

BEFORE THE COMPETITION APPELLATE TRIBUNAL,
ISLAMABAD

M/S NATION CABLE

.... APPELLANT

VERSUS

COMPETITION COMMISSION OF PAKISTAN

.... RESPONDENT

Appeal No. 02/2022

Present: Justice Mamoon Rashid Sheikh, Chairperson.
Muhammad Asghar Ch., Member Technical
Raja Saad Sultan, Member Technical

For the Appellant: Mr. Shahid Masood Bhutta, Advocate.

For Respondents: Mr. Daniyal Hassan, Advocate, Mr. Hassan
Ahsan Mian, Law Officer, Mr. Haider Imtiaz,
Law Officer.

Dates of hearing 12.01.2022, 16.02.2022, 08.03.2022,
30.03.2022, 15.06.2022, 05.07.2022,
11.10.2022

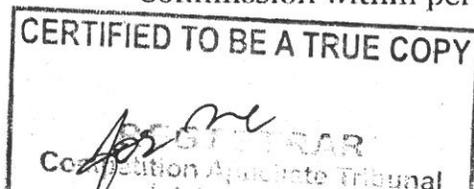
CMA No: 01 of 2022

Through the instant CMA the Appellant seeks permission to place on record certain documents. The learned Counsel for the CCP does not object. The CMA is accordingly allowed.

JUDGMENT

Raja Saad Sultan, Member Technical: -

Through the instant appeal under Section 42 of Competition Act, 2010, the Appellant, has impugned an order dated 26-03-2019, passed by the Competition Commission of ("Commission") Pakistan for contravention of Section 10(1), 10(2)(a) & (b) of the Competition Act, 2010, whereby a penalty of Rs. 500,000 was imposed on the Appellant with directions; (a) to modify all advertisements and to disclose the presence and value of the token within a period of 60 days. (b) to issue public notices in two national newspapers regarding the presence of tokens within period of 60 days, (c) to submit compliance report to the Competition Commission within period of 60 days.



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2. Brief facts of the case are that the Appellant being manufacturer of electric cables were selling their products with cash coupons inside its packing bundle without advertisement or other promotional material to indicate any such scheme. The commission alleged that this non-disclosure in the advertisement or lack of information unduly transfer the benefit of these cash coupons to the electricians instead of consumer, hence constitutes deceptive marketing.

3. The Competition Commission of Pakistan ("**Commission**") took Suo moto action and initiated a formal enquiry against all the undertakings, which formed part of the electric cable industry under **Section 37(1) of the Competition Act, 2010**, to determine prima facie contravention of **Section 10 of the Competition Act, 2010**. The Appellant was asked to provide relevant information to the enquiry committee vide letters dated 26-04-2016 & 26-05-2016, which they did not comply.

4. The enquiry report concluded that the material information, that the cash coupons were present in the bundles of electric cable, was omitted by the undertaking. This omission not only mislead the consumer but also gives unfair competitive edge to the undertakings. Therefore, this omission of disclosure of material information would constitute violation of **Section 10(1), 10(2)(a),(b) of the Competition Act, 2010**.

5. On the basis of the findings of enquiry committee, proceedings were initiated against the Appellant under **Section 30 of the Competition Act, 2010** and a **show cause notice** dated 18-11-2016 was issued to the Appellant in the following terms;

"Whereas, in terms of the enquiry report in general and paragraph 70 to 84 in particular, the inclusion of coupons in the bundles without due disclosure, is not only likely to misled the end consumers while making their purchase decision, but also such omission of material information appears to give an undue competitive edge to the Undertaking over its competitors; and"

"Whereas, in terms of the enquiry report in general and paragraph 111 in particular, the market survey conducted by enquiry officers has shown that undertaking is offering cash coupons inside their wire cable and it appears that the Undertaking does not disclose the presence of the

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coupon on its packaging of the bundles or in any other promotional material; and”

“Whereas, the inclusion of coupons in the bundles without due disclosure, is not only likely to mislead the end consumers whilst making the purchase decision, but also such omission of material information gives an *undue* competitive edge to the Undertaking over its competitors, which *prima facie* constitutes a violation of Section 10 of the Act; and”

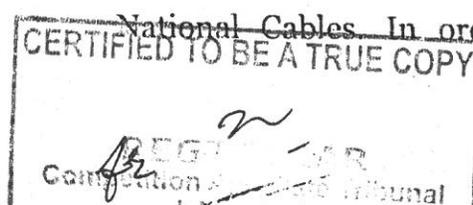
6. The Appellant contested the matter before the Commission and filed a written reply to show cause notice. In reply, they had admitted the fact that they have been following a standard market practice, which was to insert coupons of Rs.25 to Rs.100 in only one category on random basis. It was further stated that they are ready to review this policy.

7. In view of provisions of the Act, the principle issue before the Commission was,

“Whether the practice of inserting tokens in the wire cable bundle without due disclosure constitutes deceptive marketing practice under Section 10 of the Act”.

08. The Appellant by following a compliance-oriented approach submitted a compliance report before the Commission. The learned Competition Commission concluded, that the undertaking was involved in deceptive marketing practice and therefore is in violation of **Section 10(1),(2),(a)& (b)**. Accordingly, in view of the compliance filed by the Appellant, a lesser penalty of Rs. 500,000 was imposed by the learned Commission.

09. Learned Counsel for the Appellant argued that a reply to the show cause notice was submitted. However, no opportunity of hearing was afforded to the Appellant. Further contends that an opportunity of fair trial and due process was not afforded to the Appellant, as enshrined in **Article 10-A of the Constitution of Islamic Republic of Pakistan**. Therefore, the impugned order was passed against the principle of “*audi altrem partem*”. Learned Counsel further submitted that the actual case was against National cables, whereas the impugned order was passed against the Nation Cables (Appellant). He argued that the Appellant firm is registered with the name of Nation cables, which is distinct from



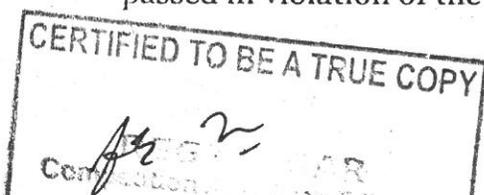
additional documents pertaining to their trade mark registration with the trade mark name "Nation Cables" and taxpayer registration certificate with the name of "Nation Electrical Co.". Learned Counsel therefore prayed for the appeal to be allowed, and for the impugn order to be set-aside.

10. Learned Counsel for the Competition Commission of Pakistan, inter- alia, argued that an enquiry was initiated to investigate an alleged violation of **Section 10 of the Act**. On the basis of Enquiry report Show cause notice was issued and a reply to show cause was also submitted by the Appellant. Learned Counsel further contended that during the proceedings before the Commission, the Appellant was given an opportunity of hearing and that they were represented by their Counsel. Further submitted that it was never contended by the Appellant before the Commission, that the enquiry was initiated against National Cables and not against the Appellant (Nation Cables). He reiterated the fact, that the enquiry was initiated against the Appellant (Nation cables) and during the proceedings before the Commission a commitment was also filed by the Appellant. During arguments, a copy of the compliance report filed by the Appellant before the commission was also submitted. Learned Counsel for the Commission therefore prayed for the appeal to be dismissed.

11. Arguments advanced by the learned Counsel for the parties have been heard and the documents, placed on record perused.

12. In view of the provisions of **The Competition Act, 2010**, the Competition Commission of Pakistan is under an obligation to ensure free competition in all spheres of commercial and economic activity, to enhance economic efficiency and to protect consumers from anti-competitive behavior. The Commission has authority under **Section 37 of the Competition Act, 2010** to initiate enquiry on its own/Suo- moto, or upon a reference by the Federal Government, or upon receipt of complaint from an undertaking or a registered association of consumers.

13. ~~The~~ Appellant has raised various other grounds in their appeal. However, during the arguments they have only pressed the ground of **Article 10 - A of the Constitution of Islamic Republic of Pakistan, 1973**. The Appellant contended that the impugned order was passed in violation of the maxim "**audi alteram partem**".

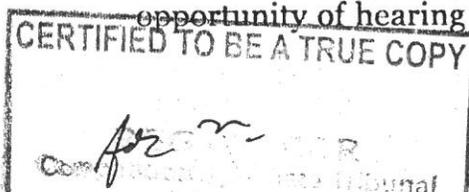


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14. Perusal of the enquiry report reveals, that the learned Commission had initiated an enquiry against the undertakings, who were suspected of being engaged in contravention of **Section 10 of the Act**. In terms of **Section 36 of the Act, read with Rule 23 of Competition Commission (General Enforcement) Regulations, 2007**, in order to ascertain whether there has been any contravention of the provisions of the Act, the Commission is required to ask for information from the Appellant. Record reveals that information had been sought from the Appellant through letters dated 26-04-2016 & 26-05-2016, however the Appellant had failed to cooperate with the enquiry officers.

15. A mere observation of the record reveals, that it was indeed the recommendation of the inquiry committee, which led to the show cause notice being issued to the Appellant. The Commission is empowered to initiate proceedings under **Section 30 of the Act**, where the Commission is satisfied that there has been a contravention with regard to the provisions of **Chapter II of the Act**. Represented by their respective Counsel during the proceedings before the Commission, a reply to show cause notice was submitted. Record further indicates that an attendance of the Appellant Counsel has been marked on the impugned order. As observed from the reported case of **Muhammad Aslam Vs. Member (Colonies) Board of Revenue Punjab, Lahore (2019 CLC 1141)**, *“Generally said maxim includes two elements (a) notice (b) hearing. Before any action is taken, effected party must be given a notice to show cause against proposed action and seek his explanation and is a sine qua non of a right of fair hearing. Any order passed without giving notice is against the principles of natural justice and is void ab initio. Second ingredient of maxim **audi alteram partem** is rule of hearing”* *“Such condition may be complied by authority by providing written or oral hearing which is discretion of authority unless statute under which action is being taken by authority provides otherwise”*

In light of above, it is evident from the record that the Appellant was asked to provide relevant information to the enquiry committee. At the enquiry stage they were only required to submit relevant information before the learned Commission. Furthermore, after show cause notice an opportunity of hearing was also afforded to the Appellant. We are of the



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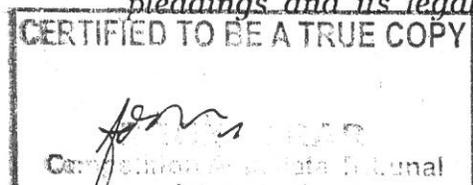
view, that an opportunity of fair trial and due process, in terms of **Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973** has been given to the Appellant. Therefore, the Appellant assertion that an opportunity of fair hearing was not given, does not hold any merit.

16. The learned Counsel for the Appellant during the arguments has verbally raised fresh ground of mistaken identity and emphasized that the actual case was against National Cables, whereas the proceedings were initiated against Nation Cables (Appellant). However, the Appellant has neither pleaded any such ground in their appeal nor before the Commission. During the arguments, in order to establish its distinct entity, the learned counsel for the Appellant has submitted certain additional documents pertaining to their trade mark registration and taxpayer registration certificate, through **CMA/No 01/2022, dated 11-10-2022**. However, these documents only reflect the Appellant legal status, which is not in dispute. Careful perusal of the record shows that all letters including show cause notice were addressed to Nation Cables (Appellant). Moreover, the Appellant in their reply has admitted this violation and has also filed a compliance report before the learned Commission. In the impugned order, it transpires that only at paragraph No: 8 due to a typographic error, the name of Respondent No 10 (Nation Cables) was written as National Cables.

17. It is settled law that parties cannot depart from their pleadings. A ground not being taken in the pleadings regarding a factual position cannot be allowed to be taken at a subsequent stage. If there is a contradiction or inconsistency in the pleadings and the arguments, then this argument has to be disregarded by the Court. Further no new evidence beyond the scope of pleadings is permissible to bring on record and the court shall not consider such evidence.

18. In this regard reliance is placed on, **Muhammad Yaqoob Vs. Mst. Sardaran Bibi and Others (PLD 2020 SC 338)**, wherein it was held, "*It is settled law that a party is not allowed to improve its case beyond what was originally setup in the pleadings*".

The Hon'ble Supreme Court of Pakistan in an earlier case of **Sardar Muhammad Naseem Khan Vs. Returning Officer, PP 12 and Others (2015 SCMR 1698)** has also held that, "*The importance of the pleadings and its legal value and significance can be evaluated and*



gauged from the fact that it is primarily on the basis thereupon that the issues are framed; though the pleadings by themselves are not the evidence of the case, the parties to a litigation have to lead the evidence strictly in line and consonance thereof to prove their respective pleas. Party was bound by the averments made in its pleadings and was also precluded from leading evidence except precisely in terms thereof".

19. Therefore, we are of the view, that the Appellant cannot be allowed to improve their case by pleading verbally a new ground of mistaken identity in their arguments, which they have neither raised in their appeal nor before the learned Competition Commission. In view of above, any new evidence beyond the pleadings could not be considered.

20. In order to ascertain, whether there has been any violation of **Section 10 of the Competition Act 2010**, we need to examine certain aspects of it.

Section 10 of the Act reads as follows,

"Deceptive marketing practices (1), No undertaking shall enter into deceptive marketing practices.

(2) The deceptive marketing practices shall be deemed to have been resorted to or continued if an undertaking resorts to,

(a) the distribution of false or misleading information that is capable of harming the business interests of another undertaking,

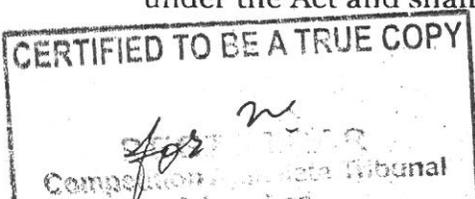
(b) the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method, or place of production, properties, suitability for use, or quality of goods,

(c) False or misleading comparison of goods in the process of advertising, or

(d) fraudulent use of another's trademark, firm name, or product labeling or packaging".

21. Firstly, the inclusion of term "practice" in **Section 10(1) of the Act**, signifies an ongoing activity, which is performed consistently or repeatedly.

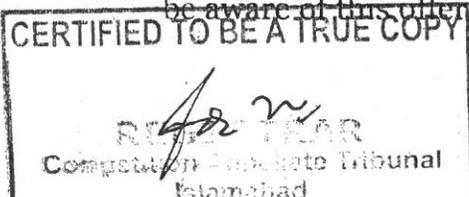
Secondly, the term used under the Act is "distribution of false and misleading information". The distribution of information is not defined under the Act and shall take its ordinary meaning. It is defined as "the act



or process of proportioning or giving out" (Black's Law Dictionary). Under the Black's Law Dictionary, False means "untrue, erroneous and deceitful", whereas, misleading is defined as "delusive, calculated to lead astray or to lead into error". Misleading information could be oral or written statements or representations, which are against the facts and it includes the deliberate omission of relevant information. The U.S consumer protection agency, the Federal Trade Commission (FTC) has elaborated the deceptive acts or practices. In view of the principle enumerated by FTC, in order to prove false or misleading information, "**firstly**, there must be a representation or an omission which is likely to mislead the consumer. **Secondly**, the consumer must be acting reasonable in the circumstances. **Thirdly**, the representation, omission or practice must be a material one". An information with regard to a product is considered to be a material information, if it is likely to affect the consumers purchase decision. Therefore, from the consumers perspective, the products information as to its price, characteristics and quality are considered to be a material information in order to make an informed decision.

22. The term consumer has not been defined in the Competition Act, 2010. Therefore, we would rely on an ordinary dictionary meaning of the word "consumer". Under the Black's Law Dictionary, consumer is defined as "Someone who buys goods or services for personal, family or household use with no intention to resale; A natural person who uses products for personal rather than business purposes".

23. The objective pursued by **Section 10(2)(a) & (b) of the Act**, provides protection to the consumers and restricts undertakings from creating a misleading impression of the product. Consumers are always vulnerable to the undertaking's practices, which are likely to distort the economic behavior of consumers. The undertakings practice, which omits any material information or provides an ambiguous information in relation to a product shall be considered as misleading. In the present case, the Appellant inserts cash tokens in their packing bundles without prior disclosures. In order to make an informed purchase decision, this information would be considered as a material information, that could affect the consumers purchase decision. An ordinary consumer would not be aware of this offer, as it is clear that there lacks indication of any such



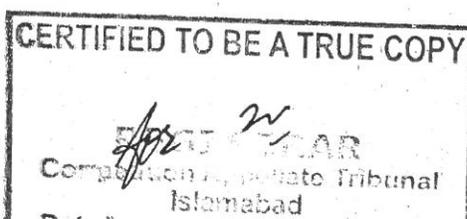
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offer on the packaging of the electric cable bundle. Keeping in view the market practice, an ordinary consumer by acting reasonably in the circumstances relies on the recommendation of electricians. The electricians would be more inclined to purchase the products with higher value of cash tokens, regardless of the quality of the product. The intention behind omitting this material information becomes apparent, as it appears to favor the electricians rather than the consumer. Under these circumstances, this practice of inserting cash coupons inside electric cable bundles is likely to mislead and deceive an ordinary consumer. In US Court of Appeal case of (**Daugherty Vs. American Honda Motor Co, Inc (2006) 144, 4th Cir. ,824, 825**), it was observed that, "*a fraudulent or deceptive omission is actionable if it is contrary to a representation actually made by the defendant, or an omission of a fact, the defendant was obliged to disclose*".

24. Furthermore, the learned Commission in its impugned order has relied on case law reported as, **International Harvester Co. 104 F.T.C. 949 Page (1058), Cliffdale Associates, Inc. 103 F.T.C. 110, (1984), American Home Products, 98 F.T.C. 136, 370 (1981)**. We have gone through these cases and agree to the principle established with respect to omission in advertisements.

25. The presence of material information, which has a beneficial value for the consumer, must be communicated. The onus is on the undertakings to disseminate all material information in relation to a product to the consumer. Therefore, we are of the view, that this omission on the part of the Appellant, by not disclosing the presence of cash coupons, is to be considered as a distribution of misleading information. In view of above, this omission would constitute deceptive marketing practice and therefore violates **Section, 10(1),10(2)(b) of the Competition Act, 2010**.

26. The aim of **Competition Act,2010** is to provide free competition in all spheres of commercial and economic activity. Whereas, if the undertakings are allowed to advertise their products without reasonable basis and prior disclosures, this would put them at unfair advantage, as they would take the benefit of their omissions. Therefore,



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this omission shall also be capable of harming the business interests of other undertakings.

In case reported as *Colgate Palmolive (Pakistan) Limited Vs. Competition Commission of Pakistan (2019 CLD 254)*, the Competition Appellate tribunal has observed,

"Suffice it to say that to prove conduct under S.10(2)(a) of the Act, it is not necessary to show actual harm to competitors. It is sufficient to show the existence of deceptive marketing practice that has potential to harm business interests of the competitors".

In view of above, this practice of the Appellant would be capable of harming the business interests of other undertaking and therefore violates **Section 10 (2)(a) of the Act.**

27. It is evident from the record, that a compliance report was also submitted before the learned Commission, in which the Appellant undertook, that they have stopped this false and misleading practice, and have also agreed to comply with any direction issued by the Commission. The applicable Regulation to the Commitment before the Commission is **Part IV of Competition Commission (General Enforcement Regulations), 2007 ('GER')**. The compliance report filed by the Appellant was submitted by the learned Counsel for the Commission, however this fact was not controverted by the Appellant Counsel during the arguments. The Commission may at its discretion accept the Commitment filed by the undertaking, who is in violation of the provisions of **Chapter II of the Act**. Once the Commitment has been accepted, the Commission at its discretion may issue a favorable decision in pursuance of **Regulation 33, Part IV of Competition Commission (General Enforcement Regulations), 2007**. If the Commission is satisfied that an undertaking, which has violated the provisions of **Chapter II of the Act**, has made full disclosure in respect of the alleged violation, a lesser penalty may be imposed on such undertaking. The Commitment filed by the Appellant was accepted by the learned Commission, and a minimum penalty was imposed in accordance with **Regulation 37 of Part VI of Competition Commission (General Enforcement Regulations) 2007**. However, the Appellant in this appeal, despite the fact that they have filed Commitment before the Commission, took contradictory stance and also mainly argued fresh ground of mistaken identity, which was

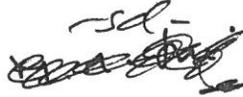
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neither raised in appeal nor before the Commission. We are of the view, that the learned Commission, keeping in view, the Commitment filed by the Appellant has already adopted lenient view and imposed a lesser penalty.

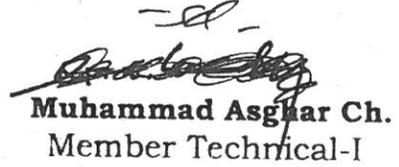
28. In view of above, we have come to the conclusion that for the reasons stated above, the impugned order does not suffer from any illegality. Therefore, the appeal is accordingly dismissed.



Justice Mamoon Rashid Sheikh
Chairperson



Raja Saad Sultan
Member Technical-II



Muhammad Asghar Ch.
Member Technical-I

Announced in open Court
14.07.2023



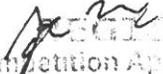
Raja Saad Sultan
Member Technical

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