



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

**IN THE MATTER OF SHOW CAUSE NOTICE ISSUED TO
M/S DIAMOND PAINT INDUSTRIES (PRIVATE) LIMITED**

On Complaint Filed By

**M/S NIPPON PAINT PAKISTAN (PRIVATE) LIMITED
FOR DECEPTIVE MARKETING PRACTICES**

(File No. 415/OFT/Diamond Paints/CCP/2021/1355)

Date of Hearing: 16.01.2024

Commission: Dr. Kabir Ahmed Sidhu
Chairman

Mr. Salman Amin
Member

Present:

On Behalf of Mr. Hammad Saeed
M/s Nippon Paint Pakistan (Private) Limited Advocate High Court
(Complainant)

On Behalf of Mr. Waqas Ahmed Mir
M/s Diamond Paint Industries (Private) Advocate Supreme Court
Limited **(Respondent)**

Mr. Anas Irtiza Awan
Advocate High Court



ORDER

1. This order shall dispose of proceedings arising out of Show Cause Notice No. 1/2023 dated 18.10.2023 (hereinafter the 'SCN') issued to M/s Diamond Paint Industries (Private) Limited (hereinafter the 'Respondent') for *prima facie* violation of Section 10 of the Competition Act, 2010 (hereinafter the 'Act').

BACK GROUND FACTS

The Complaint

2. This is the third occasion the Competition Commission of Pakistan (hereinafter the 'Commission') has received concerns regarding the non-disclosure of tokens in paint buckets by the paint manufacturers. On 28.10.2021, the Commission received a complaint filed by M/s Nippon Paint Pakistan (Private) Limited (hereinafter the 'Complainant'). The complaint stated that the Complainant is an undertaking engaged in manufacturing, marketing, sales and distribution of paints and associated products.

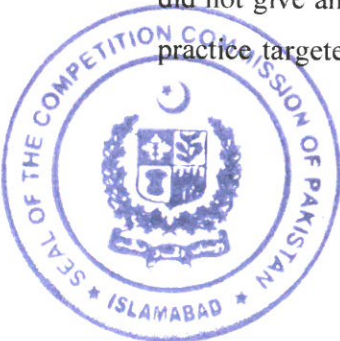
3. Brief particulars of the Complaint are as follows:

- 3.1. the Respondent aired a marketing campaign of its product namely "DURASILK" on various television channels with national outreach and viewership wherein it did not make disclosure as to the presence and value of redeemable tokens in its paint buckets;
- 3.2. the Respondent ran his marketing campaign during prime time at television channels; therefore, it was capable of affecting the consumers' buying decision and distortion of competition in the market; and
- 3.3. the television commercials (TVCs) aired by the Respondent is not only *prima facie* deceptive within the meanings of Section 10(2)(b) of the Act, but also in violation of the order passed by the Commission *In the matter of Show Cause Notice Issued to Paint Manufacturers, 2012 CLD 808* (the "CCP's Paint Order 2012").

The CCP's Paint Order 2012

4. This was the first occasion the Commission took notice of the marketing practice in the paint industry of inserting redeemable coupons/tokens in paint buckets and their non-disclosure by the paint manufacturers.

5. The Commission observed that the televised adverts and packaging of the paint buckets did not give any indication of the presence of token in these buckets. It seemed that the said practice targeted directly the painters while the end consumers paid the price and were not



made aware of the placement of token inside the paint pack in the absence of any formal disclosure on the relevant product.

6. After carrying out inquiry, the Commission, in the CCP's Paint Order 2012, directed all paint manufacturers in the country to disclose the presence of redeemable tokens in their paint buckets. The paint manufacturers were also reprimanded to ensure responsible behaviour in future with respect to marketing of their product.

7. Para 48 of the CCP's Paint Order 2012, containing directions of the Commission, is reproduced herein below:

"i) All advertisements, promotional materials, or instructional manuals pertaining to the paint packs primarily falling in the decorative paints category; manufactured by the Undertakings whether electronic, printed or otherwise are to be modified to disclose the presence and the price/value of the token on each pack for the consumer, within a period of 60 days starting from the January 15, 2012.

ii) The disclosure with respect to the token on the paint pack as mentioned at (i) above should be made with the use of bright/conspicuous colors distinct from the color of the packaging of the paint pack and should be printed in clear, bold and legible size.

iii) During 60 days period given at (i) above, the Undertakings will issue, four advertisements/public notices of A-4 size, to be published at fifteen days interval in at least two Urdu and two English newspapers of national circulation; making due disclosures to the public regarding the presence and price/value of token and the category of products in which these tokens are found present.

iv) With respect to (iii) above, "public notice" may be published by the undertakings on an individual or collective basis. In case of undertakings which are members of the association, public notice may be given by the association (naming the members therein) and in case of non-members, a collective advert naming the undertakings therein. The text and content of such advertisement prior to publication shall be cleared by the Registrar's office of the Commission.

v) A compliance report with respect to implementation of the aforementioned directions must be filed by the Undertakings no later than March 30, 2012. Continued violation and/or non-adherence to the



directions of the Commission, by any of the Undertakings shall entail penal consequences.”

Non-Compliance with CCP's Paint Order 2012

8. This was the second occasion when CCP took notice of the marketing practices in the paint industry of inserting redeemable tokens in paint packs and their non-disclosure and issued an order to the paint manufacturers.

9. Soon after issuance of the CCP's Paint Order 2012, the Commission received reference and concern from the Consumer Association of Pakistan regarding non-compliance by the paint manufacturers of the said order.

10. To ascertain compliance, the Commission conducted a market survey in December 2013. Eleven (11) paint manufacturers were found non-compliant. Complainant and Respondent, however, were not among these eleven (11) manufacturers.

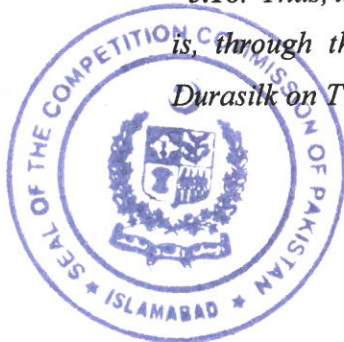
11. Show Cause notices were served on the aforesaid eleven (11) paint manufacturers. Proceedings were concluded *vide* Commission's order dated 13.10.2021 titled as ***in the Matter of Show Cause Notices issued to the Paint Manufacturers for non-compliance of CCP's Order dated 13.01.2012*** (hereinafter the "CCP's Paint Order 2021"). In para 79 of the said order, it was observed that all concerned paint manufacturers, pursuant to compliance proceedings, have finally complied with the directions of the Commission, hence, the Commission imposed no penalty.

INITIATION OF ENQUIRY

12. On 17.08.2022, the Commission authorized initiation of another enquiry to investigate into the matter and constituted an Enquiry Committee (the "EC").

13. EC collected evidence and concluded its Enquiry Report on 24.11.2022 (the "ER") with findings that there was a non-disclosure of redeemable tokens in the alleged TVC and same was admitted by the Respondent. The Respondent's products packaging and shade card contains disclosure, however, a TVC is usually a first point of contact between a consumer and a manufacturer, as product is being marketed through that medium, therefore, disclosure in TVC has its due significance. EC relied on available evidence i.e. snapshots of shade cards, the product packaging, and the relevant TVC with following findings:

"5.18. Thus, in light of the above, it can be concluded that the Respondent is, through the non-disclosure of presence of tokens in its product Durasilk on TVC, prima facie, engaged in the distribution of misleading



information to the consumers that lacks a reasonable basis related to price of goods, prima facie, in violation of Section 10 (1) of the Act in general and 10(2)(b) in particular.”

SHOW CAUSE NOTICE

14. Consequent upon the findings of ER, the Commission initiated proceedings under Section 30 of the Act by issuing SCN in the following terms:

“5. WHEREAS, in terms of the Enquiry Report in general and paragraph 5.9 to 5.18 in particular, it appears that the undertaking is engaged in distribution of misleading information to the consumers for its Product that lacks reasonable basis related to price of goods which is prima facie, in violation of Section 10(1) of the Act in general and Section 10(2)(b) of the Act in particular.”

RESPONDENT’S SUBMISSIONS

15. The Respondent filed its written reply to the SCN on 11.01.2024 and appeared before the Commission on 16.01.2024, whereby it submitted arguments, which are summarised below:

Non-compliance with CCP’s Paint Order, 2012—Substantial Disclosures

15.1. That circumstances in the instant matter are different from the CCP’s Paint Order 2012, because while the current matter encompasses situation when disclosure is already there, the later dealt with a situation when there were no disclosures at all.

15.2. The Commission, in the Paint Order 2012, did not require any undertaking to provide such information in every single marketing campaign. Also, the previous directions in the CCP’s Paint Order 2012 did not pertain to all upcoming advertisements in future. Hence, the information provided by the Respondent, clearly and conspicuously, on the shade card and the paint bucket shall suffice and satisfy the test.

15.3. Pursuant to the CCP’s Paint Order 2012, the Respondent informed the public as to the presence of tokens *via* newspapers and webpage of the *Consumer Association of Pakistan*. Therefore, compliance was made with the directions of the Commission.

15.4. No information is being concealed or omitted in the marketing campaign. The shade cards and paint bucket itself is first point of contact between the seller’s product and the buyers which contain the information pertaining to presence and value of token.



Furthermore, it was submitted that the first point of contact in this situation is not secured by deception hence any equivalence with “bait and switch” advertising is deeply erroneous. The Respondent referred to the Commission’s earlier orders wherein the Commission has set parameter of providing complete and true information to the consumer for example, *In the Matter of China Mobile Pakistan Ltd (Zong) and Pakistan Telecom Mobile Ltd (Ufone), 2010 CLD 1478* (hereinafter referred to as “**Zong Order**”), and the CCP’s Paint Order 2012. Since the disclosure is made at the shade cards and the paint bucket, which is the first contact point just before a point where a consumer would make a final transactional decision, therefore compliance with the directions of the Commission is made and no deceptive marketing practice exists.

15.5. Respondent was not a party to the previous proceedings in **CCP’s Paint Order 2021** therefore, directions in the said Order, if any, are not applicable to the Respondent.

Misleading information-Omission of Material Information

15.6. Deception occurs when there is an omission of information either because of dissemination of half-truth regarding a product, or because of an affirmative statement without a qualifying information such as disclosure/disclaimer.

15.7. The Commission, *In The Matter of Show Cause Notice Issued to M/s Proctor & Gamble Pakistan (Pvt) Limited for Deceptive Marketing Practices, 2017 CLD 1609, (the P&G Order)*, has held that advertisements are deceptive if half-truth is disseminated, and qualifying information is omitted which cannot be cured by subsequent telling of the truth. The Respondent emphasized that the Commission’s concern, as reflected from the orders in the matters of *China Mobile Pakistan Ltd (Zong) and Pakistan Telecom Mobile Ltd (Ufone) 2009, Reckitt Benckiser 2015, and Dry & Acid-Lead Battery Manufacturers 2018*, has always been the informed decision making by the consumer before making a transaction; a principle that the Respondent has followed. Therefore, the inquiry officers should have before them a narrow proposition that whether Respondent disseminated complete information to the end consumer for making informed decision.

15.8. TVC is not a first point of contact between a consumer and manufacturer as it does not result in a sale-purchase transaction. There are multiple intervening contacts before a consumer finally makes the decision to purchase the product. These multiple intervening contacts include the dissemination of the information regarding value and



presence of the token through shade cards, other sales material, and the paint bucket itself. The TVC is simply another mode of advertisement to reach a wider audience; an invitation to treat basically. Neither nationally nor internationally, is the price of a product mentioned in a TVC. Also, the consumer does not place reliance merely on the said TVC before making any transactional decision.

- 15.9. Absence of disclosure on TVC does not amount to lacking reasonable basis. Disclosure of token on product packaging and shade cards is the prevailing industry practice, therefore, the Respondent's action is no different from the industry, hence, no violation of 10(2)(b) has occurred.

No Mention of Price, No Mention of Token

- 15.10. Respondent through its TVC neither makes any claim about price of any product(s) nor claims any fact pertaining to the price. The Respondent is disclosing the price as well as the information regarding redeemable tokens through its paint buckets and shade cards etc. Since price of the product is not disclosed through TVC, therefore the disclosure pertaining to the redeemable tokens is also not required through the said medium.

- 15.11. That Commission needs to distinguish between a claim which is misleading and no claim at all. In other words, the Commission should approach differently a situation where price/token is not mentioned in the TVC but is stated by the seller itself (along with tokens) on shade cards/paint buckets at the time of purchase from a situation where a seller gives partial information in a TVC and leaves it to consumers to discover the rest through independent research.

Allegations are based on assumptions

- 15.12. The complaint is defective since it does not provide any substantial evidence of violation rather the allegations are based on assumptions, *inter alia*, that most purchases are made by contractors or painters instead of consumers; and that 60% of the consumers buy through painters or contractors, therefore, benefit of tokens is also reaped by the painters or contractors instead of the consumers.

- 15.13. The Complainant's reliance on an 11-year-old survey report is misplaced because it pertained to a time when there was no mention of tokens at all, and the consumers were totally unaware thereof. Considerable time has lapsed and today the consumers are aware of tokens in paint buckets.



Distortion in Price Mechanism/Consumer Harm

15.14. Insertion of redeemable tokens is a long-standing industry practice that not only discourages counterfeit products but also provides incentive to the consumer in terms of redeemable money, the cost of which is borne by the Respondent. If there is non-disclosure about redeemable tokens, then the price of paint bucket will come off inflated and the consumer's preference is likely to be shifted towards the rivals. In other words, keeping the consumers aware of the incentive is in the economic interest of the Respondent therefore, there is no need to hide it from consumers.

15.15. The Complainant's case is hypothetical because it failed to explain how the TVC in question has affected the consumers. There is no evidence or research to show that an intermediary, such as a contractor or a painter, is reaping benefit of tokens, or that deception or harm is caused to the consumer due to the non-disclosure in the alleged TVC.

15.16. Every TVC is limited in terms of time slot; the longer it is the more would be advertisement cost. Therefore, only viable option is displaying the information that is essential and needs disclosure to clarify an affirmative statement regarding the products.

15.17. The Commission's approach in requiring every single market player to mention in its TVC the presence and value of token amounts to overregulating the market, which puts unfair burden on commercial entities.

15.18. The Respondent has no intention to deceive consumer in any manner whatsoever.

Legal and Technical Grounds

15.19. Both ER and the SCN are unwarranted as they lack the Commission's own assessment of facts. Basic requirements of Section 37(2) of the Act are not fulfilled which imposes a positive obligation on the Commission to initiate an enquiry only in case of bona fide complaints and sufficient evidence. The Complaint has substantive shortcomings. It is vexatious, frivolous and filed with ulterior motives which is not only deficient in facts, but also, silent as to veracity of facts alleged by the Complainant.

15.20. Both EC and the Complainant have failed to establish in any persuasive manner as to how the alleged TVC violated the applicable law. The Complaint lacks reasons as to how it is actionable, whereas the ER lacks explanation with respect to assessment of facts. This lack of reason renders the ER as well as SCN liable to be set aside.



15.21. The Complainant itself has not approached the Commission with clean hands. The Complainant's own TVC, social media pages or shade cards do not mention presence of tokens. Since the Respondent is competitor of the Complainant, therefore, the Complainant attempted to harass it through the instant complaint.

ISSUES

16. The Bench has identified following issues for further deliberation and analysis:
- I. Whether the Respondent is non-compliant with the CCP's Paint Order 2012?
 - II. Whether non-disclosure of token in the alleged advertisements amounts to violation of Section 10(2)(b) of the Act?
 - III. Whether non-disclosure of redeemable tokens distorts price mechanism or competition and causes harm or economic loss to the consumers?
 - IV. Whether legal and technical grounds taken by the Respondent are tenable?

ANALYSIS

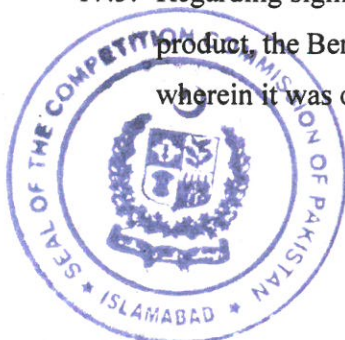
ISSUE – 1 Whether the Respondent is non-compliant with the CCP's Paint Order 2012?

17. The primary allegation against the Respondent is that it has violated directions of the Commission with respect to disclosure requirements contained in the CCP's Paint Order 2012 to which Respondent was also part of the proceedings.

17.1. The Bench has heard the arguments of the Respondent on this issue and would like to refer to CCP's Paint Order 2012, *ibid*, wherein both the Complainant and the Respondent have been part of the proceedings. Relevant directions of the Commission are already reproduced in para 7 above.

17.2. Bare perusal of the Commission's direction in the CCP's Paint Order 2012 makes it clear that all market players in the paint industry were required to disclose presence of redeemable token in all of their advertisements, promotional materials, and instructional manuals. The Commission also directed to make disclosure on all advertisements, promotional materials about the presence and the price/value of the token on each pack. The Commission's directives explicitly covered all advertising channels, regardless of whether they were first or second points of contact. However, Respondent overlooked this entirety aspect, as the necessary disclosure is only present on the shade cards and paint buckets, but not in the TVC.

17.3. Regarding significance of a TVC, and its influence on consumers' perceptions of a product, the Bench would like to refer to para 40-43 of the CCP's Paint Order 2012, wherein it was observed that:



“40. Accurate disclosure of important terms and conditions allows consumers to compare services/products offered by one or multiple providers and weigh the different terms being offered in making decisions about purchase. In the absence of information pertaining to the value of rebates on price of the paint the ordinary consumer cannot be expected to adequately compare the two varieties of paint as the true price differential is not known at the time of purchase.

41. In the case of International Harvester Co., 104 F.T.C. 949 at pg. 1058, it was held that: “[i]t can be deceptive to tell only half the truth, and to omit the rest. This may occur where a seller fails to disclose qualifying information necessary to prevent one of his affirmative It can also be deceptive for a seller to simply remain silent, if he does so under circumstances that constitutes an implied but false representation.... statements from creating a misleading impression...

42. Reference is also made to Cliffdale Associates, Inc., 103 F.T.C. 110, (1984) wherein it was held: “when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser.” [Emphasis added]

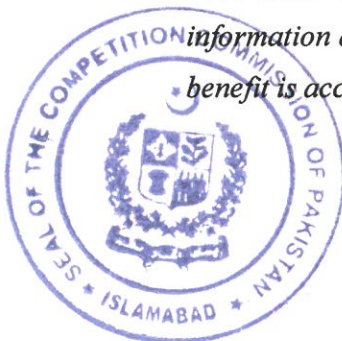
43. Therefore, it does not suffice to argue that the presence of token was not disclosed at the time of sale as it is a hidden/surprise gift as even if the consumer finds out subsequently about the presence of token, which in this scenario is highly unlikely, it still has the potential to mislead.”

17.4. Keeping in view aforementioned observations of the Commission, the Bench does not agree with the Respondent’s argument that making required disclosure only at the time of purchase suffice the purpose.

17.5. In the CCP’s Paint Order 2012, the Commission has directed the paint manufacturers to mandatorily disclose the tokens, a requirement that is not limited to a specific timeframe but extends indefinitely into the future.

17.6. The relevant portion of the said Order reads as follows:

“35. Accordingly, there is a duty on the undertakings to disclose information about tokens and take necessary measures to ensure that the benefit is accrued to the consumer otherwise it would unreasonably place



a higher onus on the consumer rather than the undertaking which would be contrary to the intent of the law.”

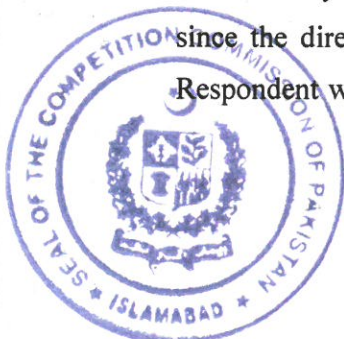
17.7. The Respondent has argued that the directions given in the CCP’s Paint Order 2012 do not pertain to all advertisements in future. However, a plain reading of sub-para (i) of para 48 of the CCP’s Paint Order 2012 clearly provides that it concerns “*All advertisements, promotional material, or instructional manuals pertaining to the paint packs falling in the decorative paints category; manufactured by the Undertakings whether electronic, printed or otherwise are to be modified to disclose the presence and the price/value of the token on each pack for the consumers, within a period of 60 days starting from the January 15, 2012.*”

17.8. As a matter of fact, the disclosure in shade cards is not prominently made and is a footnote which a consumer may ignore at the particular point in time when prime focus is on selection of the colours from shade card. Whether the disclosure in such a manner is in line with the directions of the Commission, the Bench would make reference to previous orders of the Commission where it has explicitly outlined mode and manner of a disclosure.

17.9. In the **Zong Order, supra, at para 36**, it has been held that “*fine print disclaimer, are inadequate to correct the deceptive impressions’. In fact, such disclaimers are, in themselves, a deceptive measure.*” Also, **In the Matter of Show Cause Notice Issued to M/s Proctor & Gamble Pakistan (Pvt) Limited for Deceptive Marketing Practices, 2017 CLD 1609, para 40**, the Commission has set a parameter for a disclosure by observing that “[t]he principle regarding disclaimer/disclosure is that they must be “clear and conspicuous” and placed “as close as possible” with the advertising claim.”

17.10. In view of above, the Bench finds that there is a non-disclosure of required information in the TVC. The consumer is kept unaware at the point of first contact i.e. TVC, and the disclosure made in the shade card cannot compensate or make-up for that non-disclosure as at that time consumer is more focussed on colour selection.

17.11. Furthermore, the Respondent has contended that it was not party to the non-compliance proceedings in 2021 and was only informed of the non-compliance issue directly through the instant proceedings. However, this argument lacks merit since the directives originated from the CCP’s Paint Order 2012, to which the Respondent was certainly a party. Therefore, the Bench is of the opinion that the



Respondent's reasoning of being unaware is not tenable as it was well aware of these directives of 2012. Besides, being a key stakeholder in the relevant market, it is the Respondent's obligation to be well aware of the regulatory directions in the field, particularly in view of the complaint against the respondent before the Commission.

17.12. In light of the foregoing, the Bench finds that the Respondent has not complied with the Commission's directives contained in the CCP's Paint Order 2012. The alleged TVC lacked the required disclosure as per the Commission's directives. Although some disclosure is provided on shade cards/paint buckets, it does not compensate for the non-disclosure made in TVC and thus disregards the CCP's Paint Order 2012 along with its directives and guidelines on disclosures to be made in all mediums of advertisement.

ISSUE- II Whether non-disclosure of token in the alleged advertisements amounts to violation of Section 10(2)(b) of the Act?

18. Respondent has argued that the non-disclosure of the redeemable tokens in the TVC does not contravene Section 10 (2)(b) which reads:

"10. 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) ...

(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;"

19. Considering Section 10(2)(b) of the Act, the Bench finds it appropriate to discuss as to what constitutes distribution of misleading information to consumers in the instant matter.

Misleading Information – Omission of Material Information

19.1. The Commission has defined the term "misleading information", in the Zong Order, para 23, in following words:

"Whereas 'misleading information' may essentially include oral or written statements or representations that are; (a) capable of giving wrong impression



*or idea, (b) likely to lead into error of conduct, thought, or judgment, (c) tends to misinform or misguide owing to vagueness or **any omission**, (d) may or may not be deliberate or conscious and (e) in contrast to false information, it has less onerous connotation and is somewhat open to interpretation as the circumstances and conduct of a party may be treated as relevant to a certain extent.”*

19.2. Similarly, in the 2023 Guidelines on Deceptive Marketing Practices, the Commission has provided clarification on the term “misleading information” as follows:

*“5.2.1 An **omission of material information** in the marketing content/packaging material may be treated as misleading if, such is likely to mislead consumers, even if unintentional.*

5.2.2 It is not necessary for any information to be withheld deliberately or consciously to be considered as misleading.

5.2.3 A misleading omission can also occur when an undertaking hides or provides in an unclear, unintelligible, ambiguous or untimely manner, any information that is likely to impact the consumer decision.”

19.3. The above paragraphs explain that misleading information encompasses omission of material information which is pivotal to a consumer's transactional decision. The Bench, therefore, finds that the proper disclosure of tokens qualifies as material information. Any marketing inducement through redeemable coupons is an important consideration for the consumer and omitting the same in the TVC, an ordinary consumer would lack the necessary and complete information required for an informed decision.

19.4. The same view is already iterated by the Commission earlier in the CCP's Paint Order 2012, at para 45 and 47, in following words:

“45. Further reference is made to Guidance on UK Consumer Protection Regulations (2008) where Regulation 6 deals with omission or unclear and timely provision of material information. The list of information that is considered material includes the main factors consumers are likely to take into account in making decisions relating to products. While this is not a requirement for invoking section 10, nonetheless, it is helpful to understand that this list includes “... (g) the price or the manner in which the price is calculated, (h) the existence of a specific price advantage... (k) the

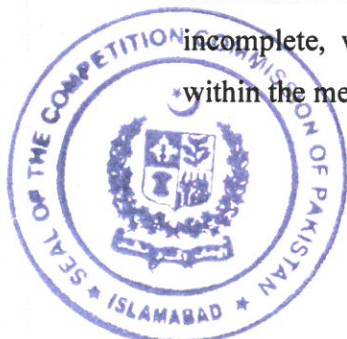


consumer's rights or the risks he may face...". **The criteria laid out reinforces the fact that the presence of token qualifies as material information.** More specifically if it is narrowed down to just the criteria at (h) and (k) the token is a form of price advantage and it is the consumers' right to avail the monetary benefit derived from it and hence the undertakings should disclose the same in terms of section 10, as it would otherwise constitute deceptive marketing.

...

47. In sum, it has been established in the preceding paragraphs that the non-disclosure of tokens in paint packs, is deceptive in that it creates ambiguity and is found lacking in having a reasonable basis as to the price borne by the consumer. Consumers are not informed about the presence of token and its value, and it is placed right at the bottom of the paint pack making access to such information further difficult. The onus is on the undertakings to ensure that no deception results through their marketing practices. This could also have the adverse effect of giving an unfair competitive edge to paint companies offering higher token values without disclosures to the consumer who bears the price, as the painter would naturally have an incentive to purchase paint containing higher token values, and other factors such as quality, durability may pale in comparison to this consideration. **The practice of omission of material information with respect to the tokens in paint packs amounts to misleading consumers, hence, is deceptive and in violation of section 10 of the Act...**"

19.5. Given the above, the Bench is of the view that there is no substance in the Respondent's reasoning as neither appropriate disclosure was made in the alleged TVC about presence of redeemable token in paint buckets nor does the disclosure in shade cards compensates due legal requirements of a disclosure that is to be made in TVC, as discussed earlier in ISSUE - I. Thus, there is an omission of material information in TVC that undermines the spirit of law and render the alleged TVC incomplete, without reasonable basis and, eventually, deceptive and misleading within the meaning of Section 10(2)(b) of the Act.



No Mention of Price, No Mention of Token

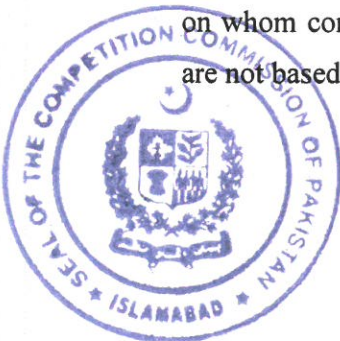
19.6. Considering the above, the Bench finds that inclusion of a token in the paint bucket is a material information that could potentially influence buyers' transactional decisions. The CCP's Paint Order 2012 explicitly mandated that inclusion of a token without proper disclosure would be deemed to have lacking a reasonable basis with regard to prices, and thus falling under Section 10(2)(b) of the Act, to which the Respondent has failed to adhere to.

Allegations are based on Assumptions

19.7. In relation to the Respondent's arguments summarized at paras 15.12 – 15.13 above, the Complainant contends that its complaint is based on observation made by the Commission in its earlier CCP's Paint Order 2012 as follows:

“33. According to a recent survey drawing data from a sample of 50 head of households and 50 painters the advice of the painter was voted to be very important by 70 percent of households in the purchase of paint. Further, the conclusion of the study was that the beneficiaries of the token incentive are mostly painters/paint contractors and that consumers are largely unaware of the details of the token scheme. It is common knowledge that in the absence of formal disclosures the painter directly involved in the application and purchase owing to experience in the industry will reap the benefit of the token. Even if the painter is not involved in the transaction, he is involved in application and the token is placed inside the paint pack at the bottom where the painter can have access to it.”

19.8. The above-referred survey in the CCP's Paint Order 2012 demonstrated that most consumers do not buy paint themselves, instead, painters/contractors actually make the purchase on behalf of the consumers. It will not be incorrect to say that beneficiaries of tokens are mostly painters/contractors and not the consumers. Omission of required disclosures in TVC makes consumers unaware of presence of redeemable coupons in buckets which are an inducement for the painters/contractors, on whom consumers are relying for selecting the paints. Therefore, the allegations are not based on assumptions.



19.9. In view of the above, the Bench holds that arguments of the Respondent are not tenable. Respondent's practice of inserting tokens without required disclosure in the alleged TVC amounts to misleading information lacking reasonable basis with respect to the price of its product, hence, deceptive within the meanings of Section 10(2)(b) of the Act.

ISSUE - III Whether non-disclosure of redeemable tokens distorts price mechanism or competition and causes harm or economic loss to the consumers?

20. In relation to the Respondent's arguments in para 15.13 to 15.15 above, the Commission in the CCP's Paint Order 2012, at para 47, has observed that:

"47. ...However, while the Commission is empowered to prohibit deceptive marketing practices, it is not our mandate to require abandoning of any particular practice if due disclosures are in place. We consider it the Undertakings' prerogative to adopt or not to adopt any marketing practices; the Commission has to only ensure that such practices are compliant with Section 10 of the Act."

20.1 When disclosures are inadequate or omitted, consumers may remain unaware of hidden monetary incentives like redeemable tokens, making them vulnerable to exploitation by intermediaries such as painters or contractors. This practice creates deception where manufacturers offering tokens without required disclosures gain an advantage, as intermediaries may recommend these products to consumers who are unaware of the token's existence. Such practices can both harm consumers and distort competition as material information is not being adequately disclosed in all mediums.

20.2. In view of above, the Respondent's argument, that it does not obtain any economic benefit; and that no harm is done to either to the competition, or to the consumers, is untenable. Without a required disclosure of material information in TVC, if the painter/contractor recommends, prefers and buys paint products for its own monetary incentive at the expense of the uninformed consumers, the Respondent definitely directly accrues economic benefits.

Economic Loss or harm-Not a determinable factor for Section 10(2)(b)



21. The Respondent has argued that non-disclosure does not cause any economic loss or harm to consumers. The Commission has held **In the Matter of Show Cause Notice Issued to Tara Crop Sciences (Pvt) Limited, 2016 CLD 105, para 45**, that:

“45. This provision (Section 10(2)(b)) relates clearly to consumer protection, and unlike Section 10(2)(a) of the Act does not require the potential of harm to be actionable. Any dissemination of false or misleading information to consumers, lacking reasonable basis, constitutes a violation under the Act.”

Intention of the Respondent-Irrelevant

22. Lastly, in relation to the Respondent’s argument given in para 15.18, the Bench would briefly state that the Commission has already clarified that subjective intention of a party is irrelevant in deceptive marking cases. **In the Matter of M/s Al-Hilaal Industries (Pvt) Limited, 2012 CLD 1861, para 19**, the Commission observed:

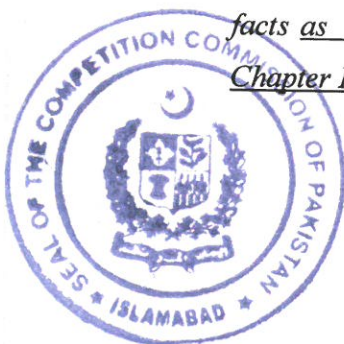
“19. ... it is not a must to establish intent and information pertaining to the product in question “may or may not be deliberate or conscious in order for it to qualify as misleading.” Accordingly, the onus is on the undertakings to ensure that no deception occurs through their marketing practices.”

ISSUE – IV Whether legal and technical grounds taken by the Respondent are tenable?

23. The Respondent has argued that the Complaint was false, vexatious, and frivolous, failing to meet the requirements of Section 37(2) of the Act. It further contended that the Complaint was filed with ulterior motives by a rival undertaking, lacking factual accuracy. Moreover, it was contended that ER has failed to establish how the TVC in question contravened Section 10 of the Act.

23.1. In this context, the Bench finds it pertinent to reproduce Section 37(2) of the Act, which outlines the specific requirements for lodging a complaint.

“37(2). Where the Commission receives from an undertaking or a registered association of consumers a complaint in writing of such facts as appear to constitute a contravention of the provisions of Chapter II, it shall, unless it is of opinion that the application is frivolous



or vexatious or based on insufficient facts, or is not substantiated by prima facie evidence, conduct an enquiry into the matter to which the complaint relates.”

23.2. The above provision delineates the criteria that must be met to substantiate a valid complaint under the provisions of the Act. This entails a written complaint from an undertaking or a registered association of consumers regarding facts that appears to indicate a violation of the provisions outlined in Chapter II of the Act, the Commission is mandated to conduct an inquiry into the matter. However, this obligation is subject to certain conditions:

23.2.1. Frivolous or Vexatious: If the Commission deems the complaint to be frivolous or vexatious, the Commission may dismiss the complaint.

23.2.2. Insufficient Facts: If the Complaint is not supported by sufficient facts, meaning there is a lack of essential information to support the allegations, the Commission may choose not to proceed with an inquiry.

23.2.3. Lack of Prima Facie Evidence: If the Complaint is not substantiated by prima facie evidence, which refers to evidence that is sufficient to establish a fact or raise a presumption unless rebutted, the Commission may decide not to conduct an inquiry.

24. Upon reviewing the case record, the Bench determines that no disclosure of the redeemable token in the TVC was sufficient evidence to warrant the commencement of an enquiry and subsequent proceedings under Section 30 of the Act. EC was obligated to conduct an enquiry to ascertain whether the promotional content displayed in the Respondent's TVC potentially violates Section 10 of the Act. Consequently, the Respondent's contentions regarding procedural irregularities pursuant to Section 37(2) of the Act in the instant matter are thus unfounded.

PENALTY/DIRECTIONS

25. It is pertinent to mention here that the Commission has considered this matter on three occasions in order to streamline the advertisement of token in the paint bucket. The Commission has given directions to the whole of the market in CCP's Paint Order 2012.

26. At the same time, the Bench is also cognizant of the Respondent's compliance-oriented approach as it has submitted that "...the Respondent has made changes to its TVCs and included a disclosure relating to presence of redeemable tokens." However, despite this compliance-oriented approach, there is established violation by the Respondent of the



provisions of Section 10(1) read with Section 10(2)(b) of the Act. The Respondent is also in non-compliance with the directions contained in the CCP's Paint Order 2012 to which Respondent was a party.

27. The Bench is therefore constrained to impose a penalty of Rs. 5,000,000/- (Rupees Five Million Only). The Respondent shall deposit penalty within 45 days from issuance of this Order and any delay will result in additional penalty of Rs. 10,000/- for each day of delay.

28. The Bench expects the Respondent to refrain from non-compliance of any directions of the Commission and violation of any provision of the Act in future and submit an undertaking to this effect.

29. In view of above, the SCN No.01/2023 is hereby disposed of.

30. It is so ordered.



ISLAMABAD, THE 16th DAY OF AUGUST 2024.