

Competition Commission of Pakistan
Government of Pakistan

**OPINION ON FIXING OF MINIMUM PRICE IN THE CIGARETTE
INDUSTRY**

Factual Background

1. The Competition Commission of Pakistan (hereinafter to be referred as the “**Commission**”) took *suo moto* notice of advertisements made by the leading cigarette manufacturing companies of Pakistan i.e. Pakistan Tobacco Company Limited (hereinafter to be referred as “**PTC**”) and Lakson Tobacco Company Limited (hereinafter to be referred as “**Lakson**”). The advertisements appeared in leading English and Urdu daily newspapers pertaining to pack prices of cigarette brands on various dates¹ for the month of July by the undertakings (Copies attached as ‘annex A’).
2. The Commission also took notice of an advertisement made by the Federal Board of Revenue (hereinafter to be referred as the “**FBR**”) dated August 23, 2008 declaring that the FBR has fixed the minimum price of cigarettes in the country to take effect from June 11, 2008. The minimum price of a pack of 10 cigarettes was fixed at Rs.7.24 (Seven Rupees & Twenty Two Paisas inclusive of sales tax and the minimum price for a pack of 20 cigarettes was fixed at Rs.14.48 (Fourteen Rupees & Forty Eight Paisas inclusive of sales tax). It was also stated in the advertisement (copy attached as Annex B) that the printing of retail price and sales tax on every cigarette pack is mandatory under the law and that cigarette manufacturers and other persons associated with the cigarette business are to abide by the above minimum prices, below which, it would not be legal to sell cigarettes. It was cautioned that violators of these mandatory provisions would face penal consequence in the form of imprisonment, fine or both.

¹ PTC advertisements on 14,17,28 July and 7,11,14,18,28 August 2008 and LTC advertisements on 26 July 2008 in Nawa-e-Waqt and The News

3. The fixing of minimum price of cigarettes by FBR and cigarette manufacturers *prima facie* appeared to be in violation of Section 4(1) of the Competition Ordinance, 2007 (hereinafter referred to as the '**Ordinance**') read with Section 4(2) (a) of the Ordinance wherein fixing of prices is expressly prohibited. The Commission, therefore, took cognizance of the matter and sent letters to PTC and Lakson under Section 36 of the Ordinance asking them to explain the rationale behind the fixing of prices of cigarettes packs vide letter dated August 05, 2008.
4. PTC only filed a brief reply vide its letter dated August 18, 2008 taking the plea that the fixing of retail price of cigarettes and printing of the same is required under the tax laws of Pakistan; however, it did not specify those exact provisions². Lakson filed its reply on September 08, 2008, stating that the sales tax and excise duty laws of Pakistan require manufacturers to pay such tax and duty to the government based on a retail price. The relevant provisions cited in this regard were Section 2(27) and Section 3 of the Sales Tax Act 1990 (hereinafter referred to as the '**Sales Tax Act**'); Section 12 (4) and Section (5) of Federal Excise Act of 2005 (hereinafter referred to as '**Excise Act**'); Rule 24A and Rule 24B of the Federal Excise Rules 2005, (hereinafter referred to as the '**Excise Rules**'); the Federal Excise General Order No.03/2006 (hereinafter referred to as the '**General Order**') and Finance Act, 2008 Schedule (VII).
5. The Commission vide letter dated January 22, 2009 asked FBR in terms of Section 51 of the Ordinance to explain, *inter alia*, the rationale behind the fixing of a minimum retail price for cigarettes and the possible implications if those laws/rules were deleted or modified. In its reply vide letter dated February 9, 2009, FBR stated that the rationale of these laws was to stop unscrupulous cigarette manufacturers from recording low prices in order to pay less tax. It also stated that similar laws also apply on many other products including those listed in the Third Schedule to the Sales Tax Act 1990. It was contended that deletion of such laws would encourage tax evasion.

² PTC's letter dated August 5, 2008

6. The Commission deputed one of its officers to conduct a market survey of the Rawalpindi and Islamabad region, and find out the actual price at which cigarettes were being sold in the market by retailers. The survey determined that the price being charged by retailers for 10 and 20 cigarettes pack of various brands was higher than the price list that was published in newspapers and that the retail prices of all brands of cigarettes (including the price of the cheapest brands of both Lakson and PTC) were higher than the minimum price fixed by FBR. Furthermore, it was also found out that the retail prices in most instances were higher than the prices published in the advertisements by PTC and Lakson.
7. In order to get a better understanding of the issues and to provide an opportunity to all concerned undertakings to voice their opinion, the Commission decided to conduct an open hearing in the matter under Section 29 (c) of the Ordinance. The hearing was scheduled for February 20, 2009 and a public notice in this regard was published in leading English and Urdu newspapers of the country, inviting all stakeholders to attend the public hearing. In particular, leading cigarette manufacturers, distributors of PTC and Lakson in the Islamabad/Rawalpindi region and representatives of FBR were invited to attend this hearing through letters dated February 12, 2009.
8. Representatives of FBR and Lakson attended the hearing, while PTC submitted its written comments. The hearing was conducted by Mr. Abdul Ghaffar, Member (Cartels & Mergers) of the Commission. Mr. Wasim Sajjad represented Lakson along with Mr. Asim H. Akhund and Ali Siddiqui, Senior Counsel, while Mr. Abrar Ahmad Khan, Chief (ST&FE-1) and Mr. Mumtaz Ali Khoso, Second Secretary, represented FBR.
9. During the hearing, the undersigned pointed out that despite the fact that there appears to be a prima facie violation of the Ordinance in fixing a minimum price and restraining undertakings from selling below such price and advertising the same in newspapers; the Commission preferred to conduct a public hearing because the undertakings perhaps would have been entitled to a regulatory conduct defense. He

further stated that the public hearing is aimed at resolving conflict situations (if any) between the enforcement of tax law and competition law.

10. During the hearing, Mr. Sajjad submitted that Lakson is fixing the minimum price of cigarettes in accordance with FBR's directions. He reiterated that any conflict between tax laws and competition laws should be resolved by the federal agencies, and he assured that Lakson would be willing to comply with their instructions. When asked to explain why, in their opinion, the law necessitated the printing of a minimum retail price, the legal counsel for Lakson explained that there were two essential reasons. Firstly, a minimum price has been fixed in order to reduce tobacco usage. Pakistan became a signatory to the Framework Convention on Tobacco Control (FCTC) on May 28, 2004 in accordance with which it has undertaken to reduce tobacco incidence and minimum prices to ensure that cost of purchasing cigarettes remains high. Secondly, the tobacco industry contributes the largest amount of tax revenues for the government. Fixing of minimum prices ensures less tax evasion especially on part of small manufacturers of cigarette who evade tax by selling at considerably lower prices. When asked about the exact market share of the informal sector, FBR could not specify the exact percentage while Lakson ventured that this sector would be around 20 percent of the market.
11. FBR's representative supported the assertions made by Lakson. He said that retail price fixing on products has been going on since the 1960's and was being done in order to control prices as well as to prevent tax evasion. He further explained that there are three different taxes levied on the cigarette industry namely Federal Excise Duty, Special Excise Duty and Sales Tax. He contended that it is very hard to enforce the tax regime on the retailers; hence in order to plug tax evasion, taxes are collected from the manufacturers. This method also helps in controlling the informal sector and this mechanism was designed to bring the informal sector under the tax net.
12. It was further stated that without minimum pricing, small local informal manufacturers would evade tax by understating the price in self assessment. He further added that printing retail price on cigarette packs helps customers as they can

insist on that price. He, however, admitted that no mechanism either on the part of FBR or on the part of companies exists that can ensure that the cigarettes are being sold at the fixed minimum price by the retailers.

13. The undersigned drew the attention of the FBR representative to the findings of the Commission's survey that most retailers sell cigarette packs at a price above the retail price printed on the pack. The inefficacy of printing the price on cigarette packs was also pointed out as it did not prevent retailers from overcharging consumers. Moreover, the undersigned questioned how tax evasion was being controlled by this practice. FBR replied that there is no way to control prices in the market beyond printing the price and that it is up to the consumer to insist on that price. Lakson added that it was not a regulator and could not control the final prices at which its distributors and retailers sell cigarette packs.

14. FBR representatives reiterated its stance that a change in the current tax regime regarding fixed minimum price would lead to tax evasion and loss of revenue. In my considered view a way must be found so that tax revenue is not lost and the competition laws are also complied with. It is for this reason all the participants were requested to assist the Commission in coming up with a workable solution.

Issues

15. In view of the foregoing three fundamental issues emerge in relation to the fixing of minimum price of cigarettes:

- What is the legal framework/scheme envisaged for FBR to prescribe the minimum retail price?
- Who determines the retail price and whether the retail price to be printed on the goods is intended to be the minimum retail price, maximum retail price or the manufacturer's recommended price?
- Whether prescribing minimum prices of cigarettes packs by FBR under the Excise Act 2005 is in conflict with Section 4 of the Ordinance?

16. At the outset, the response in seriatim to the above issues is as follows;

- In terms of Section 12(5) of the Excise Act, FBR is empowered to fix the minimum price of cigarette packs for the purposes of levying and collecting of duty. Rule 24B of the Federal Excise Rules 2005 as amended by SRO 561 (I)/2006 dated June 5, 2006 fixes the minimum retail price of cigarettes. The printing of a retail price is required under Rule 24 A but this does not require the printing of the minimum retail price. Furthermore under the Finance Act 2008, an amendment in Schedule (VII) was incorporated whereunder it was stated that for the purposes of levy, collection and payment of duty “*no Cigarette Manufacturer shall reduce price from the level adopted on the day of the announcement of Budget 2008-2009.*”(Emphasis Added)
- For all intents and purposes the ‘retail price’ is to be determined by the manufacturer in terms of Section 12 (4) of the Excise Act or Section 2 (27) of Sales Tax Act and is required to be printed on the cigarette pack. However, the language of Section 12(4) and the scheme of the law suggest that the intent is to print the maximum retail price rather than the minimum retail price. This is so because the said provision stipulates, “*if more than one such price is so fixed for the same brand or variety, the highest of such price and such retail price shall, unless otherwise directed by the Board, be legibly, prominently and indelibly indicated on each good, packet, container, package, cover or label such goods*”.
- In the Commission’s considered view there is no conflict between the Ordinance and the Excise Act in allowing FBR to prescribe a minimum price for the purposes of levying and collecting tax. The problem arises due to FBR overstepping its mandate in the implementation mechanism by requiring manufacturers not to sell it below the minimum prescribed retail price and necessitating the printing of (recommended) retail price in the newspapers.

Analysis

17. As per the advertisement, the Federal Board of Revenue has fixed the minimum price of cigarettes with effect from June 11, 2008. The advertisement further states that the printing of retail price and sales tax on every cigarette pack is a mandatory provision under the law. Moreover, the advertisement mentions that it is mandatory for cigarette manufacturers and other persons associated with the cigarette business to abide by the minimum prices specified, below which, it is not legal to sell cigarettes.
18. The above advertisement has been examined in the light of the provisions of Excise Act cited by the parties. All relevant provisions pertaining to the issues raised are reproduced for ease of reference:

Federal Excise Act of 2005

Section 12 (4)

Where any good is chargeable to a duty on the basis of retail price, duty thereon shall be paid on the retail price fixed by the manufacturer, inclusive of all duties, charges and taxes, other than sales tax levied and collected under section 3 of the Sales Tax Act, 1990, at which any particular brand or variety of such goods should be sold to the general body of consumers or, if more than one such price is so fixed for the same brand or variety, the highest of such price and such retail price shall, unless otherwise directed by the Board, be legibly, prominently and indelibly indicated on each good, packet, container, package, cover or label of such goods; (Emphasis Added)

Provided that where so and as specified by the Board, any goods or class of goods liable to duty on local production as percentage of

retail price, the provisions of this sub-section shall mutatis mutandis apply in case such goods are imported from abroad.

Section 12 (5)

The Board may fix the minimum price of any goods or class of goods, for the purpose of levying and collecting of duty and duty on such goods shall be paid accordingly

Provided that, where the price at which the goods or class of goods are sold, is higher than the price fixed by the Board, the duty shall, unless otherwise directed by the Board, be levied and collected at such higher price. (Emphasis Added)

The Federal Excise Rules 2005

Rule 24A

(1) No packet of cigarettes for consumption in domestic market shall be cleared from the manufacturing premises without printing thereon the retail price, health warning and the name of the manufacturer. (Emphasis Added)

(2) The cigarette packets cleared from manufacturing premises for export shall bear the marks, as specified under clause (c) of sub-rule (2) of rule 33.

Rule 24B

For the purposes of payment of Federal excise duty, the minimum retail price (excluding sales tax) of cigarettes, shall not be less than eighty-four per cent of the retail price specified under column (2) of serial No. 11 of Table I of the First Schedule to the Act. (Emphasis Added)

Federal Board of Revenue Act 2007

Section 4 (2)

The Board may, where appropriate, issue statutory rules and orders (SROs), orders, circulars and instructions for the enforcement of any of the provisions of fiscal law and the provision of this Act.

Federal Excise General Order No.3/2007

With the change in price structure of cigarettes, the cigarette manufacturers may face difficulty in obtaining permission for the use of old packets printed with previous retail prices thereon.

2. *With a view to mitigate the hardship of cigarette manufacturers, the Board is pleased to authorize the cigarette manufacturers to clear such quantity of packed cigarettes printed with previous retail price and are lying un-cleared, within one month from the date of change in price structure in any given year or such extended period as allowed by the Collector having jurisdiction on a written request by the manufacturer, provided that such extended period shall not exceed thirty days.*

3. *The cigarette packs printed with the previous retail price shall be cleared subject to the following conditions, namely:-*

(i) *the manufacturers shall, on the next day of the revision of prices, inform the Collector of Federal Excise having jurisdiction about the quantity of cigarette packs printed with previous retail price lying un-cleared;*

- (ii) *the excise duty in respect of such cigarettes shall be paid in accordance with the revised retail prices;*
- (iii) *the manufacturer shall advertise the revised retail price in the leading daily newspapers in English, Urdu and other regional languages, at least twice a week till such time stocks are cleared.*
The advertisement in this regard shall mention the date from which the revised prices are applicable; and (Emphasis Added)
- (iv) *the revised retail price shall be printed/rubber stamped on each such cigarette packrite.*

4. *The minimum retail price of cigarette per pack shall be such as notified from time to time in terms of rule 24B of the Federal Excise Rules, 2005.*

Finance Act, 2008 Schedule (VII)

For the purpose of levy, collection and payment of duty at the rates specified in column (4) against Serial Number 9, 10 and 11, no Cigarette Manufacturer shall reduce price from the level adopted on the day of the announcement of Budget 2008-2009(Emphasis Added)

The Sales Tax Act 1990

Section 2 (27)

"retail price", with reference to the Third Schedule, means the price fixed by the manufacturer, inclusive of all duties, charges and taxes (other than sales tax) at which any particular brand or variety of any article should be sold to the general body of consumers or, if more than one such price is so fixed for the same brand or variety, the highest of such price, (Emphasis Added)

Section 3

“(1) Subject to the provisions of this Act, there shall be charged, levied and paid a Tax known as Sales Tax at the rate of Sixteen Per Cent of the value of;

(a) Taxable supplies made by a registered person in the course or furtherance of any taxable activity carried on by him; and goods

(b) imported into Pakistan.

Notwithstanding the provisions of sub-section (1):- taxable supplies specified in the Third Schedule (which include Tobacco) shall be charged to tax at the rate of Sixteen per cent of the retail price which along with the amount of Sales Tax shall be legibly, prominently and indelibly printed or embossed by the manufacturer on each article, packet, container, package, cover or label as the case may be:”

(Emphasis Added)

19. A plain and ordinary reading of Section 12 (5) of the Excise Act, empowers the FBR to fix the minimum price of any goods or class of goods for the purposes of levying and collecting of duty. Rule 24B of the Federal Excise Rules, as amended by SRO 561 (I)/2006 dated June 5, 2006, fixes the minimum retail price of cigarettes. It is important to note that Rule 24 A requires only the printing of the retail price and not the minimum or maximum retail price as is rightly stated, to that extent, in the advertisement; *“Further Printing of Retail Price and Sales Tax on every cigarette pack is mandatory provision under the law.”* However, under the Excise Act and Federal Excise Rules while it is mandatory to publish the retail price on the cigarette packs, where such prices vary within the same brand, it is the maximum and not the minimum price that has to be indicated on the cigarette packs.
20. It needs to be appreciated that, Section 12 (4) of the Excise Act and Section 2 (27) of the Sales Tax Act clearly provide that the retail price is to be fixed by the manufacturers and the law does not by any means bar manufacturers from selling at a

retail price below or above the minimum retail price prescribed by FBR. Therefore, the statement in the advertisement that, “it is mandatory for the cigarette manufactures and other persons associated with the cigarette business to abide by the minimum prices below which it is not legal to sell the cigarette” does not find support under the Excise Act. In my considered view, no assumption can be drawn that in the absence of such restriction by FBR it would not be viable for manufacturers to sell below the minimum prescribed price. The possibility of cigarette manufacturers and other persons associated with the cigarette business making a profit, even if cigarettes are sold below the minimum retail price prescribed by FBR can not be ruled out - therefore such restriction is also affecting competition by closing manufacturer’s option to structure their profit margins.

21. In our considered view, the imposition of such restriction by FBR is resulting in prescribing minimum retail prices at two levels; first by FBR itself, and subsequently, by the manufacturers who while printing the manufacturer’s recommended price use FBR’s minimum retail price as a bench mark and prescribe the recommended price over and above FBR’s minimum retail price. A random market survey reveals that in most of the cases, the actual retail price of different brands of cigarettes is above the ‘manufacturer’s recommended price’ that is published on cigarette packs and in advertisements. Resultantly the manufacturer’s recommended price then operates as a minimum price, enabling retailers to sell over and above such price. In this entire process neither FBR nor the consumer benefits in any manner.

22. In this regard the rationale for requiring the retail price to be published in newspapers has not been duly explained. It is our understanding that while printing of the retail price is a requirement of law, its publication in newspapers does not serve any purpose viz a viz levying and collection of duty by FBR. By requiring manufacturers to print prices in the newspapers regularly, cigarette manufacturers who enjoy market power, mainly PTC and Lakson, are allowed to keep prices of their products at par with each other. This enables leading low cost brands to be priced almost at the same level given the relatively inelastic demand for cigarettes. Openly sharing such retail

(recommended) price information puts in place an automatic mechanism for monitoring the prices of competitors which may prevent or reduce competition. Sharing of information such as price tables is an example of anti-competitive behaviour since it is likely to eliminate uncertainty as to the future conduct of competitors in the relevant market and inevitably may affect future commercial policies of the undertakings. The fixing of minimum prices is in fact aiding the sales revenue of both large manufacturing companies, rather than promoting free competition in the industry. It is neither having a deterring impact on cigarette consumption nor in any way affecting or enhancing tax collection.

23. The rationale given by FBR for minimum retail price, as stated above, is that it serves to plug tax evasion by ensuring that no manufacturer can under report the price of a cigarette pack and hence pay less tax. FBR sets the minimum price for cigarettes packs and taxes are collected from the manufacturer either at the minimum price or, on the Manufacturer's Recommended Price. It is important to point out that in terms of the proviso in Section 12(5) of the Excise Act "*where the price at which the goods or class of goods are sold, is higher than the price fixed by the Board, the duty shall, unless otherwise directed by the Board, be levied and collected at such higher price.*" It appears that retailers are selling cigarette packs above the manufacturer's recommended price but do not pay tax on the price differential. Hence tax is still being evaded as no mechanism exists to find out the actual retail price.

24. Under the existing system of taxation for the tobacco industry, we are informed by FBR itself, that the entire amount of sales tax and excise duty is collected from the manufacturing companies, as the distributors/wholesalers and retailers do not pay these taxes. This safety net ensures FBR a steady flow of tax revenue from the tobacco industry because FBR simply taxes the manufacturers, without having to collect tax from the distributors and retailers. Is this not against the spirit of taxation laws, specially the Sales Tax/*Value Added Tax*? In any event the data provided by FBR itself, shows that the informal and small manufacturers contribute no more than 0.9 percent of the total tax collected from the tobacco sector while largely the burden

of tax incidence falls on the two large manufacturers. Therefore, FBR's justification for requiring the publishing of retail price in newspapers so that small manufactures can be brought in to the tax loop does not hold.

25. It has also been asserted by FBR that prescribing minimum prices for cigarette packs helps in reducing cigarettes consumption by keeping the prices up. As stated above, as far as FBR is concerned, prescribing of minimum price is solely for the purposes of levying and collecting taxes. It would not be incorrect to state that the minimum prices set by FBR, in turn operate as minimum prices for cheaper brands and in effect ensure viable prices for the leading manufacturers to prevent undercutting from other manufacturers (be it in the formal or informal sector). Moreover, through such advertisements the ban placed on tobacco advertisements imposed by the government is virtually undone.

26. Another important aspect that deserves consideration is the interpretation of 'retail price' or the abbreviation 'MRP'. The consumer must, in our view, be clear as to what MRP stands for as it can be interpreted either as; (1) 'Manufacturer's Recommended Price', (2) 'Minimum Retail Price', or (3) 'Maximum Retail Price'. The retail price that is printed on cigarette packs is only a recommended price and consumers are entitled to bargain for a price lower than the printed price. However, the retail prices published in the newspaper advertisements are likely to be misconstrued as the fixed retail price of cigarettes rather than manufacturers recommended price. This appears to be in contravention of Section 10 (2) (b) of our Ordinance, which deems distribution of information lacking reasonable basis related to the price of goods as deceptive marketing. In our considered view, if FBR would require the manufacturers to print the maximum retail price as 'Max. R.P.' it would remove any misconception in the mind of consumers regarding price, giving them the option to negotiate the price, and would encourage retailers and distributors to compete by offering discounts and competitive prices. Notwithstanding the above, FBR may continue to prescribe the minimum price or require the manufacturers to

share its recommended price, only for tax purposes which should remain *inter se* the parties.

27. It would also be useful to share how EU and EU states have dealt with this issue. The Commission found that EU states evolved a particular system of taxing the tobacco industry back in the 90's which was implemented through Council Directives 92/79/EEC, 92/80/ECC of 19 October 1992 and Council Directive 95/59/EC of 27 November 1995. With these directives, it was decided that all member countries would implement a common tax system for tobacco and that both specific and *ad valorem* taxes would be imposed on cigarettes. The specific taxes would ensure that there is a bare minimum cost attached to the cigarette packs regardless of their price, while the *ad valorem* tax would attach further tax cost based on the price of the pack itself. The council directives had to be made consistent with other EU trade policies including their competition regime. In directive 95/59/EC, Article 9 (1) stated, *inter alia*, that manufacturers would be free to determine the maximum retail price for each of their products. The structure of the taxation system indicates that it was intended that a particular amount of taxes would be made specific i.e. in Euros while the *ad valorem* would be charged on the maximum retail price given by the manufacturer. This way no tax can be evaded and at the same time competition is ensured.

28. The Commission of the European Union for competition has taken the view that minimum price fixing by the governments has the effect of affecting competition and is against EU legislation. It believes that while governments should take anti-smoking measures according to the health policies, but it should be done by increasing taxation rather than fixing price which decreases price competition in the market. The European Court of Justice has in the past upheld on two occasions, *Commission v. Greece*³ in 2000 and *Commission v. France*⁴ in 2002, the principles that minimum price fixing, whether done directly by the government or through reference marks, is

³ ECJ C-216/98. Judgement given on 19 October 2000

⁴ ECJ C-302/00

against European laws and distorts competition and that manufacturers have the right to set the maximum retail price.

29. Keeping in view the previous judgments of the ECJ, the European Commission in February 2008 took Ireland, Austria and Italy to the ECJ over their minimum price laws regarding tobacco. The governments of these countries were accused of being in collusion with the tobacco industry to fix prices in a bid to safeguard the manufacturer's profits. In its official opinion to the three countries, it said that minimum price fixing is inconsistent with EU laws and distorts competition. By fixing minimum prices, the manufacturer's profits margins are saved in the name of health benefits. It suggested that rather than keeping minimum prices, countries should increase taxes to raise prices of cigarettes and let the manufacturers compete on price. As an example, the European Commission cited Belgium, which had scrapped its minimum price laws and replaced them with an increased tax system. This not only increased their tax revenue but also addressed health concerns by raising the cost of using tobacco products.

Conclusion

30. Keeping in view that the existing legal framework makes printing of retail price mandatory and the fact that Section 12 (4) also envisages printing the highest price where there is a variation of price within a brand, it is clear that the spirit and intent of the law is to print the maximum retail price. Where the manufacturers enjoy market power in the relevant market, as is the case with PTC and Lakson, printing either the maximum and minimum retail price may have their anti competitive effects. However, if a choice is to be made, for obvious reasons, it has to be the maximum retail price. In this regard, support can be drawn from the EU jurisdiction which regards maximum retail price as a more pro-competitive practice. In our considered view the EU current state of the law in this respect appears to be reasonable as it is based on major economic assumptions acknowledging pro-competitiveness of vertical maximum price fixing.

31. Simply put, imposing a maximum retail price of cigarettes promises lower prices for consumers, as competition on price is below the prescribed level and to this extent it protects consumers from anti competitive behaviour. Printing the minimum retail price on cigarette packs, on one hand, may operate as a bench mark for the manufacturer to recover fixed price irrespective of the quality of goods. While on the other hand it may be used by manufacturers having market power to give retailers an incentive not to sell the products of lesser known or minor manufacturers at that price (i.e. effectively a quasi entry barrier); thus reducing competition in the relevant market. Printing the maximum price may encourage manufacturers/distributors/retailers to raise prices which may have an impact on the consumption of cigarettes, hence, also addressing the Health Ministry's concerns and would be, *prima facie*, a pro consumer measure. Moreover, as noted above, since generally cigarette packs are sold at a higher price than the printed price; therefore, printing of maximum retail price would not only ensure that the consumer is better informed regarding the price beyond which the product can not be sold, it would also place him in a better bargaining position.
32. In view of the foregoing, we are of the considered opinion that having appreciated the scheme of law, the conflict does not exist in the legal framework but rather it arises when FBR oversteps the mandate envisaged under law. The restriction imposed by FBR on manufacturers and other persons associated with the cigarette business for not selling cigarettes below its prescribed minimum price is not envisaged under law. Thus it is the implementation and not the law that is giving rise to an anomalous situation.
33. It is also important to appreciate that the current imposition to print the retail price whether on cigarette packs or in newspapers is neither contributing, facilitating, improving or ensuring due collection of taxes in any manner, nor is it in compliance with the spirit of the law. Parties are, therefore, advised to stop such practice with immediate effect. FBR, however, is empowered to intimate to the concerned

undertaking as to what it shall deem as the minimum price for the purposes of levying tax on the concerned goods and collect the same accordingly. As discussed above, the retail price required to be printed under law is intended to be the maximum and not the minimum price. Therefore, FBR may require the undertakings to print on the cigarettes packs in unambiguous terms the maximum retail price. Perhaps, it is also advisable that consumers be notified that the retail price printed on the goods is the “Max. Retail Price”.

34. The printing of a maximum retail price on cigarette packs would have a three fold advantage;

- firstly, it would not in any manner impact FBR’s attempt to plug the loopholes in the current tax collection system as FBR can continue to prescribe the minimum retail price for the purposes of levying and collecting tax. In fact, if a provision is made in the law as is in the EU that the tax would be levied at the maximum retail price it would ensure higher tax revenues for the government.
- Secondly, it would prevent retailers from overcharging consumers because the price would be capped at the maximum retail price. Consumers would be free to bargain for a price lower than the maximum retail price; enabling retailers to discount the product in order to spur sales.
- Lastly, if at all placing the maximum price has an impact on pushing prices up that may help in deterring and discouraging consumers from use of cigarettes, thus catering for consumer protection as well as addressing Health Ministry concerns.

(ABDUL GHAFFAR)
Member (C&M)
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