

DECEPTIVE MARKETING PRACTICES AND CONSUMER PROTECTION

- May I begin by saying how grateful I am to the sponsors of this conference, in particular the Competition Commission of Pakistan, for inviting me to participate in this conference and also for the privilege of moderating this important session. After I retired from chairmanship of the Commission, it soon became clear to me that I had become a “has been who never was” and that I had joined the exclusive and rarified ranks of the “living dead”! It is thus nice to be remembered and doubly nice to be remembered and honoured. Let me assure all those who expect to retire from the Commission in the near future that there is indeed some life after death.
- Before I proceed any further, let me make it very clear that by “consumer” we do not simply mean the individual or lay consumer at the retail level. Each business house is not only a producer or a seller of

goods and services but is also a buyer and a consumer of goods and services. Consumers are up and down the supply chain! And the Competition law makes no exceptions and seeks to protect all consumers from anti-competitive behaviour.

- It is important to note that “consumer protection” is a significant aspect of consumer welfare which can be achieved both bottom-up through the activities of consumer-focused organizations such as the Consumer Awareness Association of Pakistan, the Consumer Network Forum, the Helpline Trust etc and top-down through laws and other government measures aimed at achieving this goal.
- Basically, I will briefly talk about this top-down government-oriented approach to achieving consumer protection and here too, from an enforcement of competition norms, or an antitrust, perspective.

- It is in this respect, I have to say that the Competition Law in Pakistan, which was promulgated as an Ordinance, first in October 2007 and then re-promulgated twice before its permanent, parliamentary enactment in October 2010, is irrefutably the single, most significant and comprehensive charter for the protection of the consumer from anti-competitive behaviour, a veritable “Magna Carta” for protecting the consumer from exploitation. In holistic fashion, this law sets out the principles and norms of sound competitive behaviour as well as the manner in which these norms are to be enforced.
- Our Competition law is inspired by the principles enshrined in the Treaty of Rome and global best practices. It encapsulates the best that mankind knows on the subject of instituting and enforcing a modern competition regime. Our law is really at the cutting edge because we have benefited from what is called “late-

mover advantage” i.e., we have been fortunate enough to learn from the mistakes and successes of other jurisdictions over the past several decades.

- The important question now is what are the operational provisions stipulated in the Competition law to achieve its stated goals, namely, the achievement of productive efficiency and protection of the consumer from anti-competitive behaviour?

Firstly, ex-ante, the law tries to prevent competition reducing mergers and acquisitions through implementing a mandatory mergers clearance regime.

Secondly, ex-post, the law provides for action against abuse of dominance by a single business undertaking as also collusive behaviour or cartelization on the part of several undertakings.

Thirdly, the law makes adequate provision for action against deceptive marketing practices.

- All this is apart from requiring that positive steps be taken to create an awareness of competition issues and a culture of competition through advocacy and persuasion i.e., try to promote competition norms through means other than law enforcement.
- It is obvious that all these operational provisions in the law, if properly implemented, would effectively protect the consumer from anti-competitive behaviour as well as benefit the consumer by way of enhanced productive efficiency arising out of greater competition on a level playing field.
- Action against abuse by undertakings dominant in the market as well as action against instances of collusive behavior or cartelization are certainly beneficial for the

consumer, and the benefits derived are both direct and indirect. Equally beneficial and protective for the consumer are actions against deceptive marketing practices the impact of which is usually more direct and obvious. I would like to talk about this a little bit because I feel this aspect is important if we are to comprehensively protect the consumer.

- The entire area of deceptive marketing practices is a recent addition to the responsibilities being shouldered by competition agencies across the globe. Increasingly, competition agencies are being called upon to act against deceptive marketing practices — albeit, as yet, this is not universal and not all competition agencies include this subject in their portfolio of activities.
- The inclusion of deceptive marketing practices as an area of responsibility actually completes the picture with respect to enforcement of competition norms. In

Pakistan, this area of competition enforcement is adequately covered by Section 10 of the competition law and the Competition Commission has set up a special unit called the “Office of Fair Trading” to address issues related to deceptive marketing practices. This unit was set up on the recommendation of the Commission’s current chairperson, Madam Rahat Kaunain Hassan, who was then Member, Legal. It took me a long time to approve the proposal i.e., precisely two seconds! Normally, I took most decisions in one second or less!

- Importantly, the Commission has already dealt with several cases of deceptive marketing and has issued three landmark orders in this connection that readily come to mind. These orders are ground-breaking and have laid down certain principles that constitute important elements of the Commission’s jurisprudence on this subject.

- I would like to share with you some of the principles laid down in the Commission's orders which will demonstrate the progressive and enlightened approach adopted by us. If you read these orders, you will observe that whenever it is called for and appropriate — and wholly in keeping with our law and our circumstances — the Commission has tilted in favour of the consumer.
- Let me now point out some of the principles the Commission has laid down.

First, in the matter of deceptive advertisements, the Commission has kept the onus squarely on the undertakings that publish the impugned deceptive advertisements. We have done this by construing the word “consumer” in its widest amplitude as the “ordinary” consumer and not qualified the term

“consumer” by the prefixing of words like “reasonable” or “prudent” or any other expression that would pass on some duty of care or diligence or caution to the consumer and thus provide an escape route for the undertaking. The Commission has been very clear in its view that under the law the duty not to deceive the consumer is unfettered and absolute, and must not be diluted.

Second, the Commission has held that in cases of deceptive advertisements, actual deception need not be established or proved. It is sufficient if it can be shown that the advertisement has the tendency or potential to deceive and the capacity to mislead. Also, that disclaimers in fine print are insufficient to rectify or correct deceptive impressions in the main body of the Ad. Further, incomplete or half statements in advertisements could also tantamount to being misleading or false.

Third, as opposed to other jurisdictions (e.g., the US), it is not necessary to show that the claim being made in the deceptive advertisement was in any way material to the consumer's decision to consume the product in question nor is it necessary to determine what would be deduced from the advertisement if the consumer was reasonable.

Fourth, the Commission has shown through analysis and held that the word "goods" used in section 10 of the Ordinance extends to both goods and services. It would be an absurdity if it was otherwise!

Fifth, the Commission has held that actual harm need not be established in order to be culpable in cases of deceptive advertising.

Sixth, the Commission has held that advertisements pertaining to financial products must, as far as

practicable and applicable, use the US Truth in Savings Act as a benchmark. There must be no lack of clarity regarding the rate of return being offered.

- Further, I might mention that within the first few years of its existence the Commission has, successfully implemented the competition law in its entirety and this has been recognized in global competition forums and networks. I am happy to say that Pakistan is acknowledged as a model by several developing countries.
- While I do not wish to bore you with a list of what the Commission has accomplished, I would simply like to point out that insofar as enforcement actions are concerned, the Commission has moved very decisively against cartelization in various sectors, collusive tendering, abuse of dominance, unacceptable concentrations, and deceptive marketing practices. The

parties affected include several banks, cement companies, LPG companies, sugar companies, the largest refinery, the steel mill, power companies, all three stock exchanges, cellular companies, jute manufacturing units, a leading business school, a Government sponsored trust, several leading newspapers, a professional association, PIA, port dredging companies, TCP, and two fertilizer companies held by an Army Trust.

- As a consequence, there is a lot of bitter opposition to the law, and the Commission, by rich, powerful and influential parties – those that have been adversely affected or are likely to be adversely affected by the Commission's proactive measures in favour of the consumer and the common man. Implementation of this law is clearly not only essential for economic growth but also to eliminate cartelization and unhealthy business practices harmful for the consumer.

- Given our cutting edge law and its promise of both near and long-term benefits to business consumers and retail consumers, it is important that our law continues to be enforced as otherwise everything that we have accomplished thus far will be truly futile and our country's economic productivity will continue to stagnate as it has for the past many, many years.
- I might mention that in the first few years of its existence, the Commission has built tremendous momentum by relentlessly implementing all aspects of the competition law. It has been successful largely because it has strived to maintain the highest standards of integrity and professionalism and because it has demonstrably maintained its distance both from the government and from the rich and powerful in the private sector.
- In my view, it is an absolute necessity for the Commission not to lose this momentum. The public has

every right to expect that from its hard-earned pedestal of integrity and from its high moral plane, the Commission will continue to act with vigour and strength against those who have clearly violated the sacred provisions of the competition law thereby harming the economy and the consumer. The Commission must be seen to be neither hard nor soft but rather it must be judicious and circumspect when taking action and imposing penalties.

- Any inadvertent manifest display of cozying up to the high and mighty in the land, whether in the Government or in the private sector, and any softening of penalties imposed with a view to securing compliance with the law and with the orders of the Commission is an approach that is fraught with danger.
- Apart from its distortionary implications, such an approach is likely to erode the Commission's moral authority and weaken its effectiveness. This would obviously mean a dilution in the law's enforcement with

harmful consequences for productive efficiency as well as for the umbrella of protection the law seeks to provide the consumer.

- I am confident that the Commission will stay on course and will move forward from strength to strength in keeping with its mission as mandated by the law and be a significant instrument for economic betterment and consumer welfare.