



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

**IN THE MATTER OF SHOW CAUSE NOTICE ISSUED TO M/S EDEN BUILDERS
(PRIVATE) LIMITED FOR DECEPTIVE MARKETING PRACTICES**

(FILE No. 191/OFT/Eden Life /CCP/2015)

Date of Hearing

23 June 2016
09 August 2016
26 May 2017

Adjudicating Members

Ms. Vadiyya Khalil
Chairperson

Mr. Ikram Ul Haque Qureshi
Member

On behalf of Eden Builders (Private) Limited

Mr. Zahoor A. Janjua
Deputy Director (Coord)

Mr. Agha Ali
Manager (MCS) Customer Services

Mr. Imran Anjum Alvi
Advocate Supreme Court



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ORDER

1. This order shall dispose of the proceedings initiated pursuant to Show Cause Notice No.20/2016 dated 23 May 2016 (the 'SCN'), issued to M/s Eden Builders (Private) Limited (hereinafter the '**Undertaking**') for *prima facie* violations of Section 10 of the Competition Act, 2010 (the '**Act**'). The SCN was issued pursuant an enquiry initiated by the Competition Commission of Pakistan (the '**Commission**') in the exercise of its *suo motu* powers under Section 37(1) of the Act.
2. The main issue under consideration in this matter is whether the Respondent's marketing claims as contained in its advertisements for its newly launched housing scheme "Eden Life Islamabad" ('**ELI Scheme**') amount to the deceptive marketing practices through the distribution of false or misleading information to consumers and/or capable of harming the business interests of competitors, within the meaning and scope of Section 10 (1), read with Section 10 (2) (a) and 10 (2) (b) of the Act.

FACTUAL BACKGROUND

3. The Undertaking is a private limited company incorporated in Pakistan and is engaged in the development and marketing of residential housing projects. The Commission took notice of advertisements published by the Undertaking in the electronic and print media on 21 August 2015 at the time of the launch of its residential ELI Scheme in Islamabad, Zone 5 wherein certain absolute marketing claims regarding (i) the legal status of the scheme, (ii) its location, (iii) its price and development charges payable by consumers and (iv) terms and conditions, had been made by it.
4. After an initial probe in the matter raising considerable concerns as to the absolute claims of the advertisements, a formal enquiry (the '**Enquiry**') in terms of Section 37(1) of the Act was authorized to be initiated by the Commission. The Enquiry was concluded vide an enquiry report dated 22 February 2016, (the '**Enquiry Report**')¹ by the appointed enquiry officers (the '**Enquiry Committee**'). Based on the *prima facie* findings of the Enquiry Report, the SCN was issued to the Undertaking, wherein it was required to respond in writing within fourteen (14) days as well as to appear before the



¹Available at : http://www.cc.gov.pk/images/Downloads/enquiry_reports/eden_builders.pdf

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Commission to avail its opportunity of being heard. The relevant portions of the SCN are reproduced below:

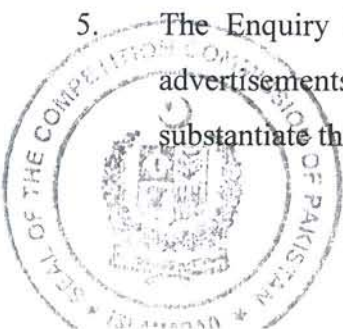
4. *AND WHEREAS, in terms of the Enquiry Report in general and paragraph 5 in particular, the Undertaking launched a housing scheme by the name of 'Eden Life Islamabad', and made statements regarding (i) the legal status of the scheme, (ii) its location, (iii) the development charges payable by consumers and (iv) its terms and conditions, through print and televised advertisements ('Marketing Claims');*

5. *AND WHEREAS, in terms of the Enquiry Report in general and paragraphs 23-40 and 42, the Marketing Claims made by the Undertaking appear to be unsubstantiated and thus prima facie constitute, individually and/or collectively, the distribution of false and misleading information that is capable of harming the business interests of another undertaking, within the meaning and scope of Section 10(2)(a) of the Act, in violation of Section 10(1) of the Act;*

6. *AND WHEREAS, in terms of the Enquiry Report in general and paragraphs 23-40 and 42, the Marketing Claims made by the Undertaking appear to be unsubstantiated and thus prima facie constitute, individually and/or collectively, the distribution of false and 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 within the meaning and scope of Section 10(2)(b) of the Act, in violation of Section 10(1) of the Act;*

SUBMISSIONS

5. The Enquiry Committee observed the following specific marketing claims in the advertisements of the ELI Scheme, in relation to which the Undertaking was asked to substantiate the same:



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- a. Approval obtained by Capital Development Authority (the 'CDA') for the purposes of building and marketing of the allotted land is in the name of 'Alhamra Avenue', which appears as an illegible disclaimer in fine print at the bottom of the advertisement;
 - b. The ELI Scheme is at a drive of 12 minutes from Serena Hotel Islamabad and 05 minutes from the proposed CDA Enclave and Chak Shahzad.
 - c. The price of a plot as seen on the print media advertisement is linked to an illegible disclaimer in fine print at the bottom to the effect that such price is "without development charges".
 - d. The first installment of the indicated price of the plot, if booked during the first week of the launch would be free/ waived.
 - e. According to the terms and conditions stated in the application/booking form, on completion of full payment, an *Allotment Letter* is to be issued to the applicant which will constitute the title document for the plot.
 - f. The exact amounts to be deposited as first payments/down payments and the reason for it being non-refundable, as indicated on the application forms.
6. The Undertaking submitted its written replies to the queries of the Enquiry Committee vide Letter dated 5 September 2015, 15 September 2015, 22 October 2015 and 13 December 2015, with the following responses as summarized below:
- a. That the ELI Scheme advertisements were in accordance with the norms of the land development industry wherein advertisements are published only to make the public aware of a certain project and to invite them to visit and make an informed decision;
 - b. That the Land developers base their marketing campaigns on comparative advertising in relation to proximity to a certain project or similarity to location



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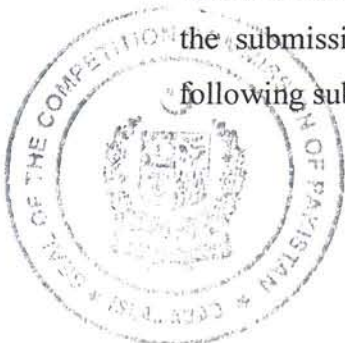
or intended purpose. Presentation of distance between two points in driving time is in itself a rough estimation which is influenced by variables such as climate and conditions. Furthermore, the exact location and distance of the project from landmarks advertised was not misleading due to the behaviour of a real estate consumer, who practices due diligence in the matters of making a buying decision in real estate, for the purpose of which multiple visits to the actual site are made;

- c. That initially, CDA issued an NOC for the advertising and marketing of “Al-Hamra Avenue” scheme in Islamabad to Al-Hamra Avenue (Pvt.) Ltd on 15 March 2008. However, upon the takeover of Al-Hamra Avenue (Pvt.) Ltd from its previous sponsors by the Eden Builders Group through one of its group companies named Orange Real Estate Development Company (Pvt.) Ltd ('OREDC') the name of the project was changed to "Eden Life Islamabad". Such decision was taken by the Board of Directors on 4 September 2013. OREDC acquired control of Al-Hamra Avenue (Pvt.) Ltd. from its previous sponsors after an NOC was obtained from the Commission in June 2013.
- d. That an application for change of name of the project from ‘Al Hamra Avenue’ to ‘Eden Life Islamabad’ was submitted with CDA on 18 September 2013. In this regard, a Civil Suit for Declaration, Permanent and Mandatory Injunction titled *Al Hamra Avenue (Pvt.) Limited vs. CDA through its Chairman* was also filed before the Senior Civil Judge, Islamabad. The Honourable Civil Court Islamabad issued an interim Order dated 10 January 2015 stating: “*Meanwhile, defendant/respondents are restrained from interfering into the peaceful and smooth operation, marketing and implementation of housing scheme of the petitioner in its own new name i.e. Eden Life...*”. This matter is still pending final adjudication.
- e. That the fact that the ELI Project was previously approved by CDA as Al Hamra Avenue was clearly mentioned in the advertisement in a legible font, “*Approval No. CDA/PLW-HS (RP) 2(865)/2005/162-(Approved as Al Hamra Avenue)*”. Hence, investors were not kept in the dark about this fact.



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- f. That the Undertaking was able to revive the ELI Scheme after the original sponsor of the real estate project was unable to meet their commitments causing it to remain in a state of halt for a considerable amount of time. Since then the Undertaking has spent large amounts of funds in developing the ELI Scheme for the existing and future allottees of plots therein.
- g. That it is the common market practice in the real estate sector to charge land charges only at the time of booking and to charge the relevant development charges at a later stage separately when the estimation of fairly accurate development cost can be made. Furthermore, the fact that prices exclude development charges has been mentioned within the advertisement in a clear and legible font.
- h. That the booking price charged per plot is lower as compared to similar schemes in the vicinity of the ELI Scheme. (Referring to 1 Kanal Plot – Residential offered by CDA Enclave at PKR 17.5 Million – PKR 20 Million).
- i. That the first installment (15% of land charges) is non-refundable to avoid speculators and short time investors who burden the project as they book multiple plots and if the price does not escalate they seek a refund. Otherwise, in land transactions, the standard practice is that a *bayana* is typically 25 to 33% of the total amount which is forfeited in case of default.
- j. It is an accepted norm in the industry that all large housing projects issue allotment letters as final documents.
7. In response to the SCN, the Undertaking filed its Interim Reply dated 19 July 2016 with the Commission, wherein it denied the allegations leveled against it and claimed that its Marketing Claims as contained in the advertisements of the ELI Scheme did not amount to deceptive marketing practices under Section 10 of the Act. While reiterating the submissions as contained in Para 6 above, the Undertaking made the further following submissions vide its Interim Reply:



- a. That the allegations against the Undertaking are out of context and farfetched especially in the absence of any complaint having been filed with the Commission;
- b. That the Undertaking is not a dominant entity in the Islamabad real estate market and hence the instant matter is outside the jurisdiction of the Commission. Even otherwise the Commission is not empowered under the Act to regulate the real estate development sector;
- c. That the ELI advertisements in question were merely to inform the general public about the re-launch of an old project with a new name and did not contain any material information that could be termed as incorrect. The correct situation could be analysed by visiting the project in person or through representatives. The advertisement itself is not persuasive in nature.

- d. That the advertisement contains terms and conditions relating to development charges as follows:

- "i. The applicant will make payment of the land charges and development charges ('Total Price') of the plot in installments according to the payment plan stipulated by Eden.*
- ii. Development charges will be paid by the Applicant as assessed by Eden Management. Possession of plot will be delivered on completion of payment of Total Price."*

- e. That the advertisement has been qualified by explanations or disclaimers to ensure that it is not false or misleading.

- f. That the Undertaking has requested for the Commission to take a lenient approach in this matter as any misrepresentation by it was neither wilful nor planned and that the SCN may be set aside.



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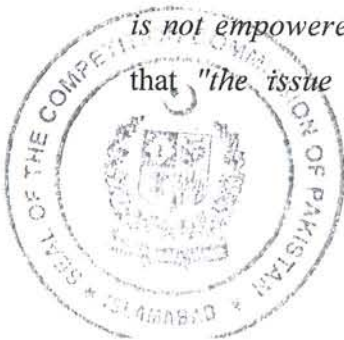
- g. The Undertaking is ready to incorporate the disclosure in Urdu and in a legible font in their advertisement following consultation with the Commission for any potential non-compliance of the Act.

ISSUES

8. In the light of the Enquiry Report, the SCN and the submissions made by the Undertaking, the substantive issues identified by the Commission are as follows:
- A. Whether the marketing claims as contained in the Undertaking's advertisement amount to the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis related to the price, character and / or properties of the ELI Scheme within the meaning and scope of Section 10(2)(b) and hence a violation of Section 10(1) of the Act;
- B. Whether the marketing claims as contained in the Undertaking's advertisement of the ELI Scheme amount to the distribution of false or misleading information that is capable of harming the business interests of its competitors within the meaning and scope of Section 10(2)(a) and hence a violation of Section 10(1) of the Act.

ANALYSIS AND DECISION

9. The factual and legal analysis herein below shall be structured according to the sequence and order of the two pertinent issues demarcated above as Issue A and Issue B. To this extent, the Commission has taken into account and perused the entire record before it including all submissions and supporting documents.
10. Before proceeding with such analysis and a consequent determination as to any contravention of the Act in fact and in law, we find it necessary to briefly address the legal objection of the Undertaking that the allegations levelled against it are "out of context, farfetched, especially in the absence of any complaint"; that "the Commission is not empowered under the Act to regulate the real estate development sector"; and that "the issue is wholly without jurisdiction and cannot form the basis of any



proceedings under the Act" as the Undertaking "is not even dominant entity in the Islamabad real estate market".

11. Regarding the above preliminary objections, it is clarified that the enquiry was initiated pursuant to Section 37(1) of the Act, according to which the Commission is empowered to conduct enquiries "*on its own*" into matters relevant to the purposes of the Act. The existence of a complaint by an undertaking is not a precondition for invoking this provision of the Act. The Commission upon taking notice of the ELI Scheme advertisement and conducting an initial probe into the matter was satisfied that a more thorough investigation was required in view of the apparent misleading characteristics of the advertisement and in pursuance of the protection of potential investors and consumers.

12. Furthermore, the Commission is empowered to initiate proceedings under Section 30 of the Act in relation to *prima facie* violations of the substantive provisions of the Act, which in the present instance pertains to Deceptive Marketing Practices prohibited under Section 10. Such proceedings may be initiated against any undertaking(s) regardless of which industry or sector it operates in, as long as it is engaged, directly or indirectly, in the production and supply of goods or provision of services in any identifiable relevant market in Pakistan. Lastly, it is clarified that an undertaking holding a dominant position is only a prerequisite for establishing a contravention under Section 3 of the Act i.e. abuse of dominant position and has no nexus to the instant matter wherein the issues under contention are those specifically and solely pertaining to Section 10 of the Act, which is reproduced as follows:

"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) the distribution of false or misleading information that is capable of harming business interests of another undertaking;



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

(c) false or misleading comparison of goods in the process of advertising; or

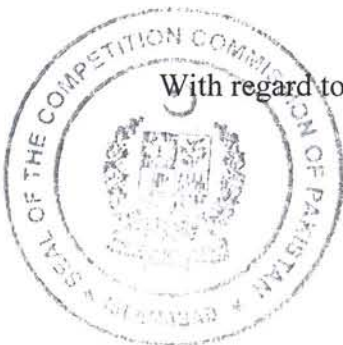
(d) fraudulent use of another's trademark, firm name, or product's labelling or packaging."

ISSUE A

13. To address this core issue, Section 10(2)(b) (as reproduced above) is applicable to the extent of determining whether the Undertaking's ELI Scheme advertisement is deceptive in terms of the information disseminated to consumers being false or misleading, including information which lacks a reasonable basis relating to the price, character and properties of the ELI Scheme.
14. We consider it relevant here to reproduce excerpts from previous findings and observations of the Commission pertaining to the interpretation of the primary elements of deception as envisaged by Section 10 of the Act and in line with international jurisprudence on the subject.
15. In its Order of 29 September 2008 in the matter of ***China Mobile Pak Limited and M/s Pakistan Telecom Mobile Limited***, reported as **2010 CLD 1478**, the Commission has outlined its approach for the examination of an advertisement in determining whether it amounts to a deceptive marketing practice as follows:

"...evaluate complete advertisement and make an opinion regarding deception is to be formulated on the basis of net general impression conveyed by them and not on isolated scripts".

With regard to consumers, the Commission has held that:



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"the term 'consumer' under Section 10 of the [Ordinance] is to be construed as an 'ordinary consumer' but need not necessarily be restricted to the end consumer of the goods or services."

False and misleading information has been interpreted by the Commission to include:

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

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 judgement, (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 erroneous connotation and is somewhat open to interpretation as the circumstances and conduct of a party may be treated as relevant to a certain extent".

16. Furthermore, as stated above, the Commission examines the net general impression of the advertisement, which may contain both express and implied claims. The advertiser itself is responsible for all such claims. Neither proof of intent to disseminate a deceptive claim nor evidence that the consumers have actually been misled is required for a violation of Section 10(2)(b) of the Act to be made out.
17. Below is a reproduction of the ELI Scheme advertisement, wherein the three contentious marketing claims being considered by the Commission in this Order, have been demarcated so that a detailed factual examination and legal analysis of each of them may be carried out henceforth:



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ایڈن... اب اسلام آباد میں!

Eden Life

ISLAMABAD Zone-5

15 منٹ سے کم 53 لاکھ روپے سے

Claim II

Claim I

CDA انکلیو اور چک شہزاد سے 5 منٹ

سرینا ہوٹل سے صرف 12 منٹ کی ڈرائیو پر واقع

تکٹ 15 فیصد

بقایا سال کی قسط میں

Convenience facility

Health facility

Customer Zone

Real Estate

Shopping

Life Entertainment

First Launch Offer

پہلے بیفتے میں ٹکٹنگ پر پہلی قسط فوری

ایڈن کالگٹری لائف سٹائل اور اسلام آباد کی خوبصورت زندگی اب آپ کیلئے بھی...

تکٹ کیلئے سائٹ آفس تشریف لائیں

آفس رات 9 بجے تک کھلا رہے گا

0800-88288

www.edenlife.pk | email: sales@eden.pk

Claim III

Claim I: Representation of location and proximity of the ELI Scheme

18. We start with the issue of the marketing claim relating to the location of the ELI Schemes seen in the image above. The ELI Scheme advertisement uses the medium of driving time to make an absolute sweeping claim without any qualifier that the sight is a 12 minutes' drive from Serena Hotel Islamabad and 05 minutes' drive from CDA Enclave and Chak Shahzad Islamabad. However, according to the preliminary investigation carried out by the officers of the Commission, this express claim of the relative proximity of the ELI Scheme from the comparative landmarks in terms of driving time is not absolute. The initial probe carried out by the Commission lead to the result that the ELI Scheme is at a distance of approximately 18 km from Serena with a drive time of about 20 to 22 minutes at an average speed of 70 km/h (average



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speed limit within ICT) as opposed to the absolute claim of 12 minutes. Furthermore, it is at an approximate distance of 13 km from CDA Enclave which takes around 15 minutes to reach the site at an average speed of 70 km/h as against the Undertaking's absolute claim of 05 minutes.

19. While the Commission is guided by the general legal interpretation on the issue of consumer deception as discussed in paragraphs 15 and 16 above, it is considered appropriate to enunciate the specific principles applicable to absolute claims made in the process of advertising. The onus placed upon undertakings making absolute claims is that the information disseminated through such a claim must not lack a *reasonable basis*. For the interpretation of information lacking a reasonable basis, the Commission in its Order dated 23 February 2010 in the matter of **M/s Procter and Gamble Pakistan (Private) Limited reported as 2010 CLD 1695**, observed that “*the advertiser must have some recognizable substantiation for the claims made prior to making it in an advertisement*”. This doctrine has been borrowed from US jurisprudence on the subject (**Pfizer, Inc., 81 F.T.C. 23 (1972)**) advertisers must possess the level of substantiation expressly or impliedly claimed in the advertisement. Where no specific level of substantiation is claimed, what constitutes a 'reasonable basis' is to be determined on a case-by-case basis, by analyzing six “*Pfizer factors*”, which are as follows:

- i. the type of claim;
- ii. the benefits if the claim is true;
- iii. the consequences if the claim is false;
- iv. the ease and cost of developing substantiation for the claims;
- v. the type of product; and
- vi. the level of substantiation experts in the field would agree is reasonable.

20. The Undertaking's explanation that this presentation of distance between two points in driving time being a rough estimation influenced by variables, cannot be accepted, as the actual claim in the ELI Scheme advertisement was phrased in absolute terms without any qualifying disclosure of approximations. Hence, from the perspective of the ordinary consumer, we are unable to impute that the claim was understood as an approximation as against an absolute statement. The Undertaking has also made no effort to state the actual distance between the ELI Scheme and the landmarks or the



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speed at which an ordinary consumer is required to travel for such driving time to be an accurate approximation. Furthermore, the Commission remains wary of the fact that the first contact between the Undertaking and the public at large/ consumers occurred at the time the ELI Scheme advertisement was read in the print media. A false or misleading statement made at such instance of the first contact cannot be negated even if the truth is subsequently made known to the potential investor. Therefore, the Undertaking's defense that this statement was not misleading due to the behaviour of a real estate consumer who visits the actual site multiple times before making a decision does not hold any merit either. Neither can the further defence be accepted that the ELI Scheme advertisement was in accordance with the norms of the land development industry where ads are published only to make the public aware of a certain project and invite them to visit before making an informed decision.

21. It is also pertinent to mention that during the course of the hearings before the Bench, the Undertaking was asked to justify the reasonable basis on which it had proceeded to make such an absolute objective claim relating to the character and / or properties of ELI Scheme. However, no explanation was forthcoming. Nonetheless, established deceptive marketing theories are based on the fact that all advertisers making objective claims, do so either by expressly stating or implying that it has certain specific grounds for making such claims and that conversely if an advertiser does not have such a reasonable basis for its claims, the consumer is no doubt acting under a false impression. In simpler terms, the ordinary consumers may have perceived the advertisement differently had they known that the advertiser had no basis for the claim it had disseminated. In the instant matter there exists no recognizable substantiation of the instant claim by the Undertaking as to the consideration of pertinent factors such as the type of vehicle, average speed and speed limits, multiple travel routes, traffic conditions, time delays at traffic signals and weather conditions amongst others.
22. The Australian Competition and Consumer Commission (the 'ACCC') in its guidelines on deceptive practices in the real estate industry have also stated in clear and categorical terms that real estate agents must take care "*not to make false claims about the location, characteristics or use that can be made of the land.*" Therefore, the Commission is fortified in its view that the instant absolute claim lacks a reasonable basis as to the character and/or properties of the ELI Scheme in specific regard to its



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relative location. Consequently, the said claim is misleading as it carries with it the tendency to misinform or misguide consumers owing to vagueness and omissions.

Claim II: Disclaimer of development charges to the representation of price

23. We now turn to the issue of the representation of the price of plots and the disclaimer that the same excludes development charges as seen in the ELI Scheme advertisement and marked in the pictorial image above. The Undertaking's said marketing claim consists of the price mentioned in red on the top right corner in Urdu "*Aik Kanal 53* Lakh Rupay Say*" with the asterisks connected to an illegible, vertically aligned disclaimer in fine print in English language at the bottom left corner stating that it is "**Without development charges*". During the hearings, when confronted with the question as to why the price was qualified and not inclusive of development charges, the Undertaking's Counsel submitted that this is the common practice in the real estate sector to charge land charges only at the time of booking and the relevant development charges at a later stage when fairly accurate estimations of the same can be made. Furthermore, the qualifying disclaimer according to the Undertaking's submissions on record has been made in a clear and legible font.
24. While the submission as to estimations of development charges made at a later stage and hence not capable of being included in the total price may be acceptable due to the norms in the real estate industry, there exist certain minimum standards and requirements for advertising with disclaimers which the Commission will now consider to determine whether the development charges qualifier to the price satisfies those conditions. In the matter of *China Mobile Pak Limited and M/s Pakistan Telecom Mobile Limited*, reported as **2010 CLD 1478**, the Commission observed that "*it is a settled principle that 'fine print disclaimer, are inadequate to correct the deceptive impressions'. In fact, such disclaimers are, in themselves, a deceptive measure.*" Furthermore, in its Order dated 8 January 2015 in the matter of Complaint filed by **M/s Wyeth Pakistan Limited against Reckitt Benckiser Pakistan Ltd., reported as 2015 CLD 40**, the Commission's examination of the advertisement in question lead to the observation that "*the present case involved a wide and sweeping claim, whereas the qualifier was not legible (being in blue on black background). Such a qualifier did nothing to take away from the claim, and such a claim should be followed by a more legible disclaimer to clarify the contents of the marketing*



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campaign." Furthermore, according to the Federal Trade Commission's (FTC) observations², "Advertisements often contain fine-print footnotes or video superscripts that attempt to disclaim, limit, modify, or explain claims made elsewhere in the ad. Advertisers cannot use fine print to contradict other statements in an ad or to clear up misimpressions the ad would otherwise leave. Similarly, accurate information in a footnote or text will likely not remedy a false headline because reasonable consumers may glance only at the headline." It is further stated that "to be effective, disclosures must be clear and conspicuous. In evaluating the effectiveness of disclosures, the Commission considers factors like:

Prominence: whether the qualifying information is prominent enough for consumers to notice and read (or hear);

Presentation: whether the qualifying information is presented in easy to understand language that does not contradict other things said in the ad and is presented at a time when consumers' attention is not distracted elsewhere;

Placement: whether the qualifying information is located in a place and conveyed in a format that consumers will read (or hear);

Proximity: whether the qualifying information is located in close proximity to the claim being qualified."

25. It is also pertinent to note that the Commerce Commission of New Zealand in its Fair Trading Act Fact Sheets, elucidates on this subject of additional costs in fine print as follows:

"When consumers see an advertised price for a good or service, they are entitled to assume that price is the full price they will be expected to pay. Fine print should not be used to disclose additional costs or charges associated with a purchase.

Attempts to advise in fine print that GST or on-road costs are additional are unlikely to prevent consumers from being misled."³

26. We place further reliance on the Judgment of the Australian High Court in the matter of **ACCC v. TPG Internet Pty Ltd** reported as **[2013] HCA 54** wherein the following

²Deception Policy Statement, 103 F.T.C. at 180-81.

³<http://www.comcom.govt.nz/fair-trading/fair-trading-act-fact-sheets/fine-print/>



principles were enunciated while holding that the total price of the relevant services (broadband) was not specified in a prominent way and as a single figure, thus being a contravention of the Australian Consumer Law:

- (a) *The "dominant message" test is central to any assessment of whether advertisements are misleading or deceptive;*
- (b) *Qualifying statements accompanying headline representations must be sufficiently clear and prominent as not to mislead consumers, particularly where the representation is about price;*
- (c) *The target audience cannot be expected to pay close attention to the advertisement and many will only absorb the "general thrust";*
- (d) *There must be a tendency to lead the consumer into error, for instance, some words in the advertisement were selected for emphasis while the balance relegated to relative obscurity;*
- (e) *Consumer knowledge about a certain practice prevalent in a particular industry was not apt to defuse the tendency of the advertisement to mislead;*
- (f) *Misleading or deceptive conduct can occur at the point where members of the target audience have been enticed into the marketing web by an erroneous belief engendered by the advertiser, even if the consumer may come to appreciate the true position before a transaction is concluded.*

27. In the instant matter, Commission finds that the price representation as a dominant message at the top right corner of the ELI Scheme Advertisement has been contradicted by a fine print illegible disclaimer of development charges at the bottom right corner. Even if it is impracticable to compute the value of development charges at the time the advertisement was disseminated to the public and hence a round figure single price value cannot be quoted, the requirements as to prominence, presentation, placement and proximity of the qualifying disclaimer have not been adhered to.



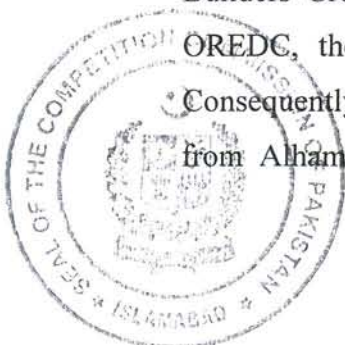
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Therefore, the disclaimer amounts to a contradiction of the price related dominant message.

28. Furthermore, while the Commission has no objection with regards to the use of the asterisks (*) which link the marketing claim of the price at the top of the advertisement to the development charges disclaimer at the bottom of the page, the Commission has no doubt in holding that the text of the illegible disclaimer has been placed in an obscure location, such that the ordinary consumer is not likely to have read it at all.
29. In light of the above, we are of the considered view that the ELI Scheme advertisement with its illegible disclaimer of additional development charges not included in the quoted price, is misleading and tantamount to an omission of material price related information to the ordinary consumer. Ordinary consumers who read the ELI Scheme advertisement are not likely to take the trouble to read the fine print disclaimer. The impression conveyed through the advertisement, in the absence of a clearly visible and legible disclaimer, is deceptive in terms of Section 10 of the Act.

Claim III - Disclosure of legal status of the ELI Scheme

30. The third contentious marketing claim is with regard to the disclosure at the bottom left corner of the ELI Scheme advertisement which reads as "*Approval No. CDA/PLW-HS(RP)2(865)/2005/162 - (Approved as Alhamra Avenue)*". A disclosure is used for sharing information which would otherwise not been known and to offset any potential for a false or misleading claim as a clarification to other information contained in the advertisement. Admittedly, there exists no NOC from the relevant municipal authority (CDA) in the name of the ELI Scheme itself whereas the disclosure attempts to disclose to the public that the NOC granted to another entity in the name of "Alhamra Avenue" housing scheme covers CDA's approval of the ELI Scheme as well.
31. The Undertaking in its written submissions and during the hearings contended that the NOC as referred to in the instant disclosure was granted to Al-Hamra Avenue Pvt. Limited in March 2008, however upon takeover of the said company by the Eden Builders Group (of which the Undertaking claims to be a group company) through OREDC, the name of the project was changed to Eden Life Islamabad (ELI). Consequently, it was submitted that an application for change of name of the project from Alhamra Avenue to ELI was submitted with CDA in September 2013. The

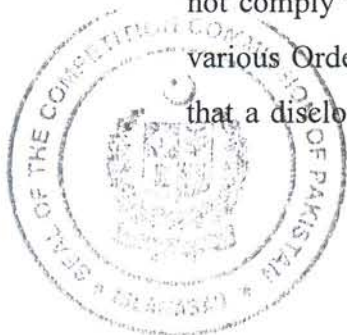


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Undertaking further placed reliance on the pendency of litigation in this matter but the Commission does not consider it appropriate or relevant to consider the same. What is admitted is that the said application has not yet been granted by CDA in favour of the Undertaking and in view of such fact the Commission will consider whether the reliance placed on an earlier NOC in the name of another housing society was a deceptive disclosure in terms of Section 10(2)(b) of the Act. A further issue is the legibility and placement of the said disclosure, which according to the Undertaking is noticeable; hence investors have not been kept in the dark. Furthermore, the Undertaking claims that the ELI Scheme advertisement and the disclosure under question was merely to inform the general public about the re-launch of an old project and has now been revived under a new name.

32. The Undertaking, despite being asked, has not placed on the record any documentation which evidences the ultimate transfer of ownership and management of Al-Hamra Avenue (Pvt.) Limited to the Undertaking from OREDC. While, OREDC is claimed to be a group company of the Eden Builders Group, the said company name does not appear in the organogram of group companies on the website of the Undertaking either. Even if the Commission is to ignore the missing links of the transfer of the housing society from its previous owners to the Undertaking, there exists no validly granted NOC in favour of the Undertaking from CDA to re-launch the project in the name of ELI Scheme. Further reinforcing is the fact that CDA issued a Public Notice in the print media which stated that "*Eden Life Zone-V*" along with certain other private housing schemes and projects are advertising and marketing in the media to attract public investments without "confirming the status of NOC from the Authority". Therefore, the impression being given to the public is that approval of CDA for the said ELI Scheme exists, albeit in another name, and it is a safe investment to make. The Commission is fortified in its view that this is a false statement and hence violative of Section 10(2)(b) of the Act.

33. Furthermore, even if the said disclosure as to the validly existing NOC was not false or misleading, the Commission finds that the vertically aligned fine print disclosure does not comply with the minimum standards, as acknowledged by the Commission in its various Orders, for the use of the same in advertisements. The Commission observes that a disclosure must be clear and conspicuous for it to be easily noticeable, legible



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and understood by consumers. For such purpose, the disclosure must be in a type, size, location, and print that contrasts with the background against which it appears.

34. The Commission therefore finds the Undertaking having resorted to deceptive marketing practices in terms of Section 10(2)(b) of the Act in relation to all three marketing claims highlighted in the ELI Scheme advertisement above (pictorial image). The Commission reiterates that any subsequent representations, disclosures or clarifications to make the truth be known to a potential investor after the publication of the ELI Scheme advertisement, was and is not sufficient to correct the deceptive claims as contained therein. The ELI Scheme advertisement was the first occurrence of contact between the Undertaking and the consumers which contains false and misleading information being disseminated to the public in violation of Section 10(2)(b) of the Act.

ISSUE B

35. With respect to this Issue, the Commission is required to determine whether the Undertaking's marketing claims (Claim I, II & III as highlighted in the ELI Scheme advertisement above) falls within the scope of the violation caught by Section 10(2)(a) of the Act.
36. Section 10(2)(a) of the Act provides that '*the distribution of false or misleading information that it is capable of harming the business interests of another undertaking*' shall be deemed to constitute a deceptive marketing practice. An in-depth discussion of the term '*business interest*' has also been provided in the order in **the Matter Of Show Cause Notice Issued To M/S Tara Crop Sciences (Private) Limited** reported as **2016 CLD 105**, by which the Commission is guided in this matter.
37. The Commission has already reached a determination with regards to *Issue A* above that the three marketing claims of the Undertaking as contained in the ELI Scheme advertisement were deceptive. In such an event that there exists a contravention of Section 10(2)(b) of the Act by an undertaking, a concurrent violation of Section 10(2)(a) is also made out. The consequences of the distribution of false or misleading information is such that it is always capable of harming the business interests of and resulting in fatal consequences for the competitors of the undertaking concerned. As



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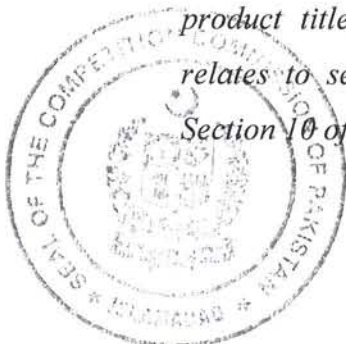
observed by the Commission on numerous occasions before, it is reiterated that no strict proof of actual harm caused to a competitor is required for a determination of a contravention of Section 10(2)(a) of the Act as long as it can be shown that such potential harm was capable or possible of being caused or foreseeable.

38. Therefore, the Commission is of the concurring opinion that the distribution of false or misleading information to consumers by the Undertaking through the ELI Scheme advertisement is in fact capable of harming the business interests of its competitors being numerous other housing societies within the territorial limits of Islamabad. The Commission therefore holds the Undertaking liable for a violation of Section 10(2)(a) of the Act.

COMITMENTS

39. On 16 November 2016 the Undertaking submitted a commitment dated 14 November 2016 to the effect that it would comply with any directions of the Commission to remedy any ambiguity and doubt apparent in the ELI Scheme advertisements. However, the commitment submitted by the Undertaking offered no indication as to how the advertisements, marketing campaigns and promotional materials would be amended to remedy the violations noted above. The Commission was of the opinion that the competition related concerns had not been appropriately addressed and resolved therein.
40. Thereafter, during the course of the last hearing in this matter, held on 26 May 2017, the inadequacies contained in the commitment of 14 November 2016 were brought to the Undertaking's attention. Upon withdrawing the said commitment, the Undertaking stated that it would submit a new commitment addressing therein the concerns and observations of the Bench. The second and revised commitment was subsequently filed by the Undertaking on 7 July 2017. The undertakings contained therein are reproduced herein below for the sake of brevity:

"1. That, Eden Builders (Pvt.) Limited media campaign relating to its product titled Eden Life, a real estate development project which relates to selling of Developed plots is in prima facie violation of Section 10 of the Competition Act, 2010.



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2. That, any/or all other advertisements or promotional materials, in print or electronic form or otherwise, in relation to the Product has been withdrawn from the public domain since 2015-16.

3. That, henceforth, our advertisements, promotional materials or instructional manuals, in print or communicated through the electronic medium or otherwise in relation to any selling of plots in the Project Eden Life shall clearly specify that, Eden Life is the new name of old project Alhamra Avenue (Private) Limited, Al Hamra Avenue Housing Scheme.

4. That, we shall comply with any and/or all directions of the Commission in the subject proceedings and shall ensure compliance with the provision of Section 10 of the Competition Act, 2010, letter and spirit, in relation to any distribution of information or making any future advertisement in relation to our products.”

41. Along with the aforementioned commitment, the Undertaking also submitted a copy of its amended advertisement which is reproduced here in below.

ایڈن... اب اسلام آباد میں!

Eden Life

A Project of Al-Hamra Avenue (Pvt) Ltd. Islamabad

تجارت کیلئے یہی!

پہلے بقیعہ میں بکنگ پیر پہلی قسط فوری

ایڈن کا گزری لاکھ سٹائل اور اسلام آباد کی خوبصورت زندگی
تجارت کیلئے یہی...

تجارت کیلئے یہی!

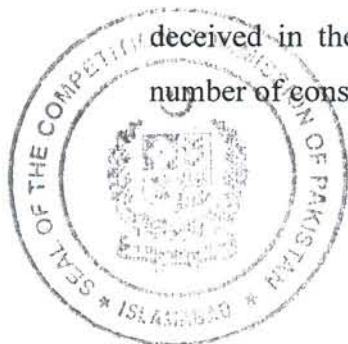
0800-88288

www.edenlifer.pk | email: sales@eden.pk



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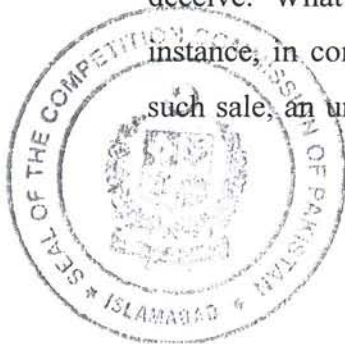
42. As can be seen from the amended advertisement above, Claim I relating to the representation of location and proximity of the ELI Scheme has been deleted by the Undertaking. Claim II relating to the price of plots has also been amended with the disclaimer as to the exclusion of development charges appearing along with the representation as to price at the top left corner. Claim III relating to the disclosure of the legal status of the ELI Scheme (approval by CDA granted in the name of Alhamra Avenue) has been altered through the incorporation of the words "A project of Al-Hamra Avenue (Pvt) Ltd" now prominently appearing below the name of the scheme (Eden Life Islamabad) at the top centre of the advertisement layout.
43. While the above commitments and amended advertisement do address some of the concerns of the Commission in general terms, at the same time, the Commission cannot ignore the Undertaking's earlier conduct and the original ELI Scheme advertisement, which in fact and in law, is violative of the provisions of Section 10(1) of the Act entailing the imposition of a penalty under Section 38 of the Act.
44. Even otherwise, there still remain certain unresolved issues of concern in relation to the amended advertisement and the accompanying commitment. Firstly, the Undertaking has submitted that the earlier ELI Scheme advertisement and accompanying promotional materials have been withdrawn from the public domain since 2015-16. This seems to be a vague statement as it is not indicative of when exactly the original ELI Scheme advertisement was withdrawn and replaced with the new amended one, if at all. Further question that arise and remain unanswered is how many persons from the targeted audience of consumers had already placed reliance upon the deceptive advertising of the Undertaking prior to it being withdrawn from the public domain. Moreover, even if it had been so withdrawn sometime during 2015-2016, the Undertaking has provided no evidence or information as to what measures it has taken to rectify the misleading impression it had earlier created to the public at large. Therefore, while the Commission appreciates that the withdrawal of the ELI Scheme advertisement from the public domain may prevent consumers from being deceived in the future, however we cannot rule out the possibility of a reasonable number of consumers having already placed reliance upon it to their detriment.



45. Secondly, the amended advertisement represents that the ELI Scheme is "a project of Al-Hamra Avenue (Pvt) Ltd.". This appears to be contradictory to the submissions of the Undertaking who submitted during the course of the hearings that Al-Hamra Avenue (Pvt.) Limited was taken over by the Eden Builders Group through OREDC and thereafter an application was filed with CDA for change of name of the project from Alhamra Avenue to ELI. The said application has not yet been granted in favour of the Undertaking and neither has any information been provided to the Commission as to whether the name of the company has been changed after the takeover by the Eden Builders Group. Therefore, representing to the public that the ELI Scheme is a project of Al-Hamra Avenue (Pvt) Ltd. appears to be misleading at the outset. Therefore, this representation should be amended to state at the least that the status of its NOC remains pending before CDA.
46. Lastly, the amended advertisement continues to represent that it is a "First Launch Offer" and that anyone who confirms their booking of a plot within the first week of the said launch will be exempt from paying the first instalment towards the price of the plot. Again, this appears to be misleading as the special offer was relevant and applicable only during the first week of the launch of the ELI Scheme and not as of the time of the amended advertisement. Therefore, the said statement regarding 'First Launch Offer'/'Special Offer' should not be included, unless this offer is in fact still in place for the benefit of those consumers who continue to confirm their plot bookings. Furthermore, a cut-off date also ought to be provided for the validity period of this special offer, displayed in a clear and conspicuous way as part of this representation.

REMEDY AND PENALTY

47. With specific regard to deceptive marketing practices prevalent in the real estate industry, undertakings engaged in the business of sale of land or an interest therein such as land owners, commercial land and private housing scheme developers, real estate agents, property managers, auctioneers and property valuers must not mislead the consumer or potential investor, regardless of the existence of an intention to deceive. What matters is how the practice was perceived by the consumer. For instance, in connection with the sale of land, an interest therein or the promotion of such sale, an undertaking that leads potential investors to a wrong conclusion or false



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impression, leaves out or hides important information (e.g. in fine-print disclaimers or qualifying disclosures) or makes a patently inaccurate claim or one that lacks a reasonable basis is culpable under the Act. All such conduct, amongst others, are deemed deceptive within the meaning and scope of Section 10(2)(b) of the Act. Special care must be taken not to make a false or misleading statement, whether express or implied claim, absolute or qualified, in the electronic or print media or otherwise, relating to pertinent information such as government approvals and no-objection certificates (NOCs), nature, characteristics and use to which the land may lawfully be put, existence of associated facilities and amenities, price and additional charges, as well as the location of the land itself.

48. The importance of responsible and accurate advertising in relation to real estate should not, in any circumstance, be undermined. The real estate market plays a very vital role in the development of any country's economy as a number of other associated sectors have close links with this sector. At the same time, the degree of regulation remains inadequate to the extent that bogus housing schemes and deceptive marketing practices continue to harm growth in this sector, ultimately causing a loss to the overall sustainability of Pakistan's economy. The Commission, at the outset, also bears in mind the specific circumstances of consumers that often fall victim to misleading claims in relation to real estate investments they may make. For the majority of the population in this country, it almost takes a lifetime of savings or obtaining credit or loans from banks to make an investment such as the acquisition of a plot to secure a more stable future. Such a transactional decision is a much more complicated and difficult one as against buying a household or shelved product from a supermarket. Therefore, we cannot stress enough, the higher burden placed on undertakings which operate in the real estate market, in relation to the accuracy of any claims or representations that they make in the course of their marketing campaigns.

49. Keeping in view the above, the Commission is of the considered view that the contravention of Section 10(1) of the Act stands established in terms of what has already been discussed above. Although in light of the commitments filed with the Commission, the Undertaking has addressed certain competition related concerns and shown its willingness to act in accordance with the directions of the Commission, nonetheless, in the given facts and circumstances and in pursuance of Regulation 37 of



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the Competition Commission (General Enforcement) Regulations, 2007 read with Section 38 of the Act, the Commission is constrained to impose a penalty in the sum of PKR 2,500,000 (Rupees Two Million and Five Hundred Thousand Only) on the Undertaking on the Undertaking.

50. That Undertaking is directed to file a further amended advertisement with the Registrar of the Commission and also to deposit the penalty imposed on it within thirty (30) days from the date of this Order, in line with the observations as contained in Paragraphs 44 to 46 above and in order to ensure that no representation, marketing or advertisement is disseminated in the public domain in violation of the Act and the directions given in this Order.
51. Before parting with this Order, we deem it appropriate to reprimand and direct the Undertaking to ensure responsible behaviour in future with respect to the marketing of their business. The Undertaking in relation to its amended advertisement or any other future marketing and promotional material must ensure that it does not make any representations or claim that lacks a reasonable basis or recognizable substantiation and that every such claim is in legible font for public viewing. In addition and more specifically, the Undertaking must clearly represent through its marketing that CDA's approval of the ELI Scheme remains pending so that a potential consumer may make an informed transactional decision thereof.
52. In terms of the above, SCN No. 20/2016 is hereby disposed of.



Vadiyya Khalil
Chairperson



Ikram Ul Haque Qureshi
Member



Islamabad the 15th December, 2017