

**2023 C L D 114**

**[Competition Commission of Pakistan]**

**Before Ms. Rahat Kaunain Hassan, Chairperson and Mujtaba Ahmad Lodhi, Member**

**SHOW CAUSE NOTICE ISSUED TO MESSRS BERGER PAINTS PAKISTAN LTD.: In the matter of**

F. No. (411) / OFT / Diamond Paints / CCP / 2021, decided on 11th November, 2022.

**(a) Competition Act (XIX of 2010)---**

---S. 10---Competition (General Enforcement) Regulations, 2007, Reglns. 30 & 32---Deceptive marketing practices---Commitments---Acceptance of commitments---Scope---Complainant alleged that the respondent had engaged in anti-competitive practice(s) by making a substantial and quantifiable claim regarding its product as "No. 1 Emulsion in Pakistan"---Contention of complainant was that such claim was not a mere puffery, being quantifiable claim that was false/misleading---Respondent agreed to rectify and address the concerns of the Commission---Validity---Presenting the impugned logo in the manner used was capable of misleading the ordinary consumer that respondent's emulsion was No. 1 in the emulsion paint market or that the product was better in ranking as a whole from the other competitors in the market---Such in turn, had the potential to harm the position and ranking of other players in the market, thereby giving the respondent an unearned competitive edge---Such certainly was capable of harming the business interest of other undertakings---Competition Commission, being satisfied with the respondent's commitment and compliance decided not to impose any penalty---Proceedings were disposed of accordingly.

**(b) Competition Act (XIX of 2010)---**

---S. 28---Functions and powers of the Commission---Seeking advice from the Commission---Scope---Competition Commission is not a clearance agency to approve a certain advertisement/logo in terms of its compliance with competition law, however, the Commission can be contacted in an advisory role as per S. 28(1) (d) read with the guidelines in this regard.

**(c) Competition Act (XIX of 2010)---**

---S. 10---Trade Marks Ordinance (XIX of 2001), S. 39---Deceptive marketing practices---Rights conferred by registration of trade mark---Scope---Competition Commission is not concerned with whether a trademark logo has been registered or not but is rather concerned with the representation of its logo by an undertaking while advertising the product being deceptive in any manner---Even if an undertaking has a registered trademark logo under the relevant laws, it would not absolve any party from complying with the relevant provisions of S. 10 of the Competition Act, 2010.

Ms. Momna Taufeeq, Ahmed Hassan and Muhammad Abdullah for Messrs Diamond Paints Industries (Pvt.) Limited.

Ahmad Hassan Khan, Mehr Muhammad Iqbal, Advocate Supreme Court and Abdul Wahid Qureshi, Director Finance for Berger Paints Pakistan Ltd.

Dates of hearing: 8th and 23rd June, 2022.

## **ORDER**

1. This Order shall dispose of proceedings initiated pursuant to Show Cause Notice No.11/22 dated 66 April, 2022 (hereinafter referred to as "SCN") issued against Messrs Berger Paints Pakistan Limited (hereinafter referred to as "Respondent") for prima facie violation of section 10(1) read with section 10(2)(a) and 10(2)(b) of the Competition Act, 2010 (hereinafter referred to as the "Act"). The SCN was issued pursuant to the findings of an enquiry concluded vide Enquiry Report dated 17th February, 2022. Earlier, the enquiry was initiated under section 37(2) of the Act, on a complaint filed by Messrs Diamond Paint Industries (Pvt.) Limited (hereinafter referred to as "Complainant") alleging that the Respondent had engaged in deceptive marketing practices in violation of the aforementioned provisions of section 10 of the Act.

## **FACTUAL BACKGROUND**

### **Complaint**

2. The Competition Commission of Pakistan (the "Commission") received the complaint on 14th September, 2021, against the Respondent, alleging that it had engaged in anti-competitive practice(s) by making a substantial and quantifiable claim regarding its product i.e. Berger Super Emulsion as 'No.1 Emulsion in Pakistan', by marketing it on its paint buckets and shade cards without there being any independent study/research or report for supporting the same. The Complainant submitted that such claim is not mere puffery, being a quantifiable claim that is false/misleading. The complaint further alleged that the false/misleading claim, i.e., "No.1 Super Emulsion", has the potential to mislead the ordinary consumer, is also likely to cause harm to the Respondent's competitors, and the Respondent is in violation of section 10(2)(a), (b) and (c) of the Act.

3. The Complainant is a private limited company registered under the Companies Ordinance, 1984 (now the Companies Act 2017). The Complainant maintains that it is engaged in manufacturing high quality decorative and industrial paints in Pakistan and abroad by utilizing modern machinery and innovative processes.

### **Enquiry and Show Cause Notice**

4. Following the complaint, an Enquiry Committee was formed by the Commission under section 37(2) of the Act. The Enquiry Committee concluded the enquiry vide Enquiry Report dated 17th February, 2022 and reached the following conclusion:

"7.1 In view of the analysis, it is concluded that the conduct of the Respondent is, through representation of 'Burger No.1 Super Emulsion' on the paint bucket and shade card/brochure of its emulsion paint, capable of harming the business interest of the complainant and other undertakings, prima facie, in violation of section 10(1) in general and in particular, section 10(2)(a) of the Act.

7.2 In light of the facts, it is also concluded that the Respondent, through the representation of 'Berger No.1 Super Emulsion' on the paint bucket and shade card/brochure of its emulsion paint, is found to be disseminating misleading information to consumers lacking a reasonable basis related to the character, properties and quality of its product, prima facie, a violation of section 10(1) in general and in particular, section 10(2)(b) of the Act."

5. Based on the foregoing, the Enquiry Committee proposed initiation of proceedings against the Respondent under section 30 of the Act.

6. The Commission, after considering the prima facie findings of the Enquiry Report, deemed it appropriate to initiate proceedings under section 30 of the Act while providing the Respondent an opportunity of being heard. The relevant parts of the SCN are reproduced hereunder:

"5. WHEREAS, in terms of Enquiry Report in general and paragraphs 6.30 to 6.35 in particular, it appears that the Undertaking through the representation of the claim "Berger No.1 Super Emulsion" on the paint bucket and shade card disseminated misleading information to consumers lacking reasonable basis regarding character, properties and quality of the product which is, prima facie, in violation of section 10(1) read with section 10(2)(b) of the Act; and

6. WHEREAS, in terms of Enquiry Report in general and paragraphs 6.11 to 6.22 in particular, it appears that the Undertaking's misleading representation of its Product on paint bucket and shade cards/brochure is capable of harming the business interest of the Complainant and other undertakings which, prima facie, in violation of section 10(1) read with 10(2)(a) of the Act; and

7. WHEREAS, in terms of Enquiry Report in general and paragraphs 6.38 and 6.39 in particular, it appears that the product of the Respondent is sold nationwide via its distribution network, therefore, the effects of anti-competitive behavior are interprovincial and would have a spillover effect throughout Pakistan; ....."

Hearings and Submissions:

7. The Respondent submitted its reply to the SCN dated 23rd May 2022. Along with its reply to the SCN, the Respondent also filed an application dated 1st June 2022 under Regulation 30 of the Competition (General Enforcement) Regulations 2007 ("GER"). Regulation 30 of GER provides the following:

"30(1) The Commission may, at any time after initiating proceedings under section 30 but before the conclusion thereof may, at its discretion, accept commitments from the concerned undertakings that remedy violations of the provision of Chapter II of the Act.

(2) Before accepting any commitments, the Commission may ensure that the commitments are sufficient to clearly address the adverse effects to competition which have been identified."

8. In the above-mentioned application under Regulation 30 of the GER, the Respondent submitted that as per the Enquiry Report, the use of "No.1" is displayed in red colour and is in bigger font than the rest of the logo, so it catches the eye of the observer first, and, due to the size of the font, may hold the attention of a consumer for some time. Hence, in the eye of the consumer, the same may appear to be implying that the product holds exemplary position regarding a certain property or is ranked first in the overall market. The Respondent further submitted that it wishes to avail the remedy as provided under Regulation 30 and submitted logos that it intended to use instead of the logo to which the Enquiry Report had taken exception to.

9. Both Complainant and Respondent appeared for the 1st hearing on 8th June 2022. The Complainant did not provide evidence of actual harm to it and relied on the principle that it is sufficient to establish that an advertisement has the tendency and capacity to mislead and actual harm to a competitor is not necessary to be proven. The Respondent, on the other hand, admitted that it is ready to comply with the competition laws and has filed commitments with the Commission to amend the impugned logo. The Bench asked both the Complainant and the Respondent to provide the Commission with information of their respective market shares after June 2021 and their current market shares. Both Respondent and Complainant were also asked to submit a list of their significant competitors in the paints industry.

10. The Respondent submitted a list of its significant competitors in the market vide letter dated 16th June, 2022. However, the market share was not provided to the Commission as according to the Respondent, it had launched the product in question very recently in the market and the market share of it vis- -vis other competitors could not be ascertained. The Respondent also submitted two more suggestions of amending the logo in question along with an undertaking to certify that it has ceased to advertise its logo/brand "Berger No.1 Emulsion" in all forms of print and electronic media.

11. The Complainant and Respondent appeared for the 2nd hearing on 23rd June 2022. The Bench pointed out that even though the Respondent submitted an undertaking mentioning that the Respondent has stopped advertising the impugned logo/brand, it was still being advertised on the Respondent's website. The Bench also made it clear to the parties that the Commission is not a clearance agency to approve a certain advertisement/logo in terms of its compliance with Competition law, however, the Commission can be contacted in an advisory role as per section 28(1)(d) read with the Guidelines in this regard.

12. The Respondent submitted another undertaking dated 27th June, 2022 confirming that the impugned logo/brand has been removed from its website and reiterated that the Respondent has ceased to advertise the impugned logo/brand in all print and electronic media.

#### ANALYSIS

13. Keeping in view the oral and written submissions made by the parties concerned, the material/evidence placed on the record and the applicable law in the matter, the following issue is framed for the purpose of deliberation and determination:

- a. Whether the Respondent has resorted to deceptive marketing practices by distributing false and misleading information in violation of section 10(1) read with section 10(2)(a) and (b) of the Act?

14. For ease of reference, the relevant portion of section 10 of the Act provides:

10. Deceptive marketing practices.---(1) No undertaking shall enter into deceptive marketing practices.
- (2) The deceptive marketing practices shall be deemed to have been resorted to or continued if an undertaking resorts to,----
  - (a) the distribution of false or misleading information that is capable of harming the business interests of another undertaking;
  - (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...

15. Since the Respondent has agreed to rectify and address the concerns of the Commission and the Complainant during the hearing, it would suffice to dispose of the matter in terms of the following:

- a. The Bench is in agreement with the observations made in the Zong Order regarding the term 'consumer'.
- b. Presenting the impugned logo in the manner used is capable of misleading the ordinary consumer that Respondent's emulsion is No.1 in the emulsion paint market or that the product is better in ranking as a whole from the other competitors in the market. This, in turn, has the potential to harm the position and ranking of other players in the market, thereby giving the Respondent an unearned competitive edge. This certainly is capable of harming the business interests of other undertakings.
- c. The Bench is of the view that distribution of the concerned misleading information has led to a violation of section 10(2)(a) and (b) of the Act by the Respondent. No independent study or research to support the nexus for claiming it to be 'No.1' has been placed on record either. In fact, the Respondent's stance has been that the term 'No.1' has been used as part of

the name of the product and the trademark logo has already been applied for in this regard.

For record we deem it relevant to clarify that the Bench is not concerned with whether their trademark logo has been registered or not but is rather concerned with the representation of its logo by the Respondent while advertising the product being deceptive in any manner. It is needless to mention here that even if an undertaking has a registered trademark logo under the relevant laws, it would not absolve any party from complying with the relevant provisions of section 10 of the Act.

#### Commitment and Compliance

16. The Respondent has already committed to cease advertising the impugned logo/brand in all print and electronic media. It is also important to mention here that the complaint against the Respondent was filed on 13th September 2021, which is after the date of its application of trademark registration which was filed on 4th June, 2021 and shows Complainant's bona fide in defense. The Respondent has shown compliance with the commitments filed under Regulation 30 of GER and has ceased to advertise the impugned logo and also removed it from all print and electronic media as per documents submitted by the Respondents. The Commission is satisfied with the compliance of Regulation 30 of GER and accepts the commitments filed by the Respondent. The Commission has decided not to impose any penalty on the Respondent due to the above-mentioned commitments in the given circumstances. The role of the Counsel acting on behalf of the Respondent in assisting and addressing the concerns of the Bench is appreciated.

17. We deem it relevant to observe that any alleged practice of a similar nature, i.e., using the term 'No.1', by any of the players in the relevant market, in a form or manner which is misleading or deceptive, needs to be stopped and/or rectified forthwith by all undertakings concerned. It needs to be recognized that to avoid any contravention of section 10 of the Act, any specific and quantifiable claim, similar to the subject case, it ought to be substantiated by some independent and/or recognizable source.

18. The Commission, through its relevant department, may initiate a report in this regard, with respect to the relevant market and segment concerned, flagging similar violation(s), for the Commission to proceed in accordance with law.

19. These proceedings are disposed of in terms of the above.

SA/13/CCOP Order accordingly.