



BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF

SHOW CAUSE NOTICE ISSUED TO
M/S VISION DEVELOPERS (PRIVATE) LIMITED

(F. NO: 237/OFT/VISION DEVELOPERS/CCP/2016)

Date(s) of hearing: 25-01-2017, 14-02-2017,
10-03-2017, 31-05-2017,
29-08-2017(11:00 a.m.),
29-08-2017 (4:00 p.m.) and
21-12-2017.

Commission: Ms. Vadiyya S. Khalil
Chairperson

Dr. Shahzad Ansar
Member

Present on behalf of:

Mr. Mubashar Javed
(Complainant)

Mr. Aziz Nishtar, Advocate High Court
Mr. Farhan Maqsood, Advocate
Ms. Sana Waheed, Associate
M/s Nishtar Kamran & Minullah

M/s Vision Developers (Pvt.) Ltd. *Nemo*

Lahore Development Authority
(LDA)

Mr. Tariq Muneer, Assistant Director
Cant. Wing



JA VSC

ORDER

1. This order shall dispose of the proceedings initiated under Section 30 of the Competition Act, 2010 (the 'Act') *vide* Show Cause Notice No. 59/2016 dated 30.12.2016 (the 'SCN') against M/s Vision Developers Private Limited (the 'Respondent'). The SCN was issued to the Respondent pursuant to the Enquiry Report dated 15.12.2016 (the 'Enquiry Report') initiated by the Competition Commission of Pakistan (the 'Commission') on the Complaint filed by Mr. Mubashar Javed (the 'Complainant') on 22.06.2016.
2. The main issue under consideration in this matter is whether the marketing campaign of the Respondent with reference to '*Park View Villas*' amount to deceptive marketing practices through the distribution of false or misleading information to consumers and/or capable of harming the business interests of competitors, within the meaning and scope of Section 10(1) read with Section 10(2)(a) and 10(2)(b) of the Act.

FACTUAL BACKGROUND

A. COMPLAINT, ENQUIRY, SHOW CAUSE NOTICES, REPLIES:

3. On 22.06.2016 the Complainant filed the Complaint with the Commission against the Respondent alleging that while marketing the '*Park View Villas*' the Respondent has resorted to deceptive marketing practices in violation of Section 10 of the Act. The main averments of the Complaint are as follows:

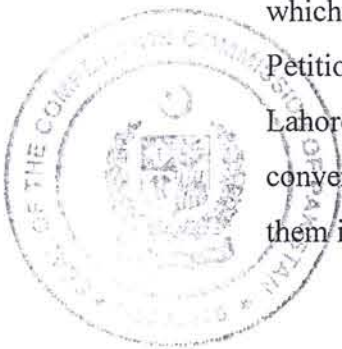
- a) On 22.02.2013, the Respondent applied to Lahore Development Authority, Lahore (the 'LDA') seeking permission for a housing scheme to be named as '*Park View Villas*' on land adjacent to *River Edge Housing scheme* in Lahore. However, the application was declined on the ground that the land for the proposed housing scheme is located in a flood zone or khaddar area, hence, could not be used for any residential and commercial purposes.

- b) The Respondent filed an appeal before the Secretary Housing, Urban Development and Punjab Health Engineering Department Lahore. On 10.12.2013, the appeal was dismissed and the decision of LDA was upheld. Accordingly, it can be inferred that '*Park View Villas*' was not approved.



[Handwritten signatures]

- c) It is the Complainant's case that despite the proposal of *Park View Villas* being rejected by LDA and dismissal of the appeal by the Secretary Housing, the Respondent in connivance with Mr. Ammar Ahmed Khan, started an extensive marketing campaign for selling of plots in *Park View Villas*. In its campaign, the Respondent portrayed that *Park View Villas* is/was part of *River Edge Housing scheme*, a scheme which was duly approved by LDA, such misleading marketing falls within the purview of prohibitions under Section 10 of the Act.
- d) It is alleged that the marketing campaign launched by the Respondent portrayed "**Park View Villas at River Edge Housing Society,**" and thereby falsely or fraudulently making people believe that *Park View Villas* is part or extension of the River Edge Housing scheme. In support of these contentions, the Complainant provided copies of the aforesaid advertising material to the Commission. The Complainant also provided copies of public notices published in daily *Nawa-i-Waqat* of 19.06.2014, *daily Jang* and *the News International* of 20.06.2014, warning that the scheme was not approved by LDA, and hence its purchase would be at buyer's own risk.
- e) The Complainant stated that in order to restrain the aforesaid marketing scheme, LDA specifically requested the Collector of the Revenue Department of Lahore *vide* Letter No. 2634 dated 03.09.3014 to ban the issuance of *Fard-e-Malkiyat*, registration of any document, and/or attestation of the mutation in favour of sponsor/developer/owner in the extended part of River Edge Housing scheme under clause 12, sub-clause 4(a) of Lahore Development Authority Act of 1975, as amended ("**LDA Act**").
- f) The Complainant has further alleged that the Respondent has encroached on the public thoroughfares and roads to be included in *Park View Villas*, upon which local residents protested against the Respondent and filed a Writ Petition (W.P. No. 22548/2015) before the Honourable Lahore High Court, Lahore. Furthermore, the Complainant alleged that the Respondent has also converted the land encroached into commercial and residential plots to sell them in violation of the rules and regulations prescribed by LDA. As a result,



[Handwritten signature]

LDA *vide* multiple letters dated 20.03.2015 requested the authorities concerned to disconnect the electricity, water and gas connections and sanitation services in *Park View Villas/ River Edge* Housing scheme. As per the Complaint, LDA also undertook onsite inspections in order to restrain illegal works carried on by the Respondent. However, LDA officials were criminally intimidated and assaulted by the Respondent's employees and its CEO, which resulted in the registration of criminal charges against them. As per the Complaint, the CEO of the Respondent and his henchmen were subsequently challaned as per LDA report.

g) Lastly, the Complainant submitted that despite all the efforts of the authorities concerned, the Respondent was successful in selling many residential and commercial plots through deceptive marketing practices. One of the major sales was to the Employees Old-age Benefit Institution (the '**EOBI**'), a public body managing contribution for the long-term benefit of the labour class after retirement. The Complainant prayed to take necessary action against the Respondent for contravention of Section 10(2) (b) read with Section 10(1) of the Act.

4. The Commission on 29.08.2016 initiated an enquiry under Section 37(2) of the Act by appointing the Enquiry Committee to investigate the matter for possible violations of Section 10 of the Act, and to submit a report to the Commission.
5. The enquiry was concluded vide Enquiry Report dated 15 December 2016 (hereinafter the '**Enquiry Report**'). The Enquiry Report concluded as follows:

"7.2. After careful examination of allegations levelled by the Complainant and analysing the information, documents and materials collected in the case under report, we are of the opinion that the conduct of the Respondent, i.e., launching an unapproved housing scheme and making false and misleading claims regarding the approval status of the Housing Scheme was not justified. Moreover, claiming "Park View Villas", an unauthorized and unapproved housing scheme, as a part of "River Edge Housing Scheme" is unlawful and unjustified. Furthermore, the name of the scheme was changed in a deceptive



VSC *TA*

manner and it was clubbed as "Park View Villas at River Edge Housing Scheme", through advertisements in the print and electronic media, lacking reasonable basis related to character, properties and suitability for use of project and was also capable of harming the business interest of other undertakings.

7.3. In view of the above, the Respondent has, prima facie, entered into deceptive marketing practices, violating the provisions of Section 10(1) in terms of Section 10(2)(a) & (b) of the Act. Therefore, it is recommended that, in the interest of the public at large, proceedings may be initiated against M/s Vision Developers (Pvt.) Ltd under provisions of section 30 of the Act for, prima facie, violation of section 10 of the Act."

6. Based on the conclusion and recommendations in Enquiry Report and in the public interest, the Commission decided to initiate proceedings under Section 30 of the Act. Therefore, the Commission issued the SCN to the Respondent setting out its concerns and granting them an opportunity of being heard on 30.12.2016. The relevant paragraphs of the SCN are reproduced below:

"4. WHEREAS, pursuant to Section 37(2) of the Act, an enquiry was initiated by the Commission which has been concluded vide Enquiry Report dated 15-12-2016 (hereinafter, the "Enquiry Report"), a copy of which is appended herewith as "Annex-I" and may be read as an integral part of this show cause notice; and

5. WHEREAS, in terms of the Enquiry Report in general and paragraphs 5.6 to 6.35 in particular, it appears that the Undertaking claims relating to Park View Villas' approval status, location and suitability for use on multiple forms of promotional materials and advertisement appear to be unsubstantiated and therefore, prima facie, amount to distribution of false and misleading information lacking reasonable basis, in violation of Section 10(1) read with Section 10(2)(b) of the Act";



VSC *PH*

6. *WHEREAS, in terms of the Enquiry Report in general and paragraphs 6.36 and 6.37 in particular it appears, prima facie, that the Undertaking has been engaged in distributing false and misleading information that is capable of harming the business interest of other undertakings in violation of Section 10(1) of the Act read with Section 10(2)(a) of the Act;*"

7. On 11.02.2017, Khawaja Ahmed Tariq Rahim and Mohammad Azhar Siddique, the legal counsel for the Respondent, filed a written reply to the SCN, posing a series of questions/objections viz., the jurisdiction of Commission, authority of the Enquiry Officers, the principle of natural justice and fair/due process of law and political victimization. No reply or justification was provided in response to violation of Section 10 of the Act, a succinct representation of the written reply submitted on behalf of the Respondent is as follows:

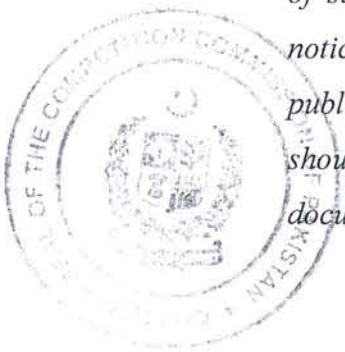
- i. *The complaint filed by the Complainant's advocate lacks bona fide information and is based on political victimization and harassment. Whether the Complainant was called at the Commission to verify the genuineness, intention, and motives along with proofs and whether the said Complainant has filed such complaints against all housing societies within the jurisdiction of Lahore, if so, the Commission should provide the details along with such complaints and enquiries.*
- ii. *How many enquiries have been conducted against the real estate developers across Pakistan and how many show cause notices have been issued so far by the Commission? The Commission should provide the details of such proceedings and orders or enquiry.*
- iii. *That, regulation of the real estate development and the housing societies purely rests with LDA under LDA Act 1975 or by the City District Government under the Local Government Ordinance 2001, or Punjab Local Government Act 2013 with Punjab and in major cities within the parameters of Development Authorities Acts. The Commission should provide a legal opinion from the experts or solicitors suggesting that*



USC JA

the Commission can interfere into the business affairs of real estate developers.

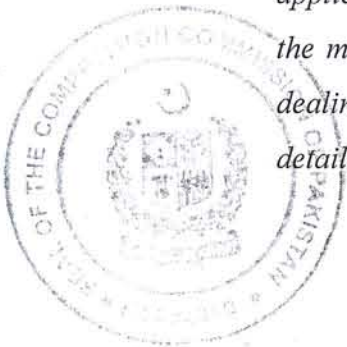
- iv. *How did Enquiry Officers come to know that the jurisdiction under LDA Rules 2014 is applicable, whereas, their vires, applicability, and jurisdiction are under challenge before the Honourable Lahore High Court, Lahore? How the Enquiry Officers did come to know that the Punjab Private Housing Scheme & Land, sub-division Rules 2010 are applicable to a master plan or otherwise within the jurisdiction of the Commission. Whether the Enquiry Officers have obtained any information, material, and documents from LDA about the legality and constitutionality before the superior Courts. Whether the Enquiry Officers have obtained such information and whether the Commission can regulate the affairs of the real estate developers? If so, the Commission should provide such information.*
- v. *From the Enquiry Report, it transpires that the Enquiry Officers had exceeded their jurisdiction, no jurisdiction rests with the Commission for examination of the NOC (No Objection Certificate) and they act illegally by keeping the provision of LDA, thus, one-sided Enquiry has been completed without soliciting reply and answers from our Client to the above issues. Paragraphs 6.3 to 6.13 captioned "NOC Examination" are in violation of statutory laws read with Article 4, 5 and 10A of the Constitution of Islamic Republic of Pakistan 1973 (the "Constitution"). The Commission must provide the information, material, documents, details, and jurisdiction of the Enquiry Officers to examine the NOC.*
- vi. *In paragraphs, 6.23 to 6.30 of the Enquiry Report some images have been reproduced, but without mentioning the dates, timings, and source of such news clippings or pamphlets. Similarly, whether the public notice of news appeared in the newspaper from our client or have been published by some other property dealers or others. The Commission should direct the Enquiry Officers to provide the information, details, documents and material, newspapers and why explanation was not*



VSC TA

asked from our client. This act is a violation of the principle of natural justice and negation of the right of a fair trial and due process guaranteed under Article 10A of the Constitution.

- vii. *It is an established principle of law that where the question of jurisdiction has been raised, the Courts/Authority/Tribunal must address the question so raised before the proceeding on merits. In terms of Section 33(2) of the Competition Act, the proceedings before the Commission are judicial proceedings and as such the Commission is bound to examine the question raised before it in a judicious manner, with reasonable approach with the meaning of Section 24-A of the General Clauses Act and follow the principle of natural justice.*
- viii. *Under which authority and jurisdiction Enquiry Committee visited the premises of our client or LDA office or other offices, the complainant and other political personalities and took pictures of the site. This amounts to exploitation under Article 3 of the Constitution. The above material separately with the authority and jurisdiction of the Enquiry Committee shall be provided to our client. Also, provide the mobile and telephone details of the Enquiry Officers from the day of authorization of the enquiry till the finalization to confirm that the officers have acted in good faith and were never under any dictation.*
- ix. *In addition, the Respondent contended that the Commission has no jurisdiction to examine the questions that are strictly the bone of contention between our client and LDA. Chapter II of the Competition Act is specific and related to the "abuse of a dominant position by a person" whereby Section 10 of the Competition Act is to be read along with Section 3 of the Competition Act. Hence, Section 10(2)(b) is not applicable to our client because it does not hold a dominant position in the market and this matter is related to the jurisdiction and shall be dealing with in detail after the above information, documents and details are provided to our client.*



[Handwritten signature] 8 of 37

- x. *In view of the above, it is submitted that the Commission in the first instance must decide the scope and jurisdiction of the Enquiry Committee, the applicability of the provisions of the Act with reference to the appointment of the Enquiry Committee against the Respondent to ascertain the bona fide of the complaint. The Complainant has represented itself as a concerned citizen neither as a consumer nor as a holder of any stake in the housing scheme of the Respondent.*

B. HEARINGS BEFORE THE COMMISSION:

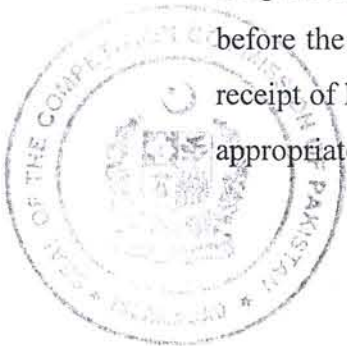
8. On 25.01.2017, first hearing in the matter was held. The authorized representatives of both parties made an appearance before the Commission. The Complainant's counsel briefed the Commission on the Complaint and upon the request of the Respondent's counsel; the proceedings were adjourned until 14.02.2017.
9. On 14.02.2017, second hearing in the matter was held. The counsel for the Complainant and the Respondent made an appearance before the Commission. Mr. Muhammad Irfan Iftikhar, representing the Respondent submitted that he was advised by his seniors to appear before the Commission only for the purposes of seeking an adjournment and submitted that before proceeding on merits of the case, the Commission must decide the averments made in their letter dated 11.02.2017. The Commission on the request of the Respondent's representative adjourned the hearing.
10. On 10.03.2017, third hearing in the matter was held. The counsel for the Complainant and the Respondent made an appearance before the Commission. Upon Commission's request, LDA also appointed one of its representatives to assist the Commission in the instant matter. In his verbal and written submissions, LDA's representative answered the questions, raised by the Commission, wherein it was clarified that Respondent's housing scheme adjacent to River Edge Housing Scheme was rejected vide LDA's letter dated 09.03.2013 on the grounds that the site falls in agricultural/industrial area as per the master plan and a housing scheme cannot be permitted in that area. Whereas, the Respondent's counsel again sought an adjournment as his senior counsel was unavailable. He was directed by the Commission to inform the senior counsel to appear



VEC *HA*

before the Commission and raise all factual, legal and constitutional objections along with submissions on the merits of the case. The matter was accordingly adjourned.

11. On 31.05.2017, fourth hearing in the matter was held. The counsel for Complainant made an appearance before the Commission. However, no one appeared on behalf of the Respondent. The Registrar of the Commission was directed to issue hearing notices to the Respondent intimating that a final opportunity is given to the Respondent to present their case before the Commission. Further, a copy of the reply filed by the Respondent was also given to the counsel for the Complainant to file a rejoinder, if any, before the next date of hearing.
12. On 29.08.2017, fifth hearing in the matter was held. The Complainant's counsel appeared before the Commission. However, no one appeared on behalf of the Respondent. A rejoinder was also filed by the Complainant's Counsel. Upon inquiry, the Registrar of the Commission reported that the Respondent /Respondent's counsel was duly served with hearing notices on 30.12.2016, 01.02.2017, 06.02.2017, 13.03.2017, 19.05.2017, 23.05.2017, 18.08.2017 in respect of each hearing conducted by the Commission. In response to the latest hearing notice dated 24.08.2017, the Respondent's counsel requested to hold a hearing to decide on the jurisdictional matter first. However, in compliance with the direction of the Commission, further hearing notices were also served upon the Respondent on 24.08.2017 and 28.08.2017. Despite serving of notices on the Respondent, no one appeared on behalf of the Respondent before the Commission. The Commission directed the Registrar to intimate the Respondent's Counsel to appear before the Commission at 04:00 p.m., today positively. Accordingly, the Commission reconvened at 4:00 p.m. The Registrar informed the Commission that the Respondent's Counsel was contacted again over telephone and notified; however, the Respondent and/or Respondent's counsel did not appear before the Commission.
13. Although the above conduct of the Respondent clearly demonstrates that the Respondent was deliberately delaying the progress of the case and the proceedings before the Commission by not putting an appearance before the Commission, despite receipt of hearing notice, however, in the interest of justice the Commission deemed it appropriate to give one final opportunity to the Respondent. Since, the counsel for the



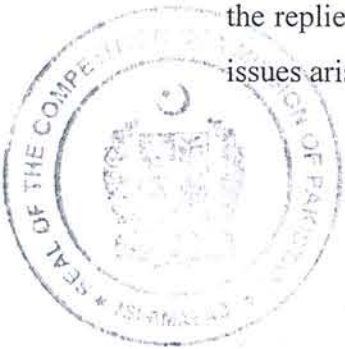
VSC HA 10 of 37

Complainant was present, therefore, he was also directed to appear and make submissions, if any, on the next date intimated by the Registrar of the Commission.

14. On 21-12-2017 sixth and final hearing in the matter was held. Again no one appeared before the Commission on behalf of the Respondent, however, the Complainant was duly represented by his counsel. The Registrar informed the Commission that the notice issued by the Office of Registrar has been served and its report was also placed before the Commission. The Director General (Legal) in attendance on special notice by the Commission, apprised the Commission that proviso to subsection (2) of Section 30 of the Act read with clause (e) of sub-regulation (2) of Regulation 26 of the Competition Commission (General Enforcement) Regulations, 2007 empowers the Commission to proceed ex-parte where the undertaking concerned is not availing the opportunity of hearing.
15. The Commission noted that almost six (6) opportunities of hearing since issuance of SCN had been given to the Respondent through notices, which were duly served on the Respondent. However, without any plausible explanation and reason the matter has been delayed owing to non-appearance of the authorized representatives of the Respondent. Therefore, the Commission decided to proceed ex-parte against the Respondent on 21-12-2017 in accordance with proviso to subsection (2) of Section 30 of the Act read with clause (e) of sub-regulation (2) of Regulation 26 of the Competition Commission (General Enforcement) Regulations, 2007. The Counsel appearing on behalf of the Complainant made detailed submissions with reference to the contents of the Complaint and the conclusions of the Enquiry Report and on the objections raised by the Respondent, after hearing the Complainant in detail, hearing in the matter was concluded.

DELIBERATION AND ANALYSIS

16. Based on the allegations leveled in the Complaint, findings of the Enquiry Report and the replies/ objections filed thereto by the Respondent and the Complainant, following issues arise for Commission's determination:




11 of 37

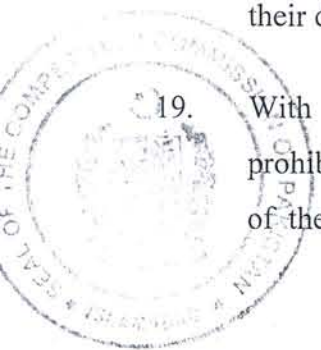
- i. *Whether the Commission has jurisdiction to conduct enquiries and initiate proceedings in the real estate sector for violation of Chapter-II of the Act in general and Section 10 of the Act in specific?*
- ii. *What is the scope of powers of the Enquiry Committee constituted by the Commission pursuant to Section 37 of the Act?*
- iii. *Whether the principles of natural justice and fair/due process guaranteed under the Constitution and the Act have been adhered to by the Commission in the instant proceedings?*
- iv. *Whether the Complainant is an undertaking and has locus standi to file a complaint under Section 37(2) of the Act?*
- v. *Whether the subject advertisements are deceptive in that they provide false and/or misleading information in violation of Section 10 of the Act?*

17. Since no one appeared on behalf of the Respondent and the Commission has proceeded ex-parte against the Respondent, therefore, the Commission shall now examine the aforementioned issues in light of the written reply filed by the Respondent and the submissions made by the Complainant and the representative of LDA, in *seriatim*.

Issue-I: Jurisdiction of the Competition Commission of Pakistan

18. It has been contended by the Respondent's counsel in his written reply that the Commission cannot assume jurisdiction to take actions pertaining to any issue in the real estate sector. The Respondent's counsel, through written reply has implied that all issues pertaining to the housing schemes in Lahore are exclusively dealt by LDA and other authority(s) established in the province of Punjab. Therefore, the Commission cannot conduct enquiries and/or initiate proceedings against the real estate sector and their developers for any violation of the Act.

19. With regard to the Commission's jurisdiction on matters involving competition prohibitions or anticompetitive practices contained in Chapter-II, including Section 10 of the Act, the Commission, while placing reliance on the judgement in the case



A handwritten signature in black ink, appearing to be 'VSC'.

A handwritten signature in black ink, appearing to be 'TH'.

reported as **PLD 1995 Supreme Court 66**, has already deliberated upon the question in its previous orders, *for instance*, in the **Banks' cartelization case**¹, the **LPG Association of Pakistan Jamshoro Joint Venture Limited case**², and the **Stock Exchanges case**³ and held the Commission can ascertain and settle these grounds one way or the other. The Commission finds it relevant to refer to the relevant parts of **PLD 1995 SC 66**, wherein the honourable Court has examined the question whether a tribunal is a competent forum to adjudicate upon the question of its jurisdiction. While discussing the case of *Akhtar Ali Parvez v. Altafur Rehman*⁴ (**Altafur Rehman case**) the August Court referred to the following opinion of Chief Justice Mr. Manzur Qadir:

"An objection to jurisdiction of a Tribunal may take one of the following general forms-

- i. that the law under which that Tribunal is created is defective or invalid;*
- ii. that the Tribunal is not constituted or appointed validly under the law;*
- iii. that a party or parties are not amenable to the jurisdiction of the Tribunal; and*
- iv. that the subject matter is outside the field in which particular court is competent to act."*

It was held that:

"If a plea falling in the first or the second category is raised before a Special Tribunal, the answer of the Special Tribunal, which is a creature of the special law and is constituted or appointed under that law, must be simply and shortly that these matters are not for the Special Tribunal to decide. If a party needs a decision on those points it will have to apply to the Courts of

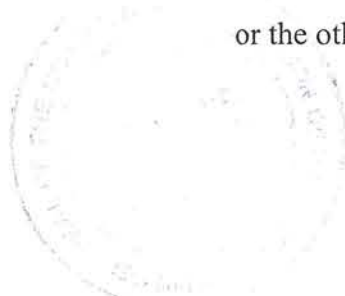


1 In the matter of 1-Link Guarantee Limited and its Member Banks dated 28.06.2012
2 In the matter of LPG Association of Pakistan Jamshoro Joint Venture Limited dated 14 December 2009
3 In the matter of Karachi Stock Exchange Guarantee Limited, Lahore Stock Exchange Guarantee Limited and Islamabad Stock Exchange Guarantee Limited dated 19 March 2009
4 PLD 1963 (W.P.) Lahore 390

general jurisdiction appropriate in appropriate proceedings for that purpose.

If, for example, a Rent Controller is told by a party before him that the West Pakistan Urban Rent Restriction Ordinance is invalid, he ought not to, on that ground, adjourn the proceedings in that case to hear elaborate arguments on some future date. Were he to do so, the logical procedure for him would be, not only to adjourn the case but to adjourn all cases, and not only to adjourn the cases, but also wind himself up as Rent Controller or not a Rent Controller under a valid piece of legislation. Similarly, if a Rent Controller is told that his own appointment is defective, it not for him to postpone the hearing in that particular case because his appointment is challenged as defective; if it is defective, if it is defective not only for the case in which the objection has been raised but also for all other cases. In respect of all such objections, the obvious and short answer of the Rent Controller must be that he, being a creature of the very laws or notifications which are being challenged before him, cannot suspend himself till he determines that matter; and that he must proceed so far as he is concerned on the assumption that his existence as a Rent Controller is of legal validity until a Court of competent jurisdiction decides or directs to the contrary."

While with respect to objections falling in the third and fourth category mentioned above, it was observed that a Tribunal can ascertain and settle these grounds one way or the other.



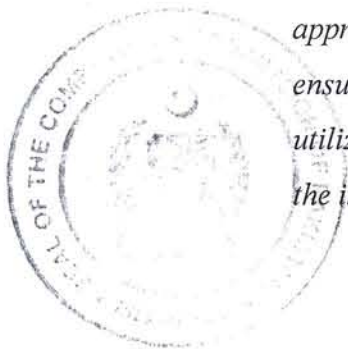
VSC AA 14 of 37

- 20: The Respondent's counsel has essentially raised objections falling within the third and fourth category identified above. Therefore, the Commission will now proceed to address the objections: *whether* the subject-matter *i.e.* deceptive marketing practices, and *whether* the party *i.e.* the Respondent, a real estate developer fall within the purview/ jurisdiction of the Act and can be tried by the Commission.
21. Needless to reiterate, in all of its correspondence (*instead of submitting a reply to the SCN on merits*), the Respondent's counsel has submitted that the Commission has no jurisdiction over the real estate matters and real estate developers. The Respondent's counsel has, *directly or indirectly*, contended that all issues pertaining to the real estate sector, *specifically* in Lahore are to be adjudicated by LDA and/or under the scheme of LDA Act. That is to say, jurisdiction over all functions, including competition prohibitions or anticompetitive conducts, carried out by a housing society/ or a real estate developer in Lahore has been conferred upon LDA by virtue of LDA Act and rules, regulations and policies made thereunder. The Commission views that the Respondent's objection with regard to the Commission's jurisdiction is merely argumentative and most likely based on the non-reading, misreading or misinterpretation of the Act and the principles applicable in the instant matter. In passing, the Commission refers to the Preamble and non-obstante clauses of the two statutes as under:

The preamble of LDA Act reads:

"An Act to provide for the constitution of the Lahore Development Authority.

WHEREAS, it is expedient in the public interest to establish a comprehensive system of metropolitan planning and development in order to improve the quality of life in the [area of Lahore Division], establish an integrated metropolitan and regional development approach and a continuing process of planning and development, to ensure optimum utilization of resources, economic and effective utilization of land and to evolve policies and programmes relating to the improvement of the environment of housing, industrial development,



VSC HA 15 of 37

traffic, transportation, health, education, water supply, sewerage, drainage, solid waste disposal and matters connected therewith and incidental thereto;”

Section 46 of LDA Act reads:

“Act to prevail over laws.— In the event of any conflict or inconsistency between the provisions of this Act and the provisions of any other law, the provisions of this Act, shall to the extent of such conflict or inconsistency, prevail particularly in matters of the master plan, land use, and house functioning.”

The preamble of the Act reads:

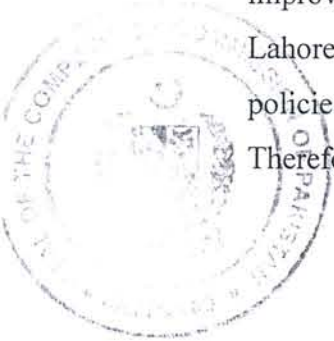
“An Act to provide for free competition in all spheres of economic activity to enhance economic efficiency and protect consumers from anticompetitive behaviour.

WHEREAS, it is expedient to make provisions to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anticompetitive behaviour and to provide for the establishment of the Competition Commission of Pakistan to maintain and enhance competition, and for matters connected therewith or incidental thereto;”

Section 59 of the Act reads:

“The provisions of the Act shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force.”

22. A bare reading of the above-reproduced preamble and overriding provisions contained in LDA Act makes the intention of the legislature clear. LDA Act was promulgated to improve the quality of, among other things, quality of life in the metropolitan area of Lahore city by providing planned development through planning and evolving such policies which would help to achieve the goals of the modern city on a sustainable basis. Therefore, it is the primary obligation of the functionaries of LDA to ensure that the



[Handwritten signature] *[Handwritten initials]* 16 of 37

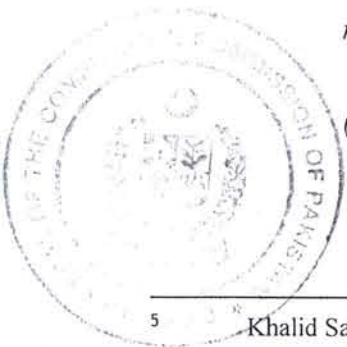
policies, rules, and regulations made pursuant to LDA Act are implemented by the people in letter and spirit and if they are abridged, such functionaries are empowered to take necessary action against the offenders⁵. Thus, the paramount object of LDA Act and associated rules, regulations, and policies administered by LDA is to ensure sustainable development of Lahore city and prosecute those who create hindrances in achieving those objectives.

23. On the other hand, if the meanings of the preamble and overriding clauses contained in two statutes *i.e.* LDA Act and the Act, as reproduced hereinabove are placed in juxtaposition, one has to come to an irresistible conclusion that the Act is not only special law on competition-related issues *such as* abuse of dominant position (Section 3), Prohibited Agreements (Section 4), Exemptions (Section 5 and 9), Deceptive Marketing Practices (Section 10), and Approval of Merger (Section 11) and has exclusive jurisdiction in all spheres of commercial and economic activities in Pakistan or any part of it. Section 46 of LDA Act gave its provisions overriding effect, however, such overriding effect would apply only in the event of a conflict or inconsistency between its provisions and that of other statutes. It has no application and could not be used to stall the Act which takes precedence over all laws on matters pertaining to competition or anticompetitive conducts provided in Chapter-II of the Act and this is abundantly clear from the language of Section 59 of the Act. The legal regimes envisaged under LDA Act and the Act are completely distinct. And, the two authorities are vested with distinct objects and operations.

24. Furthermore, reference is also made to Section 54 of the Act, which reads:

“54. Power to Exempt.—The Federal Government may, by notification in the official Gazette exempt from application of this Act or any provision thereof and for such period as it may specify in the notification,—

(a) any class of undertaking if such exemption is necessary in the interest of security of the state or public interest;



⁵ Khalid Saeed v. Shamim Rizwan (2003 SCMR 1505)

VE +A 17 of 37

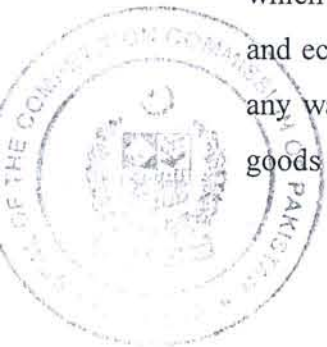
- (b) *any practice or agreement arising out of and in accordance with any obligation assumed by Pakistan under any treaty, agreement or convention with any other State or States; or*
- (c) *any undertaking which performs a sovereign function on behalf of the Federal Government or a Provincial Government”.*

25. In view of the specific language of Section 54 of the Act, it is noted that the Federal Government have not issued any notification to exempt the real estate sector. Therefore, with respect to the subject-matter jurisdiction, the Commission is of the considered opinion that the Commission has rightfully taken cognizance of the marketing practices by the Respondent. The Commission view is fortified by the fact that the non-obstante provisions contained in the Act make it clear that the Commission is the only forum to probe and initiate enquiries, conduct proceedings, and pass orders in cases of infringement of the aforementioned provisions of the Act which *inter alia* include the deceptive marketing practices.

26. The Commission now proceeds to deliberate upon the fact as to whether the Respondent is amenable to the provisions of the Act, and consequently the Commission. In this regard, the Commission notes that the concept of “Undertaking” envisaged under Section 2(1)(q) further provides guidance on the scope of application of the Act as:

“Undertaking” means any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision or control of services and shall include an association of undertaking.

27. The above definition is twofold with (i) the first part taking into its folds an individual, a company, a partnership firm, an association of undertakings, sector regulators or a body corporate established under the Provincial or Federal laws of Pakistan, a cooperative society and any other entity regardless of its legal status and the way in which it is financed; (ii) the second part of the term refers to the element of commercial and economic activity of an Undertaking, in particular, of a business entity which, in any way, is engaged in the production, supply, distribution, purchase, or offering or goods or services of any kind in a given market. Moreover, the Act makes no distinction



VE TA 18 of 37

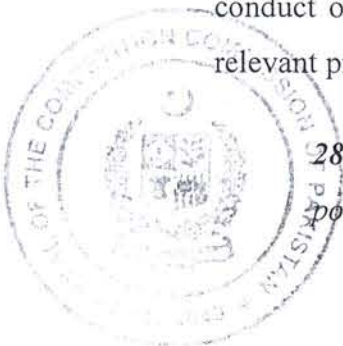
between private entities and public bodies. That is to say, the governmental departments, public bodies, and private entities are subject to the Act as long as they are/were engaged in all sectors of commercial and economic activities.

28. In view of the above, the Commission notes that the Respondent, *M/s Vision Developers Private Limited*, is engaged in the sale, purchase, and development of residential and commercial properties and hence is an “Undertaking” as defined in Section 2(1)(q) of the Act. Therefore, all of the Respondent’s commercial and economic activities are subject to the provisions of the Act and the Commission is empowered to take action against any violation of the Act.

Issue-II: Powers of Enquiry Officers of the Commission

29. It has been noted above that the Respondent’s counsel *vide* multiple identical letters in response to the Commission’s hearing notices have chosen to contend that the Enquiry Committee constituted by the Commission does not have, *inter alia*, any power to investigate into anticompetitive practices in the real estate sector, visiting the Respondent’s booking office, and examining of any NOC granted by LDA. Furthermore, the counsel contended that by doing so the Enquiry Committee/Enquiry Officers have exceeded their respective powers because the Commission itself does not have any such jurisdiction. According to the Learned Counsel for the Respondent, such acts of the Enquiry Committee are in contravention of Article 4, Article 5 and Article 10A of the Constitution. Based on these contentions, the Respondent’s counsel has asked the Commission to provide detailed documents, information, and legal opinions of solicitors and experts to undertake the enquiry and issue the SCN.
30. The Commission finds that the contentions of the Respondent’s counsel are the result of either non-reading and/or gross misinterpretation of relevant law on the subject *i.e.* Act and the Rules and Regulations made thereunder. Chapter-IV (Section 28 to Section 36) of the Act outlines the powers and functions of the Commission in relation to conduct of proceedings or enquiries for the purposes of the Act. For reference, the relevant provisions are reproduced hereunder:

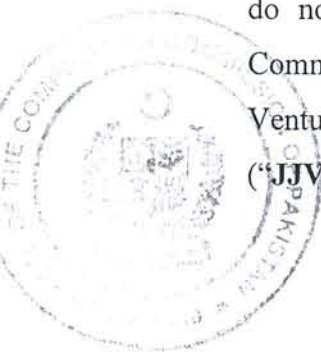
28. Functions and Powers of the Commission.— (1) *The functions and powers of the Commission shall be:*



VSC *HA*

- a. to initiate proceedings in accordance with the procedure of this Act and make orders in cases of contravention of the provision of the Act;
 - b. to conduct studies for promoting competition in all sectors of commercial and 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 undertaking is consistent with the provision 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.

31. A bare perusal of Section 28 of the Act makes it clear that the Commission may conduct enquires into the affairs of any undertaking (sub-clause (c) of sub-section (1) of Section 28). It may initiate proceedings in accordance with the procedure of this Act (sub-clause (a) of sub-section (1) of Section 28) and take all other actions as may be necessary for carrying out the purposes of Act (clause (f) of sub-section (1) of Section 28). Therefore, the Commission may delegate any of its powers and functions to its officers and Members. Those powers include, *inter alia*, conducting enquiries/ investigations into the commercial and economic conduct of any undertaking(s) either *suo muto* or on receipt of a complaint. Therefore, the Commission is of the considered view that in the presence of an express provision empowering the Commission to delegate any of its functions to any of its officers, the Respondent's objections and contentions as to the constitution/authorization of enquiry committee are baseless and irrelevant at best and do not withstand legal and/or logical scrutiny (Reference is also made to the Commission's Order in the matter of Show Cause Notice issued to Jamshoro Joint Venture Limited (JJVL) and LPG Association of Pakistan (LPGAP) dated 14.12.2009 ("JJVL-LPG" case)).

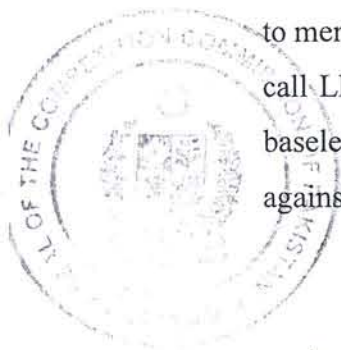


VSC

HA 20 of 37

32. The Respondent's counsel has attempted to create an illusion that the Enquiry Committee, the Enquiry, the Enquiry Report and the SCN lack bona fide or suffer from malice. Moreover, it was alleged that the members of the Enquiry Committee have had meetings with some politicians due to which the outcome of the Enquiry is prejudiced. However, the Learned Counsel for the Respondent has failed to substantiate these allegations of *mala fide* or malice on part of Enquiry Committee through independent and cogent evidence. Mere imputation of *mala fide* or malice against the departments of the Commission is not tenable, in circumstances. The Commission finds these arguments put up by the Respondent's counsel to be completely unfounded and unjustified. In this regard reference and reliance is placed on the case reported as **2017 SCMR 1249**, titled *Said Zaman Khan vs. Federation of Pakistan*, wherein the August Court held that mere levelling allegations is not sufficient to establish mala fide of fact, rather the party levelling such allegations must prove the allegations of *mala fide* through independent and cogent evidence. The Respondent's counsel has put nothing on the record even. Rather, the above objections have been raised to by the Respondent's counsel to delay the proceedings before the Commission and avoid the scrutiny of its actions under the Act by the Commission.

33. In addition to the above, the Respondent's counsel has objected through written reply that the Commission does not have jurisdiction to investigate into the real estate sector. The Commission has already dealt with this contention of the Respondent in Issue-I above. Needless to reiterate, the Respondent falls within the purview of the "Undertaking" and the commercial and economic activities and those inclusive of the real estate sector does empower the Commission to conduct enquiry/investigation, initiate proceedings for determination under the Act. The Commission and its authorized Enquiry Committee have properly acted under the Act. An enquiry into the issues raised and allegations leveled in the Complaint are directly envisaged by Section 10 of the Act and the Enquiry Committee and the Commission, within the bounds of the discretion conferred by law, have validly carried out their functions. It is pertinent to mention here that the objection raised by the Respondent's counsel to examine NOC, call LDA for information and assistance, visiting Respondent's book offices are also baseless, frivolous, and unfounded premises. Any accusation of mala fide and bias against a public authority are a serious matter and requires requisite substantiation. In

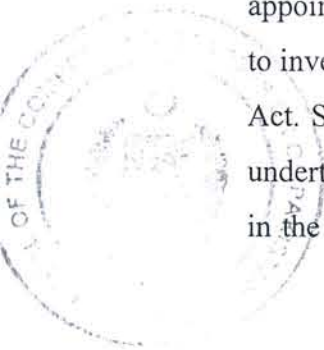


VSC

AD 21 of 37

this respect, the Commission would like to appreciate, summarily, the events as they unfolded in relation to the Respondent.

34. On 22.06.2016, the Complainant lodged the Complaint alleging that the Respondent is engaged in deceptive marketing practices in violation of Section 10 of the Act. On 29.08.2016, the Commission authorized its Officers as enquiry officers under clause (f) of sub-section (1) of Section 28 of the Act to enquire into the alleged violations of the Act. On 21.09.2016, the Enquiry Committee duly wrote to the Respondent along with a copy of the Complaint and asked to furnish its comments/ replies to the issues raised in the Complaint and to clarify its position regarding alleged contravention of Section 10 of the Act.
35. In its reply dated 29.09.2016, the Respondent rather than replying to the merits of the Complaint submitted that a Writ Petition had been filed before the Honourable Lahore High Court against the refusal of permission by LDA and the matter of sale of land to EOBI is pending adjudication before the August Supreme Court. Also, the Respondent gave a statement as to the fact that it has not been advertising any campaign in any media, neither print nor electronic since 08.06.2012. Since, no evidence was provided by the Respondent in its reply therefore, it was after the Respondent's reply that the Enquiry Committee sent the Respondent's reply to the Complainant for further comments, sought information from LDA and visited the booking office of *Park View Villas* in-person in order to collect necessary material for assessing the truth and veracity of the allegations of deceptive marketing practice, in circumstances. After a thorough probe, the Enquiry Committee submitted its report on 15.12.2016. Based on the *prima facie* findings, conclusions, and recommendations contained in the Enquiry Report, the Commission ultimately issued the SCN dated 30.12.2016 and fixed the initial hearing on 25.01.2017.
36. In view of the above, the Commission holds that the enquiry officers appointed/authorized to enquire/investigate into a particular matter, have all the powers to investigate the alleged contraventions of Chapter-II, which include Section 10 of the Act. Such powers extend to all spheres of commercial and economic activities of an undertaking as defined and discussed above. The Commission finds no substantiation in the contentions raised by the Respondent's counsel pertaining to the appointment,



  22 of 37

conduct and the findings of the Enquiry Report. Furthermore, the Enquiry Report mentions, *inter alia*, details as to the contents of the Complaint, the Respondent's comments, the rejoinder, and the investigation process employed by the Enquiry Officers. Therefore, the Commission has provided all the necessary information and details to reply to the SCN and furthermore it does not need to furnish a legal opinion to the Respondent whether it has jurisdiction to admit complaints, conduct enquiries, initiate proceedings, and dispose of the same.

Issue-III: Natural Justice and Due Process of Law

37. The Respondent's counsel has objected in its written reply that the Enquiry Report, the SCN, and the instant proceedings are unilateral and unfair violating the principles of natural justice and the fair/ due process of law. It has also been contended that the Enquiry Report and the Enquiry Committee with the pre-determined and prejudiced minds have already decided to hold the Respondent liable at the behest of the Complainant, therefore, the enquiry process and the Enquiry Report and the instant proceedings all suffer from mala fide, bias, and malice.
38. In regard to the principles of natural justice and due process of law, the Commission has deliberated on in detail, in **JJVL-LPG Order** and in the order of *Pakistan State Oil Company Limited dated 29.11.2016* ("PSO Order") for deceptive marketing practices. In the case reported as **2006 PTD 2502**, titled *Commissioner of Income Tax and others Vs. M/s Media Network and others*, the August Supreme Court of Pakistan has observed that

"the natural justice is not cast in a rigid mould and that depending on the facts and circumstances of each case, there is not a mandatory requirement of natural justice that in every case the other side must be given a notice before preliminary steps are taken."

39. Thus, as per the Honourable Supreme Court, it would suffice if the reasonable opportunity of hearing is granted to a person before an adverse action or order is made against him. Support can also be gleaned from the following precedents from the United Kingdom and the United States:



V&C *HA* 23 of 37

- a). In *Rees and others* [1994] 1 All E.R. 833 at page 842-845, it was held by the Privy Council that

“there were many situations in which natural justice did not require that a person must be told of the complaint made against him and given a chance to answer them at a particular stage in question...Essential features leading the Courts to that conclusion had included the fact that the investigation was purely preliminary; that there will be a full chance adequately to deal with the complaint later; that the making of the enquiry without observing the audi alteram partem maxim was justified by urgency or administrative necessity; that no penalty or serious damage to reputation was inflicted by the proceeding to next stage without hearing, that the statutory scheme purely constructed and excluded such as right to know and to reply at the hearing stage.”

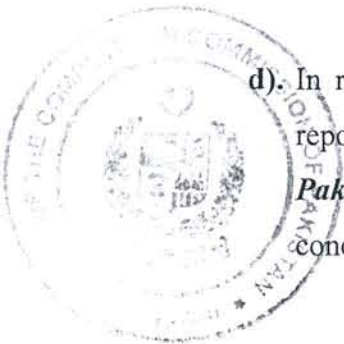
- b). In *Regina Vs. Saskatchewan College of Physicians and Surgeons* [1996] 58 D.L.R. (2nd) 622.52, the Court held that:

“the preliminary enquiry committee had no power to decide whether a doctor had been guilty of misconduct; it had no power to affect any of his legal rights in any way whatsoever, and it had no power to impose any penalty or obligation upon him. Hence, the requirements of natural justice did not apply.”

- c). In *Pary Jones Vs. Law Society and others* [1969] 1 Ch Division 1 at pp. 8 and 10, held by the Court of Appeal that:

“Where the only [e]nquiry was as to whether there was prima facie evidence, natural justice did not require that the party should be given notice of it.”

- d). In regard to due process or procedural fairness, reference is made to the case reported as **1998 SCMR 1863** titled *Aftab Shaban Mirani Vs. President of Pakistan*, wherein the Honourable Supreme Court of Pakistan has summarized the concept as follows:



VSC TA 24 of 37

- i. a person shall have notice of proceedings which affect his rights.
- ii. he shall be given reasonable opportunity to defend.
- iii. that the Tribunal or Court before which his rights are adjudicated is so constituted as to give reasonable assurance of his honesty and impartiality.
- iv. that it is a Court of competent jurisdiction.

Above are the basic requirements of the doctrine of "due process of law" which is enshrined, *inter alia*, in Article 4 of the Constitution. It is intrinsically linked to the right to have access to justice which is a fundamental right. This right, *inter alia*, includes the right to have a fair and proper trial and a right to have an impartial Court or Tribunal. A person cannot be said to have given a fair and proper trial unless he is provided a reasonable opportunity to defend the allegations made against him (*New Jubilee Insurance Company Vs. National Bank of Pakistan, PLD 1999 Supreme Court 1126*).

- e). In the context of enquiry process, the Commission in its JJVL-LPG Order observed that:

"Traditional notions of due process do not attach in adjudicative, fact-finding investigation." [U.S. Georator Corp Vs. Equal Employment Opportunity Commission, 590 F. 2d (4th Cir. 1979)]

- f). On the same point, the Commission in its JJVL-LPG Order has also noted that,

"...the full panoply of due process safeguards need not necessarily be afforded to the individual during the investigative, as opposed to adjudicative, phase of an administration of justice." [U.S. Tolbert Vs. McGriff, 434 F. Supp. 682 (M.D. Ala. 1976)]

40.

In view of the principles laid down in the abovementioned cases, the Commission notes that the right to fair trial and right/ opportunity of hearing are cardinal principles

of natural justice and have to be read into every statute even if they are not provided specifically therein.

41. Putting things in context, a reading of Act and the Competition (General Enforcement) Regulations, 2007, the Commission holds that there is no obligation on the Commission or the Enquiry Committee authorized by it to issue a notice or hold a hearing at the enquiry stage; as its merely a prima facie fact finding enquiry and that can be done through independent process. Regulation 16 of General Enforcement Regulations allows the Commission to commence an enquiry, *inter alia, suo motu* or upon reference by the Federal Government, or in the case of a complaint filed by an undertaking or a registered association of consumers. In all eventualities, the standard to be satisfied is whether the facts before it constitute a *prima facie* violation of Section 3, 4, 10, 11 and /or provisions of Chapter II of the Act. There is no requirement for notice or hearing at the enquiry stage.
42. In light of above and facts on the record, the Commission is of the considered view that the SCN was issued upon *prima facie* conclusion/recommendation contained in the Enquiry Report and no order, be it adverse or favourable was issued by the Commission. There is no evidence that the Enquiry Committee had acted in an arbitrary manner. Even so, the SCN aimed at calling upon the Respondent to submit its written replies in support of its contention and to avail the opportunity of being heard before the Commission in accordance with Section 30(2) of the Act, which reads:

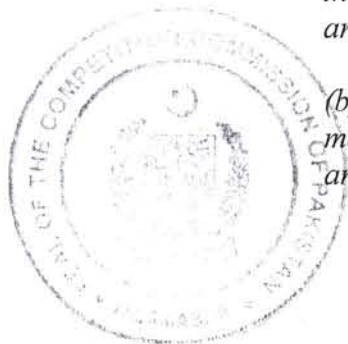
“30. Proceedings in cases of contravention.—

(1)...

(2) Before making an order under sub-section (1), the Commission shall—

(a) give notice of its intentions to make such order stating the reasons therefore to such undertaking as may appear to it to be in contravention; and

(b) give the undertaking an opportunity of being heard on such date as may be specified in the notice and placing before the Commission facts and material in support of its contentions:



VSC 40 26 of 37

Provided that in case of the undertaking does not avail the opportunity of being heard, the Commission may decide the case ex parte. ”

43. In view of the aforementioned provisions, the Commission finds that the SCN was sent through courier service, which was duly served on the Respondent. Earlier, at the enquiry stage, the Complaint along with its annexures was also provided to the Respondent and the Respondent filed a response thereof. Further, as has been observed in the preceding paragraphs, the Respondent was issued hearing notices on 30.12.2016, 01.02.2017, 06.02.2017, 13.03.2017, 19.05.2017, 23.05.2017, 18.08.2017, 24.08.2017, 28-08-2017 and 18-12-2017, and the Respondent was provided with six (6) opportunities of hearing over a period of one year. The Respondent on the other hand was avoiding the proceedings by not appearing before the Commission. Therefore, the Commission was constrained to proceed under proviso to subsection (2) of Section 30 of the Act read with clause (e) of sub-regulation (2) of Regulation 26 of the General Enforcement Regulations to proceed ex-parte against the Respondent. Thus, the Enquiry Committee and the Commission have fulfilled the requirements of due process and natural justice principle in light of the afore-cited provisions of the Constitution and the Act as well as the established case law on the subject. Therefore, the Commission deemed it appropriate to proceed and make an order on an *ex-parte* basis on 21-12-2017.

Issue-IV: Whether the Complaint is an Undertaking and has Locus Standi to Lodge a Complaint under Section 37(2) of the Act?

44. It has been noted above that the Respondent's counsel has objected in its written reply that the Complainant is not an "Undertaking" or a representative of "Registered Association of Consumers" provided under Section 37(2) of the Act. Furthermore, the Respondent has contended that the Complaint has been filed at the behest of some politician/or political party and is, therefore, motivated by political victimization and harassment. The Commission makes two observations in this regard. First, it is not the Commission's function to indulge in or enquire into the political rivalries or affiliations. Second, it is an established principle of law that where a person alleges political victimization, such person needs to substantiate the allegations with cogent evidence, which in this case the Respondent has failed to provide. Even so, the Commission refers to Section 37 of the Act, which reads:



V&S *TD* 27 of 37

"37. Enquiries and Studies. — (1) The Commission, may, on its own, and shall upon a reference made to it by the Federal Government, conduct enquiries into any matter relevant to the purposes of this Act.

(2) Where the Commission receives from an undertaking or a registered association of consumers a complaint in writing of such facts as appear to constitute a contravention of the provisions of Chapter II, it shall, unless, it is of opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by prima facie evidence, conduct an enquiry into the matters to which the complaint relates.

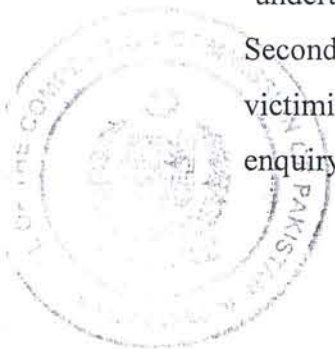
(3) The Commission may outsource studies by hiring consultants on contract.

(4) If upon the conclusion of an enquiry under sub-section (1) or sub-section (2), the Commission is of the opinion, that the findings are such that it is necessary in the public interest to do, it shall initiate proceedings under Section 30."

45. Section 37 of the Act empowers the Commission to initiate enquiries:

- i. on its own (suo motu);*
- ii. upon Reference made by the Federal Government; and*
- iii. complaints by undertakings or a registered association of consumers.*

46. With regard to the complaints, subsection (2) of Section 37 of the Act empowers the Commission to conduct enquiry upon receipt of written applications from an undertaking or a registered association of consumers. The alleged facts must appear to constitute contravention(s) of any of the provisions of Chapter-II of the Act. The Respondent's counsel has contended that the Complainant does not fall within the purview of the term 'undertaking', hence, the Commission cannot initiate an enquiry in the instant case. Second, with regard to the contention that the Complaint is based on political victimization and harassment, the Commission notes that all required to initiate an enquiry under the aforesaid provision is:



BC *HA* 28 of 37


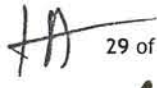
- i. *Whether the complainant or the applicant is an undertaking or a registered association of consumers?*
- ii. *Whether the complaint is frivolous or vexatious or based on insufficient facts?*
- iii. *Whether the complaint is substantiated by prima facie evidence to initiate an enquiry?*

47. If the above three requirements are fulfilled, subsection (4) of Section 37 empowers the Commission to conduct enquires and based on the findings decide whether or not to initiate proceedings under Section 30 of the Act.

48. On perusal of the case record, the Commission finds that the Complainant is engaged in the business of developing real estate, assisting individuals and institutional clients, both directly or through network of associates, in procuring and disposal of real estate assets in the name of *M/s Matto Trading & Construction* having its office at 159 Iqbal Park, Defence Boulevard Lahore Cantt., Lahore. It is relevant to highlight the Commission in one of its recent order i.e. **in the matter of Show Cause Notice issued to Utility Stores Corporation of Pakistan (Private) Limited** (hereinafter the 'USC Order') has held that "*If any legal entity or natural person is engaged in any way in the production, supply, distribution of goods or provision or control of services, the said entity would fall within the purview of the term 'undertaking'.*"

49. It is relevant to highlight that the Respondent has not provided any further evidence in support of its objection raised through the written reply, however, the Complainant on the other hand has provided his income tax details which clearly shows him to be engaged in provision of the aforementioned services of procuring and disposal of real estate assets in the name of *M/s Matto Trading & Construction*. For the foregoing reasons, the Commission is satisfied that the Complainant falls within the purview of "Undertaking" to file an application(s)/ complaint(s) for contraventions of Chapter-II provisions under subsection (2) of Section 37 of the Act. Accordingly, the objection of the Respondent in this regard is turned down.

50. Also, on perusal of the case record and the Enquiry Report, the Commission finds no element of political victimization or harassment affecting the outcome of the enquiry. Moreover, the Respondent's counsel has adduced no cogent evidence to substantiate the same. Nevertheless, in all cases, the Commission's mandate is to determine and

  29 of 37

deliberate whether or not there is contravention(s) of Chapter-II, including Section 10 of the Act, rather than addressing the non-issues, which are not substantiated by cogent evidence.

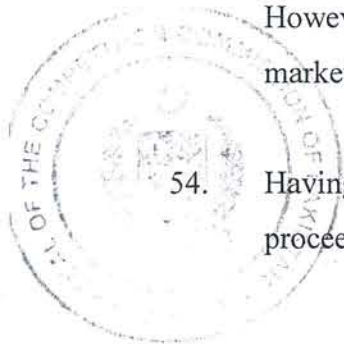
51. Now turning to the question of:

Issue-V: Whether the subject advertisements are deceptive in that they provide false and/or misleading information in terms of Section 10(2)(b) and 10(2)(a) read with Section 10(1) of the Act?

52. Before examining the deceptiveness of the advertisements, the Commission would deem it appropriate to refer to the Enquiry Report paragraphs 6.3 to 6.13, and paragraphs 6.14 to 6.30 cumulatively suggest that (i) Park View Villas is not an approved housing scheme for residential purpose, and (ii) Park View Villas is advertised as “Park View Villas at River Edge Housing Scheme”.

53. It is relevant to highlight that though the Respondent was given a number of opportunities to rebut the *prima facie* findings against its for violation of Section 10 of the Act, as has been discussed in Paragraph 43 above, however, the Respondent deliberately refused to appear before the Commission and avail the opportunity of hearing and present facts and material in support of its contentions. Therefore, the Commission is left with no other option but to proceed ex-parte against the Respondent and also to reply on the ex-parte proof and submissions made before it by the Complainant and the representative of LDA. In this regard reference is made to the matter of **China Mobile Pak Limited and Pakistan Telecom Mobile Limited** reported as **2010 CLD 1478**, wherein it was held by the Commission that the onus to prove is on the undertaking against whom deceptive marketing practices is alleged, as the object and purpose of the Act is to protect the consumer. Therefore, the onus to rebut the presumption of *prima facie* violation of the Act was on the Respondent. However, the Respondent did not provide any justification for resorting to the marketing practices under question.

54. Having established that the Commission is empowered to conduct enquiries and initiate proceedings, inter alia, in the real estate sector, for *prima facie* violations of any



VBS
HD 30 of 37

provision of Chapter II of the Act, the provisions of Section 10 of the Act, for ease of reference are reproduced herein below:

“10. Deceptive marketing practices—(1) No undertaking shall enter into deceptive marketing practices.

(2) The deceptive marketing practices shall be deemed to have been resorted to or continued of an Undertaking resorts to—

(a) the distribution of false and misleading information that is capable of harming the business interests of another undertaking;

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

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

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

55. The core issue, in this case, is the deceptive character of the advertisement. To address this core issue, Section 10(2)(b) of the Act is applicable to the extent of determining whether the Respondent's advertising and promotional material viz., ***Park View Villas at River Edge Housing Scheme*** is deceptive. In this context, the main question is whether the information disseminated to the consumer is false and/or misleading and whether the information is lacking a reasonable basis relating the character and suitability for use, among other things.

56. We deem it appropriate to refer to the earlier orders of the Commission pertaining to the analytical scheme of the alleged infringement(s) under Section 10 of the Act. In the matter of **China Mobile Pak Limited and Pakistan Telecom Mobile Limited** reported as **2010 CLD 1478**, the Commission has observed that in determining whether an advertisement or marketing material (and the advertised claims) amount to deceptive marketing practices, the Commission shall:

“...evaluate complete advertisement and make an opinion regarding deception [...] on the basis of net general impression conveyed by them and not an isolated script”.

  31 of 37

With regard to “consumers,” the Commission has held that:

“the term ‘consumer’ under Section 10 of the [Ordinance] is to be construed as an ‘ordinary consumer’ but need not be necessarily be restricted to the end consumer of the goods or services”

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

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

Misleading information: “may essentially include oral or written statement or representation that are: (a) capable of giving wrong impression or idea, (b) likely to lead into error of conduct, thought or judgement (c) tends to misinform or misguide owing to vagueness or any omission, (d) may or may not be deliberate or conscious, and (e) in contrast to false information, it has less erroneous connotation and is somewhat open to interpretation as the circumstances and conduct of a party may be treated as relevant to a certain extent”.


57. Furthermore, while evaluating the ‘net general impression’ or dominant message, the Commission also delineates and examines express and implied claims contained in an advertisement or promotional campaign while holding the advertiser liable for both. The advertiser is liable for all such claim if they are false and/or misleading or lack a reasonable basis for the same. Neither proof of intent to disseminate a deceptive claim, not evidence that consumers have actually been misled is required for an act or omission to constitute violations under Section 10(2)(b) of the Act.

58. A perusal of the case record (summarized above) adequately reflects that the seriousness of the Respondent’s conduct. It is an undisputed fact that Park View Villas is an unapproved housing society, and it appears that LDA’s refusal to grant an NOC

 32 of 37

to the Respondent is based on cogent reason. However, since this issue is pending before the Lahore High Court, Lahore, the Commission, shall not comment on it to the extent of instant proceedings.

59. After refusal of NOC by LDA and office of the Secretary Housing, the Respondent launched an advertising campaign "***Park View Villas at River Edge Housing Scheme***" which is not only false but also misleading in character because it has the potential to give an overall impression either that (i) Park View Villas is an independently approved housing scheme, or (ii) Park View Villas is part or extension of River Edge Housing Scheme.
60. In the above context, the Commission is of the view that a market is the set of actual or potential buyers (customers/consumers) of a product and the producers or offerors produce a product or offer provisions of services based on the needs of the buyers. Keeping this economic phenomenon in perspective, the Commission is of the considered opinion that the advised claim is false in the sense that it is contrary to the truth or facts and not in accordance with reality or actuality, has been made consciously, and it is not readily open to interpretation as it may have multiple connotations under the circumstances.
61. Secondly, the advertised claim is capable of, directly or indirectly, giving the impression that the Park View Villas is a registered housing scheme or a part of an extension of River Edge Housing Scheme. Therefore, it is likely to impair the conduct, thought or judgment of an actual or a potential consumer. Furthermore, one of the advertisements on the billboard barely mentions "Park View Villas" alongside its actual location, but without any reference to River Edge Housing Scheme or its approval status. Whether or not deliberate or conscious, those advertisements have a tendency to misinform or misguide (owing to the omission of a material fact) actual or potential consumers or customer who intend to buy or invest in residential and/or commercial plot(s).
62. Based on the above, we are of the considered opinion that the Respondent's representations, omission or practices for the purposes of advertisement and promotion of Park View Villas are highly likely to mislead actual or potential consumers under the circumstances.

VE  33 of 37

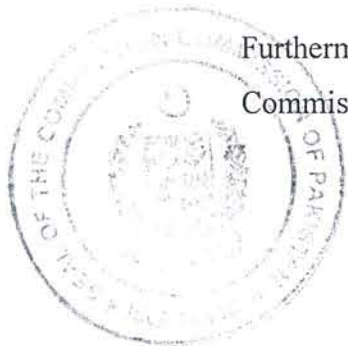
63. The Commission finds, therefore, that the Respondent has resorted to deceptive marketing practices in violation of Section 10(2)(b) read with Section 10(1) of the Act in relation to its advertising and marketing campaign viz., Park View Villas, as discussed above.
64. With respect to a violation of Section 10(2)(a) of the Act, the Commission is obligated to evaluate whether the Respondent's deceptive marketing practices have been resorted to or continued consist in:

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

65. In its previous orders, for instance, *in the matter of Show Cause Notice to M/s Tara Crops Sciences (Private) Limited* reported as 2016 CLD 105, the Commission has deliberated on to what shall be deemed to constitute "*business interests of another undertaking*". Para 23 of the aforesaid Order reads:

"Business interest, not being term of art, has not been defined exhaustively, either in the [Competition] Act, or in any of the previous orders of the Commission. The Commission has, however, in its Order in the matter of Show Cause Notice issued to M/s Jotun Private Limited for Deceptive Marketing Practices ('Jotun Order'), briefly touched upon a definition of the term by considering the 'image, goodwill and sales' of an undertaking as its business interests. The concept of 'good will' had previously also been discussed by the Commission in its Order in the Matter of Complaint filed by M/s DHL Pakistan (Private) Limited ('DHL Order'), wherein it was stated that 'it is important to recognize that part of any business identity is the goodwill it has established with consumers, while part of a product's identity is the reputation it has earned for quality and value'".

Furthermore, in regard to harm to business interests of the competing undertakings, the Commission has in Jotun Order has observed that:



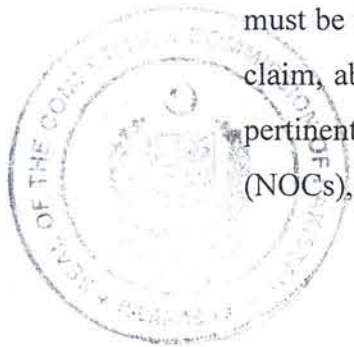
VKZ HA

“14. [...] to prove conduct under Section 10(2)(a) of the [Competitor] Act, it is not necessary to show actual harm to competitors. It is sufficient to show the existence of a deceptive marketing practice that has the potential to harm the business interest of the competitor. Among such deceptive marketing practices is the distribution of claim lacking reasonable basis that is essentially designed and used to gain an unfair advantage over competitor”.

66. It is established above that the Respondent advertising and marketing campaign contain both false and misleading claims which lack reasonable basis, specifically in terms of “character” and “suitability for use” of the property i.e. Park View Villas. The Commission holds that the unsubstantiated claims of the Respondent have potential of creating unfairly, a positive/material perception on the part of actual or potential consumers in favour of the Respondent, which, in turn, is capable of harming the image, goodwill, sales and other business interests of another undertaking(s), specifically, the competitors, in violation of Section 10(2)(a) read with Section 10(1) of the Act.

REMEDIES AND PENALTIES

67. In recent times, the Commission has become vary of the prevalent practice of deceptive marketing and misleading advertisement specifically in the real estate industry and how such conduct is perceived by consumers in terms of their transactional decision to their own financial detriment. Real estate developers are increasingly leading potential investors to a wrong conclusion or false impression, through the use of ambiguous information in their advertising campaigns without being able to back their claim with evidence. Such conduct will almost always be culpable under Section 10 of the Act. Therefore, we cannot stress enough, the higher burden placed on undertakings which operate in the real estate market, in relation to the accuracy of any claims or representations that they make in the course of their marketing campaigns. Special care must be taken not to make a false or misleading statement, whether express or implied claim, absolute or qualified, in the electronic or print media or otherwise, relating to pertinent information such as government approvals and no-objection certificates (NOCs), nature, characteristics and use to which the land may lawfully be put, existence



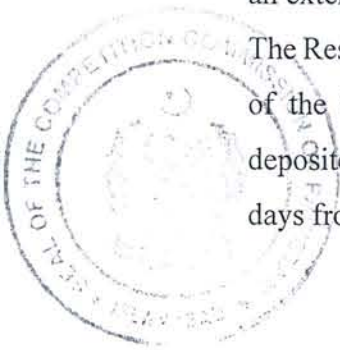
VSC 35 of 37

of associated facilities and amenities, price and additional charges, as well as the location of the land itself.

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

69. Keeping in view the above, although the conduct of the Respondent calls for a higher penalty as the Respondent has deliberately obstructed the proceedings of the Commission, however, the Commission deems it appropriate to exercise restraint, therefore, for violation of Section 10 of the Act, the Commission deems it appropriate to impose a penalty of Rs. 10,000,000/- (Rupees Ten Million Only) on the Respondent.

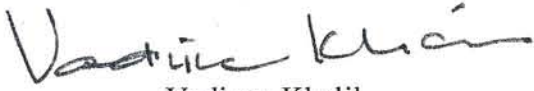
70. With regard to the facility of the advertising claim "**Park View Villas at River Edge Housing Scheme**", the Respondent is directed to inform public-at-large, through appropriate clarifications in two Urdu and two English dailies for a period of one (1) week that Park View Villas is not a housing scheme approved by LDA and is also not an extension of River Edge Housing Scheme, including the reasons assigned by LDA. The Respondent is directed to file the compliance report in this regard with the Registrar of the Commission and the penalty so imposed on the Respondent shall also be deposited with the Registrar of the Commission within the period of forty-five (45) days from the date of issuance of this order, failing which the Respondent is liable to a



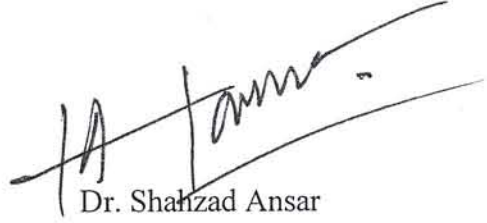
VSC HA 36 of 37

further penalty of Rs. 250,000/- (Rupees Two Hundred and Fifty Thousand Only) per day from the date of issuance of this Order and initiation of criminal proceedings against the management of the Respondent under sub-section (5) of Section 38 of the Act before the Court of competent jurisdiction.

71. Before parting with this Order, the Commission deems it appropriate to direct the Respondent to refrain from indulging in any form of deceptive marketing practices in the future and is forewarned that repeat violations may attract stricter penalties as per the law.
72. In terms of the above, the SCN No. 59/2016 dated 30 December 2016 is hereby disposed of.



Vadiyya Khalil
Chairperson



Dr. Shahzad Ansar
Member



Islamabad ¹⁷ 29 December 2017