanted to sell the kits below the recommended price advertised by the suppliers during the key selling period. It was observed that certain suppliers such as Umbro were able to and did exert considerable pressure on retailers such as Sports Soccer to persuade them to agree not to discount by threats that they might not otherwise receive a full allocation of replica kits or other products, which retailers could not afford to risk not having adequate supplies during such a peak selling period. Moreover, horizontally, retailers that were in price competition before the peak/key selling period during the football tournaments had vested interests to ensure that other retailers did not offer discounts. One of the key retailers, JJB, had considerable market power and bargaining power due to the size of its orders from supplier(s) and was able to pressurize suppliers to maintain prices in order to protect its own margins. Hence, this sequence of events amounted to a concerted practice/agreement of price fixing.

62. The aforementioned Replica Football Kits decision was appealed before the UK Competition Appellate Tribunal, which upheld the CMA's decision in *JJB and Allsports versus OFT [2004] CAT 17*. The UK CAT also upheld another similar decision of the CMA on RPM practices in *Argos Limited and Others versus Office of Fair Trading [2005] CAT 13*. In the latter case, the same related to fixing of prices of Hasbro toys and games via agreements entered into between Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd, which were brought about due to the retailers being unhappy with the margins they were receiving on Hasbro's branded products. In response, Hasbro issued a 'pricing initiative' to maintain retail margins on Hasbro's products. It was also observed that the retailers had further incentive to implement the 'pricing initiative' to prevent price undercutting by their competitors. The CMA and, subsequently, the Tribunal, found all 3 parties to have been a part of a concerted practice to fix prices as per the RPM arrangement in breach of the Competition Act, 1998.

63. Hence, a RPM arrangement is considered to be an agreement/concerted practice for the purpose of Competition Law and the very nature of a RPM arrangement, as it restricts the ability of a retailer to determine its resale prices independently in any given circumstance, restricts competition by object according to applicable EU and UK Legislation. Therefore, it is considered redundant to analyze any effects on the market as has also been established by jurisprudence in that part of the world.

64. Following the case law developed in the 2000s and 2010s, the CMA also issued an open letter to suppliers and resellers dated 20 June 2017 providing an explanation of what a RPM arrangement is and key points for suppliers to follow, which are:

- Not to dictate prices
- Issue minimum advertised price policies

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- Not to use threats, financial incentives or any other action including withholding supply or offering less favourable terms to implement such pricing policies
- Not to hide RPM agreements.

The CMA reissued the same targeting the musical instruments sector on 29 June 2020 in light of recent RPM cases (some of which have been cited in this Order) emphasizing that it is illegal for a supplier to prevent a retailer from discounting prices and that such an agreement does not have to be explicit; that it can be achieved by threats or financial incentives not to sell below a particular price.

65. In addition, according to the EU Guidelines, a RPM arrangement "*...gives rise to the presumption that the agreement is unlikely to fulfil the conditions of Article 101(3), for which reason the block exemption does not apply*[4]*. However, undertakings have the possibility to plead an efficiency defence under Article 101(3) in an individual case. It is incumbent on the parties to substantiate that likely efficiencies result from including RPM in their agreement and demonstrate that all the conditions of Article 101(3) are fulfilled.*[5]"

66. The EU Guidelines *inter alia* also list the general benefits that can be derived from vertical restraints. It also lists the anti-competitive effects/theories of harm of a RPM arrangement, which include the following:
    - Facilitating collusion between suppliers by enhancing price transparency on the market, hence, making it easier to detect whether a supplier deviates from the collusive equilibrium by cutting its price.
    - Undermining the incentive for the supplier to cut its price to its distributors as a fixed resale price would prevent it from benefitting from any expanded sales.
    - Eliminating intra-brand price competition, thus, facilitating collusion, as strong distributors may be able to force or convince one or more suppliers to fix their resale price above the competitive level helping them to reach a collusive equilibrium. Thus, the distributors' collective horizontal interest may be negative for consumers.
    - Soften competition between manufacturers and/or retailers
    - Distributors are prevented from lowering their sales price, hence, increase in prices.

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[4] See Article 4 (a) of the Commission Regulation No. 33/2010 on application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices ("**Vertical Agreement Regulations**") where the exemptions provided therein shall not apply to "*vertical agreements 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 to impose a maximum sale price or recommend 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."

[5] See also generally: **Case AT.40465 – ASUS (2018)** and **Case AT.40182 – Pioneer (2018)** *Ibid.*

- Lower the pressure on the margin of the manufacturer as, if all distributors are agreeing to/following the same price, the manufacturer would not have to lower its own price and commit to a single price for its products.
- Foreclose smaller rivals of the supplier as distributors may be ensured a fixed/increased margin through the RPM arrangement, which may entice distributors to favor or to only sell that specific brand of the supplier.
- Reduction in dynamism and innovation at the distribution level as it may hinder entry and expansion of more efficient retailers[6].

67. The EU Guidelines also lists certain efficiencies of RPM such as:
- It may be helpful during the introductory period of expanding demand for a new product as it induces dealers to better take into account the manufacturer's/supplier's interest to promote the product.
- It may increase sales efforts of distributors to sell the most products than its rivals, hence, achieving increased margins and expanding overall demand for the product.
- It may be necessary in a franchise system to ensure a similar distribution system however, the same is restricted to a coordinated short term low price campaign;
- It may allow retailers to provide additional pre-sale services as retailers may be encouraged to invest more money due to receiving extra margins;
- It may prevent free-riding, which means that consumers may take advantage of high-service retailers to make their choice but purchase the same product at a lower price from retailers that do not provide such services. This may in turn lead to high-service retailers to reduce or eliminate their services[7].

68. Therefore, despite the 'hardcore' approach adopted in the EU and UK, RPMs, although considered to have an object of affecting/restricting competition, may be granted exemption in consideration of the efficiencies listed in Article 101(3) of the TFEU. However, the EU Guidelines do stress that the parties must "*convincingly demonstrate*" that the RPM agreement can meet the conditions of Article 101(3). It is pertinent to note that under the EU Guidelines, important factors for assessing possible anti-competitive effects of a maximum or recommended resale price is the market position of the supplier[8]. Also, the timeline/duration is of importance[9] and that the same does not amount to a fixed or minimum resale price as a result of pressure from or incentives offered by any party[10].

69. The Respondent No. 2 has also relied on the *supra SA Binon* case and *Case T-17/93 Matra Hachette SA versus Commission of the European Communities* to support its argument that

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[6] At Para 224
[7] At Para 225
[8] At Paras 225 and 228
[9] We note that majority of the efficiencies listed at Para 225 are related to a short/introductory period.
[10] At Para 236

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RPM arrangements are considered under Article 101(3) of the TFEU. As far as *SA Binon* is concerned, the same has been discussed at length above where the ECJ has held RPM arrangements to be restrictive of competition under Article 101(1) of the TFEU (previously Article 85), however, an exemption application for the same may be considered under Article 101(3) of the TFEU. *Matra Hachette* concerned a merger/clearance application of a joint venture agreement between several parties to produce a multi-purpose vehicle, hence, is not relevant in the instant matter.

AUSTRALIA

70. In Australia, according to the Australian Competition & Consumer Commission RPM Notification Guidelines ("**ACCC Guidelines**"), RPM is a *per se* breach of the Competition and Consumer Act 2010, which means that it is prohibited outright, regardless of whether it has the purpose, effect or likely effect of substantially lessening competition as per Section 48 thereof.

71. Historically, RPM arrangements were illegal under the Trade Practices Act 1974 irrespective of any effect on competition (which provisions have now been repealed by the Competition and Consumer Act 2010). RPM was also a common ingredient of distribution systems in the Australian industry and linked to horizontal arrangements[11]. The approach to RPM arrangements can be aptly described with reference to the Federal Court of Australia's decision in *Trade Practices Commission v. Stihl Chain Saws (Aust.) Pty. Ltd. (1978) ATPR 40-091*, wherein the plaintiff brought an action against the defendant for publishing recommended retail prices for its products and offering discounts/special deals if payments were made within a certain time period. However, one such dealer sold the products at a discount, leading other dealers to complain to the supplier. Ultimately, the defendant terminated its dealership with the said dealer. The defendant attempted to induce and did induce the dealer not to advertise its products at prices less than those specified by the defendant. The Court found the defendant to be liable and held:

> *"It is clearly the intention of Parliament to lay down conditions for the conduct of corporate trade and commerce which will ensure that traders operate in competitive conditions and that the public has the benefits which flow therefrom. So far as resale price maintenance is concerned the object of the Act is to create conditions in which the public will benefit from traders competing with each other in respect of prices unfettered by price restraints imposed by suppliers of goods upon retailers... The steps taken by the defendant were calculated to frustrate the purposes of the Act in a direct and effective way by reducing price competition not only in country areas but also in the metropolitan area. To attempt to*

[11] OECD, *Policy Roundtables Resale Price Maintenance* (1997), pg 19
Source: https://www.oecd.org/daf/competition/abuse/1920261.pdf

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maintain the system free from price competition between dealers by deliberately pursuing the course of conduct forbidden by the Act was a serious contravention of the Act and must attract a substantial penalty."

72. Under the current legislative framework, undertakings involved or planning to be involved in RPM can lodge a notification to the ACCC requesting for exemption. The ACCC shall then assess the same by applying the public benefit test under Section 93(3A) of the Competition and Consumer Act 2010, under which the ACCC must be satisfied that the likely benefit to the public from the notified conduct will not outweigh the likely detriment to the public from the notified conduct. Hence, the ACCC recognizes that, in certain circumstances, RPM can result in benefits, including by promoting competition.

INDIA

73. RPM arrangements are illegal under Section 3 of the Indian Competition Act 2002. However, under Section 3(4), a RPM arrangement is only illegal if it causes an 'appreciable adverse effect on competition' in India. For this, the CCI generally weighs certain effect-based factors or determines whether the manufacturer controlling the prices holds significant market power (reference in this regard is made to *In Re: M/s Counfreedise and Timex Group India Case No. 55 of 2017 (2018)).*

74. One of the first cases finding a violation for RPM practices in India was *Re: M/s Fx Enterprise Solutions India Pvt. Ltd v. M/s Hyundai Motor India Limited Case No. 36 of 2014 (2017)*[12] wherein it was alleged that Hyundai entered into exclusive dealership arrangements with its dealers and dealers were required to obtain prior consent from Hyundai before taking up dealerships with other brands. Hyundai also imposed a 'discount control mechanism' through which dealers were only permitted to provide a specified discount and were forbidden from offering any discount above the specified range. On investigation, the DG found that the ex-showroom price of the cars sold by Hyundai to its dealers and in turn, by the dealers to the consumers, was fixed by Hyundai and dealers were only allowed to grant discounts within the specified range. CCI found Hyundai to be in contravention of the Competition Act 2002[13] and held:

"It is observed that an agreement that has as its direct or indirect object the establishment of a fixed or minimum resale price level, may restrict competition. This would include fixing the distribution margin or the maximum level of

[12] Note: there were previous cases concerning RPM arrangements before CCI, however, it was only till Hyundai where CCI found an undertaking liable for the same.

[13] It is pertinent to note that the National Company Law Appellate Tribunal overruled the decision on violation of Hyundai's right to fair hearing, which decision is currently under appeal. (Source: https://www.epw.in/journal/2020/50/special-articles/hyundai-and-law-resale-price-maintenance-india.html)

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discount, making the grant of rebates or the sharing of promotional costs conditional on adhering to a given price level, linking a resale price to the resale prices of competitors, or using threats, intimidation, warnings, penalties, delay or suspension of deliveries as a means of fixing the prices charged by the buyer (i.e., retailer).

88. RPM can prevent effective competition both at the intra-brand level as well as at the inter-brand level. When a minimum resale price maintenance is imposed by the manufacturer of a particular brand, distributors are prevented from decreasing the sale prices. In other words, the mechanism does not allow the dealers to compete effectively on price. The stifling of intra-brand competition results in higher prices for consumers.

90. RPM, when enforced at the instance of the distributors/dealers, is particularly problematic since it helps maintain collective interest of the downstream players, i.e. the distributors, to maintain higher resale prices, causing consumer harm.

91. RPM can decrease the pricing pressure on competing manufacturers when a significant player such as the OP (Hyundai) imposes minimum selling price restrictions in the form of maximum discount that can be offered by the dealers who are in interlocking relationship with multiple manufacturers.

92. It is known that RPM as a practice by multiple manufacturers is conducive for effective monitoring of cartel. Higher prices under RPM can exist, even when a single manufacturer imposes minimum RPM. This is more likely in case of multi-brand dealers who have significant bargaining power because of their ability to substitute one brand with another. Further, this leads to another likely anti-competitive effect of higher prices across all brands even if there is no upstream or downstream conspiracy, because preventing price competition on a popular brand would result in higher prices of competing brands as well, including those that have not adopted RPM. Thus, minimum retail price RPM has the effect of reducing inter-brand price competition in addition to reducing intra-brand competition."

<u>CHINA</u>

75. In a ruling issued on December 18, 2018, China's Supreme People's Court (SPC) ruled in favor of the Hainan Provincial Price Bureau in an administrative proceeding regarding a vertical price agreement with respect to products for resale to third parties (i.e., RPM) by Hainan Yutai Scientific Feed Company (Yutai). In its ruling, the SPC stated that RPM agreements under Article 14 of the Anti-Monopoly Law (AML) are typical vertical

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monopoly agreements which often have a double-edged effect that both limits and promotes competition. However, because market conditions at present are relatively immature and the capacity of markets for self-correction is relatively weak, the anti-monopoly enforcement agencies (now State Administration of Market Regulation (SAMR)) should emphasize prevention of the anticompetitive effects of such vertical monopoly agreements, and make the regulation and punishment of such agreements a focus of their AML enforcement activity[14]. It may also be noted that the SAMR has historically taken a tough stance on RPM.

(ii) The Leegin Case, Treatment of RPM arrangements/agreements under Section 4 of the Act & Violation in the Instant Proceedings

76. In the United States, RPM was considered by Courts to be *per se* illegal under the Sherman Act (with the exception of a few 'safe harbor' doctrines such as the *Colgate* decision) until the passing of the *Leegin* Case. By way of background, the US Supreme Court decision in *Dr. Miles Medical Co. versus John D Park & Sons Co 220 U.S. 373 (1911)*, which involved express agreements between a manufacturer of trade-marked proprietary medicines and its authorised dealers fixing their minimum resale prices, established a *per se* approach towards vertical price fixing restraints stating that the manufacturer cannot fix prices for future sales, being injurious to the public and void. The product was considered to be an article of commerce, hence, the rules concerning the freedom of trade were held to apply to it.

77. Subsequently, the *Leegin* case overruled *Dr. Miles*, in revising the principle of a 'per se' approach to vertical minimum resale price maintenance agreements to applying the 'rule of reason' standard. However, there was no determination on merits in the *Leegin* case and the US Supreme Court did not stipulate any binding test or conditions for determining the anti-competitive aspects of such arrangements. Leegin planned to introduce expert testimony describing the procompetitive effects of its pricing policy before the District Court, which excluded Leegin's expert testimony, relying on the *per se* rule established by *Dr. Miles*. The US Supreme Court granted certiorari to only determine whether vertical minimum resale price maintenance agreements should continue to be treated as *per se* unlawful. The Court overruled the *per se* approach held in the *Dr. Miles* case as it observed that the Court in *Dr. Miles* had justified its decision on formalistic legal doctrine rather than a demonstrable economic effect.

78. It is relevant to add that on being remanded, in *PSKS, Inc. v. Leegin Creative Leather Prods., Inc., 615 F.3d 412 (5th Cir. 2010)*, the US Court of Appeals upheld the lower Court's decision by dismissing the case on merits. However, the ratio decidendi as held by

[14] https://www.mondaq.com/china/trade-regulation-practices/826984/china39s-supreme-people39s-court-rules-rpm-is-illegal-per-se

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the US Court of Appeals was "*PSKS alleged that the RPM program forced consumers to pay "artificially" high prices for Brighton products. That claim defies the basic laws of economics. Absent market power, an artificial price hike by Leegin would merely cause it to lose sales to its competitors.*" Whereas, in the instant matter, both Respondents have a considerable degree of market power, i.e., Haier alone has an overall market share of 32% in the home appliances market in Pakistan, as per its own website,[15] and Dawlance has been serving consumers in Pakistan for more than 40 years and has recently been ranked as the number one home appliance brand in Pakistan by IPSOS, a global market research and public opinion specialist[16].

79. Interestingly, many States in the US still hold RPM arrangements to be *per se* illegal and US Courts have yet to set a decisive test/guidelines for determining whether RPM would have anti-competitive effects in any given market. As seen in the post-*Leegin* decision of *O'Brien versus Leegin Creative Leather Products Inc. 294 Kan. 318 (Kan. Sup. Ct. 2012),* a case on similar facts as the Leegin Case, the Kansas Supreme Court held that "*the language of Brighton's pricing policy certainly is subject to an inference that it was for the purpose of fixing prices and was designed to and tended to control the prices of Brighton's goods. While some discounting is allowed under the policy, it is permitted only under terms set by Brighton...* " The Kansas Supreme Court also held that its antitrust statute did not contain any language that would allow for or permits any mention of the 'rule of reason' approach[17] and that "*vertical price-fixing arrangements...were always impermissible in Kansas...*" and denied applying the 'rule of reason' approach.

80. The Respondent No. 2 also relied on the case of *Continental T.V., Inc. v. GTE Sylvania Inc 433 U.S. 36 (1977)* concerning the 'rule of reason' approach. The respondent manufacturer of television sets in *Continental TV* limited the number of retail franchises granted for any given area and required each franchisee to sell respondent's products only from the location or locations at which it was franchised, i.e., imposed territorial exclusivity restrictions not RPM arrangements. The US Supreme Court overruled the *per se* rule only towards non-price vertical restraints, but it reaffirmed the *per se* illegality of vertical price restrictions[18] (like RPM arrangements). In any case, we find this case not relevant. It is relevant to add that this was a pre-*Leegin* decision.

81. We also find the dissent opinion in the *Leegin* case instrumental where Justice Breyer aptly summed that there has been 'nothing new' as studies arguing the potential harm and

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[15] https://www.haier.com/pk/about-haier/haier-pk/?spm=pk.28415_pc.header_86000_20190530.4

[16] https://www.dawn.com/news/1591241

[17] K.S.A. 50-101 ("[a]ny such combinations are hereby declared to be against public policy, unlawful and void."); K.S.A. 50-112 ("[a]ll arrangements, contracts, agreements, trusts or combinations between persons, designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles . . . are hereby declared to be against public policy, unlawful and void.")

[18] Footnote 18

possible pro-competitive effects of RPM arrangements have been the same in the past century and it is not sufficient for the US Supreme Court to over-rule a well-settled principle that provides administrative certainty for over half a century. In this connection, he made the following points in relation to maintaining a '*per se*' approach:

i. Economic discussion is different from antitrust law. Where economics can and should inform antitrust law, however, antitrust law should not be so uncertain and replicate the conflicting views of economists', law being an administrative system of the effects which depend on the content of the rules and precedents applied by judges, juries and lawyers advising their client.

ii. That there was no consensus on how often the benefits for RPM occur in practice. For example, although there is consensus that free-riding takes place, free-riding is a norm in the economy where dealers, in any case, take a 'free ride' on investments that others have made in building a product's name and reputation. In his opinion, the ultimate question was not whether free-riding takes places, but how much of it takes place? And he rightly answered with "an uncertain sometimes". He also considered to not place "*significant weight upon justifications that the parties do not explain with sufficient clarity for a generalist judge to understand.*"

iii. Courts cannot easily identify instances in which benefits are likely to outweigh potential harms. For example, it is difficult to determine just when, and where, the "free riding" problem is serious enough to warrant legal protection. One can also not expect judges to apply complex economic criteria without making mistakes.

82. Therefore, we find the debate into whether or not to adopt a 'rule of reason' approach irrelevant as our law is clear on the matter. Although the Commission has passed Orders on types of RPM agreements in the past, for purposes of clarity, after a detailed review of several international precedents in various jurisdictions, we have no hesitation in holding that RPM arrangements, in whatever form, i.e., *inter alia* restricting discounts, fixing the price and/or setting a minimum or maximum price floor/ceiling, clearly fall under Section 4(2)(a) of the Act, amounting to a fixation of the selling price of a product/good, and are to be treated 'by object' as anti-competitive as it ultimately impacts both intra-brand and inter-brand competition, in whatever form. For ease of reference, Section 4 is reproduced in its relevant part as follows:

> *"**4. Prohibited Agreement.** - (1) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings, shall make decision in respect if the production, supply, distribution, acquisition or control of goods or the provision of services which have the object or effect of*

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preventing, restricting or reducing competition in the relevant market unless exempted under section 5.

(2) Such agreements include but not limited to-

(a) Fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any services ..."

83. Coming to the instant matter before us, both Respondents have admitted to imposing price and other restrictions through RPM. With regard to Respondent No. 1, such pricing restrictions are in the form of 'Price Control Circulars' annexed as Annex D3 to the Enquiry Report, applicable on only Dawlance refrigerators and split air-conditioners, where selling below the list price attracts different penalties based on the number of violations (Clause 1 thereof). Any violation may also lead to suspension of a dealer's supply of products (Clause 2 thereof). The Price Control Circular also limits the provision of gifts/package deals below a certain price and accessories apart from those specified (Clauses 5, 7 and 8 thereof). Additional prices have been fixed for fitting, brackets and stabilizers (Clauses 8 and 9 thereof). Any sale below the prices fixed or contravention of the said clauses results in fixation of specified penalties. Respondent No. 1 also shared the total amount of penalties imposed along with ledgers, hence, the Price Control Circular was implemented during 2013 to 2017, after which the new management took over and discontinued the practice.

84. With regard to Respondent No. 2, similar provisions exist in agreements found entered into with dealers annexed as Annex H4 and H5 to the Enquiry Report where, as admitted by the Respondent No. 2, it is applicable on all products and standardized for all dealers a part of its dealer network. Clause 2 thereof pertains to the RPM arrangement by the name of 'promise price', where no dealer is allowed to sell below the same. Dealers are also not allowed to provide the customer with free installation or offer associated products (as a package deal) or offer such package deals below the 'promise price'. Rates for installation are also fixed and dealers are not allowed to give any gift schemes. Clause 3 also states that providing a quotation below the 'promise price' is a form of 'propaganda'. Breach of any of the provisions would result in termination and/or fines. Respondent No. 2 has also admitted in its response (Annex H3) and during the proceedings that penalties have been imposed on dealers.

85. The Respondents have even gone so far as to prevent dealers from even suggesting that customers should survey the market or compare their products with other brands, essentially restricting inter-brand competition and consumer choice (refer to Clause 4 of Respondent No. 1's pricing policy and same is labelled as 'propaganda' by Respondent No. 2 in its pricing policy).

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86. Respondent No. 2 has contested that its RPM arrangement is not an 'agreement' for the purposes of Section 4 of the Act. We hold that both Respondents have entered into 'agreements' for the purposes of Section 4 of the Act, which is wide in its scope and includes "*any arrangement, understanding or practice, whether or not it is in writing or intended to be legally enforceable*". In this connection, Respondent No. 2 has entered into written agreements with dealers. Moreover, circulars issued from time to time also fall under the term 'agreement' between the Respondents and their dealers, being part of the existing ongoing business relationship between them and they were also duly adopted by the dealers.

87. If we sum up the review of all jurisdictions above, the overwhelming majority treats RPM arrangements/agreements as a 'hardcore restriction', being restrictive of competition by object, with the possibility of seeking exemption from the concerned competition authority due to any pro-competitive benefits/efficiencies that may be considered and assessed on a case by case basis by the concerned authority, which in our law is provided for under Section 5 of the Act read with Section 9 of the Act as well. It is emphasized that a 'by object' restriction under Section 4 of the Act in no way hinders an undertaking's obligation to file for exemption and seek clearance from the Commission under Section 5 read with Section 9 of the Act. No such application was ever received by the Respondents.

88. Without prejudice to the afore-going, even otherwise, the grounds for efficiency taken by the Respondents are primarily to protect smaller dealerships, to prevent free-riding, to improve pre-sale services and that such RPM arrangements have been implemented due to it being the industrial norm. Considering that the subject RPM arrangements are, by object, anti-competitive, while the Commission is not obligated to consider the efficiency grounds, nevertheless, for sake of completeness, we find that:

i. The mere fact as asserted by the Respondents that RPM agreements are an industry-wide practice in absence of which it is difficult to compete and dealers may request the same to protect their margins, is in itself evidence of how such arrangements impact and impede competition and makes it fall in the prohibited agreement category. Mere admission that such restrictions are an industry-wide practice *inter se* dealers and manufacturers also does not absolve the Respondents from any liability under the Act.

ii. The choice to offer forms of discount or package deals is an important part of the negotiating process with consumers, which should be left to dealers as per their own independent commercial decisions. This, coupled with fixed prices, diminishes consumer bargaining power.

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iii. The RPM arrangements may also duly result in price hikes as dealers can charge a higher price well above the fixed price to consumers. Moreover, no cogent evidence was provided that dealers were investing their resources and extra margins towards better services, in particular, amongst smaller dealerships. Targeting optimal sales even otherwise requires dealers to compete vigorously with each other in terms of service and product variety given the large amount of dealerships in one town/city, hence, there seems to be no need for any price fixing measures as RPM, although it may stabilize price levels, it prevents lower price competition, which is beneficial for the consumer.

iv. As far as free-riding is concerned, the Respondents did not establish as to what extent 'free-riding' takes place to warrant such strict protection in the form of RPM arrangements.

v. The RPM arrangement also allows competitors to reasonably predict and set their own prices accordingly and may further harm inter-brand competition, as indicated by the Respondents themselves, where dealers may prefer displaying products of brands that impose RPM, hence, protecting their margins.

89. The Respondent No. 2 has also relied on the case of *United States v. Colgate & Co., 250 U.S. 300 (1919)* as being one of the loopholes for RPM arrangements. In this regard, the *Colgate* ruling was further clarified and elaborated upon in *United States v. Parke, Davis & Co., 362 U.S. 29 (1960)*, where the Court, after detailing the history of the *Colgate* decision, held that the protection/'safe harbor' for resale price maintenance activity by an undertaking established in *Colgate* only applied in circumstances where the manufacturer exercised its right to simply refuse to sell to dealers who were not willing to resell at prices only suggested by the manufacturer. However, it did not apply where a manufacturer "*secures adherence to its suggested prices by means which go beyond its mere declination to sell to a customer who will not observe its announced policy.*" Hence, the program implemented by the Defendant in the *supra Parke Davis* exceeded the limitations of the *Colgate* doctrine as it elicited the wholesalers to deny its products to retailers. In any case, no jurisdiction recognizes the use of any coercive device in the form of penalties/threats/sanctions as a measure applicable in a valid RPM arrangement, whereas, in the instant case, the Respondents imposed heavy sanctions in order to ensure and monitor compliance of their respective pricing policy.

90. In fact, as provided by Respondent No. 1, it has fined dealers a total of PKR 24.4 million during the period of July 2013 to December 2017. When requested for the information on the total amount of sanctions, Respondent No. 2 failed to provide the complete information, however, the evidence attached with the ER sufficiently demonstrates the imposition of some sanctions by Respondent No. 2 including the sanction list provided by Respondent

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No. 2 attached as Annex H3 to the Enquiry Report. Here, it is important to highlight that Respondent No. 2 in its Petition before the Honourable Islamabad High Court (see Factual Background above) had attached a letter dated 27 May 2021, purportedly written to the Commission, in response to the Bench's directions pertaining to submission of total penalty along with ledger entries. In the purported letter (which as per record was never received by the Commission), the Respondent No. 2 has merely stated that the total penalty amounts to PKR 2.41 million and has not provided any ledger entries. The same also contradicts its stance in its letter dated 11 June 2021, where it has requested more time to submit the penalty information. This Bench deems such conduct unfortunate.

91. In light of the above, we hold that the Respondents have not demonstrated with sufficient clarity the need to enter into and implement the concerned RPM arrangements/agreements. The duration of the RPM arrangements is not limited to an introductory/short period and the Respondents both have established brand presence in the relevant market as well as significant market power. Moreover, no efficiency justification can uphold the Respondents' act of imposition of penalties and the restriction on dealers from comparing different branded products and suggesting consumers to survey the market before making their purchase decision. We also find that, due to the imposition of penalties for non-compliance of RPM, Respondents coerced dealers in complying with the same. Importantly, there is no exemption granted by the Commission under Section 5 of the Act. Resultantly, such agreements under Section 4 of the Act are void.

REMEDIES AND PENALTIES

92. Internationally, RPM arrangements/practices have been heavily penalized and are considered as serious violations of competition law. In some of the cases cited in this Order alone, the following penalties have been imposed:

- Philips Case – EUR 29,828,000 (approx. PKR 6 billion)
- ASUS Case – EUR 5,360,000 (approx. PKR 1.1 billion)
- Digital Pianos Case – GBP 278,945 (approx. PKR 67 million)
- Guess Case – EUR 39,821,000 (approx. PKR 8 billion)
- Pioneer Case – EUR 10,173,000 (approx. PKR 2 billion)
- Hyundai Case – INR 87 crores (approx. PKR 2 billion)

93. We find it of relevance to particularly add two instances in China where the Hainan Provincial Price Bureau fined Yutai, a fish feed company, RMB 200,000 (approx. PKR 5.6 million) for concluding RPM agreements with its distributors in 2014 and 2015, in violation of Article 14(1) of the AML, even though the agreements were apparently never implemented. SAMR's local branch in Zhejiang Province announced a fine of USD 45.62

million on the Bull Group for RPM in September 2021[19]. Similarly, in Turkey, the Turkish Competition Board fined Sony Eurasia Pazarlama AS (Sony) for RPM amounting to a total amount of TRY 2,346,618.62. (approx. PKR 30 million[20]), where Sony was found to have (i) monitored the price levels in online platforms, (ii) expected compliance with its recommended resale prices and (iii) had the ability to threat the distributors with withholding incentive payments in case of non-compliance.

94. However, both the Respondents requested the Commission to take a lenient view on the matter. We note that both the Respondents have international presence (as per their respective websites, Respondent No. 1/DEL is known in 146 countries and Respondent No. 2/Haier has a network covering over 160 countries in the world), they should be well aware of the seriousness with which RPM arrangements are treated.

95. We note that Respondent No. 1 has not only discontinued such practice since 2017 but has also voluntarily committed before the Bench to refund all penalty amounts back to its respective dealers. We are also cognizant of the fact that there has been a change of management in 2016, as per Arcelik's 2016 Annual Report. Moreover, the representatives of Respondent No. 1 have consistently, since the beginning of the enquiry, showcased a compliance-oriented approach, where they not only cooperated with the Enquiry Committee and with the team during the Search and Inspection but have also duly complied with the directions of the Bench in providing the ledgers, the list of dealers and verification of the penalty amount.

96. To the contrary, Respondent No. 2 has been blowing hot and cold throughout the proceedings. The Respondent No. 2 had contended that it only implemented the pricing policy from 2018 till issuance of the SCN. The Respondent No. 2 provided no proof to the Commission of the discontinuation of the policy. Even if we consider the same to be true, the Respondent No. 2 has misstated facts on record where the price control circulars attached as Annex H1 to the Enquiry Report imposing fines and circulating the new price list dates to February 2017. It negates the fact that the Pricing Policy had only been implemented from 2018. The Respondent No. 2 also remained uncooperative during the enquiry proceedings, in particular, during the Search and Inspection, and continued to fail in adhering to the directions of the Bench.

97. The Commission also finds it alarming that if such practice is rampant in the market of electronic home appliances as well as the possibility that the dealers request/lobby with suppliers/manufacturers to implement the same; it could indicate an attempt by

[19] https://www.globalcompliancenews.com/2021/11/05/china-asia-pacific-competition-highlights-q3-2021-26102021/

[20] https://www.gurkaynak.av.tr/docs/00c7c-article-90639.pdf

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undertakings in the market to eliminate price competition, intra-brand and inter-brand competition in order to protect their own margins at both the supplier and dealership levels. As seen in the *supra* UK RPM cases, even where retailers/dealers themselves have requested suppliers/manufacturers to impose a RPM arrangement, the competition authorities have found such arrangements to be in contravention of competition law due to the great degree of price distortion in the market and dealers have also been found liable and penalized accordingly. In this instance, it may be noted that we do not deem it necessary to consider the conduct of the dealers given the clear coercive element attached to the price control circulars of the Respondents, as stated above, and the sanctions imposed on dealers by the Respondents.

98. However, as for the documents/evidence provided by one of the undertakings of RPM agreements/arrangements being entered into and implemented in the electronic home appliance sector, the Commission directs these to be referred to the Cartels & Trade Abuses Department, so that the Department may proceed in accordance with law.

99. Taking the above view in its entirety, we are of the opinion that the contravention remains serious in its nature. However, the conduct, circumstances, approach, and the duration of contravention, in the given background may not justify the same treatment for both the Respondents. Therefore, we are hereby imposing the following penalties:

i. For Respondent No.1/DEL, taking into consideration its commitment to refund the penalty amounts/sanctions to its dealers, the fact that there had been a change in management and that the practice had been discontinued as well as the cooperative and compliance-oriented approach/conduct throughout the proceedings, we are restricting the penalty in the amount of PKR 100 million, not exceeding 1% of its annual turnover in the last preceding financial year (2020-2021). This lesser penalty is subject to Respondent No. 1/DEL fulfilling its commitment to refund the sanctions to its dealers within the time specified in para 100(ii) below.

ii. For Respondent No. 2/Haier, although its conduct called for a much higher and stricter penalty, considering the violation is a case of first instance for Respondent No. 2/Haier and in order to promote a compliance-oriented approach, with good faith, we are constraining ourselves and restricting the penalty in the amount of PKR 1 billion, not exceeding 3% of the annual turnover in the last preceding financial year (2020-2021), as per Section 38(2)(a) of the Act.

100. The Commission further directs the Respondents to:

Deposit the penalty amount for contravention of Section 4(1) of the Act read with Section 4(2)(a) thereof on account of RPM practices, as specified in Para 99 above, within thirty (30) days from the date of this Order.

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ii. Refund all penalty amounts imposed by the Respondents to their respective dealers and provide copy of the receipts evidencing the same to the Commission within thirty (30) days from the date of this Order;

iii. To cease and/or not repeat such conduct with immediate effect.

101. Failure on part of either of the Respondents to comply with any of the directions of the Commission mentioned above (in paras 99 and 100 of this Order) shall cause the Commission to take prompt action for such non-compliance and contravention in accordance with the provisions of the Act, and no lenient treatment is likely to be exercised in such circumstances.

102. With respect to RPM, we therefore caution all retailers, suppliers, manufacturers, dealers or any other undertaking as follows:

i. RPM Agreements are 'by object' anti-competitive in nature and a violation of Section 4(2)(a) of the Act. The Commission considers the same to be a serious violation of competition law. Any party wishing to implement the same must notify such agreements/arrangements and first seek clearance from the Commission through exemption under Section 5 of the Act addressing the efficiencies specified under Section 9 of the Act. In the absence of such exemption, such agreements/arrangements are void.

ii. Forms of RPM include imposing minimum and maximum pricing restrictions and discount restrictions.

iii. If a party has been involved in an RPM arrangement, it may benefit from lenient treatment by coming forward and filing a leniency application.

iv. Parties cannot, directly or indirectly, impose any sanction, monitor compliance and/or coerce other parties.

103. Order Accordingly.

Ms. Rahat Kaunain Hassan
(Chairperson)

Mr. Mujtaba Ahmad Lodhi
(Member)

ISLAMABAD, THE 11 DAY OF MARCH, 2022

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