

# **COMPETITION COMMISSION OF PAKISTAN**

## **ENQUIRY REPORT**

---

(Under the provisions of Section 37(2) of the Competition Act, 2010)

**IN THE MATTER OF COMPLAINT FILED BY RECKITT  
BENCKISER PAKISTAN LTD. AGAINST M/S S.C. JOHNSON &  
SON PAKISTAN LIMITED FOR DECEPTIVE MARKETING  
PRACTICES**

**BY**

Noman A. Farooqi/ Wajeaha Saif  
**Dated: 26/10/2011**

## 1. BACKGROUND

- 1.1. M/s Reckitt Benckiser Pakistan Limited (hereinafter referred to as the ‘**Complainant**’) filed a complaint against M/s S.C. Johnson & Son Pakistan Limited (hereinafter referred to as the ‘**Respondent**’) through Mr. Nadir A. Jamal, Director Finance and authorized representative of the Complainant and Mandviwall & Zafar, Advocates.
- 1.2. The complaint was analyzed and after being found in conformity with the provisions of Section 10 of the Competition Act, 2010 (the ‘**Act**’) read with Regulation 17 of the Competition Commission (General Enforcement) Regulations, 2007 (the ‘**GER**’) and reaching a conclusion that sufficient facts have been stated in the complaint and the allegations made therein are also substantiated by *prima facie* evidence, the competent authority in pursuance of S.R.O 176(I)/2010 published in the Official Gazette of Pakistan dated 15-03-2010, a formal enquiry under the provisions of Section 37(2) of the Act was initiated and Mr. Noman A. Farooqi, Joint Director (Legal) and Ms. Wajeeha Saif, Assistant Director (Legal) were appointed as Enquiry Officers on 29-09-2011.
- 1.3. The undersigned Enquiry Officers were directed to conduct the enquiry on the issues raised in the complaint and to submit the enquiry report by giving their findings and recommendations *inter alia* on the following issues:
  - (i) Whether the conduct of the Respondent is capable of harming the business interest of the Complainant in violation of Section 10(2)(a) of the Act?
  - (ii) Whether the Respondent is disseminating false/misleading information to the consumers that is lacking a reasonable basis, related to character, suitability for use, or quality of goods in violation of Section 10(2)(b) of the Act?

## 2. COMPLAINT & COMMENTS OF THE RESPONDENT

- 2.1. The Complainant filed a complaint under Section 10 of the Act read with Regulation 17 of GER against the Respondent. It has been stated in the complaint that:
  - 2.1.1. The Complainant is a company registered under the Companies Ordinance, 1984 and is principally engaged in the manufacturing and marketing of consumer household, antiseptic and pharmaceutical products including the major pest control brand “*Mortein*”. “*Mortein*” includes oil, mats, LED’s, refills, aerosols and powders targeting eradication of flying and crawling insects and was first launched in Australia in the 1880s and is presently the most popular household

insecticide worldwide. The details of various pest control products being manufactured and/or marketed by the Complainant under the brand name of “Mortein” are Aerosols, vaporizers, coils and mats.

2.1.2. The Respondent is a company registered under the Companies Ordinance, 1984 and is principally engaged in manufacturing and marketing of pest control and household cleaning products with its key brands being “*Baygon*” insect control aerosol, Glade air freshener and OFF! Mosquito repellents.

2.1.3. The AC Neilson Company (Private) Limited (hereinafter referred to as the ‘**AC Neilson**’) an affiliate of the Neilson Company USA, a leader in market research and provision of performance tracking and measurement of leading brands all over the world since 1923, conducted a retail audit survey of the pest control category of the urban market of Pakistan (hereinafter referred to as the ‘**AC Neilson Retail Audit Survey**’) and its findings are depicted in the table below:

	Volume Share		Value Share	
	%		%	
<b>Mortein</b>	33.1%	33.0%	38.8%	39.7%
<b>Baygon</b>	4.7%	4.7%	5.7%	5.7%

2.1.4. The Complainant submitted that on the basis of the AC Neilson Retail Audit Survey, Mortein has an overall market value share of 39.7% in Pakistan whereas Baygon has an overall market value share of 5.7% in Pakistan. Copy of the summary of the AC Neilson Audit Survey is annexed as ‘**Annex-A**’.

2.1.5. It has been alleged in complaint that:

- (a) The Respondent has recently launched a marketing campaign through print and electronic media all across Pakistan for “Baygon” alleging the brand to be “**No. 1 in Pakistan**” (hereinafter referred to as the ‘**Marketing Campaign**’) which is false, deceptive and misleading. The pictures of the Marketing Campaign were annexed as ‘Annex-B to the complaint which are as follows:





- (b) Based on the AC Neilson Audit Retail Survey Baygon is not “**No. 1 in Pakistan**” as alleged by the Respondent in the Market Campaign since with a mere 5.7% overall market share in Pakistan compared to Mortein’s overall market share of 39.7%, it is neither the market leader nor a popular product amongst Pakistani consumers.
- (c) The award of “Brand of the Year” given in 2010 to Baygon by the Brands Foundation was dependent on measuring the brand through quantitative and qualitative research conducted by the Brands Foundation itself. Thus the criteria used by the Brands Foundation does not truly represent and reflect the accurate and prevalent market position which can only be arrived at from retail audits conducted by independent market surveyors. Such a survey was conducted by AC Neilson that was conducted on a continuous basis with monthly reporting and by monitoring the sales to consumers by departmental and utility stores, general stores, kiriyana stores, general and exclusive medical stores, bakeries and top end retail located all over Pakistan.
- (d) The AC Neilson Retail Audit Survey has authenticity which was proven by the fact that the Competition Commission of Pakistan (the ‘**Commission**’), in its Proctor & Gamble decision dated 23-02-2011, accepted the claim made by Proctor & Gamble Pakistan (Pvt.) Ltd. of being the “No.1 anti-dandruff shampoo” in Pakistan on the basis of a retail survey conducted by AC Neilson.
- (e) With cases of Dengue and Malaria on the rise, the Marketing Campaign is a deliberate act by the Respondent to mislead and exploit the consumers to believe that Baygon being “**No. 1 in Pakistan**” is best to seek protection from these diseases, with a *malafide* intent to increase the sales and popularity of Baygon which has not only jeopardized the market position of the Complainant but is also tantamount to the Respondent making

illegal gains at the cost of the Complainant. These advertisements are undertaken by the Respondent to tarnish the business, operations, affairs, interest, goodwill and reputation of Mortein and the Complainant, thus distributing “*false or misleading information that is capable of harming the business interests of another undertaking*” in terms of Section 10 (2) (a) of the Act.

- (f) The abovementioned Marketing Campaign constitutes a false statement of fact by the Respondent in respect of Baygon which is misleading and deceptive to the substantial segment of consumers in Pakistan and that such deception is likely to adversely influence their purchasing decision and harm the Complainant. Thus it is tantamount to distribution of false or misleading information by the Respondent that is “*lacking a reasonable basis, related to price, character, method or place or production, properties, suitability for use, or quality of goods*” in terms of Section 10 (2)(b) of the Act.

- 2.2. The complaint along-with its annexures was forwarded to the Respondent for their comments vide letter bearing no. 77/REG/RECKITT/OFT/2011 dated 29-09-2011 inviting the comments of the Respondent. Through the said letter the Respondent was also asked to clarify their position regarding the claim ‘**No. 1 in Pakistan**’ and to provide the documents/evidence based upon which said claim is made.
- 2.3. The counsel of the Respondent Mr. Waseem Majid Malik, Advocate Supreme Court, vide his facsimile letter dated 06-10-2011 requested for an extension in time of fourteen (14) days to file the comments to the complaint. However, considering the fact that the Respondent was requested on 29-09-2011 to file its comments and that sufficient time was granted to the Respondent to file their comments thereof the requested extension was denied and the Respondent was required to file their comments no later than 10-10-2011.

### **3. COMMENTS OF THE RESPONDENT**

- 3.1. The Respondent filed the comments to the complaint on 11-10-2011. The summary of the submissions is as follows:
- 3.1.1 **Preliminary Submissions and objections**: The Respondent Company is registered under the Companies Ordinance, 1984 with its head office at the address given in the title of the complaint. The reply has been filed by the authorized officer namely Mr. Muhammad Kamran Khan, Chief Executive/Director of the Respondent Company.

- 3.1.2. The Respondent Company is a global consumer products company with its head office in U.S.A. The Company is over 100 years old and operates in over 75 countries. Some of the leading brands owned by the Respondent Company are Baygon, Raid, Glade, Mr. Muscle, Toilet Duck, OFF!, Pledge, Windex etc.
- 3.1.3. The Respondent has introduced a number of brands and products in Pakistan during the last ten years, the most notable among these being the Baygon range of Pest Control Products. Baygon is a strong international brand which is renowned for its high quality and high efficacy in the field of pest control. The Baygon range in Pakistan includes aerosols, liquid electric mosquito repellents, crawling insect killer powder and mosquito mats.
- 3.1.4. The Respondent submitted in its reply that the instant complaint is frivolous as it has been filed without legal basis. The Respondent submits and would establish that it has not resorted to or continues to resort to any deceptive marketing practice as alleged by the Complainant. The Respondent denies that it has distributed any (i) false or misleading information that is capable of harming the business interest of the Complainant, (ii) or any false or misleading information lacking a reasonable basis tending to mislead the consumers. Accordingly, the Respondent submits that there is no violation either of Section 10(2)(a) or (b) of the Act by the Respondent as alleged by the Complainant.
- 3.2. **The claim is not false:** The claim ‘No. 1 in Pakistan’ (the ‘**Claim**’) made by the Respondent in its Advertisement is neither false nor misleading. It is submitted that in assessing whether the claim made by the Respondent is false or misleading, the complete advertisement has to be considered and the Claim cannot be considered in isolation. It may be noted that the claim as appearing on the advertisement (copies of which are appended with the complaint) is not appearing in isolation but is immediately followed by the logo of the Brands Foundation in the following manner:

NO. 1 IN PAKISTAN



- 3.2.1. It is submitted that even a cursory consideration of the advertisement by an ordinary consumer (including the Claim followed by the Brand of year logo 2010) would immediately lead them to the conclusion that the Respondent’s Brand ‘Baygon’ has been awarded as the No. Brand for the year 2010 in the Brands of the Year Competition. It may please be noted that the logo of Brand of the Year 2010 is bigger in size than the size of font of the Claim and not in fine prints disclosures at the bottom of the advertisement which may not be visible to the

naked eye even after careful consideration. The Brand of the Year logo is visible even to the naked eye even after a very casual examination. Copy of the certificate was also provided which is '**Annex-B**' to this Report.

- 3.2.3. The Commission in the Zong case held that an opinion regarding deception is to be formulated after evaluating complete advertisement on the basis of the net general impression conveyed by the advertisement and not on its isolated excerpts. This approach was reiterated in the Head & Shoulder's case. It is submitted that the net general impression conveyed to any ordinary consumer by the Claim made by the Respondent immediately followed by the Brand of the year logo for the year 2010 is that the Respondent's brand 'Baygon' has been awarded as the No. 1 Brand for the year 2010 in the Brand of the year competition. Accordingly there is no question of deception by the Respondent by making the Claim as it appears in the advertisement.
- 3.2.3. It is pertinent to note that the Respondent does not make the claim or purports that its brand Baygon is 'No. 1 Selling Brand in Pakistan' or 'No. 1 popular Brand in Pakistan' or 'No. 1 Brand to fight Dengue' or 'No. 1 Brand to Fight Malaria'. It is merely making a statement of fact that its brand Baygon has been awarded as No. 1 Brand for the Year 2010 in the Brand of the Year Competition. There is neither any falsity in the claim nor is the Claim misleading.
- 3.2.4. It is submitted that there could have been a chance of confusion albeit still not deception if the Respondent would have advertised the Claim without signifying the Brand of the Year logo for the year 2010 as the Respondent would have basis to substantiate the Claim. Or there would have been chances of confusion albeit still not deception if the Respondent would have used the Brand of the Year logo 2010 without signifying the Claim in the advertisement. There is neither any falsity in the claim nor the Claim misleading.
- 3.2.5. The Brand of the Year award evaluates the competing brands based upon quantitative survey findings received from over 15,000 respondents from all over Pakistan and qualitative research findings that is conducted by a panel of experts. The Brand of the Year award is partnered by the Intellectual Property Organization of Pakistan, Pakistan Standards and Quality Control Authority, Ministry of Industries and Production, Ministry of Commerce and Pakistan Export Corporation. It is pertinent to note that the Brand of the Year award received over 1500 nominations in the year 2010 in the brand competition from all over Pakistan. Any reference to the Brand of the Year Award logo leads any ordinary consumer to the conclusion that it refers to the Brand of the Year Award competition conducted by the Brands Foundation.
- 3.2.6. In view of the foregoing, it is submitted that the Respondent submitted that the Claim is neither false nor misleading but a mere statement of fact when it is considered along with the Brand of the Year logo for the year 2010 immediately following it.



- 3.3. **The Claim does not Harm the Business Interest of the Complainant:** The Respondent further submitted that the Claim is not capable of harming the business interest of the Complainant or that it lacks a reasonable basis. However, for the sake of completeness, the Respondent would demonstrate that the Claim does not in any manner harm the business interests of the Complainant and that it does not lack the reasonable basis:
- 3.3.1. It is submitted that a bare perusal of Section 10(2)(a) of the Act leads to the conclusion that it applies only in cases where false and misleading information is made by one undertaking vis-à-vis another specific undertaking. For instance, the Commission in the case of Ace Group of Industries found a violation of Section 10(2)(a) of the Act as the Respondent in that case was passing off his goods as the goods of the complainants by using their trademarks without any authorization. In the instant case, the Complainant has no legal basis to aver that the Claim made by the Respondent specifically targets its business interest. The Respondent has made a statement of fact that is in no manner capable of harming the business interests of the Complainant. Accordingly there arises no question of violation of Section 10(2)(a) of the Act as the Claim is neither false nor misleading in the first place and secondly it is not capable of harming the business interests of the Complainant.
- 3.3.2. The Respondent submitted that the Complainant's stance also lacks basis, which can be demonstrated by a simple example; the Complainant's stance if applied to world cricket ranking would bar India to claim herself as the world champions as she currently ranks at number 5 in the International Cricket Council's One Day International Ranking (<http://icc-cricket.yahoo.net/>). This is in fact against the spirit of competition.
- 3.4. **The Claim is not made without reasonable basis:** The Respondent submitted that in terms of Section 10(2)(b) of the Act, the undertaking is not required to establish a 'strong basis' or 'sufficient basis', if at all there is any requirement the undertaking is required to show and establish that the claim is properly substantiated and possesses a reasonable basis. It is submitted that the fact that Respondent's brand Baygon has been awarded as No. 1 brand in Brand of the Year Awards 2010 provides it with reasonable and sufficient basis for making the Claim. Accordingly, there arises no question of deception as envisaged by Section 10 (2)(b) of the Act.
- 3.4.1. It was further submitted that the AC Neilson retail audit survey cannot be relied upon to hold that the Respondent is in breach of Section 10(2)(b) of the Act. In this regard the Respondent submitted that the Ac Neilson Audit survey only examines the sales figures of the products and not the consumer perception that the Claim is false or misleading. Even otherwise, without examining the methodology and the scope of the survey and independently verifying them, the

AC Neilson survey cannot be relied upon by the Commission as it has been conducted at the request of the Complainant.

- 3.5. The Respondent further submitted that the acceptance of the Complainant's stance would in fact be prejudicial to the consumer interest as it would bar the undertakings from advertising their achievements, which will directly or indirectly eliminate the drive for their improvement and competition among companies/undertakings.
- 3.6. The Respondent prayed as follows:
  - (a). The Commission declares that the Respondent is not in breach of Section 10 of the Act;
  - (b). The Commission declares that the Respondent is not in breach of Section 10(2)(a) or 10(2)(b) of the Act; and
  - (c). The Complainant is liable to pay costs to the Respondent.
- 3.7. The Respondent also submitted that Respondent is of the clear view that the Claim does not violate the provisions of Section 10(2)(a) or (b) of the Act, however, the Respondent is amenable to any suggestion(s) from the Commission to make its claim more compliant with the Act.

#### **4. COMPLAINANT'S REJOINDER AND MEETING WITH THE PARTIES**

- 4.1. The Respondents comments were received by us on 11-10-2011 and the same was forwarded to the Complainant on the same date for their comments, if any, to be submitted no later than 17-10-2011.
- 4.2. The Complainant & the Respondent were also informed that a meeting has been scheduled with the enquiry officers for 18-10-2011 at the Office of the Commission.
- 4.3. Accordingly, the Complainant filed the rejoinder via fax on 17-10-2011 and submitted the original in the meeting. Both the Complainant and the Respondent attended the meeting with the undersigned enquiry officers. The summary whereof is as follows:
  - 4.3.1. The stance of the Respondent i.e. leading player in pest control, cleaner and air care categories is not accepted and the Respondent be put to strict proof thereof;
  - 4.3.2. The Respondent with *mala fide* intent to mislead and deceive has placed 'No. 1 in Pakistan' on top of the Brand of the Year 2010 logo, giving an impression that the phrase is part and parcel of the logo of the Brand Foundation. In this regard the Complainant relied upon the billboard/marketing campaign of K&N Foods

(Pvt.) Limited (the 'K&N') being the winner of Brand of the Year 2010 in the brands competition of the Brands Foundation, which is as follows:



The Complainant emphasized that in the marketing campaign K&N is only using the Brand of the Year 2010 Logo and nowhere has it mentioned that its No. 1 on the basis of the Brand of the Year 2010 award.

- 4.3.3. Had the Respondent genuinely wanted the consumers to draw *“the conclusion that the Respondent’s brand ‘Baygon’ has been awarded Brand of the Year Award 2010 in the brand of the year competition”* the mere logo of the Brand of the Year 2010 Award would have been sufficient and they would not have added the phrase ‘No. 1 in Pakistan’ above the said logo.
- 4.3.4. The marketing campaign when compared as a whole to the K&N’s campaign it transpires that:
- (i) the K&N’s Campaign gives the net-general impression that the Brand of the Year 2010 has something to do with the brand K&N and does not reflect the market position of K&N;
  - (ii) whereas, on the other hand the net general impression of the Marketing Campaign is vague and that Baygon is No. 1 in Pakistan can be misconstrued to mean:
    - (a) Baygon is No. 1 in terms of Sales; and/or
    - (b) Baygon is No.1 in Pakistan in terms of Market share.
- 4.3.5. The phrase ‘No. 1 in Pakistan’ as appearing just above the Brand of the Year 2010 logo is a representation about the market positioning of Baygon which in no

- manner conveys that Baygon has been awarded the Brand of the Year 2010. With the cases of Dengue and Malaria on the rise and with the consumers going an extra mile to accord themselves protection from such lethal diseases, the Marketing Campaign is more likely to be misconstrued in the manner discussed above and harming the business interest of the Complainant.
- 4.3.6. The marketing campaign of the Respondent is deceptive and can in no event result in confusion as has been asserted by the Respondent.
- 4.3.7. The certificate of the Brand of the Year 2010 only entitles the Respondent to claim that it has been awarded the Brand of the year 2010 and it does not entitle the Respondent to claim being 'No.1 in Pakistan'.
- 4.3.8. With reference to the recognition of the AC Neilson Audit Survey and its acceptability, the Complainant submitted that AC Neilson Pakistan is an affiliate of the Neilson Company USA, which is a leader in market research and provision of performance tracking and measurement of leading brands all over the world since 1923 and adheres to a strict code of conduct when conducting surveys. The Respondent be put to strict proof regarding its assertion of conflict of interest between AC Neilson Pakistan and the Complainant.
- 4.3.9. The Complainant has also relied upon the Order of the Commission in the matter of Proctor & Gamble Pakistan reported as 2010 CLD 1695, wherein the Commission has accepted the report of AC Neilson as evidence in support of one of the claims in question.
- 4.3.10. The Complainant has re-asserted the allegations made in the complaint and reiterated that the Respondent through its marketing campaign and the advertisement is:
- (i). Distributing false and misleading information that is harming the business interest of the Complainant and therefore, the Respondent is deemed to have resorted to deceptive marketing practices to jeopardize the market share of the Complainant and making illegal gains at the cost of the Complainant in terms of Section 10(2)(a) of the Act;
  - (ii). Distributing false or misleading information that is lacking a reasonable basis related to price, character, method or place of production, properties, suitability for use, or quality of goods and therefore, the Respondent is deemed to have resorted to deceptive marketing practices in violation of Section 10(2)(b) of the Act.
- 4.4. The Complainant was represented by Mr. Mehmood Mandviwalla and Ms. Sana Iftikhar of Mandviwalla & Zafar and Ms. Muna Farid and Mr. Tauseef Faisal company representatives of the Complainant. The Respondent was represented by their counsels namely Mr. Wasim Majid Malik, Advocate Supreme Court and Mr,

Wasif Majeed, Advocate High Court. Copy of the attendance sheet of the meeting is annexed as ‘Annex-C’.

- 4.4.1. In the meeting the Respondents were asked to explain the basis of their claim. The Counsel for the Respondent submitted that since the allegations have been leveled against them by the Complainant therefore, it would be appropriate if the Complainant first makes submissions on the averments made in the complaint, once the onus is shifted to them, he will be make submissions.
- 4.4.2. The Counsel for the Complainant referred to the speech of Madam Chairperson *on deceptive marketing practices in a seminar organised by Helpline Trust in Karachi on October 5, 2010<sup>1</sup>* and the *Order of the Commission in the matter of Zong & Ufone*, wherein it was held that “for the purposes of deceptive marketing, actual deception need not be shown to carry the burden of proof. It is sufficient to establish that the advertisement has the tendency to deceive and capacity to mislead.” He further submitted that in the cases of deceptive marketing practices the onus to proof otherwise is on the undertaking making the claim or purported to be engaged in the deceptive marketing practices as in Pakistan and for the purposes of Section 10 of the Act, 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.
- 4.4.3. The Counsel for the Complainant further added that Brand of the Year 2010 award is a paid award, as the undertakings are invited to apply for the award and are also required to pay a fee for obtaining the award. Therefore, the same is not reliable. Even otherwise, the Brand of the Year Award 2010 does not entitle the Respondent to use the tagline ‘No.1 in Pakistan’ in its advertisement campaign, which the Respondent is not. The Counsel for the Complainant referred to the advertisement of K&N and compared it with that of the Respondent and elaborated that K&N was also awarded Brand of the Year 2010; however, they have not used the tagline ‘No.1 in Pakistan’, therefore, in order to let the consumers know about the achievement, the Respondent could have used only the logo of Brand of the Year 2010 and no other statement. The counsel for the Complainant reiterated its stance made in the Complaint and the rejoinder filed.
- 4.4.4. The counsel for the Respondent submitted that they have not been provided with a copy of the Rejoinder and they would like to file their comments. The Counsel for the Complainant objected to this request and submitted that being a Complainant it’s only his right to file the rejoinder and the Respondents cannot be allowed ordinarily to file their comments to the rejoinder; as it would start a never ending routine of Rejoinders and Surrjoinders thereof.

---

<sup>1</sup> [http://www.bluechipmag.com/bc/feature\\_detail.php?feature=88](http://www.bluechipmag.com/bc/feature_detail.php?feature=88)

- 4.4.5. The counsel for the Respondent elaborated the comments filed on behalf of the Respondent and mainly submitted that the advertisement in no way conveys the message that Baygon is the ‘No. 1 Selling Brand in Pakistan’ or ‘No. 1 popular Brand in Pakistan’ or ‘No. 1 Brand to fight Dengue’ or ‘No. 1 Brand to Fight Malaria’. It is merely making a statement of fact that its brand Baygon has been awarded as No. 1 brand for the year 2010 in the Brand of the Year Competition. There is neither any falsity in the claim nor is the Claim misleading.
- 4.4.6. The counsel was asked by us that ‘in which category has the Respondent been awarded Brand for the Year 2010 in the Brand of the Year Competition. The counsel responded that in ‘Aerosol category’. He was asked to explain the overall impression of the advertisement by showing the picture thereof. To which he responded that it shows that Baygon is the No. 1 brand being the winner of Brand of the Year award 2010.
- 4.4.7. The Respondent was asked to explain the criteria for awarding the Brand of the Year award. He submitted that although no official document has been provided to them by their clients or from the Brands Foundation; however, from the website of the Brands Foundation<sup>2</sup>, the criteria below is followed:
- (a). The Brands apply to the Brands Foundation in their respective category and after the final selection of categories the management of Brands Foundation through experts conduct an internal focus group study to finalize the top five most trusted and popular brands in every category with the help of the whole sale market, super markets, big shopping centers etc and on the basis of input from the educated professionals, qualified consumers and people bonded with the brands.
  - (b). Once the *top* five brands in every category are finalized – top three brands were included in a nationwide consumer survey in all major trade cities for rating of their preference. Research method is the most important approach in this scenario and our **research methodology** is as follows;
  - (c). To secure credible ratings based on consumer & expert’s opinion and the distinct voice of potential and qualified customers, we have designed our study where both quantitative and qualitative methods were given due preference.
  - (d). **Quantitative consumer survey mainly** engages analysis of numerical data regarding people bond with the brand which reflect the majority of consumer preference. It is a numbers-based research discipline, quantitative research statistically measures consumer mind-set, perception, and preference. *Over 15000 qualified respondents participated in the quantitative consumer survey. Each respondent was first examined for their brand mindset and asked questionnaire related to brand quality,*

---

<sup>2</sup> [http://www.brandsaward.com/selection\\_criteria.php](http://www.brandsaward.com/selection_criteria.php)

*affordability, familiarity and availability. After careful analysis of the viewpoints expressed, the nominated brands was given the corresponding ratings.*

- (e). **Qualitative research** is a highly subjective research discipline, designed to look beyond the percentages to gain an understanding of the customer's feelings, impressions and viewpoints. While the results of the nationwide consumer survey were being received, the management constituted a panel of experts to conduct the qualitative research on the participating brands of each category in which following major attributes of brand research were considered and evaluated:
- (i). Strong market standing of the brand,
  - (ii). Brand Popularity and trust level,
  - (iii). Nationwide Brand Recognition,
  - (iv). Sound Company Profile and corporate structure,
  - (v). Distinctive and innovative feature of the brand (if any), and
  - (vi). Consumer preference
- 4.4.7. A copy of the rejoinder filed by the Complainant was provided to the Respondent. The Respondent requested time till Monday i.e. 24-10-2011 to file its comments, if any, to the rejoinder. The Respondent was asked to file their comments, if any, no later than Friday i.e. 21-10-2011.
- 4.5. The Respondent vide its letter dated 21-10-2011 informed the undersigned enquiry officers that they have gone through the rejoinder and wish to file their additional comments and documents in their support. The Respondent filed the additional comments and the documents vide their letter dated 25-10-2011, which was received in our office on 26-10-2011. The summary of the comments are as follows:
- 4.5.1. The Respondent denies the assertions made in the Rejoinder of the Complainant and reiterates that the Claim is neither false nor misleading and it is neither capable of harming the business interest of the Complainant nor does it deceive the consumers.
- 4.5.2. The reliance placed by the Complainant on the advertisement of K&N and the claims made therein is unfounded and irrelevant to the issue in hand. K&N was awarded two awards i.e. Brands Icon of Pakistan and Brand of the Year award. Both are administered and awarded by the Brands Foundation. For the sake of completeness the research publication of the Brands Foundation titled 'Most Acclaimed Brands of Pakistan' for the year 2009 has been appended with the comments.
- 4.5.3. The Brands Foundation has been endorsed by various government bodies i.e. Intellectual Property Organization, Ministry of Industries and Productions, the

Pakistan Export Corporation, Ministry of Finance & Economic Affairs, Ministry of Commerce, Ministry of Petroleum, Ministry of Science and Technology, Trade Development Authority of Pakistan, Pakistan Standards and Quality Control Authority and Government of Punjab. A committee including the members of Brands Foundation would be set-up under the umbrella of the Ministry of Cabinet Division that would advise the government in formulating various policies. This milestone speaks of the high level of recognition and reputation earned by the Brands Foundation.

- 4.5.4. On the other hand AC Neilson has earned high reputation for its surveys in the shampoo markets all over the world. Head & Shoulders, Unilever and L'Oréal are subscribed to the AC Retail Audit data thus making it industry standard information. Whereas in insect control, the Complainant is the sole regular customer for survey done by AC Neilson and as such AC Neilson cannot claim the same level of authority for its insect control data as the data for shampoos. Unlike shampoos, where AC Neilson's independence is beyond question, significant financial loss may be involved for AC Neilson if they lose the sole customer for this part of the survey hence the question of conflict of interest cannot be ruled out.
- 4.5.5. The Brands Icon award is awarded to those brands which have become strong representative of their own categories in the mindset of consumers in Pakistan. Since, K&N has been awarded both awards, therefore, K&N would be interested in advertising the Brands Icon Award rather the Brand of the Year Award; being more prestigious. Furthermore, the Brands Foundation itself proclaims that the brand which is awarded the Brand of the Year is the No. 1 choice.
- 4.5.6. Since, the impact of the information is assessed from the view point of an ordinary consumer, therefore, reference to the ordinary literal and not legalistic meaning of the aforesaid would be helpful: according to Webster's New College Dictionary, the term 'misconstrue' means "to construe wrongly; misinterpret and misunderstood". Whereas, the same dictionary defines the term 'mislead' as; "*to lead into error (of judgment); deceive or delude*".
- 4.5.7. Without prejudice to the foregoing, the Respondent submits that the Claim is neither misleading nor can it be misconstrued by an ordinary consumer. In this regard, it is submitted that the Claim even if examined independently of the Brand of the Year logo would suggest it to be the Respondent's opinion of its products marketed under the brand 'Baygon'. It can at best be regarded as 'puffery' and not misleading. Certain advertisements have been annexed with the comments.
- 4.5.8. The Respondent reiterated that it is not claiming that Baygon is 'No. 1 Selling Brand in Pakistan' or 'No. 1 popular Brand in Pakistan' or 'No. 1 Brand to fight Dengue' or 'No. 1 Brand to Fight Malaria'. It is merely making a statement of fact that its brand Baygon has been awarded as No. 1 brand for the year 2010 in the Brand of the Year Competition. It may be noted that comparable claims such



- as ‘the best in town’, ‘best of the best’, No. 1 choice’ etc., can only be termed as puffing and not misleading information. The Claim even independent of the Brand of the Year logo can only be considered as puffery and not misleading information. Certain other brands in the past have also been heralding their achievement in a similar fashion without any protest or opposition also fortifies this position.
- 4.5.9. The Respondent is merely suggesting that its Baygon spray helps in fighting dengue. The Respondent’s suggestion is based on the fact that the Respondent’s aerosol has a highly effective formulation that may be considered better than others. This is annexed as ‘**Annex-D**’.
- 4.5.10. The Respondent submitted that the containers of the aerosol sprays of the Complainant’s product Mortein does contain the label that it kills dengue mosquitoes, however, the containers of Baygon does not contain any such logo. Even otherwise nowadays nearly all insect killer products manufacturers are claiming that their products are effective against dengue. Copies of advertisements of various brands are annexed as ‘**Annex-E1 to Annex-E-3**’.
- 4.5.11. The Respondent reiterated that neither has the Complainant provided any evidence suggesting that the business interest of the Complainant is harmed due to the marketing campaign nor any evidence has been submitted by the Complainant suggesting that the claim of the Respondent does not have a reasonable basis. Therefore, the complaint may please be rejected. The prayer clause of the original reply to the complaint was reiterated by the Respondent in toto.

## **5. ISSUES AND THEIR ANALYSIS**

- 5.1. As mentioned in Para 1.3. *ibid* the undersigned enquiry officers were directed to conduct the enquiry on the issues raised in the complaint and to submit the enquiry report by giving their findings and recommendations *inter alia* on the following issues:
- (i). Whether the conduct of the Respondent is capable of harming the business interest of the Complainant in violation of Section 10(2)(a) of the Act?
  - (ii). Whether the Respondent is disseminating false/misleading information to the consumers that is lacking a reasonable basis, related to character, suitability for use, or quality of goods in violation of Section 10(2)(b) of the Act?
- 5.2. **The Overall Net Impression of the Advertisement:** The basic allegation under the complaint is that the Claim made by the Respondent is not only misleading

and false but it also lacks a reasonable basis and is capable of harming the business interest of the Complainant.

- 5.2.1. In order to address the issues in hand, it is imperative for us to first understand the overall net impression of the Advertisement. In this regard, we must keep in mind the principle laid down by the Commission in its Order dated 29-09-2009 in the matter of Zong & Ufone that the advertisement has to be viewed as a whole without emphasizing isolated words or phrases apart from their context. The advertisement is as follows:



- 5.2.2. A clear look at the aforementioned hoarding/billboard (the ‘Advertisement’) gives a net overall impression that the products under the brand Baygon i.e. Aerosol, coils, vaporizers, powders and mats are No.1 in Pakistan and fight Dengue with its products.
- 5.2.3. The Complainant has alleged that on the basis of AC Neilson Retail Audit Survey, Mortein has an overall market value share of 39.7% in Pakistan whereas Baygon has an overall market value share of 5.7% in Pakistan. Therefore, the claim of being No. 1 in Pakistan is misleading, false and lacks a reasonable basis. The award of “Brand of the Year” given in 2010 to the Respondent for Baygon by the Brands Foundation was dependent on measuring the brand through quantitative and qualitative research conducted by the Brands Foundation itself. Thus the criteria used by the Brands Foundation does not truly represent and reflect the accurate and prevalent market position which can only be arrived at from retail audits conducted by independent market surveyors. Such a survey was conducted by AC Neilson that was conducted on a continuous basis with monthly reporting and by monitoring the sales to consumers by departmental and utility stores,

- general stores, kiriyana stores, general and exclusive medical stores, bakeries and top end retail located all over Pakistan.
- 5.2.4. The Complainant also submitted during the meeting held on 18-10-2011 that awards such as the 'Brand of the Year' awards are paid awards and the undertakings in the market apply to the Brands Foundation with a fee for their nominations, therefore, it cannot be relied upon.
- 5.2.5. However, on the other hand, the Respondents stance was that even a cursory consideration of the advertisement by an ordinary consumer (including the Claim followed by the Brand of year logo 2010) would immediately lead them to the conclusion that the Respondent's Brand 'Baygon' has been awarded as the No. 1 Brand for the Year 2010 in the Brands of the Year competition. It may please be noted that the logo of Brand of the Year 2010 is bigger in size than the size of font of the Claim and not in fine print disclosures at the bottom of the advertisement which may not be visible to the naked eye even after careful consideration. The Brand of the Year logo is visible to the naked eye even after a very casual examination.
- 5.2.6. During the meeting the Respondent was specifically asked to explain by showing the picture mentioned above, the net general impression of the advertisement. The Counsel for the Respondent briefly stated that it gives an impression that 'Baygon' is No. 1 in Pakistan but he reiterated his stance mentioned in Para 5.2.5 above.
- 5.2.7. The Respondent was also asked in which category they were awarded the Brand of the Year Award, the Respondent openly conceded that they were awarded the Brand of the Year 2010 award in the category of 'Aerosol products'.
- 5.2.8. It needs to be appreciated that the advertisement displayed on the hoardings/billboard contains all the products i.e. Aerosol products, coils, powder and vaporizers with a mark to '*FIGHT DENGUE WITH BAYGON*'. Thereby giving an overall impression that Baygon has been awarded the Brand of the Year 2010 award for the entire range of its products and on the basis of this award Baygon is No. 1 in Pakistan for the entire range of its products and is best to fight dengue.
- 5.3. Having concluded regarding the overall net general impression of the advertisement we must now proceed to address the issues referred to us. However, we are of the view that we first address the issue no. (ii) first and then address the issue (i).
- 5.4. **Reasonable Basis for the Claim 'No. 1 in Pakistan'**: With reference to issue (ii), the Complainant submitted that although they are No. 1 in Pakistan in pest control products in terms of the sales and market share but they do not make such claims in any of their advertisements. The Complainant submitted that AC Neilson, an

affiliate of the Neilson Company USA, a leader in market research and provision of performance tracking and measurement of leading brands all over the world since 1923, conducted a retail audit survey of the pest control category of the urban market of Pakistan (hereinafter referred to as the ‘AC Neilson Retail Audit Survey’) and its findings are depicted in the table below:

	Volume Share %		Value Share %	
<b>Mortein</b>	33.1%	33.0%	38.8%	39.7%
<b>Baygon</b>	4.7%	4.7%	5.7%	5.7%

On the basis of the above, Mortein (pest control Brand of the Complainant) has an overall market value share of 39.7% in Pakistan whereas Baygon (Respondent’s Brand) has an overall market value share of 5.7% in Pakistan and Mortein is the No. 1 retail brand in terms of market share as per the AC Neilson Audit survey and any claim made to the contrary is false and lacks a reasonable basis.

- 5.4.1. On the other hand the Respondents have submitted that the AC Neilson retail audit survey cannot be relied upon to hold that the Respondent is in breach of Section 10(2)(b) of the Act. In this regard the Respondent submitted that the AC Neilson Audit survey only examines the sale figures of the products and not the consumer perception that the Claim is false or misleading. Even otherwise, without examining the methodology and the scope of the survey and independently verifying them, the AC Neilson survey cannot be relied upon by the Commission as it has been conducted at the request of the Complainant.
- 5.4.2. The Respondent further submitted that the claim ‘No. 1 in Pakistan’ made by them in its Advertisement is neither false nor misleading. It was submitted that in assessing whether the claim made by the Respondent is false or misleading, the complete advertisement has to be considered and the Claim cannot be considered in isolation. It may be noted that the claim as appearing on the advertisement (copies of which are appended with the complaint) is not appearing in isolation but is immediately followed by the logo of the Brands Foundation.
- 5.4.3. It was highlighted by the Respondent that the Respondent does not make the claim or purport that its brand Baygon is ‘No. 1 Selling Brand in Pakistan’ or ‘No. 1 popular Brand in Pakistan’ or ‘No. 1 Brand to fight Dengue’ or ‘No. 1 Brand to Fight Malaria’. It is merely making a statement of fact that its brand Baygon has been awarded as No. 1 Brand for the Year 2010 in the Brand of the Year Competition. There is neither any falsity in the Claim nor is the Claim misleading.

- 5.4.4. With reference to the Brand of the Year award's evaluation it was submitted that the same evaluates the competing brands based upon quantitative survey findings received from over 15,000 respondents from all over Pakistan and qualitative research findings that is conducted by a panel of experts. The Brand of the Year award is partnered by the Intellectual Property Organization of Pakistan, Pakistan Standards and Quality Control Authority, Ministry of Industries and Production, Ministry of Commerce and Pakistan Export Corporation. It is pertinent to note that the Brand of the Year award received over 1500 nominations in the year 2010 in the brand competition from all over Pakistan. Any reference to the Brand of the Year Award logo leads any ordinary consumer to the conclusion that it refers to the Brand of the Year Award competition conducted by the Brands Foundation.
- 5.4.5. The Respondent further submitted that in terms of Section 10(2)(b) of the Act the undertaking is not required to establish a 'strong basis' or 'sufficient basis', if at all there is any requirement the undertaking is required to show and establish that the claim is properly substantiated and possesses a reasonable basis. It is submitted that the fact that Respondent's brand Baygon has been awarded as No. 1 brand in Brand of the Year Awards 2010 provides it with a reasonable and sufficient basis for making the Claim. Accordingly, there arises no question of deception as envisaged by Section 10 (2)(b) of the Act.
- 5.4.6. The Complainant has also referred to the advertisement of K&N who was also awarded the Brand of the Year 2010 Award and Brand Icon of the Year award, wherein no such statement of being No. 1 are made. Although it has been submitted by the Respondent that the same is irrelevant; however, we are not convinced with this stance. The Respondent itself has admitted in its reply that Brand Icon Award is awarded to those brands which have become strong representative of their own categories in the mindset of consumers in Pakistan. Since, K&N has been awarded both awards, therefore, K&N would be interested in advertising the Brands Icon Award rather the Brand of the Year Award; being more prestigious. Furthermore, the Brands Foundation itself proclaims that the brand which is awarded the Brand of the Year is the No. 1 choice.
- 5.4.7. It is beyond comprehension as to why the advertisement of K&N is irrelevant, as it has also been awarded with two awards and both the awards are displayed on its advertisement. On the other hand the Respondent is claiming to be No. 1 in Pakistan; however, no such certification or award has been given to the Respondent in this regard. We appreciate the fact that the Respondent has been awarded the Brand of the Year 2010 Award; however, we cannot overlook the fact that the same has been awarded to the Respondent with reference to the Aerosol products of the Respondents and not the entire range of its products.
- 5.4.8. With reference to the submissions made by the Respondent that through the advertisement Respondent is only suggesting that its Baygon spray helps in fighting dengue. The Respondent's suggestion is based on the fact that the Respondent's aerosol has a highly effective formulation that may be considered

better than others. The Respondent further submitted that the containers of the aerosol sprays of the Complainant's product Mortein does contain the label that it kills dengue mosquitoes, however, the containers of Baygon does not contain any such logo. Even otherwise nowadays nearly all insect killer products manufacturers are claiming that their products are effective against dengue. In this regard, we note that no container was provided to us with the written comments to the rejoinder, however, several other additional documents were provided to us. Despite this, we also note that the Complainant despite of being No. 1 in the market on the basis of AC Neilson Audit Survey is not making any such claims. However, with reference to any claim regarding 'killing dengue mosquitoes' made on the Aerosol containers of the Complainant, the Respondent has not provided anything to contradict the claim made by the Complainant on the mosquito Aerosols of the Complainant. Moreover, on the basis of Respondent's submissions we understand that no superiority claim i.e. being No. 1 in Pakistan or otherwise has been made by the Complainant either in their marketing campaign or on the packaging of their products. On the other hand, the Respondent is making a claim, which in terms of the certificate of Brands of the Year Award 2010 and the over all impression of the advertisement as concluded in Para 5.2.1 to Para 5.2.8 above, does gives an impression that the Respondent's entire range of products and not just the Aerosols are No. 1 in Pakistan and best to fight dengue.

5.4.9. When the overall net impression of the advertisement is taken into account and interpreted with the Award Certificate of the Brand of the Year 2010 provided by the Respondent, it becomes evident that the advertisement pertains to all the products of the Respondent under their brand 'Baygon', whereas the certificate only grants recognition/Award to the Aerosol products.

5.4.10. Keeping in view the overall net impression of the advertisement as mentioned in Para 5.2.8 above, we are of the view that the Claim made by the Respondent in its advertisement is *prima facie* disseminating false/misleading information to the consumers that is lacking a reasonable basis, related to character, suitability for use, or quality of goods in violation of Section 10(2)(b) of the Act.

5.5. **The Conduct of the Respondent is Capable of harming the business interest of the Complainant:** With reference to issue (i) the Complainant submitted in the complaint and its rejoinder that in the current season dengue is on the rise and dengue fever is increasingly becoming an epidemic in Pakistan. The disease easily spreads in rural areas of Pakistan. Five (5) persons per day are being killed by dengue. More than 10,000<sup>3</sup> people have been infected. The severity of the disease is felt in Lahore, the provincial metropolis of Punjab. More than 170 people have died and several hundreds are admitted as new cases are confirmed.<sup>4</sup> In such circumstances the consumers are going an extra mile to accord themselves

---

<sup>3</sup> ARY NEWS. 4 November 2010. <http://www.arynews.tv/english/newsdetail.asp?nid=38981>. Retrieved 11 September 2011.

<sup>4</sup> <http://www.thenews.com.pk/NewsDetail.aspx?ID=23989>

protection from such lethal disease, the Marketing campaign is more likely to mislead the consumers in the said manner.

- 5.5.1. Due to the wide spread of dengue the consumers/customers in Pakistan are interested in purchasing the best product to use as protection and to safeguard their health. The claim of the Respondent, in these times has badly affected the business of the Complainant; as the consumers are misled through their claim to go for the product of Respondent i.e. Baygon, being the No. 1 in Pakistan.
- 5.5.2. On the other hand, the Respondent submitted that the Claim is not capable of harming the business interest of the Complainant or that it lacks a reasonable basis. It was further submitted that a bare perusal of Section 10(2)(a) of the Act leads to the conclusion that it applies only in cases where false and misleading information is made by one undertaking vis-à-vis another specific undertaking. For instance, the Commission in the case of Ace Group of Industries found a violation of Section 10(2)(a) of the Act as the Respondent in that case was passing off his goods as the goods of the complainants by using their trademarks without any authorization. In the instant case, the Complainant has no legal basis to aver that the Claim made by the Respondent specifically targets its business interest. The Respondent has made a statement of fact that is in no manner capable of harming the business interests of the Complainant. Accordingly there arises no question of violation of Section 10(2)(a) of the Act as the Claim is neither false nor misleading in the first place and secondly it is not capable of harming the business interests of the Complainant.
- 5.5.3. The Respondent elaborated that the Complainant's stance also lacks basis, which can be demonstrated by a simple example; the Complainant's stance if applied to world cricket ranking would bar India to claim herself as the world champions as she currently ranks at number 5 in the International Cricket Council's One Day International Ranking (<http://icc-cricket.yahoo.net/>). This is in fact against the spirit of competition.
- 5.5.4. At this point we must point out that Section 10(2)(a) of the Act does not lead to the conclusion that it applies only in cases where false and misleading information is made by one undertaking vis-à-vis another specific undertaking. It can be towards all the other competing undertakings. Any undertaking by making any claim which is either false, misleading or lacking a reasonable basis would give the said undertaking a competitive edge over other undertakings and would ultimately result in higher sales.
- 5.5.5. With reference to the ICC cricket ranking as quoted by the Respondent, we note that the same supports the case of Complainant rather the case of Respondent; as being the winner of Brand of the Year 2010 in the Baygon Aerosol Products, the Respondent cannot be allowed to claim No. 1 in Pakistan with reference to all of its pest control products to fight dengue.

- 5.5.6. Furthermore, the language of Section 10(2)(a) of the Act and the principle laid down by the Commission in its Zong and Ufone Order dated 29-09-2009, the actual deception and the actual loss need not to be shown, it is sufficient to establish that the advertisement has the tendency/potential to deceive and the capacity to mislead. The Respondent's claim in the advertisement does possess the tendency to mislead the consumers and induce them to take a transactional decision based upon the claim made in the Advertisement i.e. Baygon being No. 1 in Pakistan and is the best pest control product in specific to fight dengue and malaria.
- 5.5.7. Keeping in view the above we are of the view that *prima facie* the conduct of the Respondent i.e. making of claim being the No. 1 in its advertisement with reference to all of its products is capable of harming the business interest of the Complainant in violation of Section 10(2)(a) of the Act.

## **6. CONCLUSIONS/FINDINGS**

6. Based on the information available on record and the submissions made before us, we the undersigned enquiry officers have reached the following conclusions:
- 6.1. In view of the foregoing and in particular Paras 5.2.1. to 5.2.8 above, *prima facie*, the overall impression of the advertisement of the Respondent is that Baygon has been awarded the Brand of the Year 2010 award for the entire range of its products and on the basis of this award Baygon is No. 1 in Pakistan for the entire range of its products and is best to fight dengue.
- 6.2. In view of the foregoing and in particular Para 5.4 to Para 5.4.9 above, the Respondent is, *prima facie* disseminating false/misleading information to the consumers regarding its products under the brand 'Baygon' that is lacking a reasonable basis, related to character, suitability for use, or quality of goods in violation of Section 10(2)(b) of the Act.
- 6.3. In view of the foregoing and in particular Para 5.5. to Para 5.5.7 above, *prima facie* the conduct of the Respondent i.e. making the claim of being the 'No. 1 in Pakistan' in its advertisement with reference to all of its products is capable of harming the business interest of the Complainant in violation of Section 10(2)(a) of the Act.



## 7. RECOMMENDATION

- 7.1 The deceptive marketing practices have a direct impact on the public at large. It is in the interest of the general public that the undertakings should be stopped to advertise their products in an unfair and misleading manner and be encouraged to resort to the advertising practices which are transparent and gives consumers/customers true and correct information. *Prima facie* violations under the Act in terms of the conclusions of this enquiry report warrant initiation of proceedings under Section 30 of the Act against the Respondent i.e. M/s S.C. Johnson & Son Pakistan Limited in accordance with the law.
- 7.2. As already mentioned in Para 5.5 above presently dengue is on the rise and dengue fever is increasingly becoming an epidemic in Pakistan. The disease easily spreads in rural areas of Pakistan. Five (5) persons per day are being killed by dengue. More than 10,000<sup>5</sup> people have been infected. The severity of the disease is felt in Lahore, the provincial metropolis of Punjab. More than 170 people have died and several hundreds are admitted as new cases are confirmed.<sup>6</sup> In such circumstances the consumers are going an extra mile to accord themselves protection from such lethal disease; the Marketing campaign/Advertisement of the Respondent is more likely to mislead the consumers in the said manner.

Noman A. Farooqi  
Joint Director (Legal)

Wajeeha Saif  
Assistant Director (Legal)

---

<sup>5</sup> ARY NEWS. 4 November 2010. <http://www.arynews.tv/english/newsdetail.asp?nid=38981>. Retrieved 11 September 2011.

<sup>6</sup> <http://www.thenews.com.pk/NewsDetail.aspx?ID=23989>