

SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

Mr. Justice Umar Ata Bandial, CJ
Mr. Justice Syed Mansoor Ali Shah
Mrs. Justice Ayesha A. Malik

CIVIL APPEAL NO.1692 OF 2021

[Against the judgment dated 14.09.2021 of the Islamabad High Court, Islamabad, passed in Writ Petition No.3454 of 2020]

The Competition Commission of Pakistan
and others

...Appellant(s)

Versus

Dalda Foods Limited, Karachi

...Respondent(s)

For the Appellant(s) : Mr. Faisal Siddiqui, ASC

For the Respondent(s) : Syed M. Feisal Hussain Naqvi, ASC

For Federation : Ch. Aamir Rehman, Addl. AG

Date of Hearing : 29.03.2022

JUDGMENT

AYESHA A. MALIK, J-. The Appellants have impugned judgment dated 14.09.2021, passed by the Islamabad High Court, Islamabad, (**High Court**) whereby the writ petition filed by the Respondent was allowed. Leave was granted by this Court vide order dated 22.11.2021 to consider the provisions of the Competition Act, 2010 (**Act**) with reference to the powers of conducting an enquiry.

2. Brief facts are that the Respondent challenged, before the High Court, the calling for information, by the Competition Commission of Pakistan (**CCP**), regarding the price of vanaspathi ghee and cooking oil vide letters dated 13.07.2020 and 06.11.2020 and the initiation of an enquiry by the same. The grievance of the Respondent was that these letters were issued for a no justifiable reason as the CCP cannot initiate an enquiry based on vague and indefinite allegations nor can it enquire into the issue of pricing. Further, that the letter dated 13.07.2020 was vague as it called for information on account of "*certain concerns*" and "*need to probe further in the matter*" whereas letter dated 06.11.2020 was a notice under Section 37 of the Act for initiating an enquiry without stating any reasons. The Respondent's argument is that the CCP could not conduct a roving enquiry on the basis that it needed to collect information. Further, that

under Section 37 of the Act, the CCP has to first form an opinion and then confront the undertaking with the material on which this opinion was formed, and on which it intended to initiate an enquiry prior to initiating such enquiry. The Respondent claimed that CCP's conduct in the matter amounts to an adverse action for which a notice disclosing relevant facts and sufficient reasons should have been provided so as to make the Respondent aware of the basis of the allegations against it. In this case, the Respondent argued that, no such opinion was formed nor any reasons given, hence, the challenge.

3. The impugned judgment considered the petition of the Respondent and concluded that the CCP must exercise discretion reasonably and that there must exist a reasonable basis to exercise its statutory authority to enquire into the affairs of an undertaking. The Court further concluded that sub-sections (1) and (2) of Section 37 of the Act are to be read together and the applicable test for the exercise of power under Section 37 of the Act is the *plausibility test*, meaning that, if the CCP wishes to initiate an enquiry it must satisfy itself that there is a plausible case of contravention of the provisions of the Act which necessitates an enquiry. Further, while relying on an earlier judgment National Feeds Limited v. Competition Commission of Pakistan and others (2016 CLD 1688), upheld by this Court vide Order dated 22.11.2017 passed in Competition Commission of Pakistan v. Punjnad Feeds Limited, etc., (C.P.Nos. 2119 to 2123 of 2016), wherein the High Court concluded that the CCP as vested with powers under a statute cannot use or exercise such powers for the purposes of making indiscriminate, roving and fishing enquiries and that even in cases of suspicion of the CCP of illegality, details should be provided to the party to enable him to have an opportunity to produce all the relevant documents and disclose information. Meaning that CCP cannot order an enquiry under Section 37 of the Act to merely dig out the facts on the basis of a hunch or suspicion and that it must disclose reasons. Consequently, the enquiry ordered by the CCP as well as the letter issued on 13.07.2020 were set aside for being in contravention to the mandate of the Act.

4. Learned counsel for CCP, the Appellant No.1, argued that the findings in the impugned judgment with reference to Section 37(1) and (2) of the Act being read together, when it comes to the manner in which the enquiry is to begin, is incorrect as the legal requirements provided in sub-sections (1) and (2) of Section 37 of the Act are substantially different. Further, it was argued that the applicability of the *plausibility test*, in these circumstances, is incorrect since the information was sought under Section 36 of the Act whereas the enquiry was initiated

under Section 37(1) thereof. The learned counsel also argued that the initiation of an enquiry under the Act, of the Respondent along with other similar undertakings, was done to assess if Sections 3 and 4 of the Act are being contravened in the light of, amongst others, the concern of the hike in price. The learned counsel stated that it was a sector-based request for information and enquiry and it was only the Respondent that challenged the letters and the initiation of the enquiry. He argued that, at this stage, there is no adverse determination against the Respondent and that it was merely a fact-finding exercise which could not itself be challenged, as it does not infringe any right. He explained that the legal requirements for initiating an enquiry under Section 37(1) and (2) of the Act are different and that there is nothing in the language of these sub-sections that suggests that the requirements of sub-section (2) are to be read in sub-section (1). He elaborated that the rationale behind the different legal requirements of the two sections is to enable the CCP to act, either on its own motion or on the basis of a complaint. Since the very basis of the action is different, hence, the legal requirements are different. He further stated that seeking information does not require any detailed reasons to explain why the CCP seeks information, therefore, the writ petition was pre-mature and that there is no justification in challenging the letters nor should the Court have interfered in the matter.

5. On behalf of the Respondent, it was emphasized that the actions of the CCP when probing for information must be justified and must be based on some reasoned order. The counsel for the Respondent argued that it is settled law that there must be a reason for initiating an enquiry and that these reasons must be disclosed. Further, that the undertaking must be aware of the allegations on the basis of which, the enquiry is being initiated so that it is able to defend its position. The Respondent relied on the *National Feeds* case (*supra*) and stated that sub-sections (1) and (2) of Section 37 of the Act have to be read together as the language of the law is similar, therefore, in order to initiate an enquiry whether *suo moto* or on the basis of a complaint, reasons must be given. It was argued that the CCP was conducting a roving sectoral enquiry for which it has no jurisdiction especially with reference to price fixation.

6. The issue raised by the learned counsel is with reference to the CCP's power to call for information from an undertaking under Section 36 of the Act and the power to initiate an enquiry under Section 37 thereof. In terms of the facts pleaded by the parties, a letter was issued on 13.07.2020, and a reminder on 10.08.2020, requiring information to probe into the matter of excessive pricing of vanaspathi ghee in the market. The

Respondent responded to this letter on 17.08.2020 by relying on the *National Feeds* case (*supra*) stating that there is no allegation against it for being in breach of any provision of the Act nor has any reason been given for initiating an enquiry and that the vague allegations contained in the letter with respect to excessive pricing are not sufficient for the purposes of an enquiry. On 07.09.2020, the CCP sought information under Section 33 of the Act and stated in its letter that a formal enquiry has been initiated by the CCP under Section 37(1) with reference to the price increase of cooking oil and ghee in the market. These two letters formed the basis of the Respondent's challenge before the High Court. For ease of reference, the relevant sections are reproduced hereunder: -

"28. Functions and powers of the Commission.--- (1) The functions and powers of the Commission shall be -

- (a) to initiate proceedings in accordance with the procedures of this Act and make orders in cases of contravention of the provisions of the Act;
- (b) to conduct studies for promoting competition in all sectors of commercial economic activity;
- (c) to conduct enquiries into the affairs of any undertaking as may be necessary for the purposes of this Act;
- (d) to give advice to undertakings asking for the same as to whether any action proposed to be taken by such undertakings is consistent with the provisions of this Act, rules or orders made thereunder;
- (e) to engage in competition advocacy; and
- (f) to take all other actions as may be necessary for carrying out the purposes of this Act.

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

33. Powers of the Commission in relation to a proceeding or enquiry.--- (1) The Commission shall, for the purpose of a proceeding or enquiry under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (Act V of 1908), while trying a suit, in respect of the following matters, namely:--

- (a) summoning and enforcing the attendance of any witness and examining him on oath;
- (b) discovery and production of any document or other material object producible as evidence;
- (c) accept evidence on affidavits;
- (d) requisitioning of any public record from any court or office; and
- (e) issuing of a commission for the examination of any witness, document or both.

(2) Any proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Pakistan Penal Code (Act XLV of 1860), and the Commission shall be deemed to be a civil court for the purposes of section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 (Act V of 1898).

(3) The Commission may, for the purpose of a proceeding or enquiry under this Act, require any undertaking:---

- (a) to produce before, and to allow to be examined and kept by, an officer of the Commission specified in this behalf, any books, accounts, or other documents in the custody or under the control of the undertaking so required, being documents relating to any matter the examination of which may be necessary for the purposes of this Act; and
- (b) to furnish to an officer so specified such information in its possession, relating to any matter as may be, necessary for the purpose of this Act.

36. Power to call for information relating to undertaking.--- Notwithstanding anything contained in any other law for the time being in force, the Commission may, by general or special order, call upon an undertaking to furnish periodically or as and when required any information concerning the activities of the undertaking, including information relating to its organization, accounts, business, trade practices, management and connection with any other undertaking, which the Commission may consider necessary or useful for the purposes of this Act.

37. Enquiry and studies.--- (1) The Commission may, on its own, and shall upon a reference made to it by the Federal Government, conduct enquiries into any matter relevant to the purposes of this Act.

(2) Where the Commission receives from an undertaking or a registered association of consumers a complaint in writing of such facts as appear to constitute a contravention of the provisions of Chapter II, it shall, unless it is of opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by *prima facie* evidence, conduct an enquiry into the matter to which the complaint relates.

(3) The Commission may outsource studies by hiring consultants on contract.

(4) If upon the conclusion of an inquiry under subsection (1) or subsection (2), the Commission is of opinion that the findings are such that it is necessary in the public interest so to do, it shall initiate proceedings under section 30."

7. Section 28 of the Act provides the general functions and powers of the CCP wherein it has been provided that CCP can initiate proceedings in accordance with the Act, make orders in cases of contravention of the Act, conduct studies for promoting competition in all sectors of commercial economic activity, conduct enquiries into affairs of any undertaking as may be necessary, give advice to undertaking asking for the same, and engage in competition advocacy. Section 33 of the Act deals with and expands upon the specific power of the CCP in relation to a *proceeding or enquiry*, such that CCP shall have the powers of a Civil Court under the Civil Procedure Code, 1908 (**CPC**) for the purposes of summoning and procuring the attendance of a witness, discovery and production of any document or other material object producible as evidence, requisitioning of any public record and formation of a Commission for the examination of any witness, document or both. Sub-section (3) of Section 33 of the Act provides that the CCP may, for the purpose of a *proceeding or enquiry*, have produced before it, for examination of, any books, accounts, or other documents in the custody or under the control of the undertaking, relating to any matter, the examination of which, is deemed necessary for the purposes of the Act. Important to note is that the *proceedings* under the Act are initiated in cases of contraventions as stipulated in Section 30 read with Section 28(1)(a) of the Act. The term *proceeding* as used under Section 33 has not been defined in the Act, however, when we consider Chapter IV (Sections 28 to 37), which outlines the CCP's functions and powers, it becomes clear that *proceeding* under Section 33 has a specific, rather than a general, meaning or otherwise it would automatically include an enquiry, instead of a separate mention of it. *Proceeding* under Section 33 means and only refers to proceedings under Section 30 of the Act, and the power to call for information under Section 36 of the Act or

conduct of a study provided for under Section 28(1)(b) cannot be treated as a *proceeding* within the meaning used in Section 33 nor can the powers provided under Section 33 be made available to CCP in their exercise of jurisdiction under Section 36 or 28(1)(b).

8. The CCP is a regulator which aims to prevent and address anti-competitive practices across markets for which it studies the market to understand market trends and practices. For this reason, CCP under Section 36 of the Act is empowered to call for information relating to an undertaking. Through a general or special order, it may call upon an undertaking to furnish periodically or as and when required any information concerning the activities of the undertaking, including information relating to its organization, accounts, business, trade practices, management and connection with any other undertaking, which information is necessary for the CCP for the purposes of the Act. This is a regulatory power available to CCP aimed to collect and gather information about the undertaking and does not fall under the ambit of a *proceeding* under Section 30. Hence, merely calling for information does not constitute a proceeding nor does it trigger any penal consequences.

9. Section 37 of the Act provides for enquiry and studies and sub-section (1) thereof provides that the CCP may, on its own, conduct enquiries and studies into any matter relevant to the purposes of this Act or as per sub-section (2) of Section 37 of the Act, the CCP may conduct an enquiry and studies of an undertaking when it receives a complaint in writing of such facts that appear to constitute a contravention of the provisions of Chapter II of the Act unless it is of the opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by any evidence to conduct an enquiry. Although enquiries and studies are referred together in Section 37 of the Act, they serve distinct functions. *Enquiry* is a process available to the CCP to assess contravention of the Act before it initiates any proceedings under Section 30 of the Act. Whereas, *studies*, as provided under Section 28(1)(b) of the Act, are conducted to promote competition in all sectors of economic activity and in terms of Section 37(3) of the Act, they are a function which may be outsourced by hiring consultants on contracts. Both *enquiry* and *studies* are used as independent tools by the CCP to collect and assess information on market trends and do not constitute an adverse action against the undertaking. Therefore, in terms of Sections 36 and 37 the power to call for information or conducting an enquiry or study do not constitute a proceeding against an undertaking under Section 30 of the Act.

10. Furthermore, in line with its authority to carry out functions under the Act, the CCP is also empowered to make rules and regulations under Sections 57 and 58 of the Act, respectively. The Competition Commission (General Enforcement) Regulations, 2007 (**Regulations**), originally made under the Competition Ordinance 2007, outline the procedures for enquiry and adjudication. Specifically, Regulations 16 and 17 empower the CCP to initiate an enquiry if the presented facts suggest a potential violation of Sections 3, 4, 10 and 11, or the provisions of Chapter II of the Act. This can be done either *suo moto* or on a reference from the Federal Government. Moreover, the CCP can also conduct an enquiry based on a complaint received from an undertaking or a registered association of consumers, provided the complaint is not deemed frivolous, vexatious, or lacking sufficient evidence. To ensure the integrity of the process, Regulation 20 empowers the CCP to dismiss any vexatious or frivolous complaints, applications, or requests for joinder or intervention. Regulation 17(2) in conjunction with Section 37(2) of the Act clearly stipulates that upon receiving a complaint indicating a potential violation of Chapter II of the Act, the CCP is obliged to conduct an enquiry, unless it deems the complaint to be frivolous, vexatious, lacking sufficient evidence, or not substantiated by *prima facie* evidence in which case, the complaint can be dismissed under Regulation 20. The format in which a complaint against an undertaking is to be made is provided for in Regulation 18, which means that such complaint must at least be in compliance with the prescribed requirements under the Regulations.

11. After having assessed the relevant provisions, it is important to draw a distinction between Section 30 and Section 37 for our purposes. Section 30 empowers the CCP to issue orders under Section 31 when it is satisfied that there is a contravention of any provision in Chapter II of the Act. Before proceeding with the matter, the CCP must provide notice of its intent and the reasons behind it, giving the undertaking an opportunity to be heard and defend itself. On the other hand, Section 37 defines a different scope for the CCP. Under this section, the CCP has the authority to conduct enquiries, either *suo moto* or based on references from the Federal Government, into matters related to the objectives of the Act. As mentioned earlier, an enquiry under Section 37 can also be initiated based on a complaint, unless the application is deemed frivolous, vexatious, lacks sufficient evidence, or is not supported by *prima facie* evidence. If, upon conducting this enquiry, the CCP is of the opinion that the findings necessitate taking action in the public interest, it shall initiate proceedings under Section 30.

Additionally, Regulation 22 provides in respect of initiation of proceedings under Section 30 and states where the CCP, on its own motion or on a complaint, is satisfied that there is a contravention of the Act, it may issue a show cause notice stating its reasons and if the information available is sufficient to satisfy the CCP that the contravention of any provision of Chapter II is committed, it may proceed without conducting enquiry under the Regulations. In other words, the enquiry under Section 37 serves as a preliminary step to gather information and evidence, and if it reveals a potential contravention of Chapter II of the Act, the CCP can then proceed. However, such enquiry is not always necessary to proceed against an undertaking, and if the CCP is satisfied on the information that it has available that a contravention of Chapter II of the Act is committed, it may proceed without it.

12. The issue raised by the Respondent before the High Court was that for the purposes of Section 36 or Section 37 of the Act, the CCP has to provide reasons in writing, to the undertaking, as to why it is seeking information or why it has opted to carry out an enquiry and further that the CCP is to provide the material on which these actions are based, meaning thereby that the CCP must provide the material before it which forms the basis of the reason to invoke Section 36 or Section 37 of the Act. As examined above, the power of Sections 36 and 37 are regulatory in nature, which do not constitute a proceeding against an undertaking under Section 30. The dispute arises on account of the interpretation of the *National Feeds* case (*supra*). In this case, the petitioners challenged notices issued by the CCP requiring them to submit information with reference to the increased price of poultry feed. Though the notices were issued on the basis of a complaint made by a consumer of poultry feed, and the CCP initiated an enquiry under Section 37(1) of the Act, the Court while considering Section 37 of the Act concluded that for the purposes of initiating an enquiry on its own motion under Section 37 of the Act, the conditions provided for in Section 37(2) will be read into the sub-section (1). Consequently, whether an enquiry is initiated under sub-section (1) or (2), the CCP has to give reasons for conducting an enquiry even if it is initiated on its own motion and ought to disclose the facts on the basis of which the enquiry has been initiated. To our minds, the reading of Section 37 of the Act caters to two separate and distinct powers vested in the CCP for initiating an enquiry. Under sub-section (1) of Section 37 of the Act, the CCP may on its own motion or on a reference made by the Federal Government, conduct an enquiry into any matter relevant for the purposes of the Act. This essentially is the *suo moto* power of the CCP to initiate an enquiry,

which means that the CCP can on its own motion initiate an enquiry, in any matter necessary for the purposes of the Act, provided that it has deliberated on the matter and has produced its reasoning in writing. The question which arises now is whether the CCP is obligated to communicate its reasons to the undertaking, and if so, whether it is required to justify its decision with supporting material. The Respondent argues that the CCP is obligated to inform them of the allegations raised, along with supporting material, and the reasons for conducting an enquiry. The CCP being a regulator must always act in a transparent manner, keeping the undertaking informed of its decisions. However, we have already stated that Section 37 does not in itself result in penal consequences and that the procedure is not a proceeding within the meaning of Section 33. However, the CCP is required to provide the gist of its reasons as recorded in its internal deliberations which led to the decision of initiating such enquiry. This is a minimum requirement for the purposes of transparency and good governance and also facilitates the regulatory process by keeping the undertaking informed.

13. Now coming to sub-section (2) of Section 37 of the Act, where the CCP receives a complaint, in this situation, it is required to first establish the veracity of the complaint to ensure that it is neither frivolous or vexatious and that there are sufficient facts provided in the complaint to necessitate an enquiry, as this is an enquiry prompted by a third person, the complainant. Section 37(2) of the Act requires the CCP to satisfy itself in the first instance before initiating an enquiry such that the mere filing of a complaint does not automatically result in an enquiry rather it requires the CCP to consider the complaint and determine whether it merits an enquiry. For the purposes of this enquiry, the CCP has to satisfy itself that there is sufficient cause to initiate an enquiry and in the course of due process when informing the undertaking of the enquiry, the CCP should disclose the nature of the complaint and the allegations contained therein to the undertaking. Before proceeding with the complaint under Section 37(2) of the Act, the CCP should form a written opinion that the complaint is not frivolous, vexatious or based on insufficient facts or necessitates an enquiry. The Regulations themselves cater to this by requiring, under Regulation 18, the necessary contents that form a complaint and therefore are required for assessing the veracity of a complaint. Regulation 18(2) prescribes that the complaint, reference, or application shall contain a brief statement of facts, a summary of the alleged contravention of the Act, a succinct presentation in support of each contravention, such other particulars as may be specified by the Commission, a schedule listing all

documents/affidavits/evidence in support of each of the presentations, and the relief(s) sought. Once again, as in the case of Section 37(1), the CCP must record its reasons in writing in respect of the veracity of the complaint, and its decision to proceed or not. In the event that CCP chooses to proceed, then it must communicate the gist of the reasons to the undertaking before proceeding on the same.

14. Accordingly, when perusing an order under Section 37 of the Act, the CCP is not required to give a detailed reasoned explanation to the undertaking as to the enquiry, but should have deliberated on the issue so as to come to the conclusion that an enquiry is necessary, the gist of which reasoning should be communicated to the undertaking in writing. The internal working documents of the CCP need not be communicated in their entirety to the undertaking whilst at the same time its intent, along with gist of the reasoning, to conduct an enquiry must be communicated. In this case, there were multiple complaints on the price hike in ghee and related products. The National Price Monitoring Committee considered the general trend of increased prices and required the CCP to check for anti-competitive practices, if any. The Chairperson and the Director General of CCP participated in this meeting and proceeded on the matter. This led to a working paper in the matter of price increase of ghee/cooking oil and related products by CCP on 27.07.2020, followed by a decision dated 30.07.2020 to initiate a sectoral enquiry under Section 37(1) of the Act. In the meantime, letters had been sent out to those in the business of ghee and cooking oil to collect information on price patterns and cost structures, amongst other factors, to look for any dominant players in the market and violation of Section 3 of the Act. The letters issued to the Respondent and others on 13.07.2020 disclosed that CCP was concerned with the excessive pricing of vanaspati ghee in the market and was looking into the matter. After 30.07.2020, once the decision to initiate an enquiry was made, the CCP vide letter dated 07.09.2020 informed the Respondent and others of its decision to initiate an enquiry to determine, *prima facie*, contravention of Sections 3 and 4 of the Act. These materials, which formed the basis for initiating an enquiry, have been brought on record and they provide the intent of the CCP to probe into the matter to determine contraventions of Sections 3 and 4 of the Act. Hence, it is clear that the CCP intended to ascertain market information to see if there are any anti-competitive practices. At this stage, it is just an enquiry to determine if there are any anti-competitive practices which are in contravention under the Act. Any adverse action would take place once the basic enquiry is made, which highlights the anti-

competitive practice and then necessitates formal proceedings for which notice, detailed reasoning and hearing is a must as given in Section 30 of the Act.

15. It is of relevance to have an understanding of the purpose and function of CCP as well which the Respondent in the instant case appears to have failed to appreciate. CCP, as a regulator, is not only empowered to but also bears the responsibility to collect the market information in order to understand the market structure as well as to ensure effective enforcement of the Act being administered by it. In the absence of market information, that it may seek from different undertakings from time to time, CCP cannot carry out its functions as envisioned under the Act and the provision of this information by no stretch of the imagination amounts to an adverse action against an undertaking. Thus, it is an obligation upon the undertakings to fully comply with such orders of CCP for provision of information. In the event of proceedings against the undertaking, the Act requires for notice, detailed reasoning to be communicated, and due process so as to allow the undertaking an opportunity to defend itself.

16. In view of the foregoing, the impugned judgment is set aside and the appeal is allowed with no order as to costs.

CHIEF JUSTICE

*I agree but have also a standard
an additional note*

JUDGE

Bench-I
Islamabad
29.03.2022
'APPROVED FOR REPORTING'
Azmat/Alizeh*

JUDGE

Syed Mansoor Ali Shah, J.- I have read the judgment authored by my learned colleague, Justice Ayesha A. Malik, which is indeed eloquent and contains a comprehensive analysis of the facts of the case and the law applicable. While I concur with it, I am adding this brief note just to underscore the difference between the object and scope of “proceedings,” “studies” and “enquiries” conducted by the Commission under Chapter IV of the Competition Commission Act, 2010 (“Act”) and the duty of the Commission to act justly, fairly, reasonably and in a structured manner while exercising its discretionary power under Section 37(1) to initiate on its own an enquiry against an undertaking.

2. The Act aims to regulate the fundamental right to conduct any lawful trade or business guaranteed by Article 18 of the Constitution of Pakistan, in the interest of free competition as provided in clause (b) of the proviso to that Article. As one of the primary objectives of enshrining a right within the Constitution is to safeguard it from being susceptible to ordinary legislation, the regulatory laws that have the effect of impacting a constitutionally guaranteed right are to be strictly construed.¹ The wide and liberal interpretation of such laws may make the constitutional guarantee redundant. Therefore, the provisions of the Act that authorize the Commission, in the public interest of ensuring free competition, to interfere in the exercise of the fundamental right to conduct any lawful trade or business must be strictly construed.

3. In view of the above principle, the argument that the power of the Commission under Section 36 of the Act to call upon an undertaking to furnish certain information is a “proceeding” within the meaning of this term as used in Section 33 of the Act, is not sustainable. Section 36 of the Act gives the Commission only one power, that is, to “call upon an undertaking to furnish periodically or as and when required any information concerning the activities of the undertaking”. By treating this “power to call information” as a “proceeding” within the meaning of Section 33, we would be conferring upon the Commission a long list of powers provided in Section 33, which include summoning and enforcing the attendance of any person and requiring the production of any books, accounts or other documents in the custody of an undertaking, etc. And by so doing we would be adding further powers of the Commission in Section 36 of the Act to interfere in the exercise of the fundamental right of the citizens of Pakistan to conduct any lawful trade or business which

¹ B.K. Ravichandra v. Union of India (2021) 14 SCC 703.

the Legislature has not provided therein. Such a wide and liberal interpretation of the provisions of the Act that have the effect of impacting a constitutionally guaranteed right, as aforesaid, is not warranted.

4. Although the word “proceeding” used in Section 33 has not been defined in the Act, the examination of the overall scheme of Chapter IV (Sections 28 to 37) that describes the functions and powers of the Commission clearly indicates what it means. It has been used in Section 33 in special meaning, not in general meaning; otherwise, there was no logic or reason to mention the words “or enquiry” therewith as in its general meaning the word “proceeding” would have included in it an “enquiry” also. That special meaning is more than evident from the use of this word in several provisions of Chapter IV. First and foremost are the provisions of clauses (a), (b) and (c) of Section 28(1), which have distinctly described “proceedings”, “studies” and “enquires” by providing thus:

28. Functions and powers of the Commission.-(1) The functions and powers of the Commission shall be-

(a) to initiate **proceedings** in accordance with the procedures of this Act and make orders in cases of contravention of the provisions of the said Act;

(b) to conduct **studies** for promoting competition in all sectors of commercial economic activity;

(c) to conduct **enquiries** into the affairs of any undertaking as may be necessary for the purposes of this Act;

(Emphasis added)

The title of Section 30, i.e., “*Proceedings in cases of contravention*”, and the provisions of that Section further illustrate what “proceedings” are referred to in clause (a) of Section 28(1). As per subsection (1) of Section 30, they are the “proceedings” initiated by the Commission for the contravention or likely contravention of any provision of Chapter II. Section 32 also uses the word “proceeding” and mentions the power of the Commission to issue interim orders “during the course of any proceeding under section 30”. Next comes Section 33(1) which uses the word “proceeding” and describes the powers of the Commission for the purpose of a “proceeding” or enquiry under the Act. Subsection (2) of Section 33 states that any “proceeding” before the Commission shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Pakistan Penal Code. Last but not least, subsections (4) of Section 37 uses this word and refers to it as “proceedings” under Section 30 by providing that ‘[i]f upon the conclusion of an inquiry under subsection (1) or subsection (2), the Commission is of opinion that the findings are such that it is necessary in the public interest so to do, it shall initiate proceedings under section 30’. All these provisions

of Chapter IV leave little room to doubt what special meaning of the word “proceeding” used in Section 33 is: it means and refers to a “proceeding” initiated under Section 30 of the Act. Therefore, the power of the Commission to call for information under Section 36 and to conduct a study under Section 28(1)(b), cannot be treated a “proceeding” within the meaning of that word used in Section 33 of the Act, nor can the powers mentioned in Section 33 in relation to a “proceeding” be made available to the Commission for the purposes of calling information under Section 36.

5. There is a also clear difference between the scope of “enquires” and “studies” to be conducted by the Commission under the Act. They cannot be used by the Commission as two alternate modes to ascertain any contravention of the Act before it initiates any specific action against an undertaking. Subsection (4) of Section 30 clearly mentions the object of holding an enquiry by stating that ‘[i]f upon the conclusion of an inquiry under subsection (1) or subsection (2), the Commission is of opinion that the findings are such that it is necessary in the public interest so to do, it shall initiate proceedings under section 30’. Enquiries are therefore a process available to the Commission to assess any contravention of the Act before it initiates any specific action against an undertaking. However, this is not the object of “studies”. Their object is mentioned in Section 28(1)(b): the “studies” are to be conducted ‘for promoting competition in all sectors of commercial economic activity’,² not to initiate any specific action against an undertaking. Under the Act, no regulatory action is triggered simply on the basis of the “studies”. Therefore, the Commission may under Section 37(3) outsource “studies” by hiring consultants on contract. It cannot be said that by doing so, the Commission outsources its statutory regulatory function to some consultants hired on contracts. Enquiries” and “studies” thus have no regulatory symbiotic relationship under the Act.

6. So far as the power of the Commission to initiate an enquiry against an undertaking either on its own under Section 37(1) or on a complaint under Section 37(2) of the Act is concerned, Section 37(2) specifically requires that before initiating an enquiry under upon a complaint of such facts as appear to constitute a contravention of the provisions of Chapter II, the Commission is to examine the veracity of the

² There are many reports of studies conducted by the Commission available online available on the official website of the Commission at https://cc.gov.pk/home/assessment_studies which clearly explain the scope and object of studies conducted under the Act.

complaint to ensure that it is neither frivolous or vexatious nor is it based on insufficient facts or unsubstantiated by *prima facie* evidence.

7. The High Court has held in the impugned judgment while relying upon its earlier decision in *National Feeds* case,³ which remained undisturbed by this Court⁴, that before initiating an enquiry on its own under Section 37(1) the Commission is required to do the same process, that is, the Commission must ascertain whether there are such sufficient facts substantiated by *prima facie* evidence which appear to constitute a contravention of any provision of Chapter II while examining the veracity of the information on the basis of which it intends to initiate an enquiry against an undertaking. The High Court has named this preliminary examination to be made by the Commission of the complaint under Section 37(1) or of the information under Section 37(1) as a *plausibility of contravention test* with which I have no issue in so far as the said test in substance remains the same as that of the said preliminary examination. It is the substance of the preliminary examination that matters, as nothing turns on the name given to it whether it be called *plausibility of contravention test* or *potential violation test*.

8. Institutions, and more so, public institutions don't function on the basis of verbal orders. Every opinion formed by the institution must be recorded and reduced in writing. Any subsequent initiation of an enquiry against an undertaking must reflect the reasons so recorded by the institution in writing. Public institutions are not unregulated personal fiefdoms run on whims and caprice of a few, but are subject to law and can function only with the remit of the Constitution and the law. The days of arbitrary exercise of discretionary powers are long gone. The constitutional courts always read the requirement of acting justly, fairly and reasonably in every statute that confers discretionary powers on some executive or judicial authority while making a judicial review of the exercise of those powers and also insist upon the exercise of such powers in a structured manner. The Commission should, rather must, do so in order to exercise its discretionary power of initiating an enquiry on its own under Section 37(1) of the Act in a just, fair and reasonable manner. And for this purpose, the Commission can advantageously follow the criterion prescribed by the legislature itself for initiating an enquiry on complaints under Section 37(2). Further, it is also essential for the Commission to

³ National Feeds Limited v. Competition Commission of Pakistan 2016 CLD 1688.

⁴ Vide Order dated 22.11.2017 passed in Competition Commission of Pakistan v. Punjnad Feeds Limited, etc, (C.P.Nos. 2119 to 2123 of 2016)

convey to the undertaking concerned the gist of the reasons and facts that prevail with the Commission in making the decision to initiate on its own an enquiry against that undertaking for a potential violation of any provisions of Chapter II of the Act.

9. In the present case, the Commission did have with it such sufficient facts substantiated by *prima facie* evidence which appeared to constitute a contravention of the provisions of Chapter II, as evident from the working paper dated 27 July 2020 placed before the Commission and the resolution dated 30 July 2020 passed by the Commission to initiate the enquiry in the exercise of its power under Section 37(1) of the Act. The letter of 13 July 2020 impugned by the respondent in the writ petition before the High Court was merely an information-seeking order of the Commission under Section 36 of the Act, while the other two impugned letters of 7 September and 6 November 2020 were issued after the initiation of enquiry under Section 37(1) in the exercise of powers under Section 33 of the Act, for the purpose of the enquiry. The material (working paper dated 27 July 2020 and resolution dated 30 July 2020, etc.) containing the statements of such sufficient facts substantiated by *prima facie* evidence which appeared to constitute a contravention of the provisions of Chapter II and formed the basis for initiating the enquiry by the Commission was provided to the respondent by the appellants during the proceedings of the present appeal under an order of this Court. This should have been done by the High Court instead of quashing the whole enquiry proceedings, especially when the respondent had not specifically challenged in its writ petition the order (resolution) of the Commission dated 30 July 2020 whereby the enquiry was initiated. The present appeal is therefore allowed, and by setting aside the impugned judgment the writ petition of the respondent is dismissed.

Judge

Islamabad,
29th March, 2021.
Approved for reporting.
Sadaqat