

**BEFORE THE
COMPETITION APPELLATE TRIBUNAL, ISLAMABAD**

PRESENT: Mr. Justice (R) MianFasih Ul Mulk, Chairperson.
Mr. Ahmed Owais Pirzada, Member Technical.
Mr. Justice (R) MiftahUd Din, Member Technical.

APPEAL NO. 45/2017

(Against the Judgment dated 10-08-2017 of
Competition Commission of Pakistan)

COLGATE PALMOLIVE (PAKISTAN) Limited

.... APPELLANT

VERSUS

1. **COMPETITION COMMISSION OF PAKISTAN**
2. **RECKITT BENCKISER PAKISTAN LIMITED.
9TH FLOOR, Q.M BUILDING, PLOT NO-BC-15,
BLOCK-7, CLIFTON, KARACHI.**

...RESPONDENTS.

For the appellant: Mr. Ejaz Ahmed Bhatti, Advocate

For Respondent No-1: Ms. Sophia Khan, Advocate.

For Respondent No-2: Mr. Saad Hashmi, Advocate.

Date of hearing: 04.10.2017, 05.12.2017, 10.01.2018, 20.02.2018,
06.03.2018, 27.03.2018, 27.06.2018, 04.07.2018,
04.09.2018, 02.10.2018, 17.10.2018.

JUDGMENT

Ahmed Owais Pirzada, Member Technical.

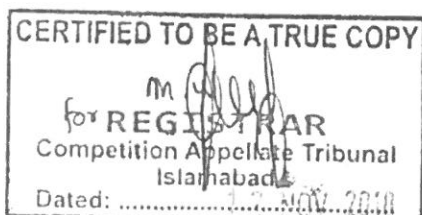
This Judgment shall dispose of the appeal, filed by Colgate Palmolive (Pakistan) Limited ("appellant") against the order dated 10-08-2017 of the Competition Commission of Pakistan ("respondent No-1").

2. Briefly the factual background of this Appeal is that Competition Commission of Pakistan initiated proceedings



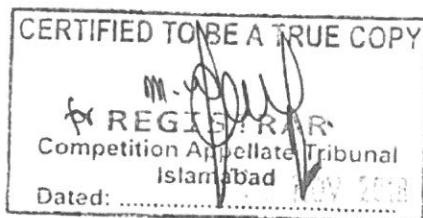
pursuant to show-cause notice dated 8th March, 2016 for prima-facie violation of section 10 of the Competition Act, 2010 by the appellant. The main issue involved in the matter was whether the appellant was engaged in deceptive marketing practices in violation of section 10 (1) and section 10 (2)(a)(b) and / or (c) of the Act. The Competition Commission of Pakistan finally held vide its order dated 10-08-2017, impugned in this appeal, that the appellant acted in violation of section 10 (2)(b), 10 (2)(c) and 10 (2)(a) of the Competition Act, 2010 and imposed total penalty of Rs. 10 Million on the appellant. The appellant being aggrieved preferred this appeal against the aforesaid order of the Competition Commission of Pakistan.

3. In his appeal, the appellant has stated that respondent No-1 has completely ignored the laboratory test reports submitted by the appellant, which has proved the claims of the appellant regarding quality and effects of its product. It has further been stated in the appeal that despite most outrageous claims made by respondent No-2, very lenient action has been taken against it by the Commission. It has been contended that despite lacking of evidence, respondent No-2 has termed the appellant's confidential manual as a "Trade Letter". It has further been contended that the impugned order has relied almost entirely upon the policy of Fair Trade Commission of the United States of America in absence of the conditions which are enforced in United States of America. Further, relying on 'Oreck' case is not justified as the same is the result of a settlement and not an adjudication, the appeal says. In the appeal, it has further been stated that the Commission has not properly been constituted while taking cognizance of the matter, resultantly the impugned order is a nullity in the eyes of law. It has been



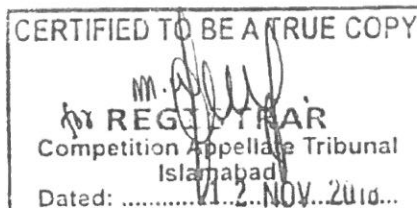
4. Learned counsel for the appellant while appearing before this Tribunal has stated that the appellant has launched a surface cleaning product namely "Max All Purpose Cleaner". The respondent No-2 has filed a complaint with respondent No-1 on 15th October, 2014 alleging violation of section 10 (2)(b) of the Competition Act, 2010, further praying that strict proof for its claim of its product formulation be provided, informing the public regarding its basis on the packaging. After obtaining comments of the appellant, respondent No-1 has kept mum for nearly about a year and then referred an internal confidential manual of the appellant, terming it as a "Trade Letter" calling for the basis of the claim made in the aforesaid manual and other supporting material. Referring to the aforesaid letter, the learned counsel for the appellant has clarified that an internal confidential manual cannot be treated as a "Trade Letter", therefore, such manual cannot be referred in this regard for any kind of explanation. The learned counsel has informed the court that during the Enquiry carried out by the Competition Commission of Pakistan, the appellant has never been provided an opportunity to participate in it to clarify its position. On the basis of effectually incorrect inquiry report, a show-cause notice dated 8th March, 2016 has been issued to the appellant and during the hearing held on 17th May, 2016 it has been shocking to find a former employee of the appellant included in the team representing Respondent No-2 at the hearing. The learned counsel has pleaded that the impugned order has been passed by respondent No-1 without properly appreciating the legal issues related to the case and without giving any cogent findings on submission of the appellant.

5. Explaining further, the learned counsel for the appellant has contended that all advertising claims are fully substantiated through confirmations by the research laboratories, however, the



same have straightaway been ignored by the respondent No-1 by passing an adverse order in the matter. The learned counsel has claimed that as a statutory regulatory authority, respondent No-1 could not act in an even handed manner while comparing the order passed against the appellant with the lenient action taken against respondent No-2 in a previous order passed by it. It has been stated that imposing penalty merely for lack of any additional information to be provided to the consumer in presence of full and accurate information already provided in this regard is entirely unjustified particularly in absence of any clear standards for disclosures to be prescribed in this behalf. Explaining position with reference to the evidence mentioned in the impugned order regarding cooperative claims of the appellant, the learned counsel for the appellant has submitted that referring confidential manual as a "Trade Letter" is totally unjustified as the same has never been referred by the appellant for marketing purposes. It has been pleaded by the learned counsel that without ensuring similar conditions, the discipline being followed in United States of America cannot be followed in Pakistan. It has further been pleaded that the policies of Fair Trade Commission of United States America cannot be asked to be followed in letter and spirit until the legal and other arrangements in place in USA are ensured in Pakistan as well.

6. Challenging constitution of the Commission, the learned counsel for the appellant has stated that in terms of section 14 of the Act, the Commission shall consist of not less than five and not more than seven Members. The learned counsel has stated that while passing the impugned order, the Commission was consisting of two Members and, therefore, the impugned order is a nullity in the eyes of Law. Raising another legal issue, the learned counsel has stated that any proceedings under section 30 of the Act can be initiated by the Commission. The notice in this behalf has however,



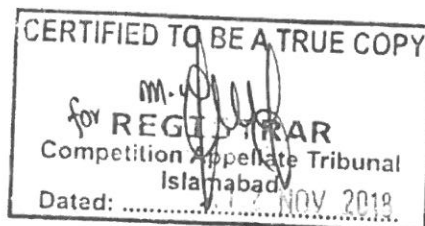
been issued by the Registrar whom such power cannot be delegated by the Commission. The learned counsel has further stated that initiation of an Enquiry under section 37 (2) of the Act is also a function of the Commission and in the absence of a validly constituted Commission, no such exercise can be undertaken.

7. After going through the appeal filed by the appellant and hearing the arguments of its learned counsel, it is understood that in addition to the issues already discussed in the order impugned in this appeal, following new issues have been raised by the appellant for consideration of this Tribunal.

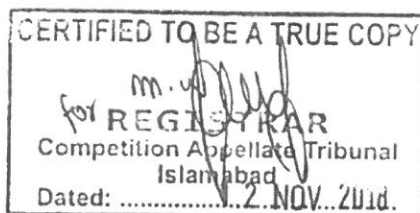
- i) Whether the Commission, while passing the impugned order was properly constituted and the aspect of quorum for any meeting of the Commission have been taken care of;
- ii) Whether the enquiry was initiated and completed without providing an opportunity of hearing to the appellant.

We will discuss the aforesaid issues in addition to the issues raised by the appellant before the Competition Commission of Pakistan as well as before this Tribunal after taking into account the arguments forwarded by the respondents' counsel during the hearing before this Tribunal.

8. The learned counsel for the Competition Commission of Pakistan has stated that respondent No-2 has filed a complaint on 15th October, 2014 alleging that the appellant is involved in deceptive marketing practices, prohibited under section 10 of the Competition Act, 2010. The aforesaid complaint under the covering letter dated 22nd October, 2014 has been forwarded to the appellant for comments. It has further been stated that the appellant has submitted comments and requisite information in this behalf on



10th November, 2014 and the Member OFT in pursuance of the powers delegated to him vide SRO dated 15th March, 2010 authorized the initiation of a formal enquiry into the matter under section 37 (2) of the Act. It has been submitted that in November 2014 at the time, the enquiry was initiated through delegated powers, the quorum of CCP (the Chairman and two Members) was present. On 10th December, 2014 the Inquiry Officer has written a letter to the appellant, referring to the complaint against them and requesting for a meeting, which has been attended by Dr. Patrick Hemalal, Head of R&D and Mr. Khurram Vohra, Associate General Manager-Marketing, on behalf of appellant on 18th December, 2014. The learned counsel has further submitted that the completion of Enquiry has taken more time due to the resignation of one of the inquiry officers. The Inquiry Report has been submitted on 20th January, 2016, while on 04th February, 2016 the Commission has resolved that proceedings under section 30 of the Act against the appellant be initiated on the basis of the recommendation contained in the Inquiry Report. It has been informed that accordingly after completing all formalities involved in this regard, show cause notice to the appellant for its reply has been issued on 08th March, 2016 for appearance before the Commission. The aforesaid notice has been issued under signature of Registrar of the Commission duly authorized through a resolution dated 8th January, 2015 of the Commission, signed by its Chairman and four other Members. It has been stated that hearing notice simultaneously has also been issued to Respondent No-2 for appearing before the Bench of Commission. The learned counsel has informed that the appellant has filed its submissions to the show-cause notice, further appearing before the Bench to explain its position. After listening all the parties concerned and taking into account all aspect of the case, the Bench of the Commission has finally passed its order on 10th



August, 2017, the learned counsel has submitted. Copies of all the relevant documents have been placed on the record by the learned counsel for respondent No-1. It has been submitted that all legal formalities have been completed by the Commission while processing the complaint, filed in this regard by the Respondent No-2 and passing the final order to decide the issues, involved in the matter. The learned counsel has pleaded that keeping in view the position stated above, the objections raised by the appellant with regard to the Constitution of the Commission and its participation in the enquiry proceedings being baseless may be ignored.

9. Coming to the merits of the case, the learned counsel for respondent No-1 has submitted that section 10 of the Competition Act, 2010 provides as follows;

"10". Deceptive Marketing Practices

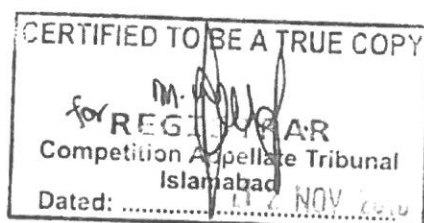
(1) No undertaking shall enter into deceptive marketing practices.

(2) The deceptive marketing practices shall be deemed to have been resorted or continued if an undertaking resort to

(a) the distribution of false or misleading information that is capable of harming 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, properties, suitability for use, or quality of goods;

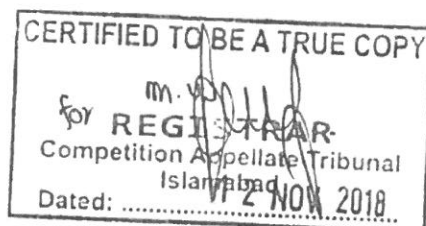
(c) false or misleading comparison of goods in the process of advertising; or



order
of
this
proceed

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

It has been submitted by the learned counsel that we have to see whether the advertising claims that the product eliminates 99.9% bacteria, protects against cold and flu and provides 24 hours long lasting freshness, constitute a violation of section 10(1) in terms of section 10(2)(b). It has further been submitted that another issue which is to be looked into is to see whether the comparative claims contained in the "Trade Letter" constitute a violation of section 10(1) in terms of section 10 (2)(c). Explaining further, it has been submitted that advertisement claim with regard to elimination of 99.9% bacteria is in fact a false statement, as without even questioning the accuracy of the disclaimer on the back side of the packaging an ordinary consumer would not be aware of this qualifying representation at first glance at retail shop, therefore, the advertising claim amounts to the distribution of the false information, causing harm to consumers, in violation of section 10(2)(b) of the Act. As regards the claim regarding product's capacity to kill 99.9% bacteria from surfaces is concerned, the learned counsel has stated that disclosures must be clear and conspicuous. The learned counsel has further stated that in evaluating the effectiveness of disclosure, factors such as prominence, presentation, placement and proximity between the claim and its associated disclaimer is very important. The disclaimer in this regard does not appear in the same font size as the claim itself even though it is in close proximity of it. In the absence of this disclaimer the prominent claim of "Kills 99.9% of bacteria" would be a patently false statement as the consumer would be unaware that those results are only possible, if at all, through concentrated usage. The learned counsel has further submitted that the sample of bacterial strain used in tests conducted by the

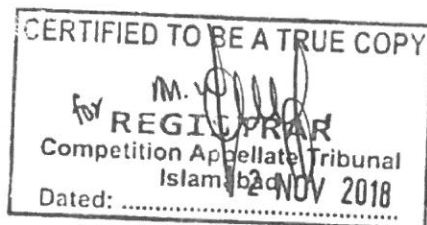


Colgate
order of
of P
s App
proceeding

respondent on Max APC does not include salmonella cholerasuis ATCC 10708 and Introbacter Cloacae ATCC 13047. This means that the efficacy of Max APC against these two strains of bacteria has not been tested and is unsubstantiated, hence claiming elimination of 99.9% bacteria is even otherwise not reliable. The learned counsel has pleaded that in light of the above, the aforesaid advertising claim constitutes a violation of section 10 (1) in terms of section 10(2)(b) of the Act. So far as the advertising claim with regard to protection against Cold and Flu ; Skin Infections ; Food Poisoning, the learned counsel has submitted that no scientific backing or evidence for disseminating such information to the consumer has relied upon and placed on record by the appellant, such claim in the absence of competent scientific evidence is not acceptable. It has been pleaded that in the absence of any credible evidence, the aforesaid claim amounts to deceptive under section 10 (1) in terms of section 10 (2)(b) of the Act.

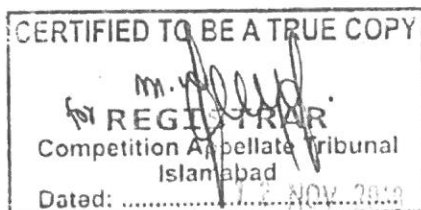
10. The learned counsel has also explained the position with regard to the claim of appellant that its product has ability to maintain 24 hours Long Lasting Freshness and submitted that the appellant has made this claim in an absolute manner with no disclaimer, disclosure orqualifier for the knowledge, awareness and consumption of consumers. It has further been explained that such an absolute claim relating to long lastingness of fragrance of house hold cleaning product is highly effective in drawing attention of an ordinary consumer when making a transaction decision to purchase. It has been contended that making such a sweeping claim in the absence of recognizable substantiation or reasonable basis as to the character and properties of the product is clear violation of section 10 (1) in terms of 10 (2)(b) of the Act.

11. The learned counsel for the Respondent No-1 has further stated that the comparative claims contained in the "Trade Letter"



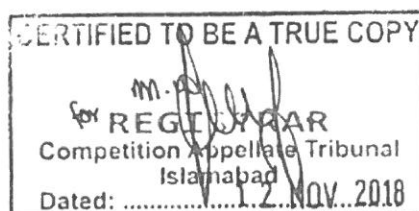
issued and circulated by the appellant is another violation of section 10 (1) in term of section 10 (2)(c) of the Act. Elaborating the stance further, the learned counsel has submitted that section 10 (2)(c) of the Act prohibits the false and misleading comparison of goods in the process of advertising. A comparison is made whenever the qualities of two or more products or services are judged against each other, such comparison must be analyzed and held to the highest level of scrutiny in order to ensure that the statements made are accurate and narrowly drawn. Regarding appellant's contention that the "Trade Letter" is an internal confidential memo, only meant for viewing and training its employed staff being the distributors, the learned counsel for respondent No-1 has referred to the Oreck Ruling, wherein the FTC has observed that deceptive information provided to Franchise Stores for their use in marketing the product is itself a means and instrumentality to its distributors to deceive consumers. The fact and admission on the part of the appellant that the "Trade Letter" has been circulated among person responsible for marketing Max APC is sufficient to conclude that a violation has in fact been made out due to the inclusion of deceptive comparison therein, the learned counsel argued. It has been pleaded that the comparative claims relating to price, expiry of the product and leakage and defective packaging lack a reasonable basis and are hence deceptive within the meanings and scope of Section 10 (1) in terms of section 10 (2)(C) of the Act.

12. Terming to section 10(2)(a) of the Act, according to which the distribution of false or misleading information i.e, capable of harming the business interest of another undertaking constitutes a deceptive marketing practice, the learned counsel has referred the order passed by Competition Commission of Pakistan in the matter of M/s Jotun Pakistan Pvt. Ltd, wherein it has been held that to prove conduct under section 10 (2)(a) of the Act, it is not necessary



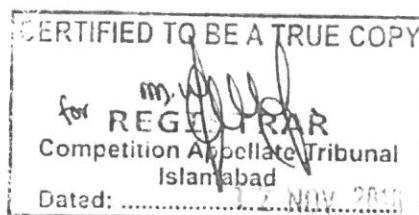
to show actual harm to competitors. It is sufficient to show the existence of deceptive marketing practice that has the potential to harm the business interest of the competitors. The learned counsel has pleaded that the appellant has distributed misleading information to the targeted potential consumer and hence be culpable under section 10 (2)(a) of the Act. The learned counsel has finally prayed that the instant appeal, being having no merits may kindly be dismissed with costs. The learned counsel for respondent No-2 has come to the roaster, submitting that he would like to rely upon the arguments of the learned counsel for respondent No-1.

13. We have gone through the appeal and heard the arguments, advanced by learned counsel for the parties. The issues with regard to the Constitution of the Commission and right of the appellant to participate in the enquiry conducted on the order of Competition Commission of Pakistan has been examined quite in detail. The learned counsel for the appellant has submitted that in terms of section 14 of the Act, the Commission shall consist of notless than five and not more than seven Members. It has further been submitted that while passing the impugned order, the Commission has only two Members, while section 24 (3) of the Act provides that at any meeting of the Commission, the quorum shall be three Members. It has been pleaded that in these circumstances the impugned order passed by the Commission is a nullity in the eyes of Law. The learned counsel, however, could not place any proof with regard to the aforesaid deficiency of the Members before this Tribunal. On the other hand, the learned counsel for respondent No-1 has placed on record the copies of the notifications, issued with regard to the appointment of the Chairman as well as Members of the Commission along with other material, which clearly show that during the period the positions were occupied by the incumbents and, therefore, there was no



problem of quorum at all. Moreover the quorum of three Members is required for the meetings of the Commission and section 14 (7) provides that no Act or proceeding of the Commission shall be invalid by reason of absence of a Member or existence of any vacancy among its Members or defect in the Constitution thereof. Even to hear an Appeal against an order made by any Member or authorized Officer of the Commission, section 41 (2) of the Act provides that the Commission shall constitute Appellant bench, comprising not less than two Members to hear such appeals. In these circumstances, two Members bench under the Competition Act is competent to hear any matter or Appeal for orders and such order will be considered a valid order, passed by the competent forum in the eyes of law.

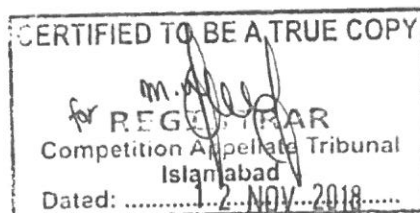
14. Learned counsel for the appellant has raised another issue with regard to non participation of the appellant during the proceedings of the enquiry ordered by the Commission. Again learned counsel for respondent No-1 has placed sufficient evidence on the record which shows that the comments have been invited from the appellant on the complaint filed against it and the appellant accordingly has submitted the comments along with necessary material to explain its position. Further, during the proceedings the appellant has been contacted by the Inquiry Committee for its participation in the proceedings and again it is evident from the record that some senior representatives of the appellant have held the meeting with the Inquiry Committee to put up the position of the appellant for consideration of the Committee. The aforesaid position clearly indicates that sufficient opportunity has been provided by the Inquiry Committee to the appellant to present its position before the Committee, so that final report could be prepared taking into consideration the position of the appellant. We, therefore, find no justification with regard to allegation of the



appellant that it has not been provided an opportunity to participate in the Inquiry proceedings.

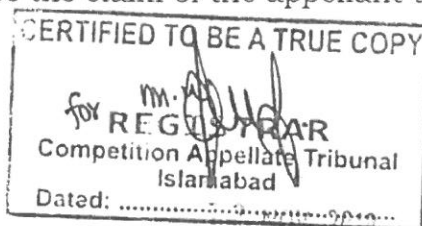
15. Coming to the merits of the case it has been observed that section 10 of the Act prohibits 'deceptive marketing practices' and as such encompasses the protection of both consumers and competitors' interest. With respect to the matter at hand, we will discuss each alleged violation in light of the spirit of law. Section 10 (2)(b) of the Act prohibits distribution of false or misleading information to consumers including the dissimulation of information that lacks a reasonable basis. With regard to the advertising claim "eliminates 99.9% bacteria", the appellant is of the view that test results as carried out in the laboratories prove the claim of the appellant that its product has capability to eliminate 99.9% bacteria, however, the Commission's finding are that such claim is not based on the ground realities, therefore, amounts to a violation of section 10 (2)(b) of the Act. We understand that the claim of the appellant could be true when there is concentrated usage without dilution in a laboratory environment. An ordinary consumer would not be aware of the disclaimer on the back side of the packaging at first glance of the product, therefore, such claim has rightly been declared as distribution of false information.

16. Similarly, another claim "it kills 99.9% bacteria from surfaces, leaving floors and household surfaces, clean, shinny and germ free" also does not sound convincing. The disclaimer in this regard does not appear in the same font, size as the claim itself even though it is in close proximity to it. We are, therefore, not satisfied that the standard of being "clear and conspicuous" have been satisfied, in so far as the proper acceptable use of disclaimer is concerned. Careful reading of the laboratory tests, referred by the appellant also shows that the tests conducted by the appellant on its product does not include certain bacterias, therefore, such claim



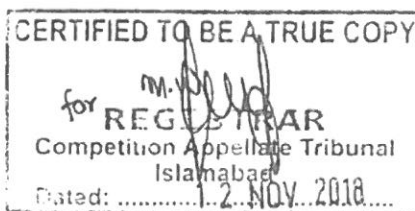
of the appellant cannot be considered reliable. In these circumstances, the aforesaid advertising claim also amounts to distribution of false information. The advertising claim "protect against cold and flu"; skin infections; food poisoning is also not sound convincing in the absence of recognizable substantiation for making this claim based on competent and reliable scientific evidence. We, therefore, hold that since no scientific backing or evidence for disseminating such information to the consumers is relied upon or placed on record by the appellant, therefore, it has failed the test of prior recognizable substantiation. The appellant in the aforesaid advertisement has also claimed that its product has ability to maintain 24 hours long lasting freshness. This claim has not been limited or qualified through a disclaimer or otherwise. The claim depicts on the front of packaging of the product without providing details as to how long the surface will remain clean and disinfected by the product and when the consumer needs to reapply to maintain sterility / disinfection and freshness. The appellant has also failed to provide recognizable substantiation or a reasonable basis as to the character, properties and suitability for the use of its product through the aforesaid material. We understand that all the aforesaid four false claims have been made through a single advertisement in violation of section 10 (1) read with section 10 (2)(b) of the Act. We, therefore, hold that the appellant is liable to be penalized for a single offence of distributing false information through the aforesaid advertisement. In view of the above, a single penalty of Rs. 1 Million in this behalf is imposed against the contravention of section 10 (1) read with section 10 (2)(b) of the Act instead of four penalties of Rs. 1 Million for each false claim.

17. Now before we examine that whether the comparative claims constitute a violation of section 10 (1) in term of section 10 (2)(c) of the Act, we have to see the claim of the appellant that the



"Trade Letter" referred in the impugned order was an internal confidential memo only meant for viewing and training of its employees staff being distributors. We understand that the admission on part of the appellant that the Trade Letter was circulated among persons, responsible for marketing Max APC, is sufficient for us to conclude that violation has in fact been made out due to the inclusion of deceptive comparison therein. Even if the "Trade Letter" was meant solely for viewing and consumption of its distributors, the deceptive comparison have created an impression in their minds as to the harmful effect of Dettol SC, which impression is eventually passed on to the consumers by the sale force marketing appellant's product. We, therefore, hold that such an activity amounts to deceptive practices within the meaning and scope of section 10 (1) in terms of section 10 (2)(c) of the Act. 18. Now turning to section 10 (2)(a) of the Act, according to which the distribution of false or misleading information i.e, capable of harming the business interest of another undertaking constitutes a deceptive marketing practices suffice it to say that to prove conduct under section 10 (2)(a) of the Act it is not necessary to show actual harm to competitors. It is sufficient to show the existence of deceptive marketing practice that has the potential to harm the business interest of the competitors. In these circumstances, we hold that in the event that there exists a contravention of section 10 (2)(b)&(c) of the Act, concurrent violation of section 10 (2)(a) is also made out. We, therefore, observe that the appellant is also culpable under section 10 (2)(a) of the Act. However, taking it a single violation, we impose penalty of Rs. 1 Million for the contravention of section 10 (1) read with section 10 (2)(a) of the Act.

19. In view of the aforesaid, we hold that the appeal being devoid of merits, is dismissed, and the impugned order dated



10-08-2017 of the Competition Commission of Pakistan is upheld with the modification that the appellant is liable to pay a sum of Rs. 3 Million in total for each violation of section 10 (2)(a), 10 (2)(b) & 10 (2)(C), leaving the parties to bear their own costs.

Announced in open court
31.10.2018

Justice (R) Mian Fasih Ul Mulk,
Chairperson

Justice (R) Miftah-Ud-Din
Member Technical

Ahmed Owais Pirzada
Member Technical

Application No.	470
Dated	05-11-2018
Applicant	CCP
No. of Pages	17/1
Copying Fee	600/-
Search Fee	/
Urgent Fee	
Total Fee	600/-
Date of Preparation of Copy	12 NOV 2018
Date of Delivery	12 NOV 2018
Prepared	Ahmed Owais Pirzada

CERTIFIED TO BE A TRUE COPY
for M. REGISTRAR
Competition Appellate Tribunal
Islamabad NOV 2018
Dated: 12 NOV 2018