

DECEPTIVE MARKETING GUIDELINES FOR THE TELECOM SECTOR

Draft Guidelines for comments and suggestions



COMPETITION COMMISSION OF PAKISTAN
Government of Pakistan

Please forward your comments and suggestions at the following address:

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INTRODUCTION

- 1.1 These Draft Deceptive Marketing Guidelines for the Telecommunication (the “**Guidelines**”) are being issued pursuant to Regulation 41 of the Competition Commission (General Enforcement) Regulations, 2007. The purpose of these Guidelines is to provide guidance in respect of Section 10 of the Competition Act, 2010 (the “**Act**”) to undertakings providing telecommunication products and services in Pakistan. Section 10 of the Act prohibits undertakings from entering or resorting to deceptive marketing practices specified therein.
- 1.2 These Guidelines are not a substitute for the Act or any rules, regulations and orders made thereunder. The Guidelines present the approach taken by the Commission in its decisions regarding deceptive marketing practices and the approach that it may take towards certain marketing practices by telecommunication service providers. However, the Guidelines are not exhaustive and the approach of the Commission shall depend upon the particular facts and circumstances of each case. As it is not possible to predict future behaviour of the undertakings involved in the telecommunication sector the Commission will not in any way be restricted to look into matters that have not been mentioned in these Guidelines.
- 1.3 These Guidelines draw knowledge and experience from jurisdictions that have similar provisions as those of Section 10 of the Act to take account of international best practices. The principles contained here will be applied and further developed and refined by the Commission from time to time in individual cases. The Commission may revise these Guidelines from time to time on the basis of its experience and in light of the developments that may take place in the future.

OVERVIEW

2.1 Section 10 of the Act reads as follows:

“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 by an Undertaking resorts to-*
- (a) *the distribution of false or misleading information that is capable of harming the business interest 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;*
 - (c) *false or misleading comparison of goods in the process of advertising; or*
 - (d) *fraudulent use of another’s trademark, firm name or product labeling or packaging.”*

2.2 For the purpose of clarity, certain factors of Section 10 may be highlighted:

- (a) Undertaking;
- (b) False and misleading information;
- (c) Consumer;
- (d) Goods.

Each of these factors will be explained below in light of the provisions of the Act and the principles established through the Orders passed by the Commission.

2.3 **Undertaking**

Section 2 (1) (q) of the Act provides the definition of an Undertaking which includes *“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 undertakings”*. Therefore, the provision of Section 10 applies to all entities, no

matter in what form, that are in any way engaged in production, supply or distribution of goods or provision or control of services.

2.4 **False and misleading information**

The Commission in its Order passed in the case of Zong and Ufone, made a distinction between the terms false and misleading. It was stated that “false information” can be said to include oral or written statements or representations that are (a) contrary to truth or fact and not in accordance with the reality or actuality; (b) usually implies either conscious wrong or culpable negligence; (c) has a stricter and stringer connotation and (d) is not readily open to interpretation. On the other hand “misleading information” has been held by the Commission to essentially include oral or written statements or representations that are (a) capable of giving a wrong impression or idea; (b) likely to lead to error of conduct, thought or judgment; (c) tends to misinform or misguide owing to vagueness or any omission; (d) may or may not be deliberate or conscious and (e) in contrast to false information, it has less onerous connotation and is some what open to interpretation as the circumstances and conduct of a party may be treated as relevant to a certain extent.

2.5 **Consumer**

As the term “consumer” has not been defined under the Act, the Commission in the Zong and Ufone Order discussed the definition of consumer for the purpose of Section 10 of the Act. According to the Commission perspective the consumer to whom such information is disseminated has to be the ‘ordinary consumer’ who is the usual, common or foreseeable user or buyer of the product. Such a consumer need not necessarily be restricted to the end user. The ‘ordinary consumer’ is not the same as the ‘ordinary prudent man’ concept evolved under contract law. Unlike the ‘ordinary prudent man’ the thrust on ordinary diligence, caution/duty of care and ability to mitigate (possible inquiries) on the part of the consumer would not be considered relevant factors. The scope of the term ‘consumer’ must be construed most liberally and in its widest amplitude. Therefore, the term

‘consumer’ under Section 10 of the Act is to be construed as an ‘ordinary consumer’ but need not necessarily be restricted to the end consumer of the goods or services.

2.6 **Goods**

Sections 10 (2) (b) and (c) use the terms goods, but this does not mean that these provisions only apply to false or misleading information in respect of goods. The Commission in the Banks Order has stated that the application of Section 10 is not limited to only goods but also to services, as Section 10 prohibits deceptive marketing practices by undertakings which may resort to any of the practices set out under sub-section (2) of Section 10. The definition of the term undertaking includes an entity that is either engaged in provision of goods or service. Therefore, it was held by the Commission that distribution of false or misleading information to consumers by an undertaking (be it engaged in the provision of goods or services) is prohibited under Section 10 of the Act.

DECEPTIVE MARKETING PRACTICES

There are certain practices that may be regarded as deceptive for the purpose of Section 10 of the Act. This section will give details of practices adopted by undertakings involved in provision of telecommunication products and services that may be regarded to be in violation of Section 10 of the Act. The list of deceptive marketing practices has been prepared keeping in mind the principles established by the Commission in its Orders relating to deceptive marketing and principles established in other jurisdictions having similar provisions as Section 10. However, this list is not exhaustive and may be amended by the Commission from time to time.

3.1 Distribution of information

The distribution of false or misleading information in respect of telecommunication products or services may take any form, be it through the print media, television advertisements, brochures, bill boards, banners, advertisements on the internet or websites, telemarketing, Short Message Service (SMS) offers, etc. Section 10 will be applicable in the case of any such form of marketing.

3.2 Onus on Undertaking

In respect of marketing practices of undertakings offering telecommunication products and services, a higher onus is placed on the concerned, as the purpose of the Act is to protect consumers against anti-competitive behaviour. Therefore, undertakings providing telecommunication products and services are under a duty to disclose essential information to consumers instead of consumers only being informed if they inquire about them. For example, undertakings when making sales of telecommunication products or services should inform the consumer of any offers that may be activated on purchase and also give details of the options available to the consumer.

3.3 **Net impression**

The Commission in evaluating any kind of marketing practice, has regard to the net impression created or given by the practice rather than focusing on isolated excerpts.

3.4 **Deception**

It has been established by the Commission in its Orders relating to Section 10 of the Act, that in case of deceptive marketing practices, it does not have to be proved that any consumer has been actually deceived by a marketing practice of an undertaking. It is enough if the marketing practice adopted by an undertaking has the tendency or capacity to deceive a consumer.

3.5 **Fine print, disclaimer and qualifications**

For the purpose of evaluating a marketing practice, the entire advertisement will be taken into account including any disclaimers or qualifications. In promoting or advertising a good or service, a telecommunication provider needs to ensure that all significant terms and conditions of a good or service are mentioned in the advertisement. A disclaimer stating “terms and conditions apply” may not be regarded as sufficient, if such terms and conditions are likely to effect the consumer's choice to purchase the good or service. When the first contact between seller and buyer occurs through deceptive practices, the law may be violated even if the truth is subsequently made known to the purchaser. If terms and conditions that are significant or central to an offer for example those relating to price or limited availability, are not clearly communicated when marketing a product, there is likelihood that the advertisement will be regarded as misleading or deceptive.

A disclosure in fine print not readable by the naked eye is in line with the well established principle that fine print disclosures are inadequate to correct the deceptive impression. One true statement in the presence of a mass false and misleading statement shall not render an otherwise misleading advertisement non-

misleading. Therefore, the fine print disclosures need to be made in a font size and color that is readable.

3.6 **Substantiation of claim**

An undertaking that through its marketing makes certain claims, representations or warranties regarding the good or service in question or even the performance of the undertaking itself, should have some recognizable substantiation prior to disseminating to consumers. It needs to be ensured that the claim being made is based upon adequate and proper testing. For example if an undertaking claims through its advertisement to provide the best coverage, there should be some report which substantiates this claim and has been concluded before such a claim was made.

3.7 **Representation**

In the Zong-Ufone Order the Commission relied on the definition of representation provided in the Halsbury Laws of England which states that a “representation is a statement made by a representor to a representee and relating by way of affirmation, denial, description or otherwise, to a matter of fact. The statement may be oral or in writing or arise by implication from words or conduct”.

3.8 **Essential Terms and Conditions**

Undertakings need to make sure that all essential terms and conditions relating to the purchase or use of a good or service are disclosed to the consumers prior to the purchase by a consumer of such good or service. These terms and conditions should be clearly stated in the contract that is being signed between the telecommunication service provider and the consumer. Undertakings must ensure that the consumer knows about these terms and conditions which should be provided to the consumer along with the good or service purchased, should be easily accessible to the consumer and published in both Urdu and English. These terms, inter alia, should include the term for which the good or service is valid,

unilateral right of the undertaking to change any term or condition, situations in which the undertaking may terminate the contract, etc.

3.9 **Omissions**

The practice of staying silent or not disclosing information may amount to a deceptive marketing practice. If an undertaking chooses to omit material information in advertisements, this may be considered as an implied but false representation. The effect of non disclosure would be the existence of ambiguity in the mind of the consumer. Half truths may also be considered to be in violation of Section 10, if the effect of the half truth is that the consumer is misled. For example if an undertaking fails to disclose that a certain offer which entitles the consumer to get discounted rates is only available for a limited period of time or the date of expiry is not mentioned, this may be regarded as an omission for the purpose of Section 10.

3.10 **Puffery**

Puffery has been defined as an exaggerated statement that is reasonably to be expected from an undertaking selling products or services as to the degree of quality of his product, the truth or falsity of which cannot be precisely determined. Generally “puffery” is intended to base on an expression of opinion not made as a representation of fact. Although puffery will generally not be regarded to violate Section 10 of the Act, however, it may be misleading where facts are wrong or distorted.

3.11 **Price disclosure**

The failure of undertakings advertising telecommunication products and services, to advertise the exact price that a consumer would be paying may amount to deceptive marketing practice. It has to be ensured that the prices advertised are inclusive of taxes. .

In respect of advertisements pertaining to price reductions, the undertakings should take care that the actual price reduction or a percentage should be advertised and that there should be in fact an actual reduction from the former price at which the good or service was being sold.

If an undertaking is advertising the price of a good or services as lower than that offered by another undertaking for the same good or service, it needs to be ensured that this comparison is based on facts and is not fictitious. The price comparison should also be in respect of prices that are inclusive of taxes.

The practice of advertising prices of products or services offered by undertakings in the denomination of paisa's will be regarded as deceptive as one rupee coin is the lowest recognized unit. Paisa's are no longer recognized as legal tender. Therefore, advertising prices in paisa's gives the impression that consumers are able to pay in paisa's for a certain good or services which is contrary to the facts, hence deceptive.

3.12 Comparative advertising

Another practice that may be regarded as deceptive is that of comparative advertising. Comparative advertising may be defined as advertising that compares alternative brands on objectively measurable attributes or price, and identifies the alternative brand by name, illustration or other distinctive information. Comparisons should only be made between products or services that meet the same needs or that are intended for the same purpose. Similarly, bundled products and services should be compared with similar "bundles" offered by a competitor to prevent any comparison from being misleading or deceptive. Although comparison of brands may aid a consumer in obtaining important information and in making a decision, the comparison has to be truthful and non deceptive. Comparative advertising should not in any way discredit the trade marks, trade names or other distinguishing marks of an undertaking.

3.13 **Use of certain terms**

Use of words such as “Free”, “gift”, “given without charge”, “bonus”, or other words or terms which tend to convey the impression to the consumers that a good or service may be regarded as deceptive in certain circumstances. Therefore, undertakings when making such offers should be careful to disclose all relevant terms and conditions of the offer, that the good or services being advertised in such a manner is actually free and the consumer does not have to pay for that good or service in some other manner. So for example if an undertaking advertises that on purchase of a sim card, a consumer will get a certain amount of credit free, the undertaking must ensure that the credit provided to the consumer is actually free and the cost is not paid by the consumer in some other manner.

If an undertaking uses the word “unlimited” in advertising any telecommunication good or service, it has to identify the part to which the term applies and also disclose any other conditions that may qualify this offer.

3.14 **Bait or switch advertising**

Bait or switch advertising is when a false impression is created about a good or service in order to attract a consumer to contact the undertaking selling the good or service only to find that the good or service is no longer available or is only available for selected areas and thereby using the opportunity to persuade consumers to purchase a good or service that is more expensive. Therefore, when an undertaking is advertising a good or service it should make sure that the good or service is available at the time of the advertisement, all terms and conditions relating to the limited availability of a product are disclosed and that the undertaking intends to supply the good or service to the consumers.

3.15 **Promotional contests**

Undertaking may carry out promotional contests for the purpose of marketing their undertaking. However, undertakings should be careful not to include any

misleading or deceptive terms or omit any material information relating to the contest. Therefore, undertakings when advertising promotions should generally disclose the approximate number or nature of the prize, restrictions on entry or the number of entries, the areas in which the consumers can take part in the contest, any information that may effect odds of winning, etc.

3.16 **Telemarketing**

Telemarketing is another tool used to promote the products and services by undertakings which involves calling potential consumers on the telephone and asking them to purchase products or services. The same rules apply to telemarketing as to any other conduct in telecommunications markets. Emphasis should be placed on clear and truthful representation of products and services.



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