BEFORE THE
COMPETITION COMMISSION OF PAKISTAN
IN THE MATTER OF
SHOW CAUSE NOTICES ISSUED TO PAINT MANUFACTURERS
(FILE NO. 43/REG/OFT/PPMA/CCP/2011)

Dates of hearing:	August 25, 2011 September 14, 2011 October 21, 2011
Present:	Ms. Rahat Kaunain Hassan **Chairperson** Ms. Vadiyya S. Khalil **Member** Mr. Shahzad Ansar **Member**

On behalf of:

M/s. ICI Pakistan Ltd	Vellani & Vellani Ms. Farzeeb Bhadha, Advocate Ms. Samiya Fikree, Advocate Mr. Jehannzeb Khan, Vice President ICI Mr. Imran Qureshi
M/s. Mansoor Paint Industries (Pvt.) Limited M/s. Diamond Paints Industries (Pvt.) Limited M/s. UP Industries (Pvt.) Limited M/s. Sikka Pait Industries (Pvt.) Limited M/s. Karss Paints Industries (Pvt.) Limited (Happilac) M/s. Nelson Paint Industries M/s. Black Horse Paints M/s. Rafiq Polymer Industries (Pvt.) Limited (Kingfisher) M/s. Allied Paint Industries M/s. Brighto Paints (Pvt.) Limited M/s. Chawla Chemicals & Metal Industries (Pvt.) Limited	Mr. Imran Anjum Alvi, Advocate Supreme Court
M/s. Kansai Paint (Pvt.) Limited	Mr. Shakeel Ahmed Qazi, Advocate
M/s. Brolac Paits	Mr. Muhammad Waseem, Chief Executive Officer
M/s. Berger Paints Pakistan Ltd	Mr. Wahid Qureshi, Company Secretary Mr. Ahmed Abbad, Advocate
M/s. Nippon Paint Pakistan (Pvt.) Limited	Mr. Irfan Ahmed Malik, Mr. Samad Zaheer, General Manager

ORDER

1. This Order shall dispose of the proceedings arising out of Show Cause Notices No. 8/2011, 9/2011, 12/2011, 11/2011, 13/2011, 14/2011, 10/2011, 15/2011, 16/2011, 17/2011, 18/2011, 19/2011, 20/2011, 21/2011, 22/2011, 23/2011 (hereinafter collectively referred to as the "**SCNs**") issued to sixteen paint companies M/s ICI Pakistan (Ltd) (the "**ICI**"), M/s Nippon Paint Pakistan (Pvt) (Ltd) (the "**Nippon**") , M/s Kansai Paint (Pvt)(Ltd) (the "**Kansai**"), M/s Berger Paints Pakistan (Ltd) (the "**Berger**"), M/s Brighto Paints (Pvt) (Ltd) (the "**Brighto**"), M/s Diamond Paint Industries (Pvt)(Ltd) (the "**Diamond**"), M/s Mansoor Paint Industries (hereinafter "Marvel"), M/s U.P Paint Industries (Pvt) Ltd (the "**Silver Sand**"), M/s Nelson Paint Industries (the "**Nelson**"), M/s Chawla Chemical and Metal Industries (Pvt) Ltd (the "**Chawla**"), M/s Brolac Paints (Pvt) (Ltd) (the "**Brolac**"), Karss Paints Industries (Pvt)(Ltd) (the "**Happilac**"), M/s Allied Paint Industries (the "**Gobi**"), M/s Sika Paint Industries (Pvt) (Ltd) (the "**Sparco**"), M/s Rafiq Polymer Industries (the "**Kingfisher**") and M/s Black Horse Paints (the "**Black Horse**"). The above named companies are hereinafter collectively referred to as (the "**Undertakings**") and have been issued SCN for *prima facie* violation of Section 10 of the Competition Act 2010 (the "**Act**") for engaging in deceptive marketing practices.

BRIEF FACTS

2. The Undertakings are engaged in the business of manufacturing and sale of paints and varnishes and qualify as undertakings as defined under clause (q) of sub-section (1) of Section 2 of the Act.

3. The Competition Commission of Pakistan (hereinafter the "Commission"), upon reference and concern expressed by the Consumer Association of Pakistan took notice of the marketing practice in the paint industry of inserting redeemable coupons (hereinafter "token(s)") in paint packs used for household purposes, falling in the decorative paints category. The Commission took notice of the fact that the televised adverts and packaging of the paint packs did not give any indication of the presence of token in these

packs. It seemed that the said practice targeted directly the painters while the end consumers bear the price and are not made aware of the placement of token inside the paint pack in the absence of any formal disclosure on the relevant product.

4. The Commission sought clarifications from the Undertakings as to whether due disclosures were being made regarding the tokens, detailed information pertaining to the value of tokens in the paint packs and appropriate reasoning as to what benefit is being passed on to the consumer who is paying for the product and what value addition exists for such consumer. Briefly the clarifications offered by the Undertakings are as under;

ICI

5. In its letter dated June 5, 2011 ICI admitted to the practice of putting tokens in its Maxilite and Paintex Brands totaling nine varieties of paint with the token values ranging from Rs. 45- Rs. 400 depending on the size of the container and quality of the paint. It submitted that it had been engaged in this practice since the mid- 1990s and tokens inserted in the paint containers serve the following purposes:

(a) ensure that the retailer (the Company's customer) is discouraged from selling fake or counterfeit paint to the consumer;
(b) provide the consumer assurance of the Company's product; and
(c) serve as a second line of defense against spurious products by ensuring that the retailer is accountable to the customer.

Nippon

6. In its letter dated June 13, 2011 and subsequent letter dated June 21, 2011 Nippon admitted to the practice of putting tokens in eleven brands totaling twenty one varieties with token values ranging from Rs. 55- Rs. 440 depending on the size of the container and quality of the paint. It submitted that when it entered the market in 2007 all major market players were engaged in this practice, hence they were forced to introduce tokens in their products in 2009. It was further stated that no disclosures were being made about the presence of the token and that this tool is targeted towards the painter and in most cases it is the painter who gets the benefit.

Kansai

7. In its letter dated June 1, 2011 Kansai admitted to the practice of putting tokens as being an accepted trade norm, in eight varieties of paint with token values ranging from Rs. 27.5- Rs. 220 depending on the size of the container and quality of the paint. It was stated that there was no mention on the product packaging, brochures and flyers regarding the tokens in the paint packs but the painters, customers and paint dealers are fully aware of these values. It was submitted that the benefit being passed on to the consumer is that he gets a discount on the labor costs of paint application, as the painter generally adjusts his labor cost with the customer against the value of the token. However, should the customer choose to avail this benefit he may also do so by opening the packs personally.

Berger

8. In its letter dated June 10, 2011 Berger admitted to the practice of putting tokens in paint packs and that no disclosure of the presence of the token was being made on the product/advert. Berger stated that according to Section 11 (1) of the Punjab Consumer Protection Act 2005 regarding duty and disclosure "*where the nature of the product is such that the disclosure of its component parts, ingredients, quality, or date of manufacture and expiry is material to the decision of the consumer to enter into a contract for sale, the manufacturer shall disclose the same*" the company was not under duty to disclose information like the presence of token in the paint pack. It was denied that any deceptive marketing practices had taken place under Section 10 of the Act as it is not misleading as no disclosure is required under the law. Detailed information regarding the value of tokens was not provided. It was further stated that the benefit passes on to the consumer who is paying for the product of a particular category which contains token unknown to the consumer through cost reductions.

Brighto

9. In its letter dated June 28, 2011 Brighto admitted to the practice of putting tokens in paint packs and that no disclosure of the presence of the token was being made on the pack. It was argued that it is an incentive for the buyer who opens the pack and finds the

coupon which is en-cashable at any shop/outlet of their products. It was submitted that the requisite detail pertaining to the value of tokens cannot be provided as their value keeps changing from time to time; however, the value ranges from Rs. 25- Rs. 200.

Diamond

10. In its letter dated June 29, 2011 Diamond admitted to the practice of putting tokens in seventeen varieties of paint packs and that no disclosure of the presence of the token was previously being made on the pack/advert. It was stated that major sale of their decorative paints is through paint contractors who usually quote "with material" prices so the benefit goes to the end consumer directly and that this practice is well known to all consumers/buyers and they can get their token redeemed from any of the company's buyers.

Marvel

11. In its letter dated June 30, 2011 Marvel admitted to the practice of putting tokens in paint packs ranging from Rs. 20- Rs. 400 and that no disclosure of the presence of the token was being made on the pack/advert. It was stated that the reason for putting these tokens was to give the buyer an incentive to purchase the product and the whole benefit goes to the buyer.

Silver Sand

12. In its letter dated July 1, 2011 Silver Sand admitted to the practice of putting tokens in twelve varieties of paint packs ranging from Rs. 50- Rs. 300 depending on size of paint pack and quality of paint and that no disclosure of the presence of the token was being made on the pack/advert. Silver Sand submitted that the ultimate benefit of this practice is for the end consumer/ buyer since on opening the pack he finds a coupon inside on which the amount of the coupon is clearly mentioned.

Nelson

13. In its letter dated June 29, 2011 Nelson admitted to the practice of putting tokens in some of the products as a means to promote sales and that no disclosure of the

presence of the token was being made on the pack/advert. Nelson submitted that benefits of this practice are two fold- paint contractors who usually provide paint services “with material” take possession of the token inside while negotiating their prices, hence the benefit goes to the consumer directly and consumers/buyers are well aware about the redemption procedure of the token.

Chawla

14. In its letter dated June 30, 2011 Chawla admitted to the practice of putting tokens in paint packs ranging from Rs. 20- Rs. 200 and that no disclosure of the presence of the token was being made on the pack/advert but details have been provided to dealers. Chawla submitted that the benefit is for the consumer of the goods who opens the pack and then goes and gets the token encashed. It was submitted that in order to survive in the presence of multinational giants the company was forced to use the same marketing tool as these giants.

Happilac

15. In its letter dated June 30, 2011 Happilac admitted to the practice of putting tokens in paint packs ranging from Rs. 20- Rs. 300 and that no disclosure of the presence of the token was being made on the pack/advert. The benefit is for the consumer of the goods who opens the pack and then goes and gets the token encashed. It was stated that in order to survive in the presence of multinational giants they were forced to use the same marketing tool as they do.

Gobi

16. In its letter dated June 30, 2011 Gobi admitted to the practice of putting tokens in paint packs ranging from Rs. 20- Rs. 400 and that no disclosure of the presence of the token was previously being made on the pack/advert. It was further stated that Gobi sells their paint through dealers who quote “with material” prices so the benefit is for the consumer of the goods.

Sparco

17. Imran Alvi and Associates on behalf of Sparco in its letter dated July 25, 2011 admitted to the practice of putting tokens in paint packs ranging from Rs. 25- Rs. 200 and that no disclosure of the presence of the token was being mentioned on the label because the value of these schemes keeps on varying from time to time. Sparco denied that deceptive marketing had taken place and stated that the false or misleading representations mean making performance representations which are not based on adequate tests, misleading warranties and guarantees, false or misleading ordinary selling price representations, untrue misleading or unauthorized use of tests and testimonials, bait and switch selling double ticketing and the sale of a product above its advertised price and non disclosure of required information that allows consumers to make informed decisions. It was further stated that providing incentive of rebate on certain products is not prohibited and certainly not deceptive marketing and that the benefit goes to the buyer and end consumers only.

Brolac

18. Siddique Chaudry and Co. on behalf of Brolac submitted that tokens are placed in paint packs to boost sales, and "*no painter indicates in which token has been placed. The value of the token varies from tin to tin and under no circumstances token is placed in all tins. If it is so done, no customer will purchase tin in which token has not been placed."*

19. From the above it is evident that the practice of placing a token within the paint pack without making any disclosure with respect to its amount or its presence in the pack, is an industry wide phenomenon. The aforementioned undertakings have admitted to the use of this marketing tool and have further admitted that no disclosure is being made in this regard.

20. It is important to note that the main consumers of paints and varnishes in Pakistan are government and semi-government organizations such as Defence Service, Shipyard, and Railways. The private housing sector is estimated to account for 20 per cent of total paint consumption in the country[1]. Pakistan's Paint Industry classifies its paints generally

[1] "Paint Industry in Pakistan" Economic Review, Nov 2000

into six types namely; Defence Service Paints, Marine Paints, Decorative Paints, Building Paints, Industrial Finishes and Special Paints. Majority of paint companies put tokens in paints used for household purposes, falling in the decorative paints category. The strategy of putting tokens is targeted directly at the painter who is fully informed about the value of tokens in different paint packs owing to experience in the industry. Consumers are largely unaware of this marketing tool, the benefit of which is accrued to the painter.

21. Upon review of the televised advertisements of the undertakings it was found that no disclosures were being made of the presence of the token or the value of the token. The Commission also purchased paint packs to serve as evidence of the undertakings that failed to provide specific details of the value of token and to assess whether disclosures are made on the paint pack including Marvel, Berger, Brighto, Chawla, Brolac, Happilac, Black Horse and Kingfisher. No disclosures were made on the paint pack and it was found in each case that the token card was concealed at the base of the paint pack underneath the paint where only the painter involved directly in the application of the paint can have access to it.

22. In view of the foregoing, the Commission issued SCNs to the Undertakings on August 11, 2011 for *prima facie* violation of Section 10(1) read with Section 10(2) (b) of the Act. The relevant parts of the SCN are reproduced as follows;

> ***"5. WHEREAS****, in Pakistan the end consumer typically does not engage in the application of paint or the opening of the paint packs. The token is concealed at the base of the paint pack underneath the paint where only the painter can have access to it while the end consumer is unaware of it. This non disclosure of important information constitutes the distribution of misleading information as to the price and character of the paint packs;*
>
> ***6. WHEREAS****, in the view of foregoing, the Undertaking prima facie appears to be distributing false or misleading information to customers/consumers related to the price of the paint in terms of clause (b) sub-section (2) of Section 10 of the Act as:*
>
> *a. The consumers are not informed about the actual price and the redeemable coupons in the paint box;*

b. *The redeemable coupons are placed at the bottom of the paint box to which only the consumer cannot have access to in the absence of any information;"*

SUBMISSIONS DURING HEARING

23. The Hearing was scheduled for August 25, 2011 and the representatives of ICI, Nippon and Berger were present before the Commission in the first session. Mr. Irfan Ahmed Malik and Mr. Samad Zaheer, General Manager represented Nippon. Ms. Ferzeen Bhadha, Advocate, Mr. Jehanzeb Khan, Vice President ICI and Mr. Imran Qureshi, Business Manager ICI appeared on behalf of ICI. Mr. Ahmed Abbas, Advocate from Surridge & Becheno and Mr. Wahid Qureshi, Company Secretary/Director Finance represented M/s. Berger Paints Ltd. Their written and oral submissions are summarized as under:

24. The representatives of Nippon were the first to avail the opportunity of being heard, they submitted that when Nippon entered into the market in the end of 2007 they were merely following what was an accepted market practice at the time. They submitted that their intention was not to deceive consumers and they were willing to withdraw the practice and that they have already started making adequate disclosures by mentioning on the paint pack that there is a token inside. During the course of the hearing they stated that in the Pakistani market approximately 60 percent of the buying is done by the painter. The market is categorized into Premium and Non premium and Middle Layer, where non premium are the cheaper paints and it is in these that the tokens are put. The Bench asked them whether they were in support of elimination of the practice altogether. The representatives of Nippon reiterated that they were in favor of elimination as they felt they were compromising their profit margins to compensate for the value of token. They also submitted that placing stickers on paint packs would be an ineffective measure to make adequate disclosures as these stickers can easily be ripped off by the painter.

25. ICI in its written submissions dated August 24, 2011 and during the hearing essentially stated that tokens were placed in their Paintex and Maxilite brands as they were more prone to being duplicated due to their simpler formulation and they serve as a

quality assurance mechanism through adding a holographic sticker depicting originality for consumers. They stated that the company cannot and does not exercise control over who becomes the ultimate beneficiary of the value of the cash redeemed. They denied that any deceptive marketing had taken place as with reference to Section 10(2) (b) that the provision suggests an act or intent to deceive, the word "distribute" involves an action while "false" and "misleading" imply intent. The further expressed their willingness to comply with the provisions of the Act and submitted proposed solutions in the form of stickers on the paint packs disclosing the presence/absence of token. In their letter dated June 5, 2011 they submitted that they were in support of elimination of the practice and that they would employ other means of quality assurance.

26. The representatives of Berger also submitted that they were in support of elimination and denied that deceptive marketing practice had taken place as the strategy is not directed at the painter but the consumer for whom it is a hidden gift. They further submitted that they had started to disclose on the paint pack information regarding presence of the token in order to ensure that the benefit is passed on to the consumer.

27. The members of Pakistan Paint Manufacturers' Association (hereinafter PPMA) availed the opportunity of being heard in the second session, these included Brighto, Diamond, Marvel, Silver Sand, Nelson, Chawla, Brolac, Happilac, Gobi, Sparco, Kingfisher and Black Horse and were represented by Imran Alvi & Associates. They submitted that they denied that deceptive marketing practice had taken place as the consumer is well informed about the presence of token as they are mostly contractors, owners of building, business centres including shops. They further submitted that they have started mentioning on the packs and started providing printed material related to incentive schemes to and value of the coupons to the dealer and sales outlets which are displayed on open spaces for information for all buyers. However, they did not support elimination as it would not be practical for them for the time being- "*Firstly, there are huge members of small paint manufacturers who are virtually impossible to detect will continue this practice in any event. Secondly, if disclosure of token is ensured by the major paint manufacturers, this practice within a couple of years will not remain as a viable marketing strategy for advertisement, and this will lead to the discontinuation of*

this market tool. Therefore, it will be in the benefit of the consumers and manufacturers that existence of rebate in paint products in the form of token is properly disclosed on the paint containers."

28. Hearing for Kansai was re-scheduled for September 14, 2011 and was represented by Shakeel Qazi (Advocate), they sought guidance from the Commission and were of the view that the Commission should have issued a public notice to all paint companies instead of SCNs. They further informed the Bench that they had started making disclosures in the form of printed stickers as an interim arrangement and eventually the disclosures would be printed on the packaging itself.

29. Hearing for Brolac Paints was conducted on October 21, 2011. Mr. Muhammed Waseem on behalf of Brolac submitted that they were in favor of elimination of the practice as well as decreasing the value of the token. They were willing to make due disclosures regarding the token and further comply with any directions given by the Commission.

30. While the conciliatory and compliance oriented approach assured by various representatives of the paint companies needs to be appreciated, it is pertinent to recognize that the main issue in this matter is to determine the misleading aspect of the subject practice i.e. whether, the lack of disclosure, regarding presence and value of the token in the paint pack is of such nature, that, it misleads the consumer. The objections raised by the undertakings need to be examined and the given factors need consideration for such determination. Accordingly, the principle issue is:

Whether the practice of inserting tokens in the paint packs without due disclosure constitutes deceptive marketing practices under section 10 of the Act?

31. As discussed earlier, majority of paint companies put tokens in paints falling in the decorative paint category primarily for sale to households. At the outset, it is pertinent to describe the nature of the market for decorative paints in Pakistan. Decorative paints typically include exterior wall paints, interior wall paints, wood finishes and enamel and ancillary products such as primers, putties etc. The decorative

paints market can be divided into 3 parts; premium, middle tier and lower tier. Generally, this division is done according to the price range of the products and the qualitative difference between the products. The members of PPMA submitted that the market for decorative paints is 210 million litres.

32. Majority of households in Pakistan hire professional services contractors/painters to paint owing to complexity arising from different varieties and uses of paint. It is for this reason that typically painters/contractors are involved directly in the transaction or purchase decision and in the application of paint. Out of the aforementioned undertakings, Nippon and Kansai admitted that the marketing tool of putting tokens is directed at the painter. During the course of the hearing Nippon also submitted that in the Pakistani market 60 percent of the buying is done by the painter. While ICI submitted that the company cannot and does not exercise control over who becomes the ultimate beneficiary of the value of the cash redeemed. Berger submitted that the benefit of the token goes to the consumer but inadvertently sometimes the benefit goes to the painter. The members of PPMA largely held that benefit is accrued to the buyer of the paint, while some submitted that paint is sold through paint contractors who take possession of the token while negotiating prices or alternately the benefit is for the consumer who opens the pack of paint and gets the token en-cashed.

33. According to a recent survey drawing data from a sample of 50 head of households and 50 painters the advice of the painter was voted to be very important by 70 percent of households in the purchase of paint. Further, the conclusion of the study was that the beneficiaries of the token incentive are mostly painters/paint contractors and that consumers are largely unaware of the details of the token scheme[2]. It is common knowledge that in the absence of formal disclosures the painter directly involved in the application and purchase owing to experience in the industry will reap the benefit of the token. Even if the painter is not involved in the transaction, he is involved in application and the token is placed inside the paint pack at the bottom where the painter can have access to it.

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[2] Ehsan Rashid (2010) "*ICI Paints Final Project*"

34. Taking into consideration the above, a distinction has been drawn between the end consumer/household and the painter in being the ultimate beneficiary of the token. For the purposes of this order it is appropriate to deem the issue of identifying the consumer along the supply chain as irrelevant. The main issue, given the context of this particular case is whether the practice of inserting tokens in paint containers is an incentive in monetary terms for the buyer/bearer of the price. Where disclosures have not been adequately made, a reasonable nexus between the retail price of the product and the cash obtained from trading in the token after purchase can not be established. The painter, contractor, end consumers are all consumers, but in the absence of any form of communication/indication of the presence of the token, the consumer who directly incurs the price of the paint inclusive of the price of the token is the one who suffers the eventual harm if the benefit of the token is reaped by another consumer along the supply chain. Hence, deception lies in failure to disclose the presence along with the value of the token card by the undertakings. In the **Zong order** the Commission held that:

> *"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"*

35. Accordingly, there is a duty on the undertakings to disclose information about tokens and take necessary measures to ensure that the benefit is accrued to the consumer otherwise it would unreasonably place a higher onus on the consumer rather than the undertaking which would be contrary to the intent of the law.

36. Having addressed the above aspect, it is important to address the core issue that is whether withholding of information regarding the tokens constitutes deceptive marketing practices under Section 10 of the Act. Section 10 of the Act prohibits deceptive marketing practices and the relevant portion has been reproduced for ease of reference:

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

37. Berger through their counsel Surridge and Beecheno had submitted that provisions of Section 10(2)(b) are silent about any disclosure requirement and quoted the Oxford Dictionary meaning of the word "misleading" as being a wrong impression or idea. They further submitted that the Black's Law Dictionary defines misleading as "delusive; calculated to be misunderstood." The ambit of the terms "false" and "misleading" have been previously defined in the Commission's Zong Order "False information can be said to include: oral or written statements or representations that are; (a) contrary to truth or fact and not in accordance with the reality or actuality; (b) usually implies either conscious wrong or culpable negligence, (c) has a stricter and stronger connotation, and (d) is not readily open to interpretation. Whereas 'misleading information' may essentially include oral or written statements or representations that are; (a) capable of giving wrong impression or idea, (b) likely to lead into error of conduct, thought, or judgment, (c) tends to misinform or misguide owing to vagueness or any omission, (d) may or may not be deliberate or conscious and (e) in contrast to false information, it has less onerous connotation and is somewhat open to interpretation as the circumstances and conduct of a party may be treated as relevant to a certain extent."

38. Hence, it has been clearly stated that an advertisement is deceptive if it has the aforementioned elements of being misleading, capable of giving the wrong impression or idea and tends to misinform or misguide owing to vagueness or any omission. This implies that withholding of important information regarding the token may not necessarily have been deliberate or conscious in order for it to qualify as misleading. ICI had denied that any deceptive marketing had taken place as with reference to Section 10(2) (b) that the provision suggests an act or intent to deceive, the word "distribute"

involves an action while "false" and "misleading" imply intent. Further, it is pertinent to mention that the practice of putting tokens is indeed an action and the subject practice is being viewed as misleading not necessarily false. In any event, in the Zong order as referred above, it is not a must to establish intent.

39. The representatives of Berger submitted that the aforementioned definition of 'false and misleading' in the Zong Order does not hold ground as it is limited to oral and written statements, and in this case there was no advertisement at all. It is clearly stated that in the Zong Order that *"misleading information' may essentially include oral or written statements or representations"*. The use of the words "may essentially include" are indicative of its enumerative nature and are not exhaustive. Further according to Halsbury's Laws of England (3rd ed. Vol. 26) *"A representation is a statement made by a representor to a representee and relating, by way of affirmation, denial, description or otherwise, to a matter of fact. The Statement may be oral or in writing or arise by implication from words or conduct"* (pg. 820). It is important to appreciate that the factum of insertion of a token in a paint pack without due disclosure would attract clause (b) subsection (2) of section 10 of the Act as in our view such product/pack would be lacking a reasonable basis related to the price printed for the consumer.

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

41. In the case of *International Harvester Co., 104 F.T.C. 949 at pg. 1058*, it was held that:

> "*[i]t can be deceptive to tell only half the truth, and to omit the rest. This may occur where a seller fails to disclose qualifying information necessary to prevent one of his affirmative*

> *"It can also be deceptive for a seller to simply remain silent, if he does so under circumstances that constitutes an implied but false representation." statements from creating a misleading impression…"*

42. Reference is also made to <u>*Cliffdale Associates, Inc., 103 F.T.C. 110, (1984)*</u> wherein it was held:

> *"when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated even if the truth is subsequently made known to the purchaser."*

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

44. In *American Home Products*, 98 F.T.C. 136, 370 (1981) it was held that:

> *"…Whether the ill-effects of deceptive nondisclosure can be cured by a disclosure requirement limited to labeling, or whether a further requirement of disclosure in advertising should be imposed, is essentially a question of remedy. As such it is a matter within the sound discretion of the Commission. The question of whether in a particular case to require disclosure in advertising cannot be answered by application of any hard-and-fast principle. The test is simple and pragmatic: Is it likely that, unless such disclosure is made, a substantial body of consumers will be misled to their detriment?"*

45. Further reference is made *to Guidance on UK Consumer Protection Regulations (2008)* where Regulation 6 deals with omission or unclear and timely provision of material information. The list of information that is considered material includes the main factors consumers are likely to take into account in making decisions relating to products. While this is not a requirement for invoking section 10, nonetheless, it is helpful to understand that this list includes *"…(g) the price or the manner in which the price is calculated, (h) the existence of a specific price advantage,, (k) the consumer's rights or the risks he may face…*".The criteria laid out reinforces the fact that the presence of token qualifies as material information. More specifically if it is narrowed down to just the

criteria at (h) and (k) the token is a form of price advantage and it is the consumers' right to avail the monetary benefit derived from it and hence the undertakings should disclose the same in terms of section 10, as it would otherwise constitute deceptive marketing.

46. The representatives of Berger submitted three cases namely Nederlandsche Banden Industrie Michelin vs Commission of the European Communities, Hoffman-La Roche vs Commission (1979) and AKZO Chemie vs Commission (1991). Having analyzed these cases, it can be concluded that these cases deal with Article 86 of the EU Treaty pertaining to Abuse of Dominance and have absolutely no relevance to deceptive marketing practices pertaining to Section 10 of the Act; the main aim of which is consumer protection from anti-competitive behavior. It would be beyond the scope of this order to assess whether the presence of token by an undertaking distorts the market share of its competitors when it has been established that it is an industry wide phenomenon and the omission of material information regarding tokens amounts to deceptive marketing under section 10 of the Act.

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

prerogative to adopt or not to adopt any marketing practices; the Commission has to only ensure that such practices are compliant with Section 10 of the Act.

48. In principle all undertakings have agreed to start disclosing the presence of token in paint packs to the consumer and have shown their willingness to comply with the directions of the Commission. Keeping in view the cooperation extended and the assurances given to rectify such practice by the Undertakings, the Commission, owing to its compliance oriented approach, particularly in OFT matters is not imposing any penalty for the committed violation. However, the undertakings are reprimanded to ensure responsible behavior in the future with respect to the marketing of their products and are directed to comply with the following in letter and in spirit:

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

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

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

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

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

49. SCN is disposed off accordingly.

(Rahat Kaunain Hassan) *Chairperson*	(Vadiyya S. Khalil) *Member*	(Shahzad Ansar) *Member*

ISLAMABAD THE JANUARY 13, 2012