



BEFORE THE
COMPETITION COMMISSION OF PAKISTAN
IN THE MATTER OF
SHOW CAUSE NOTICES ISSUED TO

*PAINT MANUFACTURERS FOR
NON-COMPLIANCE OF CCP'S ORDER
DATED 13-01-2012*

(TOKEN CASE)

(150/OFT/PAINTORDER/COMPLIANCE/CCP/13)

Date(s) of hearing: 16-06-2015, 24-06-2015
20-04-2017, 30-05-2017
06-12-2018, 13-12-2018
10-09-2020

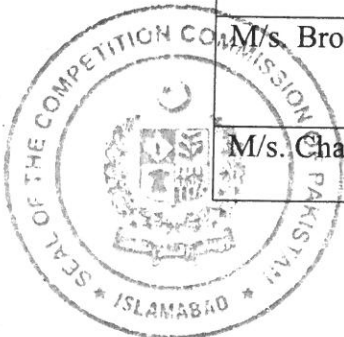
Commission:

Present: Ms. Bushra Naz Malik
Member

Mr. Mujtaba Ahmad Lodhi
Member

Present on behalf of:

M/s. Berger Paints Pakistan Ltd	Mr. Sultan Babar Mirza Mr. Wahid Qureshi Mr. Mehr Muhammad Iqbal, Advocate Mr. Aftab Chaudhry, Legal Counsel
M/s. Brighto Paints (Pvt) Limited	Mr. G. A. Tariq Khan, <i>Advocate Supreme Court</i> Mr. Omar Obaid, Brand Manager Mr. Syed John Alia
M/s. Brolac Paints	Mr. Muhammad Waseem
M/s. Chawla Paints	Mr. Tariq Munir, Advocate Mr. Muhammad Asghar



M/s. Allied Paints Industries Ltd (Gobi)	Mr. Asim Zafar (Rtd), COO Mr. Bilal Kashmiri, Advocate
M/s. Karss Paints Industries (Pvt) Limited (Happilac)	Mr. Tariq Munir, Advocate Mr. Muhammad Asghar Mr. Asad ur Rehman, Manger Supply Chain Marketing Mr. Ali Anwar, DGM
M/s. Kansai Paint (Pvt) Limited	Syed Zia Uddin, CFO Mr. Fawad Ikram, Business Manager
M/s. Rafiq Polymer Industries (King Fisher)	Mr. Tariq Munir, Advocate Mr. Muhammad Asghar
M/s. Mansoor Paint Industries (Marvell)	Mr. Tariq Munir, Advocate Mr. Agha Zahid Abbas, <i>Area Marketing Manager</i> Khwaja Imran, Director
M/s. Nelson Paint Industries	Ahsan Hameed Lilla, Advocate Supreme Court
M/s. U.P. Industries (Pvt) Limited (Silver Sand)	Mr. Tariq Munir, Advocate Mr. Muhammad Asghar



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ORDER

1. This Order shall dispose of proceedings initiated vide Show Cause Notices No. 15/2014 to 25/2014 dated October 3, 2014 (the 'SCNs') issued to (11) eleven paint manufacturing companies (hereinafter collectively the 'Respondents') by the Competition Commission of Pakistan (the 'Commission') for, non-compliance of Commission's order dated 13-01-2012, issued for contravention of Sections 10 of the Competition Act, 2010 (the 'Act').

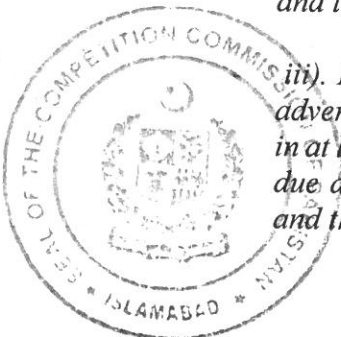
A. FACTUAL BACKGROUND

2. The Commission, upon reference and concern expressed by the Consumer Association of Pakistan took notice of the marketing practice in the paints industry of inserting redeemable coupons (hereinafter "token(s)") in paint packs used for house-hold purposes, falling within the category of decorative paints. During the course of proceedings, it was noted that the televised adverts and physical packaging of the paint packs did not provide any indication in respect to the presence of redeemable tokens within. In other words, while paint retailers/painters enjoyed discounted prices on a particular product, the consumers were left to buy the same at a price un-cumbered by the token. The Commission vide its order dated 13-01-2012 (the "Paints Order") concluded, "*The practice of omission of material information with respect to the tokens in paint packs amounts to misleading consumers, hence, is deceptive and in violation of section 10 of the Act*". Thereafter, the following directions were issued to the Undertakings to ensure that their marketing practices are in compliance with the provisions of the Act:

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

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

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



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

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

3. All the Respondents have submitted compliance reports subsequent to the Paints Order, in pursuance of the directions of the Commission. With respect to the compliance reports it is summarized as follows:

A. Berger Paints Pakistan Ltd (Respondent No. 1)

4. Respondent No. 1 has submitted compliance report, vide letter dated April 3, 2012. As per the report, Respondent No. 1 had taken the following steps to ensure compliance of the Commission's order;

a) Coupon values have been displayed on the paint packs to ensure that the consumers are able to avail the benefit of coupons.

b) Four A-4 size advertisements/ public notices approved by the Commission have been published in 2 Urdu and 2 English newspapers, having national circulation, making due disclosures to the public regarding the presence and price/ value of the token and the category of products in which these tokens are found to be present. The said notices have been published on the following dates:

- 15th Feb 2012 advertisement was published in Daily Pakistan Today.
- 1st March 2012 advertisement was published in Daily Din.
- 15th March 2012 advertisement was published in Daily Times.
- 1st April 2012 advertisement was published in Daily Din.

c) For televised advertisements, the Respondent had ensured the compliance with the Order dated 13-01-2012 as well as instructions that were contained in the letter dated 13th March 2012.



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- d) For shade cards, disclosure of coupon with maximum coupon value on page containing shade information are placed as per the Commission's order and instructions vide letter dated 13th March 2012.
- e) With respect to the paint packaging, the company has ensured compliance with the Commission's aforesaid order and instructions contained in their subsequent letter dated 13th March 2012.

B. Brighto Paints (Pvt) Limited (Respondent No. 2)

5. Respondent No. 2 has submitted compliance report, vide letter dated 30-03-2012, in which PPMA and its members had enforced the order through publication of advertisements. The Respondent confirmed that on every container of paint, disclosure of token was being published on the new packing along with a stamp identifying the value of token it contained. As far as the disclosure of the token on the advertisement material, price list and shade cards are concerned, it was also being enforced. An advertisement/public notice by the Respondent No. 2 regarding the range of the token inside had also been mentioned in the newspapers as directed by the Commission within the Paints Order.

C. Brolac Paints (Respondent No. 3)

6. Respondent No. 3 has submitted compliance report, vide letter dated 01-02-2012, along with shade cards and paint boxes indicating insertion of tokens and their values.

D. Chawla Paints (Respondent No. 4)

7. Respondent No. 4 has submitted compliance report, vide letter dated 30th March 2012 and confirmed that on every container of paint, the disclosure of token is being published on all new packing with stamp indicative of the value of token within. As far as the publication of disclosure of token on advertisement material, price list and shade card are concerned, that is also being enforced.

E. Allied Paints Industries Ltd (Gobi) (Respondent No. 5)

8. The counsel for Allied Paints presented the evidence in respect of the Respondents compliance following the Paints Order. The Respondent No. 5 provided a complete price list of all their products including information regarding the insertion of tokens and their value effective from 1st February 2012. The evidence also included shade cards and paint boxes mentioning the token and their values the disclaimer has been through the use of stickers.



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F. Karss Paints Industries (Pvt) Limited (Happilac) (Respondent No. 6)

9. The Counsel for the respondents, vide letter dated 30-03-2012, confirmed that his client PPMA and Karss Paints Industries had enforced the Order through Publications of advertisement and also confirmed that on every container of the paint the disclosure of token was being published on all the new packaging with stamp of value of the token which it contains. It was further alleged that the publication of disclosure of token on advertisements material was also being enforced.

G. Kansai Paints (Pvt) Limited (Respondent No. 7)

10. Respondent No. 7 has submitted compliance report, vide letter dated 3-05 2012, Kansai Paints had sent a compliance report with regards to the Paint Order dated 13-01-2012 passed by the Commission. The Respondent No. 7 had, vide letter dated 30-09-2013, sent another compliance report. In this Kansai Paints had taken the following steps to ensure the compliance of the Commission's Order which are as follows:

- a) All the advertisements and promotional materials pertaining to the paint packs falling in the decorative paint category, electronic and printed, have since been modified to disclose the presence and price/value of tokens.
- b) They had not run any TVC during this time.
- c) Regarding paint packs, on all the new decorative products, packs manufactured and marketed after 1-09-2012, Respondent No. 7 was displaying disclosures in a circular seal in bold and conspicuous colors.
- d) Regarding public notice, Respondent had already placed/published four (4) notices/advertisements of A-4 size approved by the Commission in two (2) Urdu and two (2) English newspapers.

H. Rafiq Polymer Industries (King Fisher) (Respondent No. 8)

11. The Respondent No. 8 has submitted its compliance vide letter dated 30-03-2012 regarding the token in the paint packs.



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I. Mansoor Paint Industries (Marvell) (Respondent No. 9)

12. The Respondent No. 9 has submitted its compliance report in June 2012 in pursuance of the Commissions directions within the Paints order.

J. Nelson Paint Industries (Respondent No. 10)

13. Respondent No. 10 has submitted compliance report vide letter dated 10-03-2012. The respondent had provided evidence to prove that it had followed the Commission's directions. Among the said evidence was a complete price list that mentioned the token values for each product dated 10-03-2012 along with shade cards, which disclosed the presence of tokens and their values. The disclosure was made for the paint boxes in the form of stickers.

K. U.P. Industries (Silver-Sand) (Respondent No.11)

14. Respondent No. 11 has also submitted compliance report pursuant to the Commissions directions within the Paints order.

15. The Competition Act, 2010 provides:

"28. Functions and powers of the Commission. (1) The functions and powers of the Commission shall be

(a) to initiate proceedings in accordance with the procedures of this Act and make orders in cases of contravention of the provisions of the Act;

(b) to conduct studies for promoting competition in all sectors of commercial economic activity;

(c) to conduct enquiries into the affairs of any undertaking as may be necessary for the purposes of this Act;

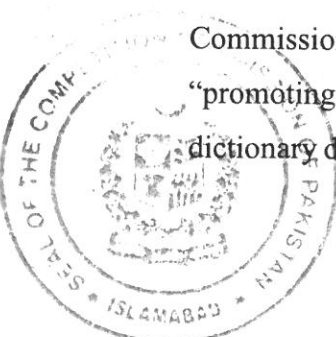
(d) to give advice to undertakings asking for the same as to whether any action proposed to be taken by such undertakings is consistent with the provisions of this Act, rules or orders made thereunder;

(e) to engage in competition advocacy; and

(f) to take all other actions as may be necessary for carrying out the purposes of this Act.

(2) The Commission may, subject to such conditions as it may think fit to impose, delegate all or any of its functions and powers to any of its Members or officers as it deems fit."

16. Within Section 28 of the Act, as reiterated and underlined above for ease of reference, the Commission is adequately authorized by the Act to perform studies for the purpose of "promoting competition in all sectors of commercial economic activity". The Black Laws dictionary defines the word "Study" as "The research, examination, identification of aspects



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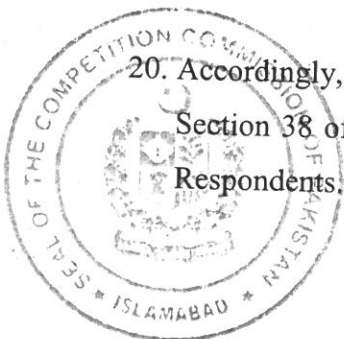
or factors of an event or activity”. In the instant matter, for the purpose of identifying and examining the compliance of the paint-manufacturers, the Commission has conducted multiple surveys in the relevant market, through its duly-authorized officers. So that any non-compliance (non-competitive behaviour) with respect to the Commission’s order may be identified and subsequently rectified in order to promote competition within in the realm of the Paints Industry.

17. The Bench deems it appropriate to note that across the globe surveys are deemed as an unbiased, efficient and effective way of gathering information in respect to the concerns present within a particular market. Surveys are being utilized for the purpose of compiling information in respect to a particular economic market, popularity in democratic elections, in the determination of psychological and social preferences, and in determining the effectiveness and standards of public health. For a prime current day example on the usefulness and reliance placed upon surveys, one may refer to the extensive use of surveys being done presently to deduce the effectiveness and possible side effects of Covid-19 vaccines.

18. Therefore, taking notice of the various concerns raised regarding the non-compliance of the Paint Order by the paint manufacturers, the Commission, conducted a survey on the 9th and 10th of December 2013 (“First Survey”), wherein it was revealed that out of the total fifteen (15) paint manufacturing companies only four companies, namely Diamond, Nippon, Black Horse and Sparco, were in compliance with the Paint Order. Whereas, eleven (11) paint manufacturing companies (the “Respondents”) were found to be in non-compliance/partial compliance of the Commissions standing order pertaining to the anti-competitive conduct in question.

19. While the compliance reports submitted by the Respondents at first instance in pursuance of the Commissions directions, were received and clearance letters to certain Respondents were also issued. The fact that the First Survey Report finds the Respondents in partial compliance of the Commission’s directions provides that the compliance of the Respondents was not completely in line with the directions of the Commission issued within the matter.

20. Accordingly, in light of the *prima facie* findings of the Commission, proceedings under Section 38 of the Act were initiated, for non-compliance of the Paints Order, against the Respondents. The relevant portion of the SCN is reproduced hereunder for ease of reference:



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“6. **WHEREAS**, the Commission took notice of various concerns raised regarding the non-compliance of the Paint Order by the paint manufacturers. Accordingly, a market survey was conducted to verify the concerns for non-compliance of the Paint Order. (Copy of the survey is attached as 'Annex-A'). Through the said survey it appears that:

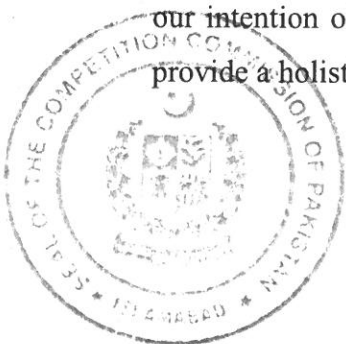
- a). the Undertaking has not issued the disclaimer on advertisement/promotional materials as directed under paragraph 48 (i) of the Paint Order; and
- b). the Undertaking has not mentioned the value of token on the Paint box as required under Para 48 (i) & (ii) of the Paint Order.

7. **WHEREAS**, in terms of the paragraph 48 of the Paint Order, the Undertaking along with other paint manufacturers was required to issue disclaimer on the advertisement/promotional materials and to mentioned the value of token on the Paint box and also to publish four advertisements/public notices of A-4 size, to be published at fifteen days interval in at least two Urdu and two English newspapers of national circulation regarding the disclosure of tokens within sixty (60) days from 15-01-2012 and to file the compliance report with the Commission on or before 30-03-2012;

8. **WHEREAS**, it appears that the Undertaking has not complied with the Paint Order of the Commission in letter and spirit, which is prima facie violation of clause (b) of subsection (1) of Section 38 of the Act.”

B. WRITTEN REPLIES, HEARING PROCEEDINGS AND SURVEY REPORTS:

21. The Respondents, vide SCNs, were called upon to respond in writing within fourteen (14) days of the show cause notices to file the written reply and to avail the opportunity of being heard before the Commission. Due to the number of Respondents involved, coupled with our intention of keeping this Order precise and clear, the Bench deems it appropriate to provide a holistic overview of the matter (in respect to the particulars captioned above).



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22. Through their written replies, all the Respondents have alleged full compliance of the Commission's directions within the Pains Order. In this regard, the Bench would like to refer to Para-18 (above), wherein it is explicitly mentioned that the First Survey has found the Respondents to be in partial compliance of the Commission's directions within the Pains Order.

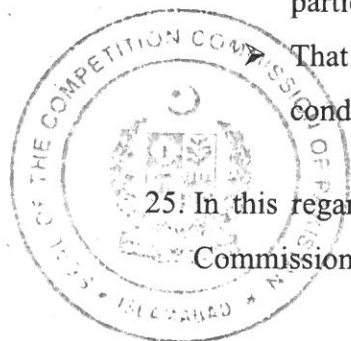
23. Certain Respondents through their replies have referred to clearance letters issued by the Commission, wherein those particular Respondents have been informed that their compliance reports are satisfactory. However, since the First Survey report has found all the Respondents to be in partial compliance of the Commission's directions, said findings provide that the compliance of the Respondents has not been practically or completely implemented in line with the directions of the Commission. That is to say, that while the compliance reports submitted to the Commission may have been satisfactory, the Respondents have failed to implement the same in their ordinary course of business, in letter and spirit (as per the findings of non-compliance by the First Survey), hence, the Show Cause Notices were issued.

24. Furthermore, from a thorough reading of the replies present before us it seems that an underlying common theme exists within the defense which has been cited by the Respondents by virtue of which they appear to absolve themselves of the contents of the Show Cause Notices. The arguments being submitted in this regard are:

- It has been alleged that the Respondent is in compliance of the Commission's directions within the Pains Order;
- It has been alleged that they have not been able to provide the modified products to the dealers present within the area where the First Survey was conducted;
- Or that the dealer was relatively new, therefore he did not have a complete stock and lastly;
- That another undertaking dealer was selling their products owing to which the particular dealer did not have all the material present with him;

That the products are not available in the particular area where the survey was conducted.

25: In this regard, prior to deliberation the Bench would like to quote an excerpt from the Commission's Order dated 29 September 2009 (IN THE MATTER OF M/S CHINA



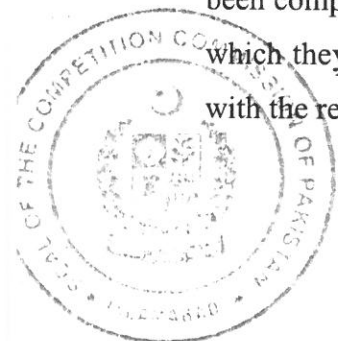
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MOBILE PAK LIMITED (File No. 2(1)/Dir.(L)/CCP/2008) & M/S PAKISTAN TELECOM MOBILE LIMITED (File No.2(6)/Dir(L)/CCP/2008), the following was noted:

“We must place a higher onus on the Undertakings in relation to the marketing practices. 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...It must be borne in mind that one of the objectives of the Ordinance is to protect consumers from anti-competitive practices; hence, the beneficiary of the law is the consumer”

26. It is important to note, that while competition law revolves around the rectification of anti-competitive practices, one of the underlying principles therein remains that of providing adequate protection to consumers. In other words, consumer protection forms a backdrop in the conduct of all proceedings before the Commission.
27. In line with the preceding two paragraphs, the Bench believes that from the outset it is important for the Respondents to understand that the consumers suffer when the compliance of the Commissions directions go unheeded in letter and spirit. The First Survey found the Respondents to be partially compliant with the Commissions directions, therefore, alleging compliance in this regard does not amount to a substantial defense. The fact that the Respondents are unable to adequately equip their dealers (irrespective of; when the dealer’s induction has taken place, the area in which the dealer operates or the fact that the dealer is another undertakings dealer) then they are in violation of the Commissions directions within the Paints Order, as the deceptive marketing continues and the consumers continue to suffer. Moreover, the Bench deems it appropriate to mention that the First Survey is based on the findings pertaining to a particular area and the fact that the undertakings products have been analyzed within the survey report make it clear that the product was indeed present within the market. Therefore, it is pertinent to note that while the arguments (referenced above in para-24) have been cited as a defense against the content of the show cause notices issued, they are in-fact an admittance of the fact that the directions within the Paints Order have not been complied with. As they indicate a lackluster effort on part of the Respondents, due to which they have not been able to properly modify all their products or equip their dealers with the relevant material, as directed by the Commission.



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28. Due to the number of adjournment requests and absences on part of the Respondents during hearing proceedings, the Bench deems it appropriate to proceed in the matter by providing a cumulative outlook in respect to the directions of the Commission during hearing proceedings and the subsequent arguments (if any) by the Respondents present for the same, in context with the findings of the Surveys conducted by the Commission in the instant matter.

FIRST AND SECOND HEARING PROCEEDINGS (held on 16-06-2015 & 24-06-2015 respectively)

29. On the first and second date of hearing, the Respondents present provided the Commission with documents pertaining to the efforts being made to ensure compliance with the Commission's order. The Respondents denied the allegations made within the Show Cause Notice and further assured/promised complete compliance in respect to the directions within the Paints Order, in person during hearing proceedings and vide letters pursuant to the above captioned hearing proceedings. Moreover, the Respondents present, argued that the disclosures on their products have been made in the form of stickers due to the difficulties which arise with the printing of the disclosures in a small period of time.

30. The Bench noted the information submitted during the proceedings. Furthermore, the use of stickers was deemed to be incorrect for the purpose of making the disclosure as it does not constitute adequate/full compliance of the Paints Order. In this regard, the Commission accorded three (3) months' times to the Respondents for compliance.

SURVEY CONDUCTED ON THE 31ST OF MARCH 2016 ("Second Survey")

31. As per the Commissions Second Survey, conducted for the determination of an accurate status in respect to the adherence of the Commissions directions by the Respondents, it was revealed that five of the Respondents (namely U.P. Industries (Pvt) Limited (Silver Sands), Rafiq Polymer Industries (King Fisher), Allied Paints Industries Ltd (Gobi), Chawla Paints and Brolac Paints) satisfied the requirements of the survey report and in turn the directions of the Commission within the Paints Order, whereas, the rest [the six (6) remaining Respondents] were still failing to fully comply the Commissions directions.



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THIRD AND FOURTH HEARING PROCEEDINGS (held on 20-04-2017 and 30-05-2017 respectively)

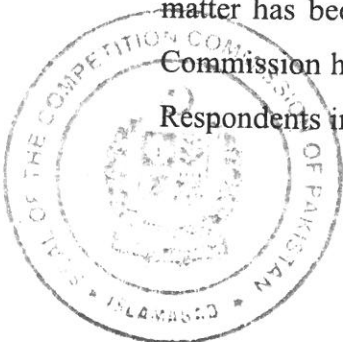
32. During the above-captioned hearing proceedings. The Bench raised concerns in respect to the availability of old products within the market, which could still be utilized to the detriment of the consumer as they have not been modified in line with the instructions of the Commission. In this respect, the Bench allowed further six-month's time for the elimination of old stock present within the market.

SURVEY CONDUCTED DURING THE TIME PERIOD OF DECEMBER 2017 – JANUARY 2018 (“Third Survey”)

33. As per the Third Survey Report, the remaining six Respondents [namely: Berger Paints, Brighto Paints, Karss Paints Industries (Pvt) Limited (Happilac), Kansai Paints (Pvt) Limited, Mansoor Paints (Marvell Paints), Nelson Paint Industries] were still found to be non-compliant with the directions of the Commission.

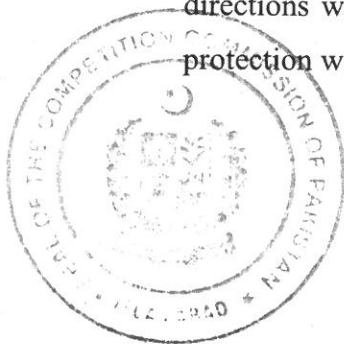
FIFTH, SIXTH AND SEVENTH HEARING PROCEEDINGS (held on 06-12-2018, 13-12-2018 & 10-09-2020 respectively)

34. On these particular hearings the findings of the 3rd survey report were regarded against the assertions of the Respondents. While the survey reports findings have already been put forth in the preceding paragraph, certain Respondents present, continued to allege full compliance with the directions of Commission within the Paints Order.
35. Moreover, it was argued that it was humanely impossible to trace out and replace all old stock (stock not modified as per the directions of the Commission) present within the market, citing obstacles and difficulties arising from the fact that the stock had already been distributed all over the country. It was further argued that the survey reports, which the Commission is using as a reference point for the determination of compliance, do not represent the specific percentage of compliance being taken up by each paint manufacturer.
36. On the seventh and last date of hearing. The Bench clarified that the Bench in the present matter has been reconstituted and as per the requirements of the governing statutes, the Commission held the seventh hearing to provide another opportunity of hearing for all the Respondents in the instant matter.



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37. Keeping in view the extensive and comprehensive approach of the Commission throughout the past decade in respect to compliance within the present matter, so that no stones to remain unturned, the Bench directed the Respondents to submit fresh verifiable compliance reports within thirty days, so that the Commission may once again determine anew the compliance of the Respondents based on their own compliance reports, on the basis of which they have alleged complete compliance with the Commissions directions.
38. Before deliberating upon the issues present within the instant matter, it is important to note that the Paint Industry in Pakistan stands primarily un-organized (60%) with market players focusing/targeting various income groups (High, middle, Low), therefore we can infer that the paints industry does not cater to the needs of a specific income group, rather the industry conducts business with the population at-large.
39. The demand for paint products is principally dependent upon construction, industrial activity and PSDP (Public Sector Development Programs) spending by government. Hence, the demand fluctuates with the economic activity in the country. Therefore, the initiation of government sponsored programs aimed at accommodating and encouraging the construction and infrastructural development within Pakistan has in turn brightened the economic prospects of the Paints Industry at large. Mega housing projects of national importance (Naya Pakistan Housing Scheme) and the development of international economic corridors (CPEC) within Pakistan are pro-found indicators of future growth in the operations of the Paints industry already being valued approximately fifty (50) billion PKR.
40. Therefore, citing the vastness of the Paints Industry and the fact that majority of the players within the industry fall within the un-organized segment, the Commission has adopted a pro-active and comprehensive approach (as is evident from the number of surveys, hearings and correspondence within the instant matter) for ensuring compliance of the Commissions directions within the Paints Order in order to ensure positive competition and consumer protection within the Pakistani economy.



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ISSUES

41. Out of the divergent arguments of the Respondents and perusal of the Enquiry Report, the Commission regards it important to deliberate on the following issues.

A. Whether the undertakings have fulfilled all direction given under Paragraph 48 of the Paint Order?

B. Whether the undertakings are liable for penal action under Section 38 of the Competition Act, 2010 for non-compliance of the Paint Order?

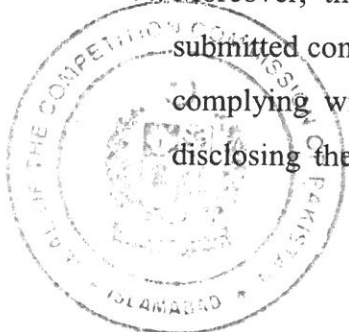
ANALYSIS

A. Whether the undertakings have fulfilled all direction given under Paragraph 48 of the Paint Order?

42. In the light of this issue the survey reports and submissions of each Respondent will be discussed individually to analyze the culpability of each undertaking in the instant matter.

43. While deliberating upon issues falling within the purview of Section 10 (Deceptive Marketing Practices) of the Act, due heed must be paid to each and every aspect of the advertisement while determining its ability to deceive. Hence, while determining an issue at hand the Commission comes to a holistic conclusion in respect to the matter and thereafter, directions for the Respondents are constructed in line with the ultimate-result or rectification which the Commission desires. These directions are not to be viewed separately, rather they are to be appreciated as a whole. In other words, failure to fully comply (100%) with the directions of the Commission would allow the persistence of anti-competitive behavior in violation of the Competition Act, 2010 and the Commission's directions (if any). Therefore, because the directions of the Commission are based on a holistic conclusion/solution (comprising of various aspects), partial compliance (irrespective of the particular percentage) will be inadequate.

44. Moreover, the Bench deems it appropriate to note that through-out the proceedings, submitted compliance reports and survey reports have revealed that the Respondents while complying with the Commissions directions have utilized stickers for the purpose of disclosing the tokens presence. It is important to note that the whole purpose of these



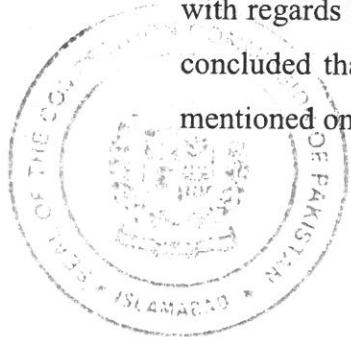

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proceedings is to ensure that consumers (who are the intended beneficiaries of the token practice) avail the benefits accorded by a token present within a paint pack. The instant matter was initiated because while the tokens were aimed at providing monetary incentive for the consumers, the painters ended up being the real beneficiaries due to the non-disclosure of tokens within the paint packs, as the painters would keep the tokens for themselves (to avail the monetary recuperation themselves) while the consumers were left in the dark. The use of stickers in this regard, therefore, undermines this whole practice of ensuring consumer benefit, as it is possible for stickers to be removed. Therefore, the use of stickers for the purpose of disclosing the tokens by the Respondents in accordance with the directions within the Paints Order, citing the anti-competitive conduct pursuant to which these proceedings were initially initiated, is unsatisfactory.

a) **M/s. Berger Paints Pakistan Ltd (Respondent No. 1)**

45. It should be noted that, Berger Paints Pakistan Limited, with regards to the directions contained in paragraph 48 of the Paints Order, as per the First Survey conducted by the Commission, failed to comply. This is because paragraph 48 of the Paint Order with regards to disclaimer on advertisement/ promotional material and the value of token mentioned on the paint pack said, all the advertisements, promotional materials, or instructional manuals pertaining to paint packs primarily falling in decorative paints category, that are manufactured by the undertaking whether electronic, printed or otherwise were to be modified to disclose the presence and the price/ value of the token on each pack for the consumer, within a period of 60 days starting from 15th January 2012. This was neither observed in the first market survey nor in the Second Survey conducted in 2016.
46. With regards to the disclosure of token on the paint pack, as mentioned above in paragraph 48 of the Paint Order, the disclosure should be made with the use of bright/conspicuous colors distinct from the color of the packaging of the paint pack and should be printed in clear, bold and legible size. The Respondent despite including the disclaimer, did so through the use of removable stickers which was expressly stated to be insufficient by the Commission multiple times. Similarly, Berger Paints efforts in respect of their compliance with regards to disclosing the value of the token on the paint packs since the third survey concluded that the Respondent was inserting multiple tokens in the paint packs while it mentioned only one token value on the pack.



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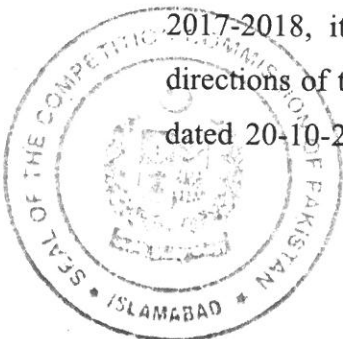
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47. Despite the Respondents consistent assertion of compliance with the directions of the Commission within the Paints Order discussed above, based on the surveys that have been conducted in the years of 2013, 2016 and 2017-2018, it can be seen that Berger Paints has not complied with all of the directions of the Commission which were given in the Paint Order dated 13-01-2012.
48. However, in light of the compliance report dated 08-10-2020 submitted by Respondent No. 1 in response to the last date of hearing conducted on 20-09-2020, the intent and application of the Respondent's compliance is evident. Through this report, Berger Paints has clarified that it is disclosing the presence and the exact value of the token on each pack in a manner that is prominent on the paint packs and without the use of removable stickers.
49. Therefore, the current report and evidence therein shows complete compliance in respect to the Paints Order. Furthermore, the efforts made previously by Respondent No. 1 to fulfill all directions of the order indicates clear intent on part of the Respondent to comply with the Paints Order in line with the promotion of competition within the market.

b) M/s. Brighto Paints (Pvt) Limited (Respondent No. 2)

50. The directions which had been passed by the Commission in the Paints Order have already been discussed above. It is important to first consider the initial compliance report given by PPMA and its members including Respondent No. 2. According to this report steps had been taken to fulfill all the directions of the Paint Order. However, the market surveys conducted by the Commission illustrate that while the Respondent has put disclaimers on the paint packs, it was done through removable stickers contrary to the Commission's directions, as has been found in all three surveys. It must be noted, that the disclaimer through promotional material was only found to have been made in the last survey conducted in 2017-2018. Prior to this no such disclosures, in respect of promotional material, had been made by the Respondent.

51. As per the above discussion and the three surveys, conducted in the years 2013, 2016 and 2017-2018, it is determined that the Respondent has not fully complied with all the directions of the Commission. However, the Respondent No. 2 vide its compliance report dated 20-10-2017 has provided the Commission detailed evidence of not only the paint



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packs and promotional material containing the disclaimers as directed by the Paint Order but have also provided invoices for their sales.

52. Furthermore, the Respondent No. 2 submitted another compliance report dated 21-10-2020 following the direction of the Bench in the last date of hearing held on 20-09-2020. According to this compliance report, the Respondent has fully implemented the instructions of the Commission and therefore, the Respondent cannot be found to be non-compliant with the Paint Order, in particular paragraph 48(i).

c) **M/s. Brolac Paints (Respondent No. 3)**

53. In light of the above discussion, it should be noted that despite the evidence of compliance presented to the Commission vide the compliance report dated 01-02-2012 whereby full compliance was alleged, the Respondent was in fact not complying with the directions of the Commission within the Paints Order, as per the First Survey. In this survey the Commission found that the Respondent failed in regards to the disclaimers to be made through advertisements/promotional material.

54. However, in the following years as can be observed by the survey conducted in the year of 2016, the Respondent No. 3 was fully compliant with all the directions of the Commission that had been contained in the Paint Order dated 13-01-2012 on all four point that were considered in the three surveys and the relevant hearings conducted by the Commission.

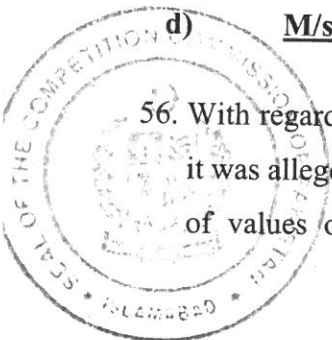
55. Moreover, Respondent No. 3 provided a complete compliance report to the Commission on 21-10-2020 in reply to the directions given in the last hearing dated 20-09-2020. In light of the aforementioned surveys and the multiple compliance reports submitted by the Respondent, Brolac Paints, it can be concluded that the Respondent is in complete compliance with the directions given to the paint manufacturing undertakings within the Paints Order.

d) **M/s. Chawla Paints (Respondent No. 4)**

56. With regard to Chawla Paints, through compliance report submitted after the Paints Order it was alleged that the disclosure of token is being published on all new packing with stamp of values of tokens it contains as well as the publication of disclosure of token on

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advertisement material, price list and shade card. It was then noted that the Respondent, based on the survey conducted in the year 2013, was acting in non-compliance with the directions of the Commissions in the Paints Order. At the time, the Respondent had not made adequate efforts to comply with the Commission's directions as per paragraph 48 of the Paint Order. However, in the following survey conducted in the year 2016 (Second Survey), it was observed that Chawla Paints was fully complying with the directions of the Commission contained and discussed above.

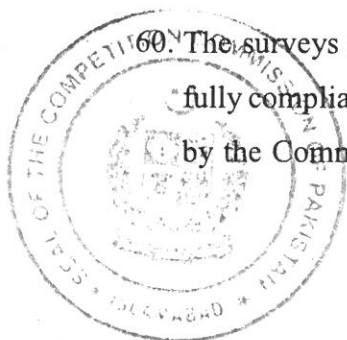
57. Furthermore, it is pertinent to consider the position of Respondent No. 4 in the paints market vide letter dated 29-09-2020. The letter referred to earlier letters of the Respondent No. 3 informing the Commission that they had left the business of paint manufacturing, and in this regard the Respondent has provided relevant evidence in the matter.

58. Keeping in view the above discussion and the current status of the Respondent, it is evident that Chawla Paints is indeed complying with the instructions of Paint Order and have concluded their business in Paints industry, as is relevant for the purpose of this matter. Therefore, the Respondent No. 4 cannot be held in non-compliance of the Commission's directions.

e) **M/s. Allied Paints Industries Ltd (Gobi) (Respondent No. 5)**

59. It is important to consider the matter first in light of the compliance report following the Paints order, wherein the Respondent provided a complete price list of all products including information regarding the insertion of tokens and their value effective from 1st February 2012. This evidence further illustrates that the disclosures were made in the form of stickers which were removable. Hence, from the outset the Respondent No. 5 was only partially complying with the Paint Order since the disclaimers could be removed. Similarly, the first survey conducted by the Commission presents Respondent No. 5 to be in non-compliance with the Commission's directions within the Paints Order on account of not publishing disclaimers on advertisements or promotional material, the subsequent surveys provided evidence to the contrary.

60. The surveys conducted in the years 2016 it was observed that the Respondent No. 5 was fully compliant in its conduct (as is relevant for the purpose of these proceedings) as directed by the Commission within the Paints Order. Furthermore, as per compliance report dated



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24-09-2020, submitted by the Respondent to the Commission, the Respondent provided proof of compliance through disclosure on the paint pack and promotional material and the advertisements issued in newspapers. Therefore, Respondent No. 5 is found to be fully compliant with the directions given in paragraph 48(i) of the Paints Order.

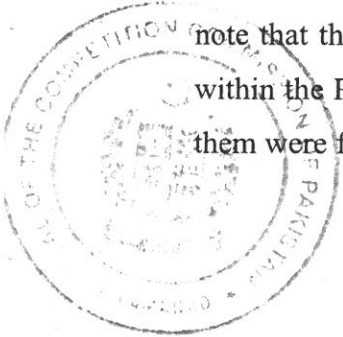
f). **M/s. Karss Paints Industries (Pvt) Limited (Happilac) (Respondent No. 6)**

61. In line with the conduct of the Respondents discussed within the preceding paragraphs, Respondent No. 6 had shown its compliance with the Paints Order vide its letters dated 30-03-2012 and then 16-04-2012. The evidence provided through these letters, albeit showing some degree of compliance, was not sufficient to be considered satisfactory. Furthermore, the First Survey report reveals that Karss Paints continued this partial compliance by failing to comply with the directions of the Commission in the Paints Order regarding the disclaimer on advertisement/promotional materials and the value of token mentioned in the paint packs. Similarly, looking at the Second and Third Surveys, it was concluded that Karss Paint had not mentioned the insertion of tokens in its promotional material in the former survey and in the latter, the disclaimer on paint packs was made through a removable sticker which was insufficient. Likewise, the paint pack did not mention the value of the token and the Respondent was only partially compliant in adequately disclosing the insertion of tokens on promotional material.

62. Presently, Respondent No. 6, vide compliance report dated 16-10-2020, has provided detailed evidence of compliance in the form of complete lists of dealers in Faisalabad, Lahore and Rawalpindi as well as the proof for paint packs and promotional material as directed within the Paints Order. Therefore, it is concluded that the Respondent has fully complied with the directions of the Commission regarding all the points mentioned in the Paints Order dated 13-01-2012.

g). **M/s. Kansai Paint (Pvt) Limited (Respondent No. 7)**

63. In respect of the first compliance report submitted by Respondent No 7, it is pertinent to note that the actions taken, although in line with the directions of the Commission given within the Paints Order, did not suffice to satisfy all the directions rather only a portion of them were fulfilled. Furthermore, based on the First Survey Report conducted in 2013, it is



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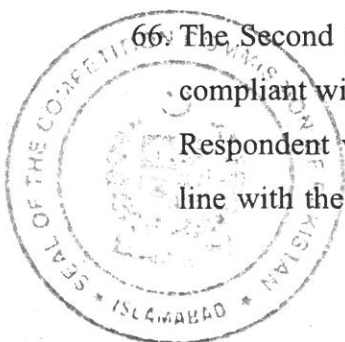
noted that Respondent No. 7 was complying with the directions of the Commission regarding the token insertion, the value of token mentioned in the paint pack and the disclaimer on the paint pack, however, the disclaimer on advertisements/promotional materials remained missing. The second survey conducted in 2016, found that the Respondent was once again partially compliant, the Respondent was using stickers for the purpose of making the disclosures, moreover, the Respondent was not mentioning the insertion of token on its promotional material. As per the Third Survey, while the Respondent was mentioning the insertion of token on its promotional material, the Respondent continued the use of removable stickers for the disclosure, therefore, the Respondent was deemed to be in partial compliance of the Commissions directions.

64. In this regard, it is important to keep in view the compliance report submitted by Respondent No. 7 following the last date of hearing held on 20-09-2020 whereby it has become evident that the Respondent has taken all the steps necessary, i.e., while the Respondents sole short-coming, with respect to the Commissions directions, pertained to the use of stickers, said short-coming has been rectified to ensure compliance. Therefore, it can be concluded that Respondent No. 7, is now fully compliant with the Commissions directions contained within the Paints Oder.

h). M/s. Rafiq Polymer Industries (King Fisher) (Respondent No. 8)

65. Although the Respondent had provided an initial compliance report pursuant to the Paints Order, the first survey conducted in the year 2013 observed that Rafiq Polymer Industries, had complied with the Paints Order in terms of the token insertion, the value of token mentioned on the paint pack and the disclaimer on the paint pack, but the Respondent was not complying with the requirement of disclosing the presence of a token on advertisements/promotional materials. Hence, the Respondent No. 8 was only partially compliant, i.e., the Respondents efforts were insufficient to satisfy the conditions of paragraph 48(i) of the Paint Order.

66. The Second Survey conducted in the year 2016 illustrates that the Respondent was fully compliant with the directions of the Commission within the Paints Order. Furthermore, the Respondent vide its letter, dated 11-10-2020, submitted a complete compliance report in line with the directions given by the Bench in the last hearing conducted on 20-09-2020.



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Therefore, it is concluded that the Respondent No. 8 is fully compliant with the directions of the Commission in the Paint Order under paragraph 48(i).

i). M/s. Mansoor Paint Industries (Marvel) (Respondent No. 9)

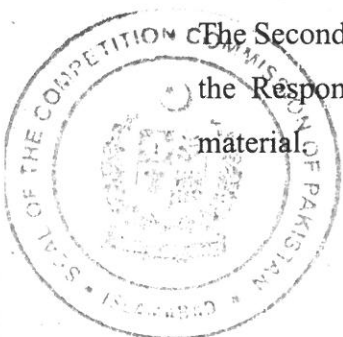
67. In light of all the surveys conducted in this matter, it was observed that Marvel Paints failed to fully comply with the Commission's directions within the Paints Order. The First Survey found the Respondent to not use a disclaimer for the insertion of tokens in promotional material. The same was seen in the second survey as well. Furthermore, similar conduct was also detected by the Third Survey Report. On account of mentioning the insertion of tokens on paint packs, Marvel Paints was only partially compliant as the disclaimers were made by stickers contrary to the Commission's direction.

68. It is pertinent in this regard to consider the compliance report dated 11-10-2020 submitted by the Respondent No. 9 which showed complete compliance with the Paint Order as well as a list of dealers in Lahore. In this report, the Respondent also discussed the steps taken to ensure compliance which allude the intent of the undertaking to act in line with the parameters of the Act. Thus, the Respondent can be deemed to be in full compliance with the directions of the Commission in the Paint Order under paragraph 48(i).

j). M/s. Nelson Paint Industries (Respondent No. 10)

69. Whilst evaluating the compliance in this matter it is necessary to consider the proof provided the Respondent vide its compliance report following the Paints Order. Similar to the aforementioned Respondents, this report showed that although Nelson Paint had complied to a certain extent, the compliance could not amount to the criteria set by the Bench, i.e., complete compliance in line with the aim and intent of the Paints Order. The Commission, based on the First and Second Survey, has observed that Respondent No. 10 was not acting in compliance with the directions in paragraph 48 (i) of the Paint Order. As per the First Survey, the Respondent had not provided disclosures in respect of token within paint pack on its promotional material, nor the value of token within the paint packs been mentioned.

The Second Survey revealed; while the value of token within paint packs had been disclosed the Respondent was still failing to mention the insertion of token on its promotional material.



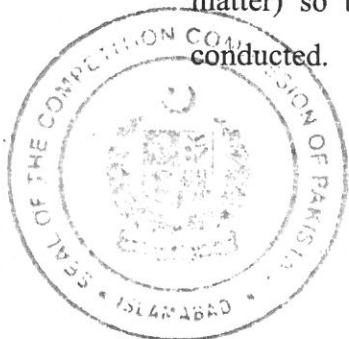
70. This situation remained the same in light of the Third Survey Report, whereby the Commission observed that the Respondent was still in partial compliance as stickers were being used for the purpose of making the disclosure of token within paint packs. However, the compliance report provided to the Commission dated 8th December 2020 has revealed complete compliance of the Commissions directions within the Paints Order by Respondent No. 10.

k). M/s. U.P. Industries (Pvt) Limited (Silver-Sand) (Respondent No. 11)

71. The First Survey conducted in the year 2013 observed that the U.P. Industries, had not been complying with the directions of the Commission in paragraph 48(i) Paint Order. This was because the Respondent was not disclosing the presence of tokens within paint packs on advertisement/promotional material.

72. However, in view of the Second Survey that was conducted in the year 2016, it can be noted that the Respondent was fully complying with the Commission's directions with regards to the points mentioned in paragraph 48(i) of the Paints Order. In the same manner, the compliance report filed by the Respondent dated 11-10-2020 provides proof of said compliance in the form of a list of its dealers and disclosures made through newspapers. Thus, it can be concluded that Respondent No. 11 is now acting in complete compliance with the Paint Order as per the directions of the Commission.

73. Upon conclusion of deliberation in respect of the compliance status of each Respondent through-out the course of these proceedings, the Bench deems it appropriate to include the following table within this order (constructed on the basis of the compliance reports submitted pursuant to the directions of the Bench on the last date of hearing in the instant matter) so that the reader may understand the criteria upon which the surveys were conducted.



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S. No	Name of Companies	Token Insertion	Disclaimer on Advertisement/Promotional Materials	Value of Token mentioned on Paint Pack	Disclaimer on Paint Pack	Remarks
1.	Berger Paints (Respondent No. 1)	✓	✓	✓	✓	The Respondents are in Compliance of the Commissions directions within the Paints Order
2.	Brighto Paints (Respondent No. 2)	✓	✓	✓	✓	
3.	Brolac Paints (Respondent No. 3)	✓	✓	✓	✓	
4.	Chawla Paints (Respondent No. 4)	Respondent No.4 has informed the Commission (along with relevant evidence) that they have left this particular line of business. The same was found in compliance of the Commissions directions by the 2 nd Survey Report.				
5.	Allied (Gobi's) (Respondent No. 5)	✓	✓	✓	✓	
6.	(Karss) Happilac (Respondent No. 6)	✓	✓	✓	✓	
7.	Kansai Paints (Respondent No. 7)	✓	✓	✓	✓	
8.	Rafiq (King Fisher) (Respondent No. 8)	✓	✓	✓	✓	
9.	Mansoor (Marvel) (Respondent No. 9)	✓	✓	✓	✓	
10.	Nelson Paints (Respondent No. 10)	✓	✓	✓	✓	
11.	UP (Silver Sand) (Respondent No. 11)	✓	✓	✓	✓	

B. Whether the undertakings are liable for penal action under Section 38 of the Competition Act, 2010 for non-compliance of the Paint Order?

74. The Competition Act, 2010 provides:

“38. Penalty – (1) The Commission may by order direct any undertaking or any director, officer or employee of an undertaking, to pay by way of penalty such sum



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24

as may be specified in the order, if, after giving the undertaking concerned an opportunity of being heard, it determines that such Undertaking: -

- a) has been found engaged in any activity prohibited under this Act;
- b) has failed to comply with an order of the Commission made under this Act;
- c) has failed to supply a copy of the agreement or any other documents and information is required under this Act or requisitioned by the Commission
- d) has furnished any information or made any statement to the Commission which such undertaking knows or has reason to believe to be false or found by the commission to be inaccurate; or
- e) knowingly abuses, interferes with, impedes, imperils, or obstructs the process of the Commission in any manner:

Provided that fair comments made in good faith and in the public interest on the working of Commission or on any order of the Commission issued after the completion of any proceedings, shall not be subject to the imposition of a penalty

(2) The Commission may impose penalties at the following rates, namely;

(a) for a contravention of any provision of Chapter II of the Act, an amount not exceeding seventy-five million rupees or an amount not exceeding ten percent of the annual turnover of the undertaking, as may be decided in the circumstances of the case by the Commission; or

(b) for non-compliance of any order, notice or requisition of the Commission an amount not exceeding one million rupees, as may be decided in the circumstances of the case by the Commission; and

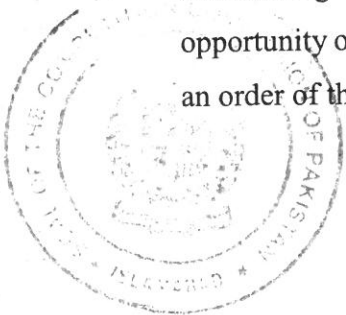
(c) For clause (e) in sub-section (1), an amount not exceeding one million rupees as may be decided in the circumstances of the case by the Commission

(3) If the violation of the Commission is a continuing one, the Commission may also direct the undertaking guilty of such violation shall pay by way of penalty a further sum which may extend to one million rupees for every day after the first such violation.

(4) Any penalty imposed under this Act shall be recoverable as provided in section 40.

(5) Notwithstanding anything contained in this Act or any other law for the time being in force, failure to comply with an order of the Commission shall constitute a criminal offence punishable with imprisonment for a term which may extend to one year or with fine which may extend to twenty-five million rupees and the Commission may, in addition to, or in lieu of, the penalties prescribed in this Act, initiate proceedings in a court of competent jurisdiction.

75. Section 38 (Penalty) sub-section 1(b) of the Competition Act, 2010 provides that an undertaking can be penalized, after the undertaking concerned has been given an opportunity of being heard, if it is determined that the undertaking has failed to comply with an order of the Commission made under this Act.



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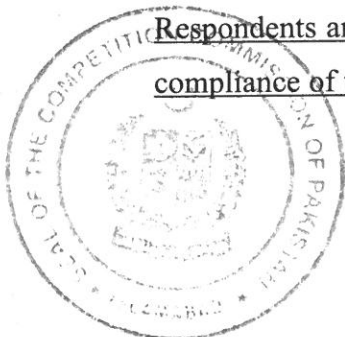
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76. In the context of non-compliance Sub Section 2 (b) of Section 38 provides that in instances of non-compliance of the Commission's order, notice or requisition, the Commission may impose a penalty not exceeding one million rupees, one million rupees for every day after the first such violation, if the violation of the Commission's order is a continuing one [section 38 (3) of the Act], moreover, as per Section 38 (5) of the Act, failure to comply with a standing order of the Commission constitutes a criminal offence punishable with imprisonment for a term which may extend to one year or a penalty not exceeding twenty-five (25) million rupees in bulk on each Respondent.

77. It is reiterated, upon reconstitution of Bench, the Commission has provided the Respondents with an opportunity of being heard on the 10-09-2020. Wherein, the Respondents were directed to provide verifiable compliance reports, which were then analyzed along with all documents available on record, compiled by virtue of the Commissions extensive and comprehensive approach in the instant matter, against the backdrop of the Commission directions within the Paints Order. After which the Commission has come to the conclusion the Respondents in the instant matter are now fully in compliance with the Commissions directions within in the Paints Order.

78. The mandate of the Commission is to encourage compliance and promote 'competition culture' within the region. This is only possible when undertakings comply with the orders given by the Commission in matters where violation of the Act have taken place. The Paints Order dated 13-01-2012 found the Respondents to have been in violation of Section 10 of the Act, as they were involved in deceptive marketing practices of including redeemable tokens within paint packs without adequately disclosing this practice to the end consumer thereby hampering free competition in the market. The purpose of this order is to ensure compliance with the Paints Order so that healthy competition prevails within the paints industry.

79. In light of the actions taken by the Respondents and the above-discussion with regard to the recognized status of compliance of each Respondent, it can be concluded that the Respondents are not liable to be penalized under Section 38(1) (b) of the Act for the non-compliance of the Commission's directions within the Paint Order.



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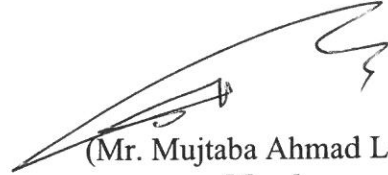
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80. Lastly, citing the vastness of resources and time which the Commission has dedicated to ensure compliance within the present matter, it should be duly noted/considered/observed that these efforts should not go unheeded, *in this regard the Bench deems it appropriate to make it clear that should any concerns in respect of similar practices in the Paints Industry be brought to the cognizance of the Commission, stern and definitive actions will follow under the aforementioned prerogatives of the Commission.*

81. In terms of the above, the SCNs are hereby disposed.



(Ms. Bushra Naz Malik)
Member



(Mr. Mujtaba Ahmad Lodhi)
Member

ISLAMABAD THE 13th DAY OF OCTOBER 2021

