

COMPETITION COMMISSION OF PAKISTAN

ENQUIRY REPORT

(Under the provisions of Section 37(2) of the Competition Act, 2010)

**IN THE MATTER OF COMPLAINT FILED BY M/S DIAMOND PAINT
INDUSTRIES (PVT.) LIMITED AGAINST M/S. BERGER PAINTS PAKISTAN
LIMITED**

FOR
DECEPTIVE MARKETING PRACTICES

BY

 
UROOJ AZEEM AWAN & RIAZ HUSSAIN

DATED: FEBRUARY 17, 2022

1. BACKGROUND:

- 1.1 M/s Diamond Paint Industries (Pvt.) Limited (the “**Complainant**”) filed a complaint against M/s Berger Paints Pakistan Limited (the “**Respondent**”) with the Competition Commission of Pakistan (the “**Commission**”) for alleged violation of Section 10 of the Competition Act, 2010 (the “**Act**”) i.e., deceptive marketing practices.
- 1.2 It has been alleged in the complaint that the Respondent has engaged in making a quantifiable claim regarding one of its products i.e., Berger Super Emulsion as “No. 1 Super Emulsion” without there being any substantiation to support the same. The allegation levelled by the Complainant is not only deceptive for the consumers but is also likely to cause harm to the business of the Complainant, which amounts to, *prima facie*, violation of Section 10(2) (a) & (b) of the Act.
- 1.3 After attaining the preliminary facts, the Competent Authority initiated an enquiry, on 23rd of Sep, 2021, in accordance with sub-section (2) of Section 37 of the Act by appointing Mr. Urooj Azeem Awan, Deputy Director (OFT) and Mr. Riaz Hussain, Assistant Director (OFT) as enquiry officers (collectively the “**Enquiry Committee**”). The Enquiry Committee was directed to conduct the enquiry on the issues raised in the complaint, and to submit the enquiry report by giving its findings and recommendations, *inter alia*, on the following:
 - i. *Whether the conduct of the Respondent is capable of harming the business interest of the Complainant in, prima facie, violation of Section 10(2)(a) of the Act?*
 - ii. *Whether the Respondent is disseminating false and misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the character, properties, suitability for use, and quality of goods in, prima facie, violation of Section 10(1) in general and in particular, Section 10(2) (b) of the Act.*
 - iii. *Whether there is a spillover effect of the conduct of the Respondents?*

2. THE COMPLAINT:

- 2.1 The Complainant is a private limited company registered under the Companies Ordinance, 1984, and engaged in manufacturing high quality decorative and industrial paints in Pakistan and abroad by utilizing modern machinery and innovative processes. Therefore, it is an ‘undertaking’, as defined under clause (q) of sub-Section (1) of Section (2) of the Act. The Act¹ defines the term undertaking as under:

“undertaking means any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply,

¹ https://cc.gov.pk/index.php?option=com_content&view=article&id=60&Itemid=110&lang=en

distribution of goods or provision or control of services and shall include an association of undertakings;"

- 2.2 The Commission holds the mandate under the Act to ensure free and fair competition in all spheres of commercial and economic activity. Section 10 of the Act prohibits 'deceptive marketing practices', which encompasses protection of consumers and competitors from harm caused by the distribution of 'false' as well as 'misleading' information in the process of marketing and advertising campaigns by an undertaking.
- 2.3 The instant complaint has been filed, as on 14th Sep, 2021, against the Respondent, a company incorporated under the laws of Pakistan, with its registered address at 28-KM, Multan Road, Lahore, as it has engaged in anti-competitive practice(s) by making a substantial and quantifiable claim regarding one of its products, i.e., Berger Super Emulsion as No. 1 Emulsion in Pakistan, without there being any independent study/research or report for supporting the same.
- 2.4 The Complaint further alleged that such false/misleading claim has the potential to mislead the ordinary consumer(s) and also likely to cause harm to its competitors. The Respondent has used this marketing claim on its paint buckets as well as the shade cards, which are used by the consumers to select colors/shades. Pictures of shade card and product packaging containing the representation being 'No. 1 Super Emulsion' are attached as **Annex-A**.
- 2.5 The Complainant submitted that the claim 'No. 1 Super Emulsion', used by the Respondent, is not puffery but a false and/or misleading quantifiable claim. That in this regard the Commission has already dealt with such a proposition in the matter of M/s Reckitt Benckiser Pakistan Limited (Order dated January 2012) wherein by relying upon *Nestle USA Report 4263, NAD Case Reports (Jan. 2005)* – Commission decided that claiming the brand or product as No. 1 is not a general but a quantifiable and specific statement, which describes specific characteristics. In the matter of Nestle, wherein the marketing campaign that "*Nescafe delivers brand credibility as the world's No. 1 coffee brand*" was under review – it was held that the claim used in the advertisement by Nescafe was quantifiable; as it could be measured and defined. In this case, the statement was termed as '*substantial claim*' and not '*puffery*'.
- 2.6 The Complainant further submitted that the substantive and quantifiable claim (No. 1 Super Emulsion), made by the Respondent, leaves an impression on the ordinary consumer that the Respondent manufactures the best quality product i.e., Emulsion as compared to its competitors without their being any independent studies/surveys or report for claiming the same. The doctrine of reasonable basis for making the advertisement claim, prior to making it an advertisement, has to be well established. In this regard, the Complainant has highlighted the observation of the Commission in the matter of M/s Protector and Gamble Pakistan (Pvt)



Limited, Order dated February 23, 2021 that *"the concept of reasonable basis... provides that the advertiser must have had some recognizable substantiation for the claims made prior to making it in an advertisement"*.

- 2.7 The Complainant submitted that it is well settled that there must be extensive, comprehensive and uniform nationwide study or survey to support such claims as it was observed by the Commission in another matter of M/s Protector and Gamble Pakistan (Pvt) Limited (Order dated July 20, 2017).
- 2.8 The Complainant highlighted that, without prejudice to the aforesaid above, the Respondent has not even used any visual disclaimers in its advertisement campaign to offset the deception caused by the false and or misleading claim. Even if, it considered that the claim is not false and only misleading, it is still anticompetitive since it does not disclose those independent study/surveys, it has relied upon, in a prominent manner in an advertisement to an ordinary consumer. Such actions amount to a blatant violation of the Competition Law.
- 2.9 The actions of the Respondent constitute a violation of Section 10 (2) (a) (b) &(c) of the Act and therefore, the Commission's intervention is sought on the grounds as follows.
- 2.10 The claim of Respondent, i.e., No. 1 Super Emulsion is not puffery but is a specific assertion or statement of fact as to its position in the relevant market without there being any reasonable basis. The statement of the Respondent is quantifiable, specific, factually inaccurate and misleading which constitute a blatant violation of Section 10 of the Act. Reliance is placed on the Commission's earlier decision in a similar matter of *M/s S.C. Johnson & Son Pakistan Limited*, dated 20 January 2012 wherein it was held that *"it is sufficient to establish that advertisement has the tendency and capacity to mislead and actual deception is not needed to be shown. This includes where the undertaking concerned disseminates only half the truth, and omit the rest. This may occur where the seller fails to disclose the qualifying information necessary to prevent one of his affirmative statements from creating a misleading impression which may lead to making of a transaction decision by the consumer"*.
- 2.11 The claim of Respondent has potential to create a misleading impression on the ordinary consumers as to the quality of its product which may result in choosing to buy the Respondent's emulsion as opposed to the emulsion produced and sold by other competitors and will ultimately result in causing harms to the profits of its competitors. It is well settled law that to prove conduct under Section 10 (2) (a) of the Act, it is sufficient to show the existence of deceptive marketing practices that has a potential to cause harm to the competitors as opposed to actual harm.

- 2.12 The ordinary consumer is being deceived due to false and/or misleading claim of the Respondent as to the quality, properties and character of emulsion. The Respondent's intent behind making such a false and/or misleading claim was to deceive the ordinary consumer. The Commission in its Order dated 29 September, 2009, in the matter of *M/s China Mobile Pakistan Limited and Pakistan Telecom Mobile Limited*, for purpose of Section 10 (2) (b) of the Act, said that the threshold set for consumer is that of an ordinary consumer and not a prudent man. In the market for paints where an ordinary consumer may be house owner will make its transactional decisions on the basis of such false or misleading claims i.e., No. 1 Super Emulsion, to buy the Respondent's emulsion.
- 2.13 The Respondent has claimed that its emulsion is No. 1 in its marketing campaign and has created a misleading comparison of goods which is a violation of Section 10 (2) (c) of the Act. The Respondent has made comparison, by making a claim, i.e., No. 1 Super Emulsion, with other emulsions in the paint market which is false as it is not based on any independent study/survey. The ordinary consumer will see such claim as a comparison between the Respondent's emulsion and other emulsions in the market and will make a transactional decision on the same basis. Such misleading comparison constitutes a violation of Section 10 (2) (c) of the Act.
- 2.14 The Complainant respectfully prayed that:
- The proceedings against Respondent may kindly be initiated for violation of Section 10 of the Act, i.e., deceptive marketing practices;
 - The Commission may, in the interim, restrain the Respondent from using claim, i.e., No. 1 Super Emulsion in its marketing campaign;
 - Direct the Respondent to commit on record before the Commission that it will not engage in any anti-competitive activity in the future ;
 - Any other relief deemed fit and appropriate by the Commission may also be granted.

3. SUBMISSIONS OF THE RESPONDENT:

- 3.1 The complaint was forwarded to the Respondent by the Enquiry Committee for comments on September 28, 2021. However, the Respondent, through its counsel, requested an extension vide letter dated October 12, 2021. The extension was granted till October 25, 2021 through a letter dated October 12, 2021. The Respondent, vide letter dated October 25, 2021, once again requested for extension in time which was granted till November 01, 2021. The Respondent finally submitted its comments, through its authorized representatives Allied Legal Services, Advocates and Legal Consultants through letter dated November 01, 2021, the contents of which are reproduced below.
- 3.2 That the Respondent is a leading paint manufacturing company in Pakistan which started its operations in Pakistan in 1950 and was the first organized Paint Company to offer premium



products through import from the United Kingdom. The local manufacturing facility was established in Karachi in 1955 and expanded its business gradually.

- 3.3 The Respondent submitted that the complaint under reply is false and frivolous and had been filed with mala fide intent to defame the Respondent and its product "Berger No. 1 Super Emulsion". The Respondent submitted that it has in no point of time claimed that its product was 'Pakistan No. 1' product.
- 3.4 That the Complainant in sheer contrast to allegations levelled against the Respondent is himself falsely claiming that it is "Pakistan No. 1 Paint" and violating Section 10 of the Act. The Complainant's false claim, Pakistan No. 1 paint, was being aired on electronic media and also portrayed at its official website, Facebook page and other merchandizing material. The Respondent reserves the right to file complaint before the Commission in this regard and take other remedies available under the law. The Complaint is not based on true facts and has been filed to harass and blackmail the Respondent. The Complainant, on its failure to compete with the Respondent in the open market has filed this false and frivolous complaint which is liable to be dismissed.
- 3.5 Moreover, the Complainant has tried to put in a false and misleading impression that the Respondent's product seeks to make a substantial and quantifiable claim that it's "Emulsion is No. 1 in Pakistan". The Respondent denied any such assertion being incorrect. The Respondent submitted that a bare reading of the logo clearly spells out "Berger No. 1 Super Emulsion" and repels any such allegation, assertion or declaration made by Complainant. Hence, the complaint being frivolous needs to be dismissed on this ground alone.
- 3.6 That the Complainant had also moved a copyright application before the Intellectual Property Organization, Pakistan (IPO) by the name of 'Diamond No. 1 Super Emulsion'. Similarly, the Respondent had also moved an application for registration of its trademark in the name of 'Berger No. 1 Super Emulsion'. The above application suggests that the same is a brand name and does not qualify as a quantifiable claim or in any manner signifies, demonstrates, implies or gives an impression that the product is "No. 1 emulsion in Pakistan". Hence, allegation of deception is baseless and therefore needs to be dismissed on this ground.
- 3.7 That the Complainant has tried to create a false impression before the Commission that consumers are being misled by the figure "No. 1". The Respondent submitted that the prevailing image on top of the product, also a leading brand name of sales of such product, is Berger and the Complainant has tried to segregate the brand name 'Berger No. 1 Super Emulsion' and created a confusion by figure out the term 'No. 1 Super Emulsion' separately.
- 3.8 That it is established law that complete advertisement has to be looked at while evaluating its alleged misleading and false nature and an opinion is to be formed on the net general



impression conveyed by it and probability of deception has to be looked into. Moreover, for deception to occur there must be a practice which is likely to mislead the consumers and that deception must be material. The logo displayed in the product does not deceive the consumers or create general impression that violates Section 10 of the Act. Reliance placed on 2021 CLD 484 and 2019 CLD 37.

- 3.9 That it is also a settled law that question of dilution, ordinary or secondary meaning or words or phrases used in a trademark/trade dress falls outside the realm of Section 10 of the Act, hence, complaint is liable to be dismissed. Reliance is placed on 2019 CLD 37.
- 3.10 That provision of Section 10(2) (a) of the Act constitutes two main ingredients, i.e., (1) there must be dissemination of false or misleading information and (2) the information must be capable of harming another's business interest and violation of said provision occurs when both of the elements/ingredients exist. The complaint under reply lacks the aforementioned two ingredients, hence, the Commission lacks the jurisdiction in the matter in hand and the complaint is liable to be dismissed.
- 3.11 That the Complainant has failed to establish that while using the name of emulsion "Berger No. 1 Super Emulsion" the Respondent has ability to influence the consumer and in turn increased its sales, hence, question of possibility to influence consumers by the Respondent does not exist. The ordinary person would not be deceived when the trademark, i.e., 'Berger No. 1 Super Emulsion', name of product, is seen as whole.
- 3.12 That it is settled law that any part of name of product cannot be judged separately from its complete name rather the same should be judged and considered as a whole and the totality of impression made on purchasers of the goods in question and said only factum would be the determining factor. Reliance is placed on 1989 MLD 1137.
- 3.13 That the mala fide of the Complainant may be gauged from the fact that M/s No. 1 National and Tower Paints has been engaged in manufacturing number of emulsions and other paints in the following names:
- i. No. 1 National Weather Shield
 - ii. No. 1 National Silk Emulsion
 - iii. No. 1 National Emulsion
 - iv. Etc.

However, the Complainant, on account of fear of its failure to compete with the Respondent in the market, has filed the complaint only against the Respondent and not against the No. 1 National and Tower Paints.

- 3.14 The Respondent further submitted that without conceding anything it is humbly submitted that if this Commission finds that name of the Respondent's product, i.e., Berger No. 1 Super



emulsion misleading or in violation of any law, the Respondent is ready to discontinue the use of said product name or change the same as per instructions/directions of the Commission.

- 3.15 The Respondent denied that the Complainant has been manufacturing high quality decorative and industrial paints in Pakistan and internationally by using modern machinery and innovative processes while abiding by international standards. The Respondent submitted that the same needed to be proven with evidence.
- 3.16 That the Commission is competent to initiate proceedings only when any violation of the Act, Rules and Regulation made there under has been committed. The jurisdiction of the Commission has been denied in the peculiar facts and circumstances of the present case as the Complainant has not substantiated the basic elements of Section 10 (2) (a) of the Act. The Respondent further submitted that the question of dilution, ordinary or secondary meaning of word or phrases used in a trademark/trade dress also falls outside the realm of Section 10 of the Act.
- 3.17 The Respondent denied that it has made any substantial or quantifiable claim that its emulsion is No. 1 Super Emulsion in Pakistan. A bare reading of the logo clearly spells out ‘Berger No. 1 Super Emulsion’ and repels any allegation, assertions or declaration made by the Complainant. It has also been denied that the Respondent has made any misleading advertisement and/or false claim regarding its emulsion product ‘Berger No. 1 Super Emulsion’ being No. 1 in the market and used the said slogan on its paint buckets as well as on the shade cards in relation thereto.
- 3.18 The Respondent submitted that *ration decidendi* of Order, in the matter of Reckitt Benckiser Pakistan Limited dated January 20, 2012, quoted by the Complainant is not attracted in the present case, since it prohibited/reprimanded use of the words “No. 1 in Pakistan”, which is not the case here as the Respondent has not made any misleading and/or false claim.
- 3.19 That the Complainant has misquoted the name of the product and insisted on using the words “No. 1 Super Emulsion” while the complete logo is “Berger No. 1 super emulsion”. A reading of the logo by an ordinary consumer does not give any impression of false and misleading information. Although, the impression of the best quality product has been given by the internationally acclaimed brand name Berger. The Respondent has not made any substantial and quantifiable claim that its emulsion is No. 1 emulsion in Pakistan and *ration decidendi* of Orders dated 20-07-2017 are not attracted in the present case.
- 3.20 With regards to the allegation of false or misleading quantitative claim, the Respondent denied and submitted that the logo on the product is not a quantifiable and specific claim and does not violate Section 10 of the Act or any Rules, Regulations made thereunder. The Respondent



further submitted that there was no specific assertion of facts as to its position in the relevant market without reasonable basis.

- 3.21 With regards to the allegation of false and misleading claim, which is capable of harming the business interest of another undertaking in violation of Section 10 (2) (a) of the Act, the Respondent denied and submitted that any allegation relating to creation of misleading impression on the ordinary consumer as to quality of product and harming the profits of the competitors, including the Complainant has been denied.
- 3.22 The Respondent denied that it has engaged in deceptive marketing practices which have a potential to harm the business interest of the Complainant or has made any false/misleading claim regarding its emulsion paint ranking in market.
- 3.23 With regards to the allegation of false or misleading information to the consumers, including the information lacking a reasonable basis in violation of Section 10(2) (b) of the Act, the Respondent denied the allegation and submitted that it has not been involved in any false/misleading marketing campaign/slogan which mislead the consumers as to the quality, properties and character of the product namely Berger No. 1 Super Emulsion. The Respondent reiterated that Berger is a brand name, and this image of 'Berger' is what the consumers look for while buying the product instead of looking at the figure "No. 1", which does not have any impact on the consumers.
- 3.24 With regards to the allegation of false/misleading comparison of goods in the process of advertisement, which constitutes violation of Section 10 (2) (c) of the Act, the Respondent vehemently denied and submitted that logo of the product, in any way, does not create a false/misleading impression. The Respondent also denied the allegation of false comparison between the products of the Complainant and Respondent.

4. REJOINDER:

- 4.1 The Respondent's reply was forwarded to the Complainant for a rejoinder vide letter dated November 02, 2021. The Complainant vide letter dated November 08, 2021, requested for extension till November 26, 2021 to submit rejoinder, which was duly granted. The said rejoinder was received through a letter dated November 26, 2021, the contents of which are summarized in the following paragraphs.
- 4.2 That the Respondent's reply contains baseless assertions without any legal backing and irrelevant to the proceedings under the Act. It was further submitted that the Respondent has failed to justify the use of the representation (i.e. No. 1 Super Emulsion), which is false and/or misleading and amounts to deceptive marketing practices in violation of Section 10 of the Act.



- 4.3 That the whole reply of the Respondent revolves around the two following arguments and the representation of same arguments time and gain; (i) 'No. 1 Super Emulsion' is not a substantial and quantifiable claim but only a name of the Respondent's product and its trademark; (ii) the Respondent never intended to claim its product as No. 1 within the relevant market. With respect to the first argument, the Complainant submitted that registering such representation as trademark neither absolves the Respondent of their liabilities and responsibilities under the Act nor it bars the jurisdiction of the Commission.
- 4.4 That the Commission in various matters have held trademarks (registered or not) to be deceptive and violating the Competition law. The Complainant denied that Respondent did not have any intention to give an impression to the ordinary consumer that its product is No. 1 or best as compared to the competitors. The Complainant alleged that the Respondent very shrewdly got such representation registered as trademark so they could misuse it. The Respondent did not mention 'Berger No. 1 Super Emulsion' in a manner that would give the impression that it's just the name of the product. Instead, the Respondent has mentioned 'No. 1 Super Emulsion' in a different color, large font and separately from the word 'Berger' to mislead and deceive the consumer as to the quality and characteristics of the product.
- 4.5 Moreover, even if such a representation or statement is a registered trademark it is still violating the Competition Law since the Respondent has disseminated only a half-truth and has omitted the rest. In this regard, a disclaimer should have been printed that 'No. 1 Super Emulsion' is the name of product and not a claim related to the quality and character of the product. Such omission directly impacts the consumers' decision-making power and hinders the consumers' ability to make an informed decision².
- 4.6 The Complainant submitted that the Respondent has denied all the grounds mentioned in the complaint solely on the basis that it never intended to disseminate such false and/or misleading representation in order to mislead. Without prejudice to the above, not specifically claiming its product as No. 1 may fall outside the scope of 'express claim' and misleading 'representation' but it is still covered under the definition of 'implied claim' and misleading representation because such representation gives an impression to ordinary consumer as to the quality and characteristics of the product. The Complainant submitted that intention to disseminate the false and misleading representation is immaterial. It is well settled law that neither proof of intent to disseminate a deceptive claim nor evidence that consumers have actually been misled is required for an act or omission to constitute violation under Section 10 of the Act³.

² *M/s Reckitt Benckiser Pakistan Ltd., 2016 CLD 40; International Harvester Co., 104 F.T.C 949 t pg. 1058; Cliffdale Associates, Inc., 103 F.T.C 110, (1984)*

³ *Irshad Trading Corporation; 2021 CLD 78*



- 4.7 The Complainant has also highlighted that for the purpose of Section 10 of the Act, actual deception does not need to be shown to meet the burden of proof. It is sufficient to establish that the advertisement has the tendency to deceive and capacity to mislead⁴.
- 4.8 The Complainant further rebutted and highlighted that no strict proof of actual harm caused to the competitors is required for determination of a contravention of Section 10 (2) (a) of the Act. It is enough to prove that the misleading and false information published by the undertaking has the tendency to harm the business of its competitors⁵.
- 4.9 That the net general impression created, of the claim “No. 1 Super Emulsion” is that Berger’s super emulsion product is No. 1 in the relevant market. It has further been submitted that where the net general impression of the claim is considered, the requirements of disclaimers and disclosures that may influence the consumers’ choice are crucial.
- 4.10 With respect to the counter allegation of the Respondent as to the claim of “Pakistan’s No. 1 National Selling Brand or “Pakistan’s No. 1 Paint”, the Complainant submitted that its annual net sales are more than any other paint company (either national or multinational) operating in Pakistan. The Complainant submitted that the same could be verified from the publicly available financial/audited report including Securities and Exchange Commission of Pakistan records of all the paint companies. Moreover, the Complainant, with such marketing slogan, has mentioned a clear disclaimer which contains qualifying information regarding such marketing slogan. The disclaimer has been mentioned in the following words: “*Source Publicly available financial data of paint companies for 2019 including SECP records.*”
- 4.11 That the Complainant does not need to justify its marketing campaign in the current proceedings before the Commission since the complaint was lodged by the Complainant against the Respondent. However, all the above-mentioned information with regards to its marketing campaign has been provided in a good faith. Moreover, if the Respondent party is aggrieved by any such claims made by the Complainant, they may file a separate complaint before the Commission in that regard. Such so-called grievance of the Respondent does not merit indulgence without enquiry by the Commission and while requiring into the titled complaint.
- 4.12 The Complainant denied the preliminary objection raised by the Respondent and submitted that on the advertisement material and both the impression created as well as the representation made is No. 1 Super Emulsion as substantiated from the advertisement material. The Complainant has also denied that “Berger No. 1 Super Emulsion” is a trademark

⁴ M/s Reckitt Benckiser Pakistan Ltd. For Deceptive Marketing Practices; 2016 CLD 40

⁵ 2020 CLD 995

and not a claim pertaining to quality and characteristics of the product. The Complainant submitted that the word Berger has been written on top of the paint bucket and 'No. 1 Super Emulsion' has been mentioned separately to give an impression to ordinary consumer that the Respondent's product is No. 1, which is a substantive and quantifiable claim. The Complainant further mentioned that it is a settled law that while examining the advertisement, 'net general impression' or dominant message is to be considered.

- 4.13 Moreover, it doesn't matter whether the Respondent intended to claim their product as No. 1 or unintentionally deceived the consumer. It is well settled law that all representations, whether intentionally or unintentionally, if had the likelihood to influence one's conduct, thought or judgement, or had the potential to misinform or misguide due to vagueness or omissions, are materially misleading and constitute a violation of the Act. The Complainant further submitted that if the Respondent did not want to leave an impression on an ordinary consumer that its product (i.e., Super Emulsion) is No. 1, it could have added a disclaimer regarding the same. Whereas, the disclaimer and/or information that the representation is only a brand name has been omitted which is a deceptive marketing practices in itself and constitutes a violation of Section 10 of the Act.
- 4.14 That the Respondent has failed to understand that claim of being No. 1 is not itself anti-competitive and constitutes violation of Section 10 of the Act. However, not having any independent studies/surveys or report to support such claim is anti-competitive. As reference, the Complainant has mentioned its own marketing campaign, i.e., 'Pakistan No. 1 Selling Brand', based on highest sales record for the year 2019. The Complainant submitted that it had added disclaimer for the consumers to know the reason behind making such marketing slogan, i.e., *publicly available financial data of paint companies for 2019 including the SECP records*.
- 4.15 That in fact the Respondent is unable to compete in the relevant market and therefore has made false and/or misleading claims and is not only deceiving an ordinary consumer but also harming the business interest of its competitors(s). The Respondent has mentioned the statement No. 1 emulsion separately from its brand name 'Berger' to deceive the consumer as to the quality and character of the product based on false and/or misleading impression.
- 4.16 That the Respondent lacks the basic understanding of the competition law and that it is a well settled law that neither proof of intent to disseminate a deceptive representation/claim nor evidence that consumer have actually been misled is required for an act or omission to constitute violations of Section 10 of the Act.
- 4.17 The Complainant submitted that the Respondent's reliance upon 2021 CLD 484 has been misplaced as the decision was not in its favour. Moreover, it is a mandate of the Commission



to decide what the 'net general impression' is of the advertisement from an ordinary consumer's perspective and not from the Respondent's perspective. The reasons, provided by the Respondent, behind making such claim does not matter, the only thing that matters is whether the advertising material has the potential to deceive an ordinary consumer and a potential to harm the business interest of its competitors.

- 4.18 In response to Para 3.9 *ibid*, the Complainant submitted that the Respondent's reliance upon 2019 CLD 37 is misplaced, and it has failed to provide analysis and reasoning as to whether the aforementioned case is applicable to the current set of circumstances. The Respondent has only cited the case without explaining the case and details as to how the question of dilution, ordinary or secondary meanings of words or phrases used in the trademark/trade dress are relevant to the matter in hand. In the aforementioned matter, the Commission restrained the undertaking from explaining the meanings of their trademarks and asked them to argue the matter to the extent of deceptive marketing practices.
- 4.19 The Complainant denied the objections raised in Para 3.10 *ibid* and submitted that the Respondent has denied the contents of the complaint in its entirety, however, did not prove as to how the complaint lacks basic ingredients to file a complaint for violation of Section 10(2)(a) of the Act. The Respondent's use of slogan (i.e., No. 1 Super Emulsion) is not only false since it lacks independent study/surveys to support such claim but also has the potential to create a misleading impression on the ordinary consumer as to the quality and character of the product which may result in choosing to buy the Respondent's product as opposed to its competitors. Use of such statement (No. 1 Super Emulsion) would generally or is likely to get the Respondent a competitive edge enhancing the market share and the Complainant would be denied the market share which otherwise would have been gained by the Complainant. The Complainant reiterated that to prove the conduct under Section 10(2) (a) of the Act, it is sufficient to show the existence of deceptive marketing practices that has a potential to cause harm to the competitors.
- 4.20 In response to the submission vide Para 3.12 *ibid*, the Complainant submitted that the judgement referred by the Respondent is completely irrelevant to the matter at hand. The Respondent is very shrewdly trying to get away from their responsibility to act fairly in the relevant market by mixing up the proceedings at hand with the trademark dispute which is neither relevant nor binding upon the Commission.
- 4.21 The Complainant denied the content of Para 3.13 *ibid* and submitted that not filing complaint against No. 1 National and Tower Paints substantiates the mala fide of the Complainant. Such use of false and/or misleading representations by other paint manufacturers doesn't justify the Respondent's deceptive marketing practices. Moreover, it is within the mandate of the Commission to initiate proceedings against No. 1 National and Tower Paints if the



Commission is of the view that such practices are prohibited and falls under Section 10 of the Act. The Complainant further submitted that without prejudice to the above, it may kindly be noted that No. 1 National and Tower Paints is the name of the entity and does not give an impression to the ordinary consumer that an entity is claiming their products as No. 1 and best as compared to its competitors. Whereas, Respondent's representation, i.e., No. 1 Super Emulsion on advertisement material and packaging clearly amounts to deceptive marketing practices. The reason being that it has been mentioned in a very specific manner which gives an impression to ordinary consumer that the Respondent product is best as compared to the competitors. Furthermore, registration of "Berger No. 1 Super Emulsion" as trademark does not absolve the Respondent from their liabilities and responsibilities under the Act.

- 4.22 The Complainant has appreciated the submissions of the Respondent wherein it had admitted to stop using such false and misleading representation if the Commission reach the conclusion that such representation amounts to deceptive marketing practices.
- 4.23 The Complainant reiterated that proof of intent (on part of Respondent) to disseminate a deceptive claim is not required for the acts or omissions to constitute violation of Section 10 of the Act. It does not matter whether or not the Respondent intended to claim their product as No. 1 – the impression of such representation is what the Commission has always been considered about. The Respondent time and again has failed to understand that it is not their intension that matters – it is the impression that representation leaves on an ordinary consumer. The use of word "No. 1" itself is substantive and quantifiable claim and since the Respondent has not used No. 1 in Pakistan does not absolve them of liability to prove through independent reports and provide reasonable basis for claiming the same.
- 4.24 The Complainant submitted that the Respondent does not mention 'Berger No. 1 Super Emulsion' in a manner that it seems like it's the name of product, whereas, it has printed/mentioned No. 1 Super Emulsion separately from the word 'Berger' and in a much bigger font size to leave the wrong impression on the consumer and mislead them. The Complainant denied that prevailing image on the advertisement material is Berger and the consumer only sees the Respondent's name while buying a product. This assumption has no legal basis in the competition law. The Respondent has its own understanding of competition law and consumer's prospective.

5. REPLY TO REJOINDER:

- 5.1 The rebuttal of Complainant was forwarded, dated December 03, 2021, to the Respondent for further comments on facts of the matter, revealed by the Complainant through its rejoinder. The Respondent, vide letter dated December 09, 2021, requested for an extension of ten (10) days to file its comments which was granted accordingly. On December 22, 2021, the Respondent filed its comments which have been summarized below.



- 5.2 The Respondent further submitted that under Section 37 of the Act the Commission, on its own, has the power to conduct inquiries into any matter relevant to the purposes of this Act. The Complainant, in its rejoinder, has asserted that it needs not to justify its own marketing campaign slogan of being *“Pakistan’s No. 1 Paint”* in the current proceedings before this Commission. A perusal of the above Section gives the Commission a clear mandate to conduct inquiries against an undertaking *sans* any formal complaint. The Respondent submitted that it had already provided sufficient grounds to the Commission to take action against the Complainant as per law, and any such inaction on part of the learned Commission in this regard would be discriminatory and violating Article 25 of the Constitution of Islamic Republic of Pakistan, 1973.
- 5.3 The Complainant had stated in its Rejoinder that while dealing with the inquiry initiated on the Complainant’s Complaint against the Respondent, the Commission doesn’t have jurisdiction to enquire into the allegations levelled by the Respondent in its Reply to the Complaint. However, on the basis of information provided by the Respondent in its Reply to the Complaint, the Complainant stated that *“it is within mandate of the learned Commission to initiate proceedings against ‘No. 1 National and Tower Paints’ which speaks volume about mala fide of the Complainant.*
- 5.4 The Complainant has tried to justify its use of marketing campaign/slogan *“Pakistan’s No. 1 Paint”* by stating that its annual net sales were more than any other paint company in Pakistan. The Complainant stated that it was using *“the No. 1 National Selling Brand”* before year, 2019 which was based upon the comparison of its annual net sales within its local/national competitors. It had further asserted that post year, 2019, it changed its marketing slogan from *“The No. 1 National Selling Brand”* to *“Pakistan’s No. 1 Paint”* since it did not only defeat national competitors but multi-national competitors in its annual net sales and thus became *“Pakistan’s No. 1 Paint”*. It has further asserted that the marketing campaign slogan clearly mentions the disclaimer in the following words: *“Source: “Publicly Available Financial Data of Paint Companies for 2019 including SECP Records”*. The said assertions are vehemently denied on the following:
- i) If the assertion of the Complainant that its marketing campaign slogan of *“Pakistan’s No. 1 Paint”* is based on its annual net sales being more than any other paint company in Pakistan, then this marketing campaign slogan is misleading and unlawful as the same gives an impression to the general public that it is the best paint in quality and does not give any impression that it is best in terms of net sales.
 - ii) Without prejudice, the use of its marketing campaign slogans by the Complainant *“The No. 1 Selling National Brand”* and *“Pakistan’s No. 1 Paint”* were both allegedly



based on the reasoning that the annual net sales were more than any other paint company, the only difference been that the earlier slogan was used when its net sales were best in the Country and under later slogan is being used on the alleged premise that its net sales are best in Pakistan. It is submitted that although the earlier slogan may be justified because its annual net sales were more than any other paint company in the Country; however, the later slogan "Pakistan's No. 1 Paint" could not be justified on this basis, since it refers to the Complainant's paint being No. 1 in quality and not in net sales. Hence, the act of Complainant linking the later slogan with its net sales is misleading, unjustified, illegal and unlawful.

- iii) The Complainant has asserted that it has used a disclaimer "*Source: "Publicly Available Financial Data of Paint Companies for 2019 including SECP Records"*". It has been submitted that this disclaimer does not mention or points out to the alleged fact that the Complainant's annual net sales were more than any other paint company in Pakistan and therefore, remains misleading, inadequate and insufficient. Kindly note that the advertisements provided by the Respondent in its Reply to the Complaint clearly suggest that no such disclaimer was ever mentioned with the marketing campaign slogan, "Pakistan's No. 1 Paint". It has further been submitted that the Complainant aired a recent commercial of its product during the *T-20 Cricket World Cup 2021* claiming it to be Pakistan's No. 1 Paint but no disclaimer was published thereby and it is only after the Reply to the Complaint was filed by the Respondent that such a disclaimer was inserted.

- 5.5 The Complainant has asserted that no disclaimer has been published by the Respondent while using name of its product "Berger No. 1 Super Emulsion". It is submitted that the Respondent is merely using its name while selling its product and has at no point claimed that its product is "Pakistan's No. 1 Paint". The contents of reply to the complaint are reiterated.
- 5.6 The Complainant has tried to create an impression that use of Respondent's name i.e. Berger No.1 Super Emulsion, misleads the consumers choice. The Complainant has stated that "No. 1 Super Emulsion" is in different colour, font and separately from the word "Berger" which misleads and deceive the end consumer. It may kindly be noted that the word "Berger" is used in large capitalized font which is conspicuous and clear in the first sight and does not give any impression that the end consumer would be deceived or misled in any manner whatsoever.
- 5.7 The Complainant in its rejoinder Rejoinder/Replication has tried to defend that "No. 1 National and Tower Paints", does not give an impression to an ordinary consumer that its products are No. 1 and best as compared to its competitors. This strengthens the case of the Respondent, as submitted earlier, that on account of its failure to compete with the Respondent in the market, the Complainant has only targeted the Respondent and not No. 1 National and Tower Paints



and similar other competitors. This speaks highly of *mala fide* intention of the Complainant while filing the instant Complaint.

- 5.8 The Complainant has asserted twice that the Respondent lacks basic understanding of Competition Law. This self-conceited and arrogant statement of the Complainant is strongly refuted and any inference that only the Complainant has the capacity to understand the Competition Law is vehemently denied. The advertisements annexed by the Respondent with its reply clearly demonstrate that the Complaint filed is based on *mala fide* intent with fear of competition, hence trying to monopolize and harass the Respondent.
- 5.9 Without prejudice it has been submitted that the Complainant has asserted that its annual net sales are 1 Billion Rupees more than the Respondent's annual net sales, hence, it is justified in using the slogan "Pakistan's No. 1 Paint". It has further been submitted that the Respondent is a public listed company and its accounts are available to public at large. Conversely, the complainant is a private limited company, having confidential accounts which are not available to the Respondent, therefore, such a claim couldn't be verified and Complainant is put to its strict proof.
- 5.10 Without prejudice, the Complainant has asserted that the back side of the paint bucket submitted to the Commission states only "No. 1 Super Emulsion". In this regard it has been submitted that the Respondent has clearly used the word "Berger" in bold and capitalized font on front of the bucket and the words "No. 1 Super Emulsion" on the back of the bucket are a continuation of the same. It has further submitted that the consumer cannot miss the fact while purchasing a product that what they are purchasing, hence, there is no question that the consumer could be misled in any manner or the Respondent has acted illegally.
- 5.11 The Respondent, once again, requested that the complaint may be dismissed with exemplary cost and also request for any other relief which the Commission deems just and appropriate.

6. ANALYSIS

- 6.1 The Enquiry Committee was given the mandate to conduct an enquiry regarding the issues raised in the complaint, and to submit the enquiry report by giving its findings and recommendations, *inter alia*, on the following issues:
- Whether the conduct of the Respondent is capable of harming the business interest of the Complainant in, prima facie, violation of Section 10 (2) (a) of the Act?*
 - Whether the Respondent is disseminating false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the character, properties, suitability for use, and quality of its products in,*



prima facie, violation of Section 10 (1) in general and in particular, Section 10 (2) (b) of the Act.

iii. *Whether there is a spillover effect of the conduct of the Respondent?*

- 6.2 Before moving forward, it is necessary to establish the difference between false and misleading information. The Commission, in its order held against **M/s CMPak Limited**⁶, has defined “**False**” and “**Misleading**” information as deceptive marketing practices in the following manners:

False Information:

‘False information’ can be said to include: oral or written statements or representations that are; (a) contrary to truth or fact and not in accordance with the reality or actuality; (b) usually implies either conscious wrong or culpable negligence; (c) has a stricter and stronger connotation, and (d) is not readily open to interpretation.

Misleading Information:

“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.”

- 6.3 The above reference suggests that any information disseminated as part of a marketing practice can mislead consumers if it is vague in any way or has omitted certain information, even if such a conduct is not deliberate. Consequently, distribution of misleading information is capable of giving a wrong impression with respect to a good or service which could induce a consumer into distorted decision making, hence, causing consumer injury, amounting to deceptive marketing practices in terms of Section 10 (2) (b) of the Act.
- 6.4 Similarly, any information distributed via marketing campaign, which results in the flow of business/economic value away from a competitor/s or helps gain an undeserved competitive advantage in the market, thereby harming business interest of other undertakings, amounts to deceptive marketing practices in terms of Section 10 (2) (a) of the Act.
- 6.5 The alleged product in the complaint is an emulsion paint produced by the Respondent. The Complainant has submitted that the Respondent is allegedly violating Section 10 of the Act through displaying the claim ‘**No. 1 Super Emulsion**’ and ‘**No. 1 Emulsion in Pakistan**’, on its paint container and shade card/brochure.

⁶ <http://cc.gov.pk/images/Downloads/ZONG%20-%20Order%20-%2029-09-09%20.pdf>

- 6.6 Emulsion paint is a water-based paint, which contains small polymer particles that have pigments inside. The particles containing pigment are suspended in water. After the paint dries, the particles combine, producing a film of paint on the wall. Emulsion paint can be used for the exterior as well as the interior of the house⁷.
- 6.7 There are about 20 organized and 110 unorganized producers in the Pakistani paint industry including multinational paint producers such as AkzoNobel, Jotun, Kansai, Nippon and local companies such as Buxly, Brighto, Diamond, Happilac, Master and Nelson.⁸
- 6.8 In continuation of Para No. 6.5 above, it is necessary to be clarified that none of the supplementary evidence by the Complainant corroborates with the alleged claim '**No. 1 Emulsion in Pakistan**'. The evidence provided by the Complainant only contains the claim '**No. 1 Super Emulsion**'. Therefore, this enquiry report will not discuss the allegation '**No. 1 Emulsion in Pakistan**' any further as it is found lacking substantial evidence.

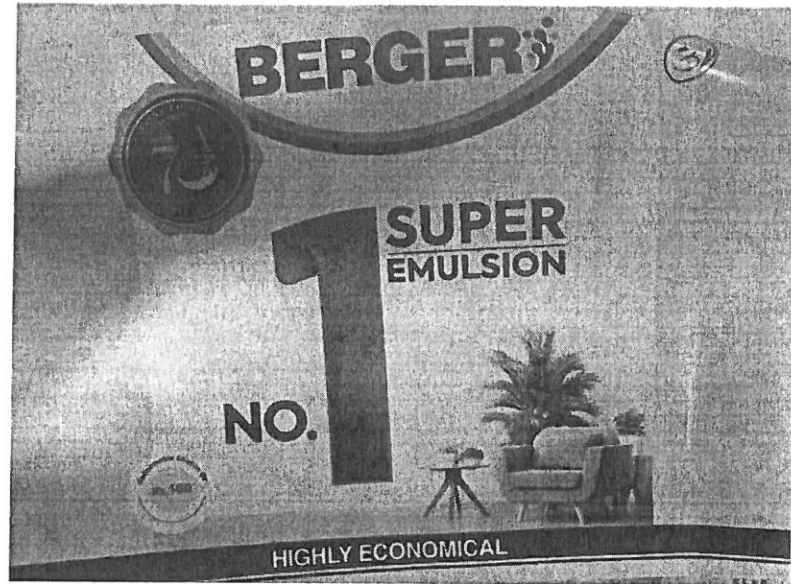
I. Whether the conduct of the Respondent is capable of harming the business interest of the Complainant in, prima facie, violation of Section 10 (2) (a) of the Act?

- 6.9 Based on the preceding paragraphs, we will now draw an analysis of the allegation levelled by the Complainant against the Respondent in light of the Section 10 (2) (a) of the Act.
- 6.10 The Complainant has submitted the paint bucket and shade card/ brochure of the Respondent's product as supplementary evidence along with the complaint.
- 6.11 As can be seen from the image reproduced herewith, the Respondent's paint bucket has the brand/firm name 'Berger' at the top of the bucket in bold capital letters followed by an oversized number '1' in red color as a prominent figure on the packaging. The number '1' is accompanied by the words 'Super Emulsion' in a much smaller font than the number '1' itself.

⁷ <https://indigopaints.com/blog/what-is-emulsion-paint/#:~:text=Emulsion%20paint%20is%20water%2Dbased,particles%20that%20have%20pigments%20inside.&text=After%20the%20paint%20dries%2C%20the,the%20interior%20of%20the%20house.>

⁸ <https://www.coatingsworld.com/issues/2018-11-01/view india asia pacific reports/overview-of-paint-coatings-industry-in-pakistan/>





- 6.12 Similarly, the shade card/ brochure of the alleged product has somewhat similar representation to that of the paint bucket, where the firm name/ brand name is displayed at the top with the phrase 'No. 1 Super Emulsion' at the bottom. The number 1 is displayed in a font much larger compared to the rest of the phrase, just as on the paint bucket. The same can be viewed in the image below.



- 6.13 From the perspective of an ordinary consumer, the number '1' on both the paint bucket and the shade card/ brochure takes away the vision from other elements of the packaging. It has been shown in the largest and boldest of the font compared to the rest of the phrase. Moreover, where the rest of the words on the packaging are displayed in tones of blue to match the firm name/ brand name on the packaging, the number '1' has been displayed in red, which has the

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longest wavelength than any other color⁹. This means that the number 1 on the packaging catches the eye of the observer first and foremost, and due to the size of the font, may hold the eye the longest.

- 6.14 Therefore, the most highlighted element on the packaging and the takeaway from the overall image is the 'No. 1'. Hence, in the eye of an ordinary consumer, the same may appear to be implying that the product holds exemplary position regarding a certain property or is ranked first in the overall market.
- 6.15 The Respondent argued in its submissions that the words 'Berger No. 1 Super Emulsion' is its brand name is especially designed for this particular product and that the same has been applied for registration under the relevant copyright and trademark laws with the Intellectual Property Organization - Pakistan (IPO-Pakistan). The Respondent further submitted that the dilution, ordinary and secondary meaning of the trademark/ copyright does not pertain to the jurisdiction of the Hon'ble Commission.
- 6.16 However, for the purposes of this Enquiry Report, the matter is being merely analysed as to the deception, which the marketing content of the Respondent may or may not be causing. The Commission is mandated to ensure free and fair competition in the market. The analysis of marketing practices of undertakings for finding elements of deception, which may distort the competition in the overall marketplace falls well within the mandate of the Hon'ble Commission.
- 6.17 Moreover, the mandate of this enquiry does not entail the deciphering of the dilution, ordinary and secondary meanings of the brand name of the Respondent. Neither is the determination of right in terms of intellectual property a concern of this enquiry report. The enquiry report is limited to the collection and presentation of facts regarding, *prima facie*, deceptive marketing practices, as alleged by the Complainant, and whether these practices harm the interest of any other undertakings and consumers, thereby violating Section 10 of the Act.
- 6.18 Therefore, the application of registration of copyright and trademark of the Respondent is not relevant to this enquiry report. However, in order to analyse deception, the graphical representation of the same as per the application to register is essential to this enquiry report.
- 6.19 According to the copyright application, the Respondent's brand name has been applied for as "Berger Super Emulsion No. 1". Similarly, the trademark application has been made with the phrase "Berger No. 1 Super Emulsion". According to the Respondent, the phrase has been devised as only a brand name for the product and the number '1' does not signify any other meaning.

⁹ <https://volt6.com/blogs/news/92000326-which-light-color-can-be-seen-from-the-farthest-distance>



- 6.20 However, the marketing content is always analysed as a whole and not in isolated elements of the campaign. In this particular instance, the graphical display of the brand name is not coherent with the ideology presented by the Respondent. In fact, the firm name/ brand name 'Berger' appears on the top of all of its products, as can be viewed from some of the other products by Berger.



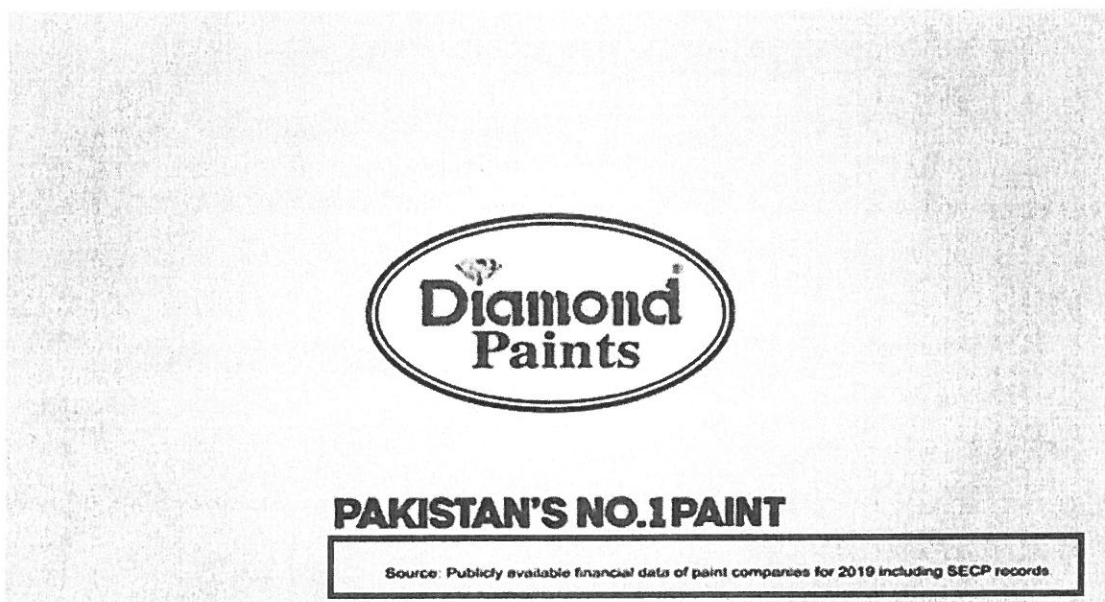
- 6.21 Moreover, the phrase, being applied for registration by the Respondent as a brand name/ trademark, has been displayed on the packaging in a broken form, where number '1' is the major highlight of the label. According to the Respondent, the phrase implies that the referred product is being called the best of its own formulation and is not a depiction of the ranking of its product in the market. However, the phrase, as being currently displayed does not resonate with the ideology presented by the Respondent. Instead, it does seem to imply ranking in the emulsion paint market as being No. 1.
- 6.22 Therefore, the packaging and shade card/brochure of the Respondent, *prima facie*, does appear to be implying that the Respondent's emulsion paint is No. 1 in the emulsion paint market, thereby giving a misleading impression of the product.
- 6.23 It is important to bring into consideration that the facts do not suggest whether the action of the Respondent had been deliberate or no intent of deception was part of the strategy. The Respondent, however, did submit its intent to change the marketing material as per the direction of the Hon'ble Commission, if need be.
- 6.24 Moreover, the Complainant did not submit any financials to show if actual harm had been caused to it. However, no actual harm needs to be proven for the purposes of Section 10 of the Act.
- 6.25 Furthermore, since the marketing material of the Respondent, *prima facie*, appears to be misleading in its meaning, it implies that the Respondent's product is better in certain aspects or in ranking as a whole from other competitors in the market. This in turn has the potential to harm the reputation, position and ranking of other players in the market, including, but not limited to the Complainant. The same may also give the Respondent a certain unearned competitive edge over other market players, thereby harming the business interest of other undertakings.
- 6.26 Moving on, the Respondent in its replies brought to light a few other major competitors who were involved in similar marketing practices. Their brand names also consisted of the words No. 1 along with their various categories of paints. The Respondent alleged that the

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Complainant was also involved in a similar practice of calling itself 'Pakistan's No. 1 Paint'. Therefore, the Respondent submitted that the Complainant had not come to the Commission with clean hands or otherwise it would have filed a complaint against all other companies and also itself refrained from such deceptive practices. A sample picture of the Complainant's claim is given hereunder for reference:



Handwritten signature or initials.



6.27 The current enquiry is not mandated to look into the practices of the market in general and is limited to the allegations levelled against the Respondent. However, while merely stating facts, the Complainant has widely marketed itself as the 'The No. 1 Selling National Brand' since 2020, changing it to 'Pakistan's No. 1 Paint' in 2021. However, it does add a disclaimer at the bottom of the marketing content, disclosing that SECP ranked the Complainant the No. 1 selling brand in Pakistan in 2019.

6.28 Although, the claim may have been justified in the year 2020, as based on a review by SECP in the year 2019, the same may not have been valid for the year 2021. However, the mandate of this enquiry does not entail an investigation into this matter and hence no data has been collected for corroboration in this regard.

6.29 In light of the Para No. 6.11 to 6.22 above, it is evident that the conduct of the Respondent is, through representation of 'Berger No. 1 Super Emulsion' on the paint bucket and shade card/ brochure of its emulsion paint, capable of harming the business interest of the Complainant and other undertakings, *prima facie*, in violation of Section 10 (1) in general and in particular, Section 10 (2) (a) of the Act.

II. Whether the Respondent is disseminating false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the character, properties, suitability for use, and quality of its products in, prima facie, violation of Section 10 (1) in general and in particular, Section 10 (2) (b) of the Act?

6.30 To draw an analysis under Section 10 (2) (b) of the Act, it is necessary to define what is meant by the word 'consumer'. The Commission, in its Order held against M/s CMPak Limited¹⁷, states that;

¹⁷ <http://cc.gov.pk/images/Downloads/ZONG%20-%20Order%20-%202029-09-09%20.pdf>

A handwritten signature in black ink, consisting of stylized letters, located at the bottom right of the page.

“Therefore, from OFT’s perspective, the consumer to whom such information is disseminated has to be the ‘ordinary consumer’ who is the usual, common or foreseeable user or buyer of the product. Such a consumer need not necessarily be restricted to the end user.”

- 6.31 In this particular scenario, the term consumer is not restricted to the end user. Rather, the usual market dynamics of this industry includes stockists, distributors, retailers, painters/ service men and end users.
- 6.32 The stockists, distributors, retailers, painters/ service men and end user are all disseminated similar marketing information, which then trickles down to the end user. However, the end user may be affected the most since it does not buy to profit from it through resale and instead bears the actual cost in total. Even still, the word consumer is construed in the widest possible angle and includes all people down the supply chain.
- 6.33 Therefore, the consumer in this case is being imparted with information by the Respondent which is open to interpretation regarding its product through the use of an ambiguous, open ended brand name, which may hold different meanings to the Respondent and the consumer. The Respondent makes no effort to clear the impression being given by its brand name to the consumer.
- 6.34 Infact, the said marketing practice may bring the Respondent more business than usual from consumers. Therefore, the Respondent only stands to gain from this ambiguity. Moreover, the marketing practice of the Respondent possesses the tendency to change the buying behaviour of its consumers. The potential to change or influence the buying behaviour of a consumer through dissemination of misleading information is categorized as a deceptive marketing behaviour.
- 6.35 Therefore, it is also concluded that the Respondent, through the representation of ‘Berger No. 1 Super Emulsion’ on the paint bucket and shade card/ brochure of its emulsion paint, is found to be disseminating misleading information to consumers lacking a reasonable basis related to the character, properties and quality of its product, *prima facie*, a violation of Section 10 (1) in general and in particular, Section 10 (2) (b) of the Act.
- 6.36 The Complainant had also alleged a violation of Section 10 (2) (c) of the Act, while submitting that the mere implication of superior ranking of the Respondent’s product, through its misleading brand name, from the Complainant’s product, acts as a false comparison of goods and services.
- 6.37 However, the allegation did not have merit since the Complainant failed to supply any information regarding marketing practices of the Respondent explicitly comparing its product with that of the Complainant’s or any other undertaking’s, while portraying itself as superior. In the absence of any substantiation of allegation levelled by the Complainant, the allegation proves to be meritless and does not warrant any further action in this regard.




III. Whether there is a spillover effect of the conduct of the Respondent?

- 6.38 As regards the effect of anti-competitive behaviour spilling over territorial limits of other provinces is concerned, it is noted that the product of the Respondent is sold nationwide and has a wide network of supply chain.
- 6.39 Similarly, the product is widely marketed on both electronic and print media nationwide and also has presence on the social media platforms. Therefore, the spillover of the Respondent's marketing practices does not stay limited to a certain provincial jurisdiction and warrants action under section 10 of the Act.

7. CONCLUSION & RECOMMENDATION:

- 7.1 In view of the analysis, it is concluded that the conduct of the Respondent is, through representation of 'Berger No. 1 Super Emulsion' on the paint bucket and shade card/ brochure of its emulsion paint, capable of harming the business interest of the Complainant and other undertakings, *prima facie*, in violation of Section 10 (1) in general and in particular, Section 10 (2) (a) of the Act.
- 7.2 In light of the facts, it is also concluded that the Respondent, through the representation of 'Berger No. 1 Super Emulsion' on the paint bucket and shade card/ brochure of its emulsion paint, is found to be disseminating misleading information to consumers lacking a reasonable basis related to the character, properties and quality of its product, *prima facie*, a violation of Section 10 (1) in general and in particular, Section 10 (2) (b) of the Act.
- 7.3 To ensure free and fair competition in the market undertakings should be stopped from marketing their products in deceptive and misleading manner. The undertakings should be encouraged to resort to the marketing practices that are transparent and give consumers/customers true and correct information. Therefore, in light of the above-mentioned findings, it is recommended that the Commission may consider initiation of proceedings against M/s Berger Paints Pakistan Limited, under Section 30 of the Act for the, *prima facie*, violation of Section 10 of the Act.


Ms. Urooj Azeem Awan
Deputy Director (OFT)
Enquiry Officer


Mr. Riaz Hussain
Assistant Director (OFT)
Enquiry Officer

Annex-A'

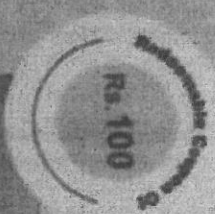
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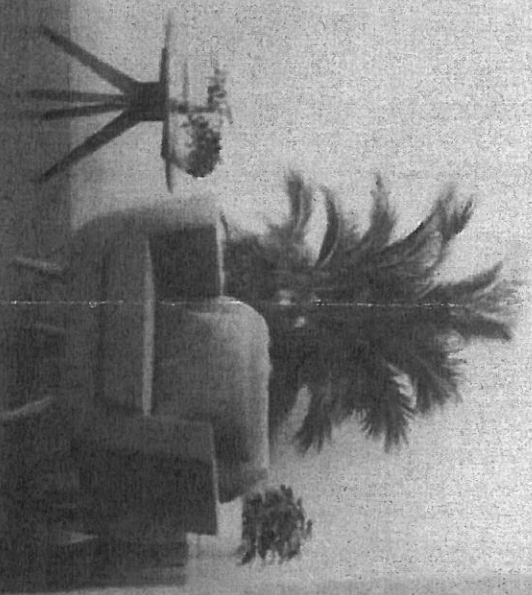


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