



**BEFORE THE  
MONOPOLY CONTROL AUTHORITY  
IN THE MATTER OF  
M/s. Unilever Pakistan Ltd  
&  
M/s. Dalda Foods (Pvt) Limited  
(File No. 1(1)/MISC/DD-R&I/MCA/04)**

Date of hearing:	1-2-2005
Present	Mr. Muhammad Arshad Parwaiz Member Mr. Abdul Ghaffar Member
Date of hearing:	23-8-2006
	Mr. Khalid A. Mirza Chairman Raja Raza Arshad Member Mr. Abdul Ghaffar Member
Date of hearing:	30-10-2006
Present:	Mr. Khalid A. Mirza Chairman Raja Raza Arshad Member
Present for Respondent:	Mr. Amar Naseer Company Secretary & Ms Zarin Riaz Khwaja, Legal Manager of Unilever Pakistan Ltd., Mr. Abdus Samad, Finance Director, Dalda Foods (Pvt) Limited.

**ORDER**

On June 17, 2004 a news item appeared in the daily 'Business Recorder' with the head line "Dalda changing hands; Unilever deal with Palm Oil mogul". The news item started with the words: "*Leading palm oil*

*importer Bashir Janmohammad, in collaboration with an Employees Group led by Pervez Khan has reportedly purchased the Selected Oils and Fats Business (SOFB) of Unilever Pakistan Ltd (UPL) for Rs1.4 billion.”*

### **Preliminary**

2. Monopoly Control Authority (hereinafter referred to as the “Authority”), while taking *suo moto* notice of the press report, vide letter dated July 31, 2004 asked Unilever Pakistan Ltd (hereinafter referred to as the “Vendor” or “UPL”) to supply a copy of the agreement in terms of which the undertaking was selling or had sold its “*ghee and cooking oil business*” to Westbury Group of Companies (the business house of Mr. Bashir Janmohammad) and others. The Vendor was also asked to supply a copy of any additional agreement executed by it with the Purchaser.

3. The Vendor, vide letter dated August 21, 2004 supplied copies of (i) the “*Agreement to Transfer Business*” by which the business in question was sold to a newly formed company called Dalda Foods (Private) Limited established by the Westbury Group and associates (hereinafter referred to as the “Purchaser” or “DFL”), and (ii) a separate document entitled “*Non-Competition Agreement*”, concluded between the Vendor and the Purchaser.

4. The Vendor is a public limited company and the Purchaser is a private limited company. The Vendor, *inter alia*, was engaged in the business of manufacturing, marketing, distributing and selling in Pakistan (hereinafter referred to as the ‘territory’) selected edible oils and fats, refined oils and margarine products. The Purchaser came into existence on July 8, 2004.

5. The Vendor sold and the Purchaser bought the vanaspati and oils business of the Vendor (also hereinafter referred to as the “*Selected Oils and Fats Business*” or “SOFB”) upon terms and conditions stipulated in the

Agreement to Transfer Business, executed on July 9, 2004. Under Article 3 of this agreement, the consideration for transfer of the vanaspati and oil business comprised:

Value of Immovable Property	Rs.475.00 million
Value of Movable Property	Rs.475.00 million
Value of the inventory Book (As at the transfer date, subject to transfer audit; Value as at June 30, 2004)	Rs.348.00 million
Value of Copyright	Rs. 1.00 million
Value of Commercial Information	Rs. 10.00 million
Value of Technical Information	Rs. 19.00 million
Value of Goodwill	Rs.100.00 million
<b>Total</b>	<b>Rs.1428.00 million</b>

6. Article 15 of the Agreement to Transfer Business states that the Purchaser and the Vendor have agreed to enter into the following further agreements on the transfer date in order to facilitate the transaction:-

*“a). A Commission Agency Agreement in the Agreed form, brief particulars of which are set forth in Schedule F, for the provision of certain services by the Vendor in relation to the sale and distribution of Products for a period of two (2) years after the Transfer Date.*

*b). A Toll Manufacturing Agreement in the Agreed Form, brief particulars of which are set forth in Schedule G, for the provision by the Purchaser of toll manufacturing services for the manufacture of margarine for the Vendor for an initial period of three (3) years after the Transfer Date.*

*c). One or more services Agreements each in an Agreed Form, brief particulars of which are set forth in Schedule H, for the provision by the Vendor of the services mentioned in the said Schedule.”*

7. The Non-Competition Agreement mentioned earlier was also executed on July 9, 2004 the consideration for which was the amount of Rs

250 million (Rupees Two Hundred and Fifty million) payable in lump sum on a date to be mutually agreed between the Purchaser and Vendor. As regards the covenant not to compete (hereinafter, as the context permits, the expression “non-compete” will refer to this covenant, in both specific and generic terms), this agreement essentially states:

**“1.1: Scope of Covenant Not to Compete”**

*1.1.1 UPL agrees, for a period of five (5) years from the date on which the consideration set forth in Article 2.1 is paid to UPL by DFL, not to:*

*(a). Directly or indirectly own, manage, operate, join, control or participate in the ownership, management, operation or control of any company, firm or person carrying on business in or from Pakistan which is competitive with the Business, or*

*(b). Provide technical or other information to any third party concerning the setting up of any manufacturing facility or the methods for the manufacture of vanaspati (hydrogenated vegetable fat) and edible oils or the marketing of such products.*

*1.1.2. Notwithstanding anything contained in the Agreement, the Vendor may continue to manufacture, market, promote, distribute or sell products like margarines, spreads, margarine spreads, table margarine and industrial margarine, and any olive oil based products and value-added oils/fat based spreads.”*

8. The Authority vide letter dated January 18, 2005, asked the Vendor to supply by January 27, 2005 a copy each of the agreements mentioned under Article 15 of the Agreement to Transfer Business. At the same time, the Purchaser was also asked to supply the following information by January 27, 2005:

- i). Details of products which were being produced, prior to purchase of business; and
- ii). Details of products being produced, after purchase of business.

9. The Purchaser and the Vendor supplied the requisite information (vide their letter dated January 26, 2005). Both the Vendor and the Purchaser were also duly provided an opportunity of being heard; and in accordance with a hearing notice issued on January 19, 2005, Mr. Amar Naseer, Company Secretary of the Vendor and Mr. Abdus Samad, Finance Director of the Purchaser appeared before the Authority on the date of hearing viz February 1, 2005.

10. Mr. Abdus Samad submitted that DFL came into existence on July 8, 2004 and was not a competitor of the Vendor prior to the transfer of the business in question. He also contended that the Non-Competition Agreement had been executed for a period of five years and not for an indefinite period; and further that the relevant market share of the Vendor being only 3%, transfer of this business did not have any adverse consequences for the market. However, after hearing both parties, the Authority took the view that the Non-Competition Agreement was *prima facie* in violation of Sections 5(1)(b) and 6(1)(a) of the Monopolies and Restrictive Trade Practices (Control & Prevention) Ordinance 1970 (hereinafter referred to as the “Ordinance”). Accordingly, Show Cause Notices No 67 and 68 of 2004-05 dated March 25, 2005 (in content, these being *mutatis mutandis* the same Notice) were served on the Vendor and the Purchaser respectively. Basically, the Authority felt that the Non-Competition Agreement had apparently lessened competition in the market and could be deemed to be an unreasonably restrictive trade practice as stipulated in the Ordinance. Referring to all this as well as the general prohibition of unreasonably restrictive trade practices under Section 3 of the Ordinance (and, of course, capturing the essential facts set out in the

preceding paras), both the parties were required to show cause by April 14, 2005 as to why action under Section 11 read with Section 12(1)(c)(i)&(ii) of the Ordinance should not be taken against them.

11. The Authority held a further two hearings in Karachi on August 23, 2006 and on October 30, 2006 during which various aspects of the case were discussed threadbare. Both the Vendor and the Purchaser were given full opportunity to air their views freely, present their case and urge whatever they wished, without any let or hindrance. They were also allowed to couch their presentations in terms they were most comfortable with. The Vendor and the Purchaser also made a total of five written submissions, in response to the Show Cause Notice, and otherwise. It is considered appropriate to reproduce below, in date-wise sequence, the essential text of these submissions so that the facts pointed out by the parties and their arguments are duly considered in totality:

**A. Vendor's response to the Show Cause Notice, dated May 9, 2005:**

*"In reply to the subject show cause notice No.67 of 2004-05 dated 25 March 2005 of the Monopoly Control Authority ('Authority') which directed the Respondent to the show cause why action should not be taken under section 11 read with Section 12(1)(c)(i)&(ii) of the Monopolies and Restrictive Trade Practices (Control & Prevention) Ordinance 1970 ('the Ordinance') regarding the non-competition agreement dated 9 July 2004 between Unilever Pakistan Ltd ('the Respondent') and Dalda Foods (Pvt) Limited ('DFL'), the Respondent above-named respectfully submits as follows:*

*1. The Respondent had since many years engaged in manufacturing, marketing, distributing and selling in Pakistan vanapati (hydrogenated vegetable fats) and edible oils until the transfer date as defined in the Agreement dated 9 July 2004 for selling, assigning, conveying, transferring and delivering to DFL the assets designated as the Vanaspati and Oil Business inclusive of the goodwill. As and from that date, those assets including the goodwill vested in DFL enabling DFL to itself establish and carry on a business in vanaspati and edible oils while the Respondent discontinued the business it had earlier carried on in those products.*

2. *In this connection it is submitted that even as early as 1872, the Contract Act had recognized, and continues to recognize even today, the need for contractually binding the seller of goodwill of a business to refrain from carrying on a similar business so long as the buyer of the goodwill carries on a like business. This is provided for in exception 1 to Section 27 of the Contract Act 1872 ("Contract Act"). While the Section declares that every agreement by which any one is restrained from exercising a lawful profession or a trade or business of any kind is to that extent void, the exception saves an agreement not to carry on a business of which the goodwill is sold under the conditions therein specified. The Non-Competition Agreement provided reasonable protection to DFL which had purchased the goodwill from the Respondent and had intended to establish its own business in vanaspati and edible oils that the Respondent would refrain from carrying on a similar business for a period of 5 years in or from Pakistan. In the absence of such an agreement it would have been foolhardy for DFL to set up its own vanaspati and edible oils business with the goodwill and other assets purchased from the Respondent, considering the fact that the Respondent had carried on a business in those products in Pakistan for over fifty years and possessed the know-how required for engaging in the business successfully. As such the agreement not to compete was a practical necessity for DFL and as submitted above, even the Contract Act has always recognized the need for and protected such agreements.*

3. *Therefore it is apparent that the agreement not to compete and the assurances therein provided by the Respondent in fact made it possible for DFL to make the investments required not only for purchasing the goodwill and the assets purchased from the Respondent but also for itself establishing and carrying on a business for the production and sale of vanaspati and edible oils. The vanaspati and edible oils business thus established by DFL now provides to the market the products earlier made available by the Respondent. The Non-Competition Agreement made it possible for these products to remain available in the market after the Respondent discontinued its business in those goods.*

4. *The Show Cause Notice incorrectly suggests that the Respondent and DFL are actual or potential competitors. It is submitted that the goodwill and assets relating to the business formerly carried on by the Respondent having been sold and*

*transferred to DFL, that business has ceased to be carried on by the Respondent, ought not to be regarded as a competitor of DFL which is not carrying on its own business in vanaspati (hydrogenated vegetable fats) and edible oils with the assets purchased by it. Also, the Respondent having given its assurances in terms of the Non-competition Agreement not to carry on a similar business for a period of 5 years as allowed by exception 1 to section 27 of the Contract Act, the Respondent ought not to be regarded as a potential competitor of DFL.*

*5. The Non-Competition Agreement in substance assures DFL, as the purchaser of the assets including goodwill for establishing and carrying on its own vanaspati and edible oils business that the Respondent, having sold those assets to it, will not carry on a competing business. It is respectfully submitted that this agreement does not fix the purchase or selling prices with regard to the sale or distribution of the goods supplied by that business nor does the agreement impose any other restrictive trading conditions with regard to the sale or distribution of those goods. In this regard it would be appreciated that the goods in question are those of a business in vanaspati and edible oils which the Respondent no longer desires to carry on, and is now carried on by DFL to the exclusion of the Respondent from whom DFL had purchased the necessary assets including goodwill. Further, the agreement not to compete does not provide for dividing or sharing of markets for those goods inasmuch as the Respondent no longer carries on that business and has not present intention of re-commencing that business in competition with DFL to whom the relevant assets and goodwill have already been sold by the Respondent, or at all.*

*6. It is therefore respectfully submitted that the Non-Competition Agreement containing assurances on the part of the Respondent as the seller of assets including goodwill does not constitute any unreasonably restrictive trade practices whether under section 6(1)(a)(i) or section 6(1)(a)(ii) of the Ordinance as alleged. In particular nothing contained in the Non-Competition agreement lessens competition in the market place. In place of the products of the vanaspati and edible oils business formerly carried on by the Respondent which had earlier supplied the market, those goods are now supplied to the market by DFL under the same brands which it has purchased. As such, there is no lessening of competition in the market. The Respondent decision to sell the assets and*



*goodwill to DFL results from the Respondent's decision not to carry on any longer the vanaspati and edible oils business which it had earlier carried on. DFL's decision to engage in a similar business with the assets and goodwill purchased from the Respondent now substitutes in the market place the vanaspati and edible oils products that were formerly supplied in the same market by the Respondent.*

*7. Further, it is respectfully submitted that the agreement not to compete ought not to be regarded as constituting an unreasonably restrictive trade practice having regard to the provisions of sub-Section (2) of Section 6 of the Ordinance. The production and supply of vanaspati and edible oils is no longer regarded as a core business of the Unilever group to which the Respondent belongs. Unilever companies in all other countries have already ceased to carry on business in those goods. Consistent with its group policy, the Respondent had also decided to discontinue its business in those products. The physical assets and goodwill thereby made surplus to the Respondent's requirements could have been sold to any buyer without regard to the buyer's intention to establish and carry on its own vanaspati and edible oils business. In that case the vanaspati and edible oils products previously supplied to the market may have simply been withdrawn from the market. As stated above, the assurances on the part of the Respondent not to compete made it possible for DFL to establish and carry on its own business in vanaspati and edible oils and to make the products of that business available in the market under the same brands which the consumers were accustomed to buy. It is respectfully submitted that the agreement not to compete has in fact substantially contributed to the efficiency of the production and distribution of the goods concerned, besides promoting technical progress by making it possible for DFL to engage in a business in the same goods. None of these efficiencies or benefits would have been available in the absence of the Respondent's assurances contained in the agreement not to compete. Having regard to the information and know-how acquired by the Respondent through carrying on that business for many years, it would have been foolhardy for DFL to commence a business in vanaspati and edible oils without the Respondent's assurances that it would refrain from carrying on a competing business for a period of five years.*

*8. In the circumstances, it is respectfully submitted that no occasion arises on account of the signing of the Non-Competition agreement that would call for any order under*

*Section 12(1)(c)(i) or (ii) of the Ordinance and as such the Show Cause Notice may kindly be withdrawn.*

*9. Without prejudice to the foregoing, the respondent respectfully urges the following additional legal objections each of which is intended to be an independent submission made without prejudice to any of the submissions made above:*

- (i) That the subject Show Cause Notice issued to the Respondent does not comply with the provisions of Section 11(2) of the Ordinance. The notice does not state the specific terms in which the order is intended to be made. Further, no notice of the Authority's intention to make the order has been issued to persons likely to be prejudiced or affected by such order. In particular no such notice has been issued to all the persons affected by the intended order referred to in the subject Show Cause Notice.*
- (ii) That the subject Show Cause Notice is deficient and insufficient in respect of its contents and as to the parties concerned and in any event does not serve the purpose of lawfully initiating proceedings under Section 11 of the Ordinance.*
- (iii) That the subject Show Cause Notice fails to state the evidentiary and other materials on which the Authority's "satisfaction" is based as to the alleged necessity in the public interest for an order to be made. It is respectfully submitted that full disclosure of such material is always necessary as is in fact required by the rules of natural justice. It will be appreciated that the Respondent is embarrassed and considerably prejudiced in having to answer a Show Cause Notice without full disclosure of the material on which it is founded. The Respondent is further embarrassed and considerably prejudiced in having to answer the subject Show Cause Notice since it does not specify the terms of the proposed order. The Respondent reserves its right to make further submissions when the deficiencies in the subject Show Cause Notice are supplied.*
- (iv) That no reasonable basis or evidence exist, and none has been communicated to the Respondent,*

*that could reasonably satisfy the Authority that the Respondent is in a situation of unreasonably restrictive trade practices within the meaning and intendment of the Ordinance as alleged or otherwise.*

(iv) *That no occasion has arisen enabling action to be taken under Section 11 of the Ordinance. In particular, nothing that the respondent has done or omitted to be done is or can reasonably be said to necessitate or justify action in the public interest. None of the orders available to the Authority would in any event serve the public interest.*

(v) *That the subject Show Cause Notice is deficient and void and any order proposed therein if issued will also be void, for the following among other reasons:*

(a) *The notice does not specify the order intended to be made in the manner contemplated in Section 11(2) of the Ordinance.*

(b) *Notice has not been issued to all persons or undertakings that will be prejudiced or affected by the intended order.*

(c) *No occasion has arisen to authorize the issue of the notice to the Respondent.*

(d) *The pre-requisites for the issue of a notice have not been fulfilled in the present case.*

(e) *That the Authority has thus far proceeded in a manner contrary to the rules of natural justice and the statutory intendment of Section 11(2) of the Ordinance in that the Authority has not provided to the Respondent the terms of any order nor the evidence or other material on which its preliminary decisions set forth in the notice are based.*

*The Respondent respectfully submits that for each of the above and other good and cogent reasons, the Authority lacks jurisdiction to make any order mentioned therein.*

*10. The Respondent requests that adequate opportunity be provided for the Respondent to produce such evidence and also for the consideration of and for producing documentary and other evidence in rebuttal of any evidence which the Authority may have taken or may hereafter take into account for the purposes of the subject Show Cause Notice.*

*11. The Respondent respectfully prays that for the reasons stated in this reply and for other good and cogent reasons the Show Cause Notice should be withdrawn and cancelled.*

*12. The Respondent further prays for an opportunity of being heard in person and by counsel in defence of the Show Cause Notice.”*

**B. Purchaser’s response to the Show Cause Notice, dated September 2, 2006:**

*“1. “In response to the subject show cause notice No.68 of 2004-05 dated 25 March 2005 of the Monopoly Control Authority (‘Authority’) which directed the Respondent to the show cause why action should not be taken under section 11 read with Section 12(1)(c)(i)&(ii) of the Monopolies and Restrictive Trade Practices (Control & Prevention) Ordinance 1970 (‘the Ordinance’) regarding the non-competition agreement(“Agreement”)dated 9 July 2004 between Unilever Pakistan Ltd (“Unilever”) and Dalda Foods (Pvt) Limited (‘DFL’)(the Respondent), the Respondent adopts the submissions made by Unilever (“Unilever Submission”) and in addition, respectfully submits as follows:*

*2. The Authority has issued DFL a Show Cause Notice as to why the Agreement is not in violation of sections 6(a)(1)(i) &(ii) of the Ordinance for engaging in unreasonably restrictive trade practices. Section 6 (1)(a)(i) of the Ordinance defines unreasonably restrictive trade practice(“RTP”) as “fixing the purchase or selling prices or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any services.” Section 6(1)(a)(ii) defines RTP as “dividing or sharing markets for any goods or services.”*

3. In interpreting the provisions of the Ordinance, it is important to consider interpretation of the said provisions in “Searle (Pakistan) Limited vs. Monopoly Control Authority” (PLD 1980 71), in which the High Court of Sindh at Karachi held that:

*“While dealing with the cases of legality or otherwise qua the agreements between citizen and citizen, the dominant consideration should be to save that transaction unless the same are patently violative of the dictates of law. The object of legislation is to achieve the result of breaking monopolies or unreasonably restrictive trade practices. The object of the Ordinance is not to interfere with undertakings involving individual trade unless of course such undertakings violate the manifest intention of the statute. Such powers of the Authority have also to be exercised only in public interest and not otherwise. While dealing with the determination of these issues the justification underlying the terms of the agreement are of no lesser significance. (Emphasis added)*

4. According to the Honorable Court, it is of primary consideration that the transaction be saved, unless it is patently violative of the Ordinance, and therefore the underlying justification of the transaction is to be given consideration. Hence, the business interests of the parties are to be given foremost importance. In the instant case, the restrictive clause was necessary in order to make the buyout commercially viable and in fact the buyout may not have occurred had this Agreement not been negotiated, which was a commercial necessity. The Respondent had paid consideration for the goodwill Unilever’s brand name and its association with the Dalda brand, which would have been lost had Unilever launched a different brand. The Agreement was therefore an essential component of the entire transaction.

5. Further, the Agreement was not aimed at restricting competition in the market, nor would it have the effect of creating a monopoly (its underlying purpose, explained above, was substantially different). This is evidenced by the fact that the edible oils and vanaspati ghee business (“the Business”) is a relatively large market with a total production of about 2.5 million tones of edible oils and vanaspati ghee per year. Of this total market, DFL produces about 65 thousand tones, which accounts for less than 3% of the market share. Even

*considering the premium segment of the market, the Dalda brand accounts for about 24% of the market share. Its other competitors include Habib Oil Mills, Tullo Oil, Soya Supreme Oil, Sufi Banaspati and Kissan Oil. Therefore the Agreement would not unreasonably restrict competition due to the existing competition as well as the relatively small share of the overall market controlled by DFL.*

*6. Under the terms of Section 6(2)(a), a restrictive trade practice will not be deemed an unreasonably restrictive trade practice if the restriction “contributes substantially to the efficiency of the production or distribution of goods or of the provision of services...” Section 6(2)(b) qualifies this by further requiring that “such efficiency or promotion could not reasonably have been achieved by means less restrictive of competition.” Finally under Section 6(2)(c) “the benefits from such efficiency or promotion clearly outweigh the adverse effect of the absence or lessening of competition.”*

*7. It is submitted that the Agreement between DFL and Unilever contributed towards efficiency by enabling the Business to be separated from the other operations of Unilever (the Business is no longer among the core businesses of Unilever in other countries, as stated in the Unilever Submission) and for greater specialization to be achieved as a result. Further, the separated company would be more closely managed and would achieve the benefits of specialized operations and production.*

*8. A less restrictive means could not have been used because the restriction on Unilever is already limited to Pakistan and would last for 5 years only. It was thought that a less restrictive means could not be used in order to make this transaction commercially feasible for the buyers. It is also submitted that the 5 year limitation is not unreasonable and it was estimated to be the minimum time needed for DFL management to consolidate the buyout.*

*9. As the 5 year limitation was a pre-requisite to the sale of Dalda business (without which no commercially viable acquisition was possible) and there is no evidence whatsoever that the agreement would in anyway lessen competition (both on account of Unilever’s decision to cease operating in the Business in Pakistan and the small market share of around 3% of the Business), the benefits of the 5 year limitation outweigh the adverse effect.*

10. *It is therefore submitted that there is ample justification for the Agreement which does not therefore constitute an unreasonable RTP and that the Authority is requested to refrain from instituting proceedings under the said provisions and that for the reasons stated in this reply and for other goods and cogent reasons the Show Cause Notice should be withdrawn and cancelled.*

11. *The Respondent further prays for an opportunity of being heard in person and by counsel in defence of the Show Cause Notice.”*

**C. Vendor’s letter dated September 7, 2006:**

“2. *Prior to the issuance of the show cause notice a hearing in the matter was conducted on 1 February 2005 and thereafter show cause notice No. 67 of 2004-05 was issued to the Respondent. The Respondent submitted a prompt reply in response to the notice.*

3. *Thereafter the Authority issued a hearing notice dated 16 August 2006, directing the Respondent to appear on 23 August 2006 for proceedings under section 19 of the Ordinance. The hearing notice was however received by the Respondent only one day prior to the date of hearing, that is, 22 August 2006, thereby making it impossible for the Respondent to either consult with their counsel or carry out necessary preparation.*

4. *At the hearing which was held on 23 August 2006 the Respondent through its Company Secretary submitted that the show cause notice which had been issued to the Respondent did not state or inform the Respondent of the identity of the other necessary parties nor did the Authority state whether or not the other necessary parties had been issued a show cause notice. It only transpired at the hearing that a separate show cause notice No. 68 of 2004-05 dated 25 March 2005 had also been issued to DFL. The representative of DFL denied having received the said show cause notice and sought time to reply to it. The Respondent accordingly contended that it would be appropriate to adjourn the hearing until DFL had filed its response.*

5. *Despite the above submissions, the Authority was proceeded with the hearing, and directed the Respondents to adduce additional written submissions after the hearing.*

6. *Pursuant to this direction and in furtherance of its reply dated 9 May 2005 to the Show Cause Notice, the Respondent respectfully reiterates and confirms whatever is stated in its said reply and affidavit filed in support thereof and additionally submits as follows:*

- i). *That it was essential for DFL as the buyer of the vanaspati and edible oils business to secure under the Non-competition Agreement appropriate covenants and undertakings from the Respondent in connection with the sale of the vanaspati and edible oils business in order to contractually bind and refrain the Respondent for a period of 5 years from carrying on a similar business to that of DFL so long as DFL carries on a like business. The entire purpose of the Non-Competition Agreement was to provide DFL and its recently acquired vanaspati and edible oils business a reasonable and fair amount of protection, as in the absence of such an agreement it would have been foolhardy for DFL to set up its own vanaspati and edible oils business with the goodwill and other assets purchased from the Respondent, considering the fact that the Respondent had carried on a business in those products in Pakistan for over fifty years and possessed the know-how required for engaging in that business successfully. As such the agreement not to compete was a practical necessity for DFL. Even the Contract Act 1872 has always recognized the need for and protected such agreements and provides for such under the first exception to Section 27 thereof.*
- ii). *The Respondent and DFL are not actual or potential competitors. It is submitted that the goodwill and assets relating to the vanaspati and edible oils business formerly carried on by the Respondent was sold and transferred to DFL. Having been sold and transferred to DFL that business has ceased to be carried on by the Respondent. The Respondent is no longer carrying on or conducting that business and therefore could not and ought not to be regarded as a competitor of DFL which is now carrying on its own business in vanaspati and*



*edible oils with the assets purchased by it from the Respondent.*

- iii). *The terms of the Non-Competition Agreement were not unreasonable in any way and in fact were essential in order for DFL to make the investments required not only for purchasing the goodwill and the assets purchased from the Respondent but also for itself establishing and carrying on a business for the production and sale of vanaspati and edible oils. The Agreement restricted the Respondent (seller of the business) not to compete only for a period of 5 years, in vanaspati and edible oil business and specifically excluded margarines, spread, value-added industrial margarines, olive oil based products, and value added oils/fats based spread. The terms of the non-competition covenants were limited to a short period and only applied to a few products in the edible oil and fats category/segment. It is respectfully submitted that this Agreement does not fix the purchase or selling prices with regard to the sale or distribution of the goods supplied by that business nor does the Agreement impose any restrictive trading conditions with regard to the sale or distribution of those goods. In fact, the business in vanaspati and edible oils is now carried on by DFL to the exclusion to the exclusion of the Respondent from whom DFL had purchased the necessary assets including goodwill. It is submitted that the agreement not to compete does not provide for dividing or sharing of markets for those goods inasmuch as the Respondent no longer carries on that business and has not present intention of re-commencing that business in competition with DFL to whom the relevant assets and goodwill have already been sold by the Respondent, or at all. It is therefore respectfully submitted that the Non-Competition Agreement does not constitute any unreasonably restrictive trade practices whether under Section 6(1)(a)(i) or Section 6(1)(a)(ii) of the Ordinance as alleged.*
- iv). *Nothing contained in the Non-Competition Agreement lessens competition in the market place. The products of the vanaspati and edible oils business formerly carried on by the Respondent which had earlier supplied the market, those goods are not supplied to the market by DFL under the same brands which it has purchased. As such, there is no lessening of competition in the market.*

*DFL has merely substituted in the market place the vanaspati and edible oils products that were formerly supplied in the same market by the Respondent under the same brands. Hence the manufacturer and supplier of vanaspati and edible oils products has merely been replaced in the market by the entry of a new business in replacement of the old in order to supply the same good under the same brand.*

- v). The Show Cause Notice issued to the Respondent does not comply with the provisions of Section 11(2) of the Ordinance and is deficient and insufficient in respect of its contents and as to the parties concerned and in any event does not serve the purpose of lawfully initiating proceedings under Section 11 of the Ordinance.*
- vi). The Authority has failed to specify or disclose to the Respondent the evidentiary and other materials on which the Authority has relied on in order to reach its pre conceived conclusions regarding the terms of the non-competition agreement being “unreasonable” or not in the “public interest”. It is respectfully submitted that full disclosure of such material is always necessary as is in fact required by the rules of natural justice in order for the Respondent to adequately respond to and rebut the allegations made against it. The respondent reserves its right to make further submissions when the deficiencies in the subject Show Cause Notice are supplied by the Authority in order to substantiate the allegations made by it against the Respondent.*
- vii). That no reasonable basis or evidence exists, and non has been supplied or communicated to the Respondent, that could reasonably satisfy the Authority that the Respondent is in a situation of carrying out unreasonably restrictive trade practices within the meaning and intendment of Section 6 of the Ordinance as alleged or otherwise.*
- viii). That no occasion has arisen enabling action to be taken under Section 11 of the Ordinance. In particular, nothing that the respondent has done or omitted to be done is or can reasonably be said to necessitate or justify action in the public interest. None of the orders available to the Authority would in any event serve the public interest.*

- ix). *That, the respondent is entitled to receive a copy of any submissions/reply submitted by DFL, to make further submissions accordingly.*
- x). *The Respondent also reserves the right to make further submissions and arguments at the time of any hearing.*
6. *The respondent humbly submits that in view of various submissions and other good and cogent reasons the Show Cause Notice should be withdrawn and cancelled.*
7. *The Respondent respectfully submits that for each of the above and other good and cogent reasons, the Authority lack jurisdiction to make any order mentioned in the Show Cause Notice and the said notice should be withdrawn and cancelled”.*

**D. Purchaser’s letter dated November 4, 2006:**

*“3. As explained in our response to the Show Cause Notice the agreement between Dalda Foods and Unilever contributed towards improving efficiencies in the businesses. This is evident from amongst others:*

- *That the consumer price for Dalda products was kept at the same level and not increased after the business acquisition in 2004 up to 2006, for a period of over two years despite substantial increase in input cost like fuel, electricity, transport, labour, etc.; other comparable food products had registered significant price increases during this time period as is evident from CPI figures for food items published by Government of Pakistan which have registered an average of over 10% increase each year,*
- *That the quality of Dalda products was not only maintained at their exceptionally high standards, rather further increased as evidenced by Dalda products winning Consumers Choice Awards for two years in a row in 2005 and 2006; in addition Dalda Foods has the distinction of being the only edible oil and ghee company in Pakistan which has three ISO certificates – ISO 9001 for Quality, ISO 14001 for Environment and OHSAS 18001 for Occupational Health and Safety; more over Dalda vanaspati continues to have the quality hall mark of being the only vanaspati ghee in Pakistan which is trans fat*

*free and thus the healthiest vanaspati available not only in Pakistan but also meeting the European quality standards as evidenced by it being the only vanaspati ghee from Pakistan which is acceptable in Europe and is exported to UK and fulfills their food quality standards,*

- That the overall competition in the market continues to increase as is evident by entry of many new entrants in the edible oil and ghee market since year 2004 – new entrants with new brands like Eva, Umda, Goldensun, Hayat, Pearl, etc are few examples from many.*
- That through focus and resulting specialization, Dalda Foods is not only improving its own efficiencies but also helping raise the standards of the industry through acting as a bench mark-amongst many, some of the examples are in helping to develop new suppliers for packaging materials and other raw materials which besides improving the efficiency of Dalda products also assist in improving the overall efficiency of the local industry as these suppliers provide new and better services to the industry and also helps in import substitution; another example is shrink wrapping and collating of product cases for better transport efficiencies which was pioneered by Dalda and are now increasingly being adopted by the oil and ghee industry, etc.*
- It is therefore submitted that the Agreement has in fact helped improve the over all business efficiencies and in no way adversely impacted on the level of competition in the market.”*

12. After both parties were asked to show cause (and a response received from the Vendor), there was a hiatus of over a year as the Authority was pre-occupied with other pressing matters to which its limited resources were directed. A hearing was eventually called for August 23, 2006. Just prior to the hearing, the Purchaser advised the Authority that they had not received the Show Cause Notice. The Purchaser's representative was handed over a copy of the Show Cause Notice at the hearing itself; hence their delayed response. Also, at the hearing, the Vendor submitted that they had received the hearing notice only a day earlier, i.e. on August 22, and requested an adjournment. The Authority, however, decided to proceed

with the hearing since the Vendor and the Purchaser were represented by very senior executives (who had been at the forefront in connection with the transaction in question) and to direct the parties to provide further written submissions, as necessary, as well as schedule an additional hearing to allow the parties another opportunity for oral arguments, with or without counsel, as desired by them.

13. In the event, the additional hearing that was initially scheduled on September 26 was re-scheduled by the Authority to take place in Karachi on October 30 at the request of the Vendor who stated that a date after October 20 would be convenient since both the Vendor's Senior Counsel and Company Secretary would be out of the country for some time. As requested by the Vendor, the Authority duly supplied a copy of the Purchaser's response to the Show Cause Notice. Every effort was made by the Authority to be transparent and to facilitate both an understanding of the issues the Authority was seeking to address as well as provide the parties limitless opportunities to make both oral and written submissions.

### **Show Cause Notice**

14. The Vendor's arguments regarding deficiencies in the Show Cause Notice were deliberated upon at the hearing on August 23. The Authority has carefully considered these submissions. Contrary to what has been averred by the Vendor, we find that the factual basis or material based on which the Show Cause Notice was issued is indeed self-evident from the Show Cause Notice itself. It is not clear how the Show Cause Notice can be regarded as deficient in this respect. The Vendor, too, has not provided any further oral or written justification for the view taken by them beyond the assertions made in their submissions of May 9, 2005 and September 7, 2006.

15. An interesting point has been raised by the Vendor, namely, that the Show Cause Notice should have stated the “specific terms” in which the Authority intends to make its Order, and therefore, the Show Cause Notice does not serve “*the purpose of lawfully initiating proceedings under Section 11 of the Ordinance*”. The question here is how much specificity is needed or appropriate in the Show Cause Notice. The Vendor’s submissions very nearly go to the extent of suggesting that the Show Cause Notice should have specified the precise content of the Order the Authority intended to make. Clearly, this is neither the letter nor the spirit of Section 11 which certainly does not call for “specific terms” of the Order to be specified --- the language used in this section does not emphasise or stipulate any degree of precision, detail or specificity. Indeed, if it did, it would mean either putting forth largely uninformed and invidious pre-judgments with regard to detailed aspects or the carrying out of necessary investigations prior to the issuance of the Show Cause Notice. The latter, if done properly, would naturally involve adherence to the norms of natural justice and due process thus largely pre-empting the need for the procedure outlined in Section 11. The Show Cause Notice issued to the Vendor and the Purchaser, after setting out the rationale why the Non-Competitive Agreement *prima facie* comes within the mischief of unreasonably restrictive trade practices in terms of Section 6, proceeds to question why action under Section 11 read with Section 12 (1) (c) (i) & (ii) should not be taken. These Sub-clauses clearly stipulate the actions that can be taken by Authority depending upon the explanations provided by the parties in their replies and in the oral submissions made by them during the hearing.

16. As regards the Vendor’s view that “action in the public interest” has not been justified, it is the Authority’s considered opinion that unless there are valid and substantial reasons to conclude otherwise, any contravention

of Section 3 of the Ordinance would *ipso facto* not be in the public interest, and accordingly call for remedial action. This is indicated in Section 11 as well; and furthermore, the preamble to the Ordinance clearly states *inter alia* that “*unreasonably restrictive trade practices are injurious to economic well-being, growth and development*”. Therefore, any step or steps taken to arrest, nullify, disband or reverse unreasonably restrictive trade practices, as may be necessary, would be clearly in the public interest. As distinguished from the view expressed in the submissions made by the Vendor, the Authority feels that the scope for making Orders by way of remedial action in this connection in order to serve the public interest is self-evident from a plain reading of Section 12(1)(c).

17. Deliberations regarding the impugned deficiencies in the Show Cause Notice at the hearing on August 23, 2006 revealed essentially only one short-coming, namely, the fact that the Non-Competition Agreement is stated to have violated, *inter alia*, Sub clause (ii) of Clause (a) of Section 6 (1) which is not really the case. The agreements executed by the Vendor and the Purchaser, including the Agreement to Transfer Business, and the Non-Competition Agreement, do not definitively divide the market between the Vendor and the Purchaser although this was envisaged in the Information Memorandum with the margarine business remaining exclusively with the Vendor and the remaining vanaspati and edible oils business going exclusively to the Purchaser. The documents eventually executed do not put the Purchaser under any “non-compete” restraint with regard to the margarine business as has been done in the case of the vanaspati and edible oils business insofar as the Vendor is concerned. While there could be an implicit or informal understanding regarding this division of product markets, this is not documented anywhere or claimed to be in existence by either party or both of them. While Sub-clause 6(i)(a)(ii) is not relevant, Sub-clause 6(1)(a)(i), which is reproduced below, is fully

applicable and relevant inasmuch as it refers to the imposition of “*any other restrictive trading conditions*” albeit the first part of this Sub-clause regarding the fixing of purchase and selling prices would not be applicable to this case:

“(i) *fixing the purchase or selling prices or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any services;*”

The mere fact that Sub-clause 6 (1)(a)(ii) is not relevant does not by itself vitiate the Show Cause Notice because this is not central to, and does not detract from, the basic, substantial thrust of the document, namely, that the Non-Competition Agreement has lessened competition and comes within the ambit of unreasonably restrictive trade practices prohibited under the Ordinance. This is the fundamental question that the Authority has to judiciously and objectively consider, and this was amply highlighted to the parties during the hearings.

18. It needs to be clarified that in giving consideration to this matter, the Authority must adhere to the basic tenet of upholding and jealously guarding the sanctity of commercial transactions unless it can be shown unassailably, whether by logic or through empirical evidence, that the transaction in question fell foul of the law as well as the underpinning sacred public policy principles. On the one hand, we have to guard against striking down commercial transactions merely on account of technical violations, and on the other, appropriately as well as judiciously address situations that are technically within the law but not in substance. The approach adopted by us is not inconsistent with the view taken by the High Court of Sindh in *Searle (Pakistan) Limited vs Monopoly Control Authority* (PLD 1980 71) as quoted by the Purchaser in their submission of September 2, 2006.



## **Transactional Aspects**

19. Now, coming to the transaction, it is clear that Unilever which had over a period spanning several decades developed its Selected Oils & Fats Business (SOFB) --- one of its many consumer product divisions --- decided, sometime in 2004, to divest its SOFB division other than its margarine products i.e. vanaspati (hydrogenated vegetable fats) and edible oils product range, manufactured and sold under the DALDA brand viz Dalda Vanaspati, Dalda Melange, Dalda Cooking Oil, and Dalda Planta. It may be mentioned that Dalda Vanaspati, the oldest and the main product in this range, is the undisputed leader in the vanaspati market because of its superior quality, its health consciousness, and its other distinctive, indefinable characteristics (flavour, texture etc) that put it ahead of all vanaspati products including those in the premium quality range. Dalda is the original vanaspati and a household name (that within a certain plane of reference is synonymous with vanaspati, “Dalda” being used interchangeably with “vanaspati” --- the ultimate achievement of any brand when, in common parlance, the brand name substitutes the generic product name). The other three products in the range obviously enjoy enormous benefits from association with the Dalda name. It is noteworthy that the Information Memorandum that was made available by Unilever to prospective buyers of SOFB had this to say about these three products:

*“ Dalda Melange is a recently developed cooking medium that is typically used in the preparation of all types of meals. It has been developed as a middle product between Vanaspati and edible oil primarily to appeal to the health conscious customers. As the brand has recently been launched, it represents significant opportunities for development and brand extension. The Company believes that the early market feedback of the product indicates overall opportunity for new products in the market.*

*Dalda Cooking Oil is a well-established name in the Edible Oils Market having a significant share of premium branded cooking oil. Launched in 1981, the brand is on top of the recalled food brands of Pakistan. It has seen a continuous volume growth over the years and is one of the most trusted household names.*

*Planta was launched in 1989 specifically to attract the customers who wanted the health benefits of oil and taste of Vanaspati. The brand was transferred to the house of Dalda in June 2000 and the name was reformatted as Dalda Planta. It enjoys very loyal customers' base taking 4% of the branded edible oil market."*

20. Vanaspati prices vary a lot with the premium brands being priced higher than the lower quality brands and the lower quality brands being priced higher than the unbranded market. Dalda is invariably priced higher than the other premium brands, and while an increase in the price of Dalda Vanaspati could and does have an upward push on the prices of other premium brands, this type of "price parallelism" is mostly limited, it may occur with a time lag, and more often than not, it does not mean "price catch-up" or a reduction in the price gap. Thus, Dalda can either be regarded as constituting a market by itself, or at best, and at a stretch, it can be included in the market for the premium brands like Habib Oil, Tullo, Soya Supreme, Sufi, and Kissan mentioned by the Purchaser in their submission of September 2, 2006. While the other products in the Dalda range of products are certainly in the premium category with Dalda Cooking Oil enjoying a very high degree of market penetration, yet these products do not have the pre-eminence that accrues to Dalda Vanaspati. UPL's Information Memorandum regarding the SOFB sale shows that Dalda Vanaspati has a share of about 33% of the premium brand market for vanaspati and 4% of the total vanaspati market, both branded and unbranded; and further that Dalda Cooking Oil and Planta have a share of about 36% of the market for premium edible oils. It is clear that the

vanaspati and edible oils business sold by UPL comprised products with recognized brand leadership and a significant share of the premium market for each product category.

21. While the Authority did look into the modalities of how the deal was concluded, we do not think it is relevant to discuss this and would simply like to note the fact that the Information Memorandum did indicate the Vendor's willingness "*to enter into appropriate non-compete arrangements for Pakistan covering the edible oil business with the buyer for a limited period. However, final details will be agreed when the deal is finalized*". (Margarine and value added oil/fat-based products were to be excluded). It was indicated by the Vendor that the possibility of non-compete arrangements was inserted in the Information Memorandum at the request of several prospective buyers, including the Purchaser (during initial soundings prior to finalizing the Information Memorandum). Also, at two places, the Information Memorandum states that UPL will require non-compete arrangements with the buyer with respect to margarine products albeit as far as we know such arrangements never saw the light of day.

22. The first question to be considered is: why would "non-compete" arrangements be necessary particularly when Unilever has exited from this business globally despite its profitability and has openly made it clear, in a variety of ways, its intention to concentrate on "*core brand and product areas*". One would hardly expect a multi-national group of the standing of Unilever, with presumably its carefully considered business strategy, and sound governance processes, to revert back and re-establish a non-core line of business from which it has recently divested. Explaining this about-turn to shareholders would be both a challenge and an embarrassment, quite apart from the much higher costs that would now be entailed in setting up a greenfield project, and the difficulties that would be faced in establishing a

new brand despite UPL's in-house knowledge of the business. Rationally, to save face, if not for any other reason, it would be a few years before Unilever decides to venture into this area again. Why then was the Purchaser interested in "non-compete" arrangements and paid the large sum of Rs. 250 million to secure these arrangements?

23. We have deliberated upon this question at the hearings and examined the submissions made by both parties, the Vendor and the Purchaser. Neither party was able to convince the Authority as to the justification for the Non-Competition Agreement and the consideration of Rs 250 million paid over and above the agreed purchase price for the business. To say --- as has been averred by the Vendor --- that it would have been "foolhardy" for the Purchaser to get into this business without "non-compete" assurances from the Vendor having regard to the information and know-how acquired by the Vendor through carrying on this business for many years is not really plausible in view of what we have stated in the previous para. The Purchaser effectively states that the Non-Competition Agreement was a "commercial necessity" to "*make the buy out commercially viable*" but does not state the rationale for this i.e. an assertion without an explanation.

24. The fact of the matter is that the Purchaser acquired every single tangible and intangible asset of SOFB from the Vendor. Even the staff of SOFB and its product distribution outlets were transferred to the Purchaser. The Vendor continued to have proprietary information with respect to considerable technical and commercial know-how pertaining to the business of SOFB, which was also duly provided to the Purchaser, but which could have been utilized by the Vendor to either re-establish the same business under a different brand name (however unlikely this may be in view of the challenges involved), or alternatively, sell its store of technical and commercial information to parties desirous of entering into

the vanaspati and edible oils business with products very similar to the range of Dalda products transferred to the Purchaser. Either of these alternatives, if and when they eventually crystallized, would have meant competition for the Purchaser. Both the Vendor and the Purchaser are commercial, profit maximizing entities and it was natural for the Vendor to seek the best possible price for the business being sold as well as further earnings through sales of its wealth of relevant commercial and technical information. The Purchaser, on the other hand, sought a safe harbour from competition and was prepared to pay for it, since presumably the Purchaser could easily pass down this cost to the consumer because of: (a) Dalda's loyal customer base, (b) quality leadership of Dalda products at the top end of the premium brand market, and (c) the substantially higher prices it is able to charge without affecting its marketability.

25. The Non-Competition Agreement enabled:

- (a) the Vendor to realize higher proceeds for the business sold to the Purchaser (and upfront!) instead of subsequently selling know-how to make up for the lower sales proceeds realized through the sale of the business without the stipulated "non-compete" and
- (b) the Purchaser to have the comfort of operating with hardly any competition at the top end of the premium brand segment (i.e. sans any product with "that certain something" which only Dalda has to offer).

In the final analysis, both the Vendor and Purchaser are "in clover" while the consumer possibly suffers. This appears to be a classical case of producer surplus vs consumer surplus! And unless it is possible for the Vendor or the Purchaser to show, in cogent terms, how the public interest has been served through increased efficiency or technical progress that outweighs the adverse effects of lessened competition which could not have been achieved through means less restrictive of competition in terms of

Section 6(2) of the Ordinance, it may not be possible to countenance the Non-Competition Agreement.

**Contribution to Efficiency**

26. The Purchaser has stated, in effect, that the Non-Competition Agreement has contributed to efficiency since it enabled a non-core business of Unilever to be taken out of Unilever and to receive specialized and focused attention by the Purchaser. We are not persuaded by this argument since once the business was acquired by the Purchaser and run as the sole business of the Purchaser, it would have been given the same focused attention whether or not “non-compete” arrangements were in place. In fact, one would have ordinarily expect greater care and attention when potential competition is a factor as compared to a situation where competition is substantially not in the picture. Also, there is nothing to show that Unilever’s non-core products receive proportionately less attention than their core products. Unilever is universally known to be diligent and to take meticulous care of all their product lines, whether core or non-core.

27. The Purchaser may well have managed to sustain product quality, or even improved it, and also prices have remained largely stable or may have increased only a little. There is, however, nothing to show that these positive aspects are a consequence of, or received any impetus from, the Non-Competition Agreement. As indicated earlier, the assertion of the Purchaser that this was a “commercial necessity” in order to “make the buy out commercially viable” has not been supported, much less persuasively established in any way.

28. Without in any way trying to detract from the Purchaser’s avowedly commendable performance as reported in their submission of November 4,

2006, it is important for us to view this in perspective and to observe as follows:

(a) While the prices of Dalda products have remained broadly stable since before the acquisition by the Purchaser except for a small increase in July 2005, the prices of other premium products have been essentially the same or declined slightly over this period. It is interesting to note, however, that the official wholesale price index of Vegetable Ghee has actually declined from 273.04 in 2003-4 to 269.52 in 2005-6 (Base: 1990-91). It would appear, therefore, that the industry as a whole, not necessarily just the Purchaser, has responded well to the “increase in input costs such as fuel, electricity, transport, labour etc” mentioned by the Purchaser in their letter of November 4, 2006. The reason for this is not far to seek --- the inputs mentioned above represent only about 3-5% of the cost per kg partly depending upon how the fixed cost component is pro-rated over the volume of production. On the other hand, the basic raw material i.e. the oil that is converted into vanaspati/cooking oil is about 45-50% of the cost of production; and the prices of imported Soyabean Oil, Palm Oil, and Palmolein overwhelmingly used by the industry have fallen by 10-20% since 2003-04 which has more than offset any increase in the other cost inputs mentioned. Roughly speaking, a 50% increase in these input costs would have been cushioned by a mere 5% decline in the cost of the basic raw material. It is thus not surprising that some manufacturers of vanaspati/edible oils had actually reduced prices as evidenced by the small decline in the wholesale price index for vegetable ghee. On the other hand, as stated earlier, the Purchaser, largely kept prices stable or increased them slightly on one occasion.

(b) It is creditable that the Purchaser appears to have maintained product quality and may have improved upon it. However, in this connection, we believe the ISO certification and other distinctions mentioned in the Purchaser’s letter of November 4, 2006 had been largely already secured, or perhaps in process, prior to acquisition of the business by the Purchaser.

It is important to note that the mere fact that the Purchaser has been efficient is not relevant. We have to see whether the Non-Competition Agreement has, in and of itself, contributed to increase efficiency and this has not been established in any definitive sense.

29. Also, the question before us is not whether there is sufficient competition in the market or whether the number of competitors has increased or not. Our duty is to determine whether or not the Non-Competition Agreement has served to lessen competition. The fact that the Vendor has been prevented from entering the market and also the fact that the Vendor has been effectively estopped from selling know-how relating to production of Dalda-like products has prevented entrants in the premium brand segment where the Purchaser is dominant. The Purchaser is certainly protected from competition by products with the same distinguishing or special qualities as the Dalda range. The consumer is thus denied the benefits of competition in this market segment and also suffers because of the huge payment made by the Purchaser to the Vendor to secure the “non-compete” arrangements which the Purchaser can be rationally expected to recover from the consumers through higher prices. There is nothing in the Non-Competition Agreement that would or could prevent the Purchaser from passing on to the consumer the burden of costs incurred as a result of this agreement.

30. As the acknowledged market leader in the premium brand segment and its distinctly superior quality vis-à-vis other premium brands, Dalda is able to command prices higher than prices of other premium brands. As mentioned earlier, Dalda may even be deemed to constitute market by itself --- thus upto a point, it is possible for the prices of Dalda products to be increased without any impact on sales and without any direct parallel price response by other manufacturers, albeit, in due course, the premium segment (if not the broad market as well) would factor the price movement in Dalda products with consequent impact on prices of other manufacturers. The Non-Competition Agreement serves to eliminate the potential of direct competition at the exclusive top end of the market where Dalda products hold sole sway. It also clearly lessens potential competition for the premium brand segment as a whole. Without doubt, this situation feeds into the



prices of Dalda products and with the possibility of an eventual indirect trickle down impact on the prices of other vanaspati and edible oil products. The consumer clearly gets the short end of the stick!

31. An attempt has been made by the Vendor to show that the absence of “non-compete” assurances would have meant considerably lessened interest in buying their vanaspati and edible oils business, and that this could have led them to simply sell the assets that were in surplus to their requirements without regard to whether or not the business remains extant in which case the Dalda products previously supplied to the market would have been lost. We have considered this argument and consider it somewhat specious since the sale of a running business, even without “non-compete” stipulations, should ordinarily fetch a better price than simply selling the assets comprising that business unless there are special factors for the reverse to be true. Being a commercial entity, one would have expected the Vendor to maximize their sale proceeds through disposal of the running business rather than the assets. However, even if it had been more expedient to sell piece meal the assets rather than the going concern, it would have certainly made perfect commercial sense to have sold the intangible assets associated with the business as well as the related technical and commercial know-how, presumably to a buyer with the obvious intention of setting up a vanaspti and edible oils business carrying the Dalda brand. The intangibles would be primarily of interest to buyers with this goal in mind. Either way, Dalda products would have continued to grace the store shelves.

### **Validity of Non-Competition Agreement**

32. We would now like to turn to the question of whether the Non-Competition Agreement is valid and can be saved because it comes within the ambit of Exception 1 to Section 27 of the Contract Act, 1872. Both this section and the exception are reproduced below:

*“27. Agreement in restraint of trade void. Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.*

*Exception 1. Saving of agreement not to carry on business of which goodwill is sold. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein: Provided that such limits appear to the Court reasonable, regard being had to the nature of the business. “*

In the first place, it is very clear that Exception 1 above clearly refers to agreements in respect of the sale of goodwill. It does not cover agreements that do not pertain to the sale of goodwill. Clearly, an agreement not to carry on a business that does not entail the sale of goodwill would not attract relief under this Exception.

33. The Non-Competition Agreement does not involve the sale of goodwill. This agreement is completely separate from the Agreement to Transfer Business. The Non-Competition Agreement does not mention the Agreement to Transfer Business, either directly or indirectly, nor it does mention or refer to the sale of the SOFB business by UPL to DFL. And the Agreement to Transfer Business is completely silent with regard to the Non-Competition Agreement and does not indicate in any way the intention of the parties to enter into any kind of “non-compete” arrangements. The Agreement to Transfer Business unequivocally states in Section 17.4.1 that “this agreement constitutes the entire understanding of the Parties with respect to the subject matter hereof ....”, and in Section 17.4.2(i), the Purchaser acknowledges and agrees that “it has not relied on and has not been induced to enter into this Agreement on the basis of any assurance (express or implied) made or given by or on behalf of the Vendor, other than those expressly set out in this Agreement”. Section 17.4.3 further adds: “Each of the Parties acknowledges that in agreeing to enter into this

Agreement it has not relied on any representation, warranty or other assurance except those set out in this Agreement”. It is, therefore, abundantly obvious from the documentation that the Non-Competition Agreement is an entirely separate transaction from that embodied in the Agreement to Transfer Business and that it does not have any nexus with the sale of goodwill covered in the latter agreement.

34. The Purchaser, however, has stated in their submission of September 2 that the Non-Competition Agreement was “an essential component of the entire transaction”. In the hearing held on October 30, the Vendor’s representative had also indicated that the two agreements were really the same agreement and that the “non-compete” part had been separated out into another agreement because of the longer time period it covered. It is difficult to see how one can square all this with the crystal clear position set out in the preceding para.

### **Justification of Restraint**

35. Now, assuming that the two agreements are really two parts of one agreement, and that the Non-Competition Agreement really relates to the sale of goodwill, we would like to consider whether or not this agreement is valid. Let us first consider the rationale behind Exception 1. What is goodwill and why did the law make this concession in the blanket prohibition on agreements in restraint of trade. In *Khatoon Begum and others Vs M/s. Hyesons Commercial and Industrial Corporation Ltd*, reported as 1980 CLC 1666, the term goodwill has been explained as given below:

*“the term goodwill of business is a composite thing, which has very wide connotation, and that it includes every positive advantage that has been acquired in carrying on the business, whether connected with the premises of the business or its name and style, and everything connected with or carrying with it the benefit of the*

*business. It is also referable in part to its locality, in part to the way in which it is conducted and the personality of those who conduct it. A sale of goodwill of business may and may not include the business premises as it will depend on the terms of the contract, the nature of business and the question as to whether a running business is sold, etc. Where a trade is established in a particular place, for the chance of being able to keep the trade connected with the place where it has been carried on, like goodwill of a well-accustomed public house. There may be a case in which goodwill of business may include things as per terms of the agreement”.*

Ordinarily, Goodwill would comprise the aggregate of all intangible attributes of a business excluding very specific, and definable, non-physical assets such as intellectual property, copyrights, patents etc. While physical assets or specific non-physical assets sold can be transferred in entirety from the seller to the buyer, this may not always be possible in the case of the intangible attributes that comprise goodwill. Thus, for example, the portly appearance alongwith a certain under-stated, refined disposition of a restaurant proprietor that somehow endears customers to the restaurant cannot be transferred to the buyer of the restaurant; nor can that certain, indefinable touch that a halwa-maker gives to his halwa preparation be transferred to the buyer when the halwa-making business is sold --- the buyer will get the recipe (intellectual property) alongwith the other business assets but not that certain touch and quality that comes from the halwa-maker personally.

36. The law recognizes such situations and protects the buyer of goodwill by way of the Exception 1 to Section 27 of the Contract Act which provides that in a sale of goodwill the parties may agree that within certain specified local limits (that appear reasonable to the Court) the seller will refrain from engaging in a business similar to that sold. The language of Exception 1 appears to suggest the law-maker’s grudging reluctance in this connection.

37. Restraints on the sellers of goodwill appear reasonable in the case of skilled trades, e.g. if a Dentist were to sell his practice, it would be perfectly reasonable for the buyer to insist that the seller should not practice within a certain specified local area for a certain limited period primarily because sale of the goodwill could not possibly have transferred to the buyer all the intangible attributes linked to the person of the seller. If soon after the sale, the seller were to set up shop again in close proximity to the buyer, it would be tantamount to nullifying the sale of goodwill. Exception 1 to Section 27 really relates to such situations. On the other hand, the sale of a car assembly undertaking which, as is quite normal, effectively involves the transfer of management, production, and sales staff, along with the assets, it is obvious that the goodwill (which is linked primarily to the name, premises, and staffing) would stand fully transferred to the buyer and there would be hardly any justification to restrain the seller in any way. In *Vancouver Malt and Sake Brewing Co. Ltd vs. Vancouver Breweries*, reported as AIR 1934 Privy Council 101, it has been held that the burden of justifying the restraint is on the party seeking to uphold it and that “the tests are reasonableness and public interest”. The Nagpur High Court, in *R.S. Krishnachandra Sharma vs Firm Kaluram Hiralal*, reported as AIR 1944 Nagpur 73, held that “*the test of reasonableness is to consider whether the restraint is such only as to afford a fair protection to the interests of the parties and not so large as to interfere with the interests of the public*”.

38. The sale of SOFB business by the Vendor to the Purchaser fits in with the example regarding the sale of a car assembly undertaking given in the preceding para. The Purchaser bought the business undertaking in question “lock, stock and barrel” from the Vendor. Apart from all the immovable and moveable assets, the Purchaser paid for and fully acquired the commercial and technical know how (i.e. the intellectual property), the copy rights, the patents, the brand name, and the goodwill. Nearly the entire

staff complement of SOFB: management, labour, production, including key employees, were absorbed by the Purchaser. The Vendor's distribution outlets to facilitate sale of SOFB's products also moved over to the Purchaser. Nothing remained with the Vendor. The only thing that naturally continued to remain with the Vendor was commercial and technical know-how which had been, of course, sold to the Purchaser alongwith transfer of the staff well versed in utilizing this know-how as well as sale of the necessary physical facilities and logistics developed by the Vendor. As stated earlier, in the absence of the Non-Competition Agreement, the Vendor would have been at liberty to use this know-how to get into this business again, or alternatively, sell it to other parties desirous of doing so albeit the Non-Competition Agreement simply restrains the Vendor and has nothing to do with the goodwill sold to the Purchaser.

39. The question is: was there any special aspect of the intangibles attributable to the SOFB business comprising the goodwill sold that continued to be attached to the Vendor and with held from the Purchaser? And if there was none, is it reasonable to impose any restraint on the Vendor in connection with the sale of goodwill?

40. We have ponder over these questions in the light of the submissions made, orally and in writing, we cannot see any feature related to the goodwill sold that would continue to stick to the Vendor, and therefore, we cannot see any obvious basis to justify the restraints imposed on the Vendor. However, in this connection, one aspect brought to our attention in the hearings needs to be examined, and that is the fact that since Dalda products had been promoted by Unilever, the association of Dalda products with Unilever was an intangible positive which, of necessity, could not be transferred to the Purchaser. Thus, any re-entry by Unilever in this field, even if under a different brand name, would be unfair for the Purchaser

before the Purchaser has had the opportunity to consolidate their position in the market without the Unilever umbrella.

41. Clearly, as to whether the point raised in the preceding para has any validity depends on whether or not Unilever was associated with Dalda in the public mind. We have looked into this matter and do not find evidence to support it. Unilever's global marketing strategy is to sell branded products. Unilever promotes the brand and not itself. In their public advertisements in the media all over the world and in Pakistan, Unilever is hardly ever presented, and if at all this occurs, it is to state something factual which is inserted without any prominence whatsoever. It is the brand name that is vigorously and prominently promoted, not the corporate name. Even on product packages, Unilever's name only appears in fine print, probably to comply with some regulatory requirement of giving the particulars of where the product was manufactured. This is, of course, different from other manufacturers that promote their own corporate name equally, if not much more, than the brand name e.g. Toyota, Christine Dior, Hewlet Packard etc. It is evident that Unilever's policy is to ensure quality and consistency, and based on these attributes the overall aim in each case is to promote a brand that becomes a household name and a market benchmark. Only the very inquisitive or well informed know that Lifebuoy, Sunsilk, Slim-Fast, Ariel, Knorr, Wall's Ice Cream etc are Unilever products. The same is true of Dalda. The public knows and recognizes the hallmark of Dalda which is accepted without question as the rain from above and no one is really interested as to who makes it.

42. We are fully satisfied that the fact that Dalda products were manufactured by Unilever is not an intangible that can be attributed to the goodwill associated with the SOFB business. This being the case it is difficult to see why it would be reasonable to impose any restraint on

Unilever, i.e. the Vendor, in connection with the sale of goodwill since all the intangibles associated have been fully transferred to the Purchaser (alongwith all physical assets and other non-physical assets) and virtually nothing remains with the Vendor which could justify or be the basis of such restraint. Of course, the potential of the Vendor as a possible competitor or indeed competition from other sources acquiring the necessary know-how would remain, but this is entirely in the interest of the consumers, in the overall public interest, and precisely in accordance with law as well as public policy imperatives.

43. The construction and content of the two agreements, whether read together or separately, do not suggest in anyway that “non-compete” stipulations embodied in the Non-Competition Agreement have any connection with the sale of goodwill. These stipulations are purely anti-competition --- an unreasonable and quite unnecessary restraint on trade that merely serve to lessen competition (or the potential thereof) in the market place.

44. The Non-Competition Agreement simply reflects the Purchaser’s desire for a comfort zone and anxiety to be shielded from competition and from which the Vendor has benefited. It is quite possible – although we do not have concrete evidence in this regard --- that this agreement may have been spurred by some indication during the negotiations, unwittingly or otherwise, to the effect that Unilever’s re-entry into this line of business at some point in time could not be ruled out entirely. Eventually, the Vendor has received a higher price for the business sold and the Purchaser is in a comfortable position with the consumer having paid for all this: firstly, through product prices higher than would have been paid in the absence of the “non-compete” in order to recover the large sum paid for it; and secondly, through loss of other beneficial effects consequent upon reduced competition. Nothing has been demonstrated, in either form or substance, to



show that the Non-Competition Agreement facilitated the sale of the SOFB business or provided fair protection to the interests of the parties. However, both the Vendor and the Purchaser have gained whereas the public has been the loser.

### **Order**

45. In the light of the discussion above, we find the Non-Competition Agreement to be in restraint of trade and to have had the effect of lessening competition in the market. It cannot be shown to be reasonable, whether on grounds of public interest or in furthering the underlying transaction between the parties. It thus constitutes an unreasonably restrictive trade practice prohibited by law. We, therefore, order as follows under Section 11 read with Section 12 (1)(c) of the Ordinance:

- (1) The Non-Competition Agreement is terminated with immediate effect; and
- (2) Unilever Pakistan Limited will refund the sum of Rupees two hundred and fifty million (Rs. 250,000,000) to Dalda Foods (Private) Limited within fifteen calendar days of the date of this Order and report compliance to the Authority.

(Khalid A. Mirza)  
Chairman

(Raja Raza Arshad)  
Member

**Islamabad, December 19, 2006**