Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 3454 of 2020

Dalda Foods Limited

Vs

The Competition Commission of Pakistan, etc.

PETITIONER BY:	Mr. Feisal Hussain Naqvi and Barrister Saman Mamoon, Advocates.
RESPONDENTS BY:	Mr. Farrukh Shahzad Dall, Assistant Attorney General. M/s Kashif Ali Malik and Qaiser Abbas Gondal, Advocates for CCP.
DATE OF HEARING:	25.05.2021.

BABAR SATTAR, J.- Through this petition the petitioner has impugned (i) the letter issued by the Competition Commission of Pakistan/respondent No.1 ("**CCP**") dated 13.07.2020 seeking information to address concerns regarding excessive pricing of Vanaspati ghee, (ii) letter dated 07.09.2020 informing the petitioner that an enquiry had been ordered by CCP under Section 37(1) of the Competition Act, 2010 ("**Act**") in the matter of price increase of Ghee/Cooking Oil to determine *prima facie* contravention of Sections 3 and 4 of the Act in relation to which information was sought from the petitioner under Section 33 of the Act, and (iii) Special Order dated 06.11.2020 passed under Section 36 of the Act reiterating

respondent No.1's request for information for purposes of the enquiry and warranting of penal consequences in the event that the petitioner failed to abide by the order.

2. Brief facts of the case are that respondent No.1 received certain complaints regarding excessive pricing of the cooking oil from the Government of Punjab as well the Federal Government. The matter of excessive pricing of food items was considered by the National Price Monitoring Committee in its meeting held on 20.05.2020 and the minutes of the meeting reflected that one of the decisions taken was that *"the Competition Commission of Pakistan should check anti-competitive practices by taking into consideration the international commodity prices that has not fully translated into fall in their domestic prices."* There was a complaint received by the Prime Minister's Performance Delivery Unit through Pakistan Citizen's Portal dated 21.05.2020 stating that while local ghee companies reduced their prices after reduction of prices of petrol and diesel multinational companies were not following suit. The Ministry of Industries and Production of the Government of Pakistan then wrote to respondent No.1 on 08.06.2020 stating that despite reduction in Palm Oil prices, the retail prices of vegetable ghee in the market have not shown a declining trend and requested that CCP to intervene in such situation under Sections 3(3)(a) and 37 of the Act and take *suo motu* action under Section 37 of the Act read together with other enabling provisions. On the basis of such information and request from the Federal Government, the CCP issued the request for

information to all players and stakeholders within the ghee/cooking oil industry including the petitioner. The request for information was resisted by the petitioner. However, many other undertakings who received requests for information from respondent No.1 furnished the information requested and after such preliminary fact-finding exercise respondent No.1 ordered a formal enquiry under Section 37(1) in the matter of price increase of ghee/cooking oil to determine *prima facie* contravention of Sections 3 and 4 of the Act. For purposes of the enquiry information was sought to determine whether any undertakings in ghee and cooking oil were engaged in activities that were in breach of Sections 3 and 4 of the Act. Having found the petitioner to not be in compliance with the request for information under Section 33 of the Act, the petitioner was issued the special order under Section 36 of the Act for provision of information through notice dated 07.09.2020. Aggrieved by the initiation of enquiry, the affiliated request for information under Section 33 and the special order, the petitioner filed the instant petition.

3. Learned counsel for the petitioner submitted that the request for information neither contains details of CCP's concerns regarding excessive pricing nor the relevant statutory provisions under which it was exercising authority. In response to CCP's request, the petitioner asserted that CCP could only deal with matters that fell within the purpose of the Act and that pricing of food items did not fall within CCP's domain. That in any event, the share of the petitioner in the ghee and cooking oil market

was limited to 3% and consequently no information could be sought from it for purposes of Section 3 as the petitioner neither had a dominant position in the market nor could be assumed to be abusing such dominant position. That once the petitioner received letter dated 07.09.2020 regarding initiation of enquiry, it once again asserted that the CCP could only exercise such jurisdiction as vested in it under the Act and if the information was being sought for purpose of Section 3 (abuse of dominant position) and Section 4 (prohibited agreements) CCP was obliged to disclose the *prima facie* basis for initiating the enquiry. That the petitioner drew respondent No.1's attention to ***National Feeds Limited Vs. Competition Commission of Pakistan (2016 CLD 1688)***, wherein this Court had struck down a notice of enquiry for its failure to disclose the basis for initiating an enquiry while holding that regulatory authorities could not initiate enquiries without relevant basis or forming a *prima facie* view regarding the infraction suspected as otherwise such enquiry would amount to a fishing expedition. That without adhering to the petitioner's request to disclose the *prima facie* basis for initiating the enquiry and the material on the basis of which CCP concluded that there was need to enquire into the concerns regarding abuse of dominant position or the petitioner's involvement in a prohibited agreement, CCP issued special order dated 06.11.2020 which is illegal, as it is based on the enquiry ordered under Section 37 which in itself is illegal in view of the ***National Feeds*** and it is settled law that if the foundation is found to be illegal the superstructure built upon it also comes

down along with the foundation. He has placed reliance on ***Muhammad Yousaf Ali vs. Muhammad Aslam Zia*** ***(PLD 1958 SC 104)***. The learned counsel has relied on ***Complaint by Messers Catkin Engineering Sale and Services (Pvt.) Limited vs KPK Directorate of Agriculture Engineering (2020 CLD 497)***, wherein the Competition Appellate Tribunal relied on ***National Feeds*** to hold that mere filing of a complaint was an insufficient basis to initiate an enquiry and CCP had to be satisfied based on *prima facie* findings regarding breach of law for an enquiry to be sustainable. He further stated that subsections (1) & (2) of Section 37 had to be read together and a notice under Section 37 must "disclose the sufficient facts or *prima facie* evidence on the basis of which an enquiry is initiated" and as none of the notices issued by CCP to the petitioner seeking information in exercise of power under Section 37 read with Section 36 of the Act revealed any basis for the enquiry initiated, the request for information, the enquiry notice and the special order were all illegal. Learned counsel for the petitioner asserted that the petitioner had a 3% market share in the ghee and cooking oil industry and could not conceivably be charged for abuse of dominant position. And that CCP had not alleged that it has entered into a prohibited agreement for purposes of Section 4 and consequently the petitioner could not be roped into a roving enquiry being conducted by CCP. He relied on ***Assistant Director Intelligence and Investigation, Karachi Vs. M/s B.R Herman and others*** ***(PLD 1992 SC 485)***, ***Adamjee Insurance Company Ltd. etc. Vs. Assistant***

Director, Economic Enquiry Wing, Federal Investigation Agency (NLR 1989 Criminal 637) and ***M.D Tahir, Advocate Vs. Director State Bank of Pakistan, Lahore (2004 CLD 1680)***. He referred to Article 129 of the Qanun-e-Shahadat Order, 1984, to argue that if CCP had any incriminating material, the petitioner should have been confronted with it and CCP's failure to do so would result in presumption that no such incriminating material existed. For this argument he relied on ***Dr. Moula Bux and others Vs. Government of Sindh and others (2000 PLC (CS) 905)***.

4. Learned counsel appearing for the Competition Commission of Pakistan submitted that CCP had merely called for information from undertakings that transacted in edible oil and many had already provided the information sought. He acknowledged that CCP did not have the mandate to fix prices and asserted that CCP was not seeking information for such purpose. That Chairperson, CCP, was part of the National Price Monitoring Committee, which was headed by the Federal Finance Minister. This committee had observed that the benefit of low edible oil prices in the international market had not being passed on to consumers by the edible oil industry in Pakistan and CCP was consequently tasked by the Federal Government to investigate whether undertakings involved in the business of edible oil were indulging in anti-competitive practices thus keeping prices at a high level. He submitted that the enquiry in question was not targeted against the petitioner but was a sectoral enquiry regarding agreements and business practices

within the edible oil industry. He emphasized that CCP had not alleged that the petitioner was liable for any breach of provisions of the Act, but was considering the role of undertaking in the sector of edible oil in general and consequently the petitioner couldn't possibly be aggrieved by such sectoral enquiry. He contended that provisions of the Act vesting statutory authority in CCP ought not be given restrictive meaning in such manner that might prevent CCP from discharging its statutory functions. That CCP had the authority to seek information from undertakings pursuant to Sections 36 and 37 of the Act and such information had been sought for purposes of considering whether undertakings forming part of the edible oil industry had acted in breach of Sections 3 and 4 of the Act. He submitted that the enquiry had been initiated on the basis of information and materials provided by the Federal Government and CCP had the statutory mandate to look into such matter in view of Section 37(1) of the Act. And that the purpose of the enquiry was to protect the rights of consumers, which fell squarely within CCP's mandate and responsibility.

5. The questions raised by the instant petition are the following. One, what are the prerequisites for exercise of authority by CCP to order an enquiry under Section 37 of the Competition Act? Two, is a division of the Federal Government or the National Price Monitoring Committee vested with authority under the Competition Act to direct CCP to initiate regulatory action on the basis that in its opinion a fall in international prices of a commodity have not translated into reduction in domestic

prices of such commodity? And three, in view of the facts and circumstances of the instant case, was the exercise of authority by CCP in ordering an enquiry and seeking information for such purpose a legitimate exercise of powers under Sections 33, 36 and 37 of the Act?

6. In view of the provisions of the Act, CCP is authorized to exercise its authority for "*purposes of the (2010) Act*", which primarily include CCP's obligation to address anti-competitive practices in a particular market. In view of Sections 3, 4, 10, 11, 28 and 31 of the Act, CCP is required to ensure free competition in the marketplace by exercising its regulatory authority to curb four anti-competitive practices:

> *a. Abuse of dominant position by an undertaking, prohibited under Section 3(1) of the Act (which includes, under Section 3(3)(a), "unreasonable increases in prices" by an undertaking enjoying a dominant position in a market);*
>
> *b. Entering into prohibited agreements, as defined by Section 4(1) of the Act (which includes, under Section 4(2)(a), "fixing the selling or purchase price…of any goods or the provision of any service");*
>
> *c. Indulging in deceptive market practices, prohibited under Section 10(1) of the Act; and*
>
> *d. Entering into anti-competitive mergers, prohibited under Section 11(1) of the Act.*

7. In view of provisions of the Act, pricing can trigger a legitimate competition concern. However, the quantum of price is not in and of itself a sufficient ground to set regulatory action rolling under the Act. Under Section 3, price increase (or

decrease) by an undertaking is actionable only when it amounts to abuse of dominant position by such undertaking. Likewise, Section 4 deals with prohibited agreements, "*which have the object or effect of preventing, restricting or reducing competition with the relevant market*." Such agreements can include fixing the purchase or sale price of any goods or services. As the foundational object of the Act is to promote free competition, it prohibits anti-competitive behavior on part of an undertaking. And pricing of goods or services can be a trigger for action when it either amounts to abuse of dominant position (such as in case of predatory pricing) for purposes of Section 3, or amounts to price-fixing by undertakings in order to prevent, restrict or reduce competition thus qualifying as a prohibited agreement for purposes of Section 4.

8. In order to determine whether a contravention of a Chapter II provision has transpired, CCP is empowered to undertake an enquiry "*into any matter relevant to the purposes of the Act*" under Section 37 of the Act. This enquiry for a breach of provisions of the Act may be undertaken in one of three ways: by CCP, *suo moto*; upon a reference made to CCP by the Federal Government; or upon receipt of an application/complaint in writing from an undertaking or a registered association of consumers. Let us consider the rest of the regulatory scheme under the Act before we return to Section 37 and the prescribed prerequisites for ordering an enquiry.

9. If upon conclusion of the enquiry CCP is of the opinion that it is "*necessary in the public interest*" to initiate proceedings against an undertaking, it is obliged to do so under Section 30 of the Act. After initiating proceedings under Section 30, CCP must satisfy itself that there has been a contravention or there is likely to be a contravention of provisions of the Act before taking regulatory action under Section 31 or imposing a penalty under Section 38 of the Act.

10. For purposes of conducting an enquiry under Section 37 and proceedings under Section 30 of the Act, CCP has been bestowed with broad powers of discovery and related purposes akin to those of a Civil Court under the Code of Civil Procedure, 1908. A summary of these powers under relevant sections of the Act is as follows:

a. Under Section 33(1), CCP has the powers available to a court under the Code of Civil Procedure, 1908 for the following purposes:

i. Summoning and examination of witnesses;

ii. Discovery and production of "any" document;

iii. Evidence on affidavits;

iv. Requisitioning of public record; and

v. Issuing a commission for the examination of any witness or document.

b. Under Section 33(3), CCP may require an undertaking to allow any of CCP's officer to examine "any" books or accounts of the undertaking in control of the undertaking to fulfill the purpose of the 2010 Act, or to furnish before an officer such information as may be necessary for the purpose of the 2010 Act;

c. Under Section 34, CCP has the power to search premises (for reasonable grounds, to be recorded in writing), which includes the power to seek "full and free access" to any premises, accounts, documents, and computers;

d. Under Section 35, CCP's officers may forcibly enter premises (upon a written order of CCP, duly signed by two Members appointed under Section 14 of the 2010 Act) if an undertaking refuses to allow CCP to exercise its Section 34 powers;

e. Under Section 36, CCP has the power to call for information pertaining to an undertaking's activities, including information pertaining to accounts, business, trade practices, management etc.

11. The scheme of the Act reflects that CCP wears four hats simultaneously. It acts as (i) an investigator for purposes of Section 37, (ii) a prosecutor for purposes of proceedings under Section 30, (iii) an adjudicator for purposes of Sections 31 and 38, and (iv) an advocate promoting the interest of competition under Section 28(b) and (e) of the Act. As all such functions amount to exercise of statutory authority by a public authority, the requirement of reasonability thus attaches to the actions of CCP and such exercise of discretion and authority pursuant to provisions of the Act is subject to judicial review. The nature of review and the manner in which reasonability is to be ascertained depends on the particular role being discharged by CCP. For example, the performance of the advocacy function by CCP that might not involve the rights of any undertaking may receive a deferential review in contrast to discharge of any other

function leading to initiation of regulatory action and resulting in possible imposition of regulatory penalties.

12. Section 37 relates to exercise of powers by CCP to initiate an enquiry. The culmination of an enquiry is not the imposition of enforcement action or a penalty. An enquiry under Section 37 is to be ordered by CCP to determine whether or not the facts and circumstances of a case mandate initiation of proceedings under Section 30 of the Act. The language of Section 37 when compared with that of Section 30 reflects that the standard affixed for purposes of initiating an enquiry is different from that of initiation of regulatory action after undertaking proceedings. This makes logical sense too. At the investigation stage, CCP must ensure that there exists reasonable basis to exercise its statutory authority to intrude into the affairs of an undertaking and employ its resources to inquire into an alleged infraction under the Act. In exercise of its authority under Section 37, CCP is only required to form a preliminary opinion that there exist "*facts as appear to constitute a contravention of provision*" of the Act. In exercise of its powers under Section 30, CCP must be "*satisfied that there has been or likely to be a contravention of any provision of Chapter II*." If viewed on a spectrum, the possibility of infringement of provisions of the Act by an undertaking can always exist. But that is not sufficient to trigger an investigation under Section 37.

13. Section 37(2) prescribes a two-part test for ordering an enquiry. The first limb is a positive test that requires CCP to

satisfy itself that there exist facts that appear to constitute a contravention of provisions of the Act. The second limb is a negative test wherein CCP must form an opinion that the complaint seeking the enquiry is not frivolous or vexatious or based on insufficient facts or not substantiated by *prima facie* evidence. The standard to be met for purposes of ordering an enquiry under Section 37 is the plausibility of contravention of the Act in view of *prima facie* evidence. Thus, possibility alone is insufficient, and probability of a contravention is the higher standard applicable in relation to proceedings under Section 30. The standard attracted under Section 37 is that of plausibility. This is because the legislature has attempted to strike a balance between the latitude to be afforded to the competition regulator to effectively discharge its functions under the Act, without rendering undertakings vulnerable to fishing expeditions assuming the form of roving and intrusive enquiries. In other words, CCP does not have unbridled authority to order an enquiry on the basis of a hunch alone. Prior to ordering an enquiry, CCP must determine, in view of the facts before it, that a contravention of a provision of the Act seems plausible based on *prima facie* evidence. It can then order an enquiry to confirm the veracity of such plausible cause, which once confirmed would graduate to the stage of proceedings under Section 30.

14. It has already been held by this Court in ***National Feeds*** that Sections 37(1) and (2) of the Act are to be read together. It was further held that the test applicable to the exercise of CCP's powers upon receipt of a complaint from an

undertaking would also be applicable to CCP's *suo motu* initiation of enquiry. It is settled law that there is no room for uncontrolled discretion in a polity structured on the basis of rule of law. The language of sub-clauses (1) and (2) is distinguishable not because the prerequisites for ordering an enquiry vary depending on whether an undertaking initiates a complaint or CCP decides to initiate inquisitorial proceedings into a suspected contravention of a provision of the Act in its own discretion. The language used is different because where the complaint is initiated by another undertaking, such undertaking has a right to have its complaint treated reasonably by CCP and it can acquire a cause of action against CCP if not so treated. That is why the legislature has prescribed a test in Section 37(2) to explain the considerations to be taken into account by CCP, after which it can elect not to order an enquiry if the complaint in question does not satisfy such test. But even where CCP wishes to initiate an enquiry in its own discretion or on the basis of a reference filed by the Federal Government, it must satisfy itself before ordering an enquiry under Section 37 that there exist facts that lead it to conclude that a plausible case for contravention of provisions of the Act is made out.

15. Other than structuring discretion, there are additional reasons for satisfying the plausibility test before powers under Section 33, 34, 35 and 36 are to be exercised in relation to an enquiry. It is essential for the regulator to determine the provision of law, in view of the facts before it, the breach of which seems plausible and needs to be enquired into. Such

determination will then guide its exercise of authority under Section 33 or 36 to seek discovery of information during inquisitorial proceedings. Such determination and its communication will put the undertaking being subjected to the intrusive enquiry powers of CCP on notice as to the breach being suspected. Communication of the suspected infraction will enable such undertaking to share relevant information with CCP and discharge its obligation to cooperate with the regulator with the hope of helping it form an opinion that no breach of law is made out. On the other hand, in the event that the information relates to a breach that the undertaking is in fact liable for, such undertaking also has protection under the rule against self-incrimination and by putting such undertaking on notice regarding the suspected infraction, CCP would help uphold the right of such undertaking to a fair trial.

16. In ***The State of Maharashtara v. Nagpur Electric Light (AIR 1961 Bombay 242)***, the Bombay High Court, adjudicating over alleged non-payment of dues by a company amounting to a criminal offence, observed that in certain cases, a company may be liable to penal consequences, which could have grave consequences for its reputation and its members. The court went on to hold that any person capable of incurring penalties must not be compelled to admit a criminal offence, before holding that the same principle must also be extended to companies due to the aforementioned penal consequences (relying on the judgment of the UK Court of Appeal in *Triplex*

Safety Glass, [1939] 2 All ER 613 where a company was sued for libel).

17. The same rationale was applied in an antitrust case by the European Court of Justice ("**ECJ**") in ***Orkem v. Commission of the European Communities (Case No. 374/87)***, where the undertaking refused to answer certain questions posed by the antitrust regulator in order to determine the existence of a price fixing agreement that the undertaking had allegedly entered into. Under the European Union ("**EU**") competition law scheme, much like Pakistan's, the procedure for determining an antitrust violation is bifurcated into a "preparatory investigation" and later proceedings conducted "in presence of the parties". The purpose of the preparatory investigation – similar to the enquiry stage under the Act – is to "*determine the actual existence and scope of a specific factual and legal situation*". For this factual and legal determination, "*wide powers*" are conferred upon the regulator. The antitrust regulator can obtain "*all necessary information*" from undertakings, and the undertakings are obligated to "*cooperate actively*" as they do not have the right to "*evade*" the investigation. The ECJ held in ***Orkem*** that certain limitations on the power of the Commission to investigate were "*implied*" in order to preserve the "*right to defence*" of the undertaking. The ECJ observed that such a right to defence was safeguarded in "*administrative proceedings where penalties may be imposed*". The ECJ held that it was thus necessary to prevent this right to defence from being "*irremediably impaired*" during "*preliminary enquiry procedures*" which may be "*decisive*" in

providing evidence of unlawful conduct of the undertaking (for which the undertaking may be liable). Therefore, despite the broad powers at its disposal, when the regulator calls for information, it cannot compel an undertaking to "*provide answers which might involve an admission*" by the undertaking to "*the existence of an infringement which the regulator must prove.*"

18. Section 37 does not require an undertaking to be afforded a right to a hearing at the stage of determining whether or not an enquiry is to be ordered. But CCP is under an obligation to pass a reasoned order explaining how the enquiry order is in compliance with the test laid out in Section 37(2) and further inform the undertaking in question as to what breach is suspected in relation to which information is being sought. As at the culmination of the enquiry no adverse order is to be passed against the undertaking in question, the principle of *audi alteram partem* is not applicable at this stage. This right is to be afforded to the undertaking under Section 30 of the Act once CCP decides to initiate proceedings as required by the Act. Nevertheless, for purposes of Section 37, the undertaking in question has the right to be provided a written order that satisfies the requirements of Section 37(2) as well as Section 24A of the General Clauses Act, 1897, and states in clear terms the suspected infraction that CCP seeks to enquire into. While the Act does not impose an obligation on CCP to confront the undertaking in question, at this stage, with the actual evidence on the basis of which CCP has formed an opinion that a breach of law appears plausible and

needs to be inquired into, it has been held by this Court in ***National Feeds*** that relevant facts related to the suspected infraction ought to be disclosed to the undertaking as part of the notice of enquiry.

19. A similar issue came before the Supreme Court of India in ***Competition Commission of India v. Steel Authority of India Limited ((2010) 10 SCC 744)***. The Indian Supreme Court held that the Competition Commission of India before issuing a direction to the Director General to conduct investigation under Section 26(1) of the Indian Competition Act, 2002, is expected to "*form a prime facie view without entering into any adjudicatory or determinative process*". In other words, the information received must be adequate to meet the *prima facie* test without the regulator needing to expend any effort to probe the matter further before calling for investigation of the same. Further, even while forming this *prima facie* view, the regulator is to "*record at least some reason*" and discharge the onus on the regulator to duly apply its mind at every step of the process.

20. Regulation 26A(2)(a) of the Competition (General Enforcement) Regulations, 2007, specifies certain forms of evidence that are admissible before the CCP in proceedings before it, such as "*verifiable transcripts of tape recordings, unedited versions of video recording, electronic mail, telephone records including authenticated mobile telephone records, written signed un-sworn statements of individuals or signed*

responses to written questionnaires or interviews or comments or opinions or analyses of experts based upon market surveys or economic studies or other authoritative texts or otherwise, as documentary evidence". Regulation 58 of the Competition (General Enforcement) Regulations, 2007, provides that information received anonymously by the CCP must be "*believed to be authentic*", for reasons to be recorded in writing, on the basis of "*supportive evidence*". Regulation 59 provides that the Member or authorized officer who receives such information is bound to determine if "*the information received merits a formal enquiry*". Further, under Section 50 of the Act, offices and agencies of the Federal and Provincial Governments as well as regulators, including, *inter alia*, the State Bank of Pakistan, the Securities and Exchange Commission of Pakistan, the Federal Board of Revenue are obliged to provide to CCP relevant information required by it to perform its functions under the Act. Thus, even for purposes of *suo motu* initiation of an enquiry under Section 37(1), the law identifies sources of information on the basis of which CCP can act if the test laid out in Section 37(2) is satisfied.

21. In ***National Feeds*** this Court held that CCP's power to call for information was restricted to information that was "*necessary*" to meet the "*purposes of the Act*" i.e. the regulation of anti-competitive practices identified in Chapter II of the Act. The statutory power to demand information from an undertaking is required to be exercised by CCP in a just, fair and reasonable manner. Thus, as aforesaid, in the absence of the prior existence

of facts (provided by an undertaking or the Federal Government under Section 37 or garnered by CCP in exercise of powers under Section 50 of the Act), that satisfy the plausibility test under Section 37(2), CCP cannot order an enquiry under Section 37 merely to dig out facts on the basis of a mere hunch or suspicion.

22. The second question before this Court is whether a division of the Federal Government or the National Price Monitoring Committee can direct CCP to exercise its powers under Section 37 to initiate an enquiry. Section 37(1) of the Act authorizes the Federal Government to make a reference to CCP to initiate an enquiry. In the instant case it is not CCP's case that the enquiry has been ordered on a reference by the Federal Government. In view of the law laid down in ***Mustafa Impex, Karachi Vs. The Government of Pakistan through Secretary Finance, Islamabad (PLD 2016 SC 808)***, a reference made by the Federal Government under Section 37(1) would mean a reference approved by the Federal Cabinet. ***National Feeds*** has further held that Sections 37(1) and (2) are to be read together. Thus, in view of the ratio in ***National Feeds***, in face of a reference by the Federal Government, CCP would still be under an obligation to ensure that such reference satisfies the test under Section 37(2) prior to ordering an enquiry on such basis. Admittedly, the Federal Government made no reference to CCP for purposes of Section 37(1) and consequently there is no need to dwell any further on a

hypothetical reference that could have been made by the Federal Government.

23. What must be noted however that the provisions of the Act manifest clear legislative intent to confer on CCP regulatory independence. Section 12(3) states unequivocally that, "*the Commission shall be administratively and functionally independent and the Federal Government shall use its best efforts to promote, enhance and maintain the independence of the Commission.*" In view of Section 14 read together with Section 19, while the Federal Government appoints the members and Chairperson of the Commission, they are to be appointed for fixed term and can only be removed for cause. Section 50 places the Federal Government under an obligation to share with CCP such information as it requires for discharging its obligations under the Act. Section 53 empowers CCP to "*seek the assistance of any person, authority or agency for the performance of its functions under this Act*." Section 56 empowers the Federal Government to issue policy directives to CCP, but clarifies that such directives cannot be inconsistent with provisions of the Act. It is obvious from the scheme of the Act that while Parliament could have opted for any model for enforcement of competition law, it chose to do so by creating a competition regulator that is autonomous and independent of the Federal Government. The Federal Government's authority to interfere with the manner in which CCP discharges its statutory functions is limited to issuance of policy directives not inconsistent with provisions of the Act. It is not CCP's case that any policy directive relevant for

adjudication of the instant petition has been issued by the Federal Government.

24. The legal authority backing the creation of a National Price Monitoring Committee under the auspices of the Federal Government is not a question before this Court. However, the executive authority of the Federal Government under Article 97 of the Constitution extends to matters in relation to which Parliament has the power to make laws. It is thus unclear if the Federal Government possesses executive authority to regulate prices of goods and services to the extent that Parliament lacks the legislative authority to regulate the same by law. However, it is no one's claim before this Court that Federal Government or CCP have the authority to indulge in price regulation or control. This Court therefore need not render a finding on the legal competence of the Federal Government to do so.

25. What is however curious is that the Chairperson of CCP has been included as a member within the National Price Fixing Committee headed by the Federal Finance Minister. The Act envisages no such role for the CCP or its Chairperson or Member. As CCP is a creature of statute, it can only exercise such powers and perform such functions as authorized by the Act. It is during the meetings of the National Price Fixing Committee (the minutes of which have been placed on record in the report filed by CCP) that it was decided that CCP shall initiate an enquiry to consider whether undertakings that form part of the Ghee/Cooking Oil industry are liable for anti-competitive

practices in view of the fact that drop in the price of cooking oil in the domestic market was not commensurate with drop in prices of cooking oil in the international market. It is evident from the communication placed on record, initiated by the Ministry of Industries, that the Federal Government was unhappy that the Ghee/Cooking Oil industry had not transferred the entire benefit of the drop in international prices to consumers. And the Ministry of Industries and the National Price Monitoring Committee concluded that while the Federal Government had no power to force reduction in domestic edible oil prices, CCP was vested with powers under the Act, which could be employed to achieve such purpose.

26. There are two points that need to be emphasized in this regard. One, the Ministry of Industries would qualify as an "undertaking" as defined under Section 2(q) of the Act, which includes governmental bodies, and could thus file a complaint before CCP for purposes of Section 37(2) of the Act seeking the initiation of an enquiry subject to compliance of the test provided thereunder. Two, the exercise of powers vested in CCP under provisions of the Act (being discretionary authority vested by a statute) can neither be outsourced to the Federal Government or a committee formed by it, nor can it be weaponized to achieve a collateral purpose. Price regulation or reduction is not an object or purpose of the Act, and CCP cannot be goaded or counselled into exercising its statutory authority such that the outcome is a reduction of prices of goods or services to a level deemed

desirable by the Federal Government. Such exercise of statutory authority would be tantamount to being a fraud on the statute.

27. Let us consider the preamble of the Competition Act that summarizes its object in the following terms: "*An Act to provide for free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behavior*". In trying to reflect on the objectives of competition law more generally Bailey J Rogers and Angus MacCalloch argue in *Competition Law and Policy in the EC and the UK* (Fourth Edition; Rutledge Cavendish 2009; pp 11) that:

> *"Neoclassical economic theory plays a crucial role in competition policy, and is based on the presumption that society, or consumer welfare to use a more traditional term, is better off when a state of perfect competition exists in a market. Perfect competition under economic theory has certain prerequisites. There must be identical products; there must be an infinite number of buyers and sellers; there must be free entry and exit from the market; and information must be available to all buyers and sellers allowing them to make rational decisions. The perfect competition model is abstract and unlikely to arise in practice due to improbability of all these conditions existing simultaneously."*

While the influence of Adam Smith and laissez-faire system of thought on the evolution of competition law and policy cannot be understated, the debate in the realm has moved on overtime. The competition regimes in the EU and US also no longer pursue the pure competition objective, as originally understood, of letting free market operate unhinged. Neoclassical theory is thus only a guide to understanding the problem that competition law

sets out to address. However, consumer interest in protection of consumers from anti-competitive practices and abuses remains a key objective of competition law. But simple price competition culminating in lower prices is not the sum total of consumer interest that competition law seeks to serve. The ability to choose from a variety of options, a market structure that facilitates innovation and efficiency in markets etc. are all legitimate interests that competition law and policy seek to promote in the interest of consumers. For our purposes, we need not engage with the debates between different schools of thought on the scope and object of consumer law and policy. Suffice it to say that while price efficiency is expected to be an ancillary outcome of competition law and policy and is deemed as one of the products of an effective competition regime, the object of the Act is the facilitation of free competition in the market and not price fixation, stabilization or reduction. Thus, the use of regulatory authority flowing from Act for the purpose of achieving pricing outcomes is not a legitimate use of such authority.

28. It is not that the manner in which goods and services are priced can never raise competition concerns. But the price of goods or services being deemed undesirable, without further evidence of an intent or attempt by undertakings to fix prices to prevent, restrict or reduce competition, does not raise a valid concern for purposes of the Act. Even in case of parallel price increases, such escalation cannot automatically be interpreted as evidence of entry into a prohibited agreement to fix prices.

29. Case law from the US extensively details the economic rationale behind parallel price increases by market players, before dwelling on the methodology which the regulator and courts ought to adopt in such cases. For context, Section 1 of the Sherman Act (the relevant antitrust legislation in the United States) is reproduced below:

> "*Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.*"

30. Certain core principles applicable to interpretation of parallel price increases between firms have been identified by US courts in litigation under Section 1 of the Sherman Act. In ***Flat Glass Antitrust Litigation (385 F.3d 350),*** the 3rd Circuit heard an appeal against District Court's ruling that certain manufacturers of flat glass had conspired to fix prices of flat glass by increasing their prices by similar percentages in a coordinated manner. The court first identified the higher threshold that a plaintiff must meet in antitrust litigation and held that this higher threshold restricts the inferences that can be drawn from circumstantial evidence in a case under Section 1 of the Sherman Act, as held in ***Matsushita Electric Industrial***

***Co. v. Zenith Radio Corporation* (475 U.S. 574).** And that inferences could be drawn if:

> *i. The inference is plausible i.e. make "perfect economic sense"; and*
> *ii. The inference would not have the effect of deterring "significant precompetitive conduct".*

The Court in ***Flat Glass*** held that both elements of the test were met. The theory that the defendants would have incentive to fix prices made "*perfect economic sense*", and such an inference would not deter precompetitive conduct. However, the Court still urged a cautious judicial approach when dealing with alleged horizontal price fixing agreements in oligopolistic markets. The Court distinguished the operation of the flat glass market as an 'oligopolistic' market, which is a market where, due to the presence of only a few large sellers, the dynamics of competition were markedly different from a 'competitive' market. This distinction was deemed crucial in light of the 'interdependence theory' which explains how firms choose to act depending on the market they are in (i.e. whether the firm is operating in a competitive or oligopolistic market). The 'interdependence theory' cited in ***Flat Glass*** argues that in a market with many firms, the effects of any single firm's price and output decisions would be "*so diffused among its numerous competitors that they would not be aware of any change*". However, in an oligopolistic market, any single firm's price and output decisions will have a "*noticeable impact on the market and on its rivals*". Therefore, whenever a firm in an oligopolistic market decides on a course of action, "*any rational decision must take into account the*

anticipated reaction of other firms". Thus, according to the interdependence theory, firms in oligopolistic markets may increase their prices beyond a competitive level without needing to engage in any "*concerted action*" to fix prices, premised on the market knowledge of how the few other competitors would react to one firm's price increase. It was held by the 3rd Circuit in ***Chocolate Confectionary Antitrust Litigation (801 F.3d 383)*** that "*conscious parallelism*" is a "*way of life in oligopolies*". It was further held that conscious parallelism was not an agreement and hence did not fall under the purview of the Sherman Act and that while conscious parallelism was not "*desirable*", courts had "*no effective remedy*" against it.

31. The US jurisprudence concludes that in view of the interdependence theory, an adverse finding against undertakings for horizontal price fixations cannot be based on parallel price escalations alone. Both ***Flat Glass*** and ***Chocolate Confectionary*** held that presence of "*plus factors*" is crucial to conclude that firms engaged in horizontal price fixing. ***Flat Glass*** identified three plus factors which could assist in gauging if parallel price escalation exhibited a concerted agreement between firms to fix prices:

> i. Evidence of motive to enter into a price fixing conspiracy i.e. (which *Chocolate Confectionary* elaborated to mean that a particular market is "*conducive to price fixing*");
> ii. Evidence that the defendant acted contrary to its own interest (which *Chocolate Confectionary* described

as "*behavior that is inconsistent with a competitive market*"); and

iii. Evidence implying a traditional conspiracy i.e. "*non-economic evidence that there was an actual, manifest agreement not to compete*".

32. ***Flat Glass*** and ***Chocolate Confectionary*** both found the first two plus factors to not be useful in cases of oligopolistic markets as they "*largely restate the phenomenon of interdependence*". But that the plus factors were useful for evaluating conduct in a competitive market because "*their existence tends to eliminate the possibility of mistaking the workings of a competitive market*". The third plus factor i.e. non-economic evidence of a traditional conspiracy was held in ***Flat Glass*** to be the "*most important evidence*" for gauging violations of horizontal price fixing regulations in oligopolistic markets. According to ***Chocolate Confectionary***, the third plus factor looks for "*proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations or exchanged documents are shown*".

33. The purpose of discussing the US case law on the issue of conscious parallelism is not to lay down a test for initiating an enquiry under Sections 37 or proceedings under Section 30 where pricing decisions of undertakings are deemed indicative of a plausible or probable breach of Section 3 or Section 4 of the Act. The purpose is to merely illustrate that prices of goods or services, whether too high or too low or static, in the absence of

plus-factors, and without further analysis of the nature of the market in which the undertakings in question are functioning, cannot be a sufficient basis to conclude that there exists a plausible case for initiating an enquiry to determine whether or not a breach of a provision of the Act has transpired. Such analysis is a prerequisite for exercise of powers by CCP under Section 37 of the Act to determine whether or not a plausible case is made out, as opposed to exercising enquiry powers as part of a lazy and mindless expedition to gather information from one undertaking or all undertakings in a certain sector of the economy with the hope that the regulator might stumble upon an infraction of the Act during such exercise.

34. In view of the scheme and requirements of the Act as enumerated above, let us now consider the facts of the instant case. CCP has not received any reference from the Federal Government for purposes of Section 37(1). It appears to have initiated an enquiry on the prodding of the Ministry of Industries and the National Price Monitoring Committee, but without having received a complaint from any governmental body or undertaking for purposes of Section 37(2) of the Act or satisfying itself that the test prescribed under the said provision stood satisfied. The enquiry can at best be deemed to be an enquiry ordered under Section 37(1) of the Act by the CCP *suo motu*. However, even then such enquiry falls foul of the law laid down in ***National Feeds*** as the CCP has (i) not determined whether it is in possession of facts that *prima facie* establish a plausible

case of for breach of a provision of the Act, and (ii) not passed a reasoned order stating that the requirements of Section 37(2) stand satisfied, while identifying the suspected infraction of provisions of the Act and the factual basis of such finding, in relation to which information has been sought from the petitioner.

35. The learned counsel for CCP stated candidly that the petitioner was not suspected of having breached any provision of the Act and that CCP was conducting a sectoral enquiry and seeking information from all undertaking that formed part of the Ghee/Cooking Oil industry. Section 37 of the Act, however, neither makes any special allowance for a sectoral enquiry nor prescribes a test for such purpose different from one prescribed in relation to individual undertakings. The petitioner with approximately 3% of the market share, admittedly, does not enjoy a dominant position in the Ghee/Cooking Oil industry and can thus not be liable for any breach of abuse of dominant position under Section 3 of the Act, as alluded to by the Ministry of Industries in its missive to CCP. In case of a prohibited agreement, Section 4 seeks to hold an undertaking as well as an association of undertakings independently liable for being party to such agreement. Thus, the fact that CCP is seeking to indulge in a sectoral enquiry to consider a breach of Section 4 is no basis to be excused from satisfaction of the test prescribed under Section 37(2). Where the object of the enquiry is to investigate cartelization or entry into a prohibited agreement, the enquiry in

most cases would naturally end up being sectoral in nature. In such situations too, undertakings cannot be roped into an enquiry indiscriminately and mindlessly merely because they are members of an association or function within a certain sector that is suspected of having engaged in a prohibited agreement. CCP must first satisfy itself that there exists a plausible case for enquiry based on *prima facie* evidence, as required by section 37(2), before initiating an inquiry against an association of undertakings, or an individual undertaking, or both, as the case may be.

36. In view of the aforesaid, this Court has come to the conclusion that the impugned enquiry has been ordered by CCP for a collateral purpose without satisfying the requirements of Section 37 and the enquiry order has been passed in breach of provisions of the Act and is therefore void. The subsequent orders seeking information from the Petitioner for purposes of the enquiry and the Section 36 order reiterating the demand for information being contingent upon and rooted in a void order are also not backed by lawful authority. This petition is accordingly **allowed** and the impugned letter by CCP seeking information dated 13.07.2020, the impugned letter informing the Petitioner that enquiry had been ordered by CCP under Section 37 dated 07.09.2020, and special order dated 06.11.2020 passed under Section 36 of the Act are all set aside. This decision does not however prohibit the CCP from exercising its authority under Section 37 of the Act, to the extent that materials already received from the Federal and Provincial Governments and/or

from undertakings in the Ghee/Cooking Oil industry make out a plausible case for initiation of an enquiry against the Petitioner for breach of Section 4 or any other provision of the Act, through a reasoned order satisfying the requirements of Section 37(2) of the Act as enumerated above.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 14.09.2021.

JUDGE

Approved for reporting.

Saeed.