

# COMPETITION COMMISSION OF PAKISTAN

## ENQUIRY REPORT

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

**IN THE MATTER OF COMPLAINT BY M/S AGRITECH LIMITED  
AGAINST M/S TARA FERTILIZER (PVT) LTD FOR  
DECEPTIVE MARKETING PRACTICES**

**BY**

*Noman Laiq, Riaz Hussain & Urooj Azeem Awan*

**Dated: JUNE 14, 2016**

## **A. BACK GROUND:**

1. This report concludes the enquiry initiated by the Competition Commission of Pakistan (hereinafter the '**Commission**'), pursuant to a formal complaint filed with the Commission by M/s Agritech Limited (hereinafter the '**Complainant**'), through its duly authorized officer, Muhammad Faisal Muzammil, who is a Director of the Complainant's.
2. The Complainant alleged the, *prima facie*, violation of Section 10 of the Act i.e. deceptive marketing practices by M/s Tara Fertilizer Private Limited (hereinafter the '**Respondent**').
3. Keeping in view the above, the Competent Authority, after completing the primary analysis, initiated an enquiry pursuant to Section 37 (2) of the Competition Act, 2010 (hereinafter the '**Act**'), read with regulation 17 (2) of the Competition Commission (General Enforcement) Regulations, 2007, for the alleged violation of Section 10 (1) of the Act, in terms of (a), (b) and (d) of subsection (2) of Section 10 of the Act.
4. The Competent Authority, exercising its powers, appointed Mr. Noman Laiq, Director (OFT) and Ms. Resham Ibrahim, JEO (OFT), as the Enquiry Officers. During the course of enquiry Ms. Resham Ibrahim resigned and thus the competent authority appointed Mr. Riaz Hussain, Assistant Director (OFT) and Ms. Urooj Azeem Awan, Management Executive (OFT) as enquiry officers in her place to conclude the enquiry (hereinafter collectively referred to as the '**Enquiry Committee**').
5. The undersigned enquiry committee was directed to conduct an enquiry and to submit the report by giving findings & recommendations *inter alia* on the following;

*“Whether the allegations leveled in the complaint constitute a, prima facie, violation of Section 10(1) of the Act in terms of Section 10(2) (a), (b) & (d) of the Act?”*

## **B. COMPLAINT**

6. The Complainant is a fertilizer and chemical manufacturing concern engaged in the production of urea, phosphate and other allied products including, but not limited to, both nitrogenous and phosphatic fertilizers.
7. The Respondent has been registered by the Securities and Exchange Commission of Pakistan as a private limited company, engaged in the manufacture and supply of fertilizers of various kinds and other allied products including SSP<sup>1</sup>.

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<sup>1</sup> Single Superphosphate

8. It is submitted that the Complainant was acquired by Azguard Nine Limited in the year 2006. The success of the acquisition is evident from the fact that the Complainant was able to acquire eight percent (8%) market share within nine months of the acquisition, which was then also followed by a steady rise in sales and revenue of rupees three billion, in the initial nine months only. The new management also changed the name of the Complainant from Pak-American Fertilizer Limited to the current name ‘Agritech Limited.’
9. In the midst of all this, the new management launched a brand name ‘Tara’ in December, 2006 for its urea, DAP, MAP, MOP, SSP etc (hereinafter referred to as the ‘**Tara Products**’) and embarked upon an aggressive branding strategy to make Tara a branding success on a country wide scale.
10. The Complainant further submitted through complaint that they applied for the registration of the trademark/logo “Tara” to use alone and in conjunction with various other marks in its name. Summary of the applications filed by the Complainant with the Trademarks Registry, Karachi and their current status is as under:

S.No	TRADEMARK	APPLICATION NO.	CLASS	STATUS
1	TARA DAP	228549	5	Registered
2	TARA Urea	228550	5	Registered
3	TARA MOP	248023	1	Registered
4	TARA MAP	248024	1	Registered
5	TARA Urea	228548	1	Registered
6	TARA	277637	1	Pending
7	TARA	277636	5	Pending
8	TARA DAP	228547	1	Pending
9	TARA SSP	267778	1	Pending

11. In the same tune therefore, since 2006, the Complainant has continuously been using the trademark Tara, alone and in conjunction with other marks on its various products; including, but not limited to the Tara Products.
12. Furthermore, in order to promote the brand at the user level (i.e. the farmer community), the Complainant appointed various persons to act as Agriculture Service Representatives across Pakistan. Their role was to assist the farmer community generally with their farming issues alongside promoting the use of Tara Products amongst them. This initiative proved tremendously effective in boosting the Tara Products sale in the early stages of its launch.
13. It has been submitted in the Complaint that the adoption of the word ‘**Tara**’ as part of its business name, by the Respondent, is both, tainted with fraud and mala fide intentions. The Respondent is accused of having adopted the word Tara as part of

its business name to 'justify the otherwise illegal use by it of the Complainant's trademark Tara.'

14. The Complainant alleged that the Respondent has copied substantial elements of the Complainant's bag of 'Tara SSP' for its own bag of SSP, which further substantiates the Complainant's assertion that the Respondent is engaged in deceptive marketing practices. (Photographs of both the bags may be seen below).



15. The Complainant alleged that the Respondent has resorted to the distribution of misleading information that is capable of harming the business interests of the Complainant. The distribution of misleading information also tends to mislead the consumer as to the method or place of production, properties and quality of goods as such lacks reasonable basis. Furthermore, it has been alleged that the Respondent has fraudulently adopted the trademark, packaging and packaging color of the Complainant's product in order to deceive the consumer.
16. The Complainant submitted that the mala fide intent of the Respondent may also be gauged from the fact that the Respondent is getting the production of its packaging bags from the same supplier as that of the Complainant.
17. The Complainant further submitted that the Respondent is using a similar trademark with similar packaging and color on its SSP product, which is invariably bound to mislead, deceive and to create confusion amongst the consumers as to the origin of the goods. This shall in turn enable the Respondent to take unfair advantage of the repute of the Complainant's trademark much to the Complainant's detriment.
18. The Complainant stated that the likelihood of confusion and deception amongst the ordinary consumer is very likely as similar trademark, on similar packaging, with similar colors is being used by the Respondent for identical goods which are sold under the same roof and are used and purchased by the same class of consumer. It is

enabling the Respondent to pass-off their goods as the goods of the Complainant, to the detriment of the business interest of the Complainant.

19. The Complainant alleged that the use of similar trade name by the Respondent is completely dishonest and fraudulent, which is not permitted under law.
20. The reliefs claimed in the Complaint are as follows:
  - I. Provide relief for breach of clause (a), (b) and (d) of subsection (2) of Section 10 of the Act;
  - II. Permanently restrain the Respondent, its agents, distributors, servants, dealers, workman, affiliates, employees and all representatives from indulging in deceptive marketing practices through the use of similar trade/word mark (Tara), with similar packaging and similar color on its similar product (SSP), or as part of its trade name or company name;
  - III. Order the Respondent to immediately remove from the market all products, publications and material bearing a similar trademark, packaging and color of SSP bags;
  - IV. Restrain the Respondent from fraudulently using the Complainant's trademark as part of its trade name; and
  - V. Provide any other relief deemed appropriate in the said circumstances of the case.

### **C. RESPONDENT'S REPLY**

21. Before proceeding further it is pertinent to mention that five separate reminder letters were sent to the Respondent on different addresses before a reply was received from the Respondent. The details of the attempts are as under:
  - i.* On 9 June, 2014, a letter was written to the Respondent on the address provided by the Complainant in the Complaint i.e. *House No. 550-F/2, Wapda Town, Lahore*, along with the Complaint filed by the Complainant. However no response was received from the given address within the time provided.
  - ii.* Therefore, two reminders were sent to the Respondent on the aforementioned address dated 8<sup>th</sup> of August, 2014 and 21<sup>st</sup> of October, 2014.
  - iii.* The Complainant was then directed on 10<sup>th</sup> of December, 2015, to provide the registered address of the Respondent by obtaining Form-21 filed by the Respondent. On 18<sup>th</sup> of December, 2015, the Complainant provided the enquiry committee with the Form-21 of the Respondent showing its registered office at *4-Mujtaba Canal View Housing Scheme, Near Pepsi Cola Godown, Vehari Road, Multan*.

- iv. Relying on the above information, a reminder was sent on the registered address on 29<sup>th</sup> of Dec, 2015. However, no reply was received from the Respondent within reasonable time.
  - v. The Complainant was then requested to seek a valid address of the Respondent from market search and the supplier of packaging referred to in the Complaint. The legal counsel to the Complainant then, in an email, provided the enquiry committee with Respondent's manufacturing plant address situated at *Kala Khatai Road, Lahore*, along with the Respondent's other contact details. The legal counsel also provided information through market resources that the Respondent's product was still being loaded and dispatched from Godowns near *Saggian Pull More, Kot Abdul Malik, Lahore*.
  - vi. The Enquiry Committee sent a reminder on 26<sup>th</sup> January, 2016 at the latest address provided by the Complainant, however, the Respondent could not be located by the courier services at the destination and the same was returned to the Commission's office.
  - vii. The Enquiry Committee then made an attempt to communicate with the Respondent via a phone number provided by the Complainant. The Respondent responded to the phone call after several attempts and was directed to submit a reply to the letters written.
  - viii. The Respondent submitted a reply to the letter sent to him dated 29<sup>th</sup> of December, 2015 (*referred to in para 20(iv) above*), which was received at the Commission's office on 16<sup>th</sup> of February, 2016.
22. It was submitted by the Respondent that their company has been selling its product SSP under the brand name "**Watan SSP**" which is clearly visible, prominent and printed on its bag and that it had no intentions to mimic the Complainant's product.
23. Moreover, the Respondent submitted that to establish good competitive environment in the market, it is ready to rectify/change the printing of the bags so as to satisfy the complaint of the Complainant.

#### **D. REJOINDER**

24. The reply by the Respondent was sent to the Complainant on 19<sup>th</sup> of February, 2016 to obtain a reply/rejoinder on the response.
25. The legal counsel to the Complainant sent a rejoinder on 25<sup>th</sup> of February, 2016, wherein it reinforced the allegations made in the complaint. It further submitted that the Respondent has refused to accept the breach of the provisions of the Act, for

which a direction may be issued to the Respondent, restraining it from committing breach.

## **E. ANALYSIS**

26. The following paragraphs shall seek to provide a detailed discussion and analysis, in light of the aforementioned facts, to consider whether there has been a, *prima facie*, violation of provisions of Section 10 (1) of the Act in terms of Section 10 (2) (a), (b) and (d) of the Act.
27. In doing so, the Enquiry Committee wish to identify three distinct issues:
  - I. Whether the allegations levied against the Respondent under the Complaint constitute a, *prima facie*, violation of section 10 (1) of the Act in terms of Section 10 (2) (d) of the Act i.e. fraudulent use of another's trade mark, product labeling or packaging; and
  - II. If so, whether the allegations levied against the Respondent under the Complaint constitute a, *prima facie*, violation of section 10 (1) of the Act in terms of Section 10 (2) (a) of the Act i.e. distribution of false or misleading information that is capable of harming the business interest of another undertaking.
  - III. And, whether the allegations levied against the Respondent under the Complaint constitute a, *prima facie*, violation of section 10 (1) of the Act in terms of Section 10 (2) (b) of the Act i.e. 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.

<p><b>I. WHETHER THE ALLEGATIONS LEVIED AGAINST THE RESPONDENT UNDER THE COMPLAINT CONSTITUTE A, <i>PRIMA FACIE</i>, VIOLATION OF SECTION 10 (1) OF THE ACT IN TERMS OF SECTION 10 (2) (D) OF THE ACT I.E FRAUDULENT USE OF ANOTHER'S TRADE MARK, FIRM NAME, OR PRODUCT LABELING OR PACKAGING.</b></p>
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28. The Complainant has invoked the jurisdiction of the Honorable Commission by virtue of clause (d) of subsection (2) of Section 10 of the Act i.e. '*fraudulent use of another's trademark, firm name, or product labeling or packaging.*'
29. In the said provision, reference has been made to the word 'trademark' and not 'registered trademark.' Hence it has been alleged by the Complainant that a violation of the same would occur if one person fraudulently uses another's trademark, whether registered or not. A violation of clause (d) of subsection (2) of

Section 10 of the Act would also occur if one person fraudulently uses another persons' product labeling or packaging.

30. It has been claimed by the Complainant that the right in a trademark does not arise from its registration but arises, in fact, from its use. The Complainant has submitted that it has been using the trademark 'Tara' since 2006 for the aforementioned Tara Products. Ergo it may reasonably be presumed that the rights of the Complainant in the trademark Tara would have deemed to accrue since 2006.
31. It has further been alleged by the Complainant that under the Trademark Ordinance, 2001 (hereinafter the '**TM Ordinance**'), the registration of a trademark is not compulsory and it remains optional for the trademark owner to register its trademark. Registration of a trademark under the TM Ordinance is considered, *prima facie*, evidence of ownership and only seeks to provide registered trademark holders enhanced remedies, including remedies at custom frontiers.
32. Therefore, in case of a dispute the right of a prior user is superior, even where the subsequent user has a registered trademark (in this case, the Respondent has not registered the use of the trademark either). Reference in this regard is made to the judgment of Durafoam (Pvt.) Limited vs. Vohra Enterprises (Pvt.) Ltd, 2002 CLD 1639.
33. It is submitted that the Complainant's trademark Tara for some of its Tara Products, including urea and Dap, has already been registered with the Trademarks Registry.
34. It has also been alleged by the Complainant that they have been using their requisite trade dress/ packaging since 2009, thereby vesting them with the exclusive rights since the said year. Furthermore, the Complainant has also moved an application for the registration of its trade dress/ packaging with the Trademarks Registry.
35. In order to establish their use of the trade dress/ packaging since 2009, the Complainant has submitted a variety of evidence along with the Complaint. These include; quotation letters and acceptance of the same for manufacturing the Tara SSP Bags in their signature orange color for the years 2009-2014 alongside various promotional materials to establish the continuous use of their packaging since 2009 (such as a 2009 diary/planner, flyers, eid cards, wall calendar etc.)
36. It seems pertinent to consider what the Honorable Commission has previously declared on similar issues. Reference has been made to In the Matter of Complaint filed by M/s. DHL Pakistan (Pvt.) Ltd<sup>2</sup> (hereinafter the '**DHL Order**'), Para 47 of the Order, the Honorable Commission has held:

*'In a larger sense, trademarks promote initiative and enterprise worldwide by rewarding the owners of trademarks with recognition and financial profit. Trademark protection also hinders the efforts of*

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<sup>2</sup> [http://www.cc.gov.pk/images/Downloads/dhl\\_pakistan.pdf](http://www.cc.gov.pk/images/Downloads/dhl_pakistan.pdf)



*unfair competitors, such as counterfeiters, to use similar distinctive signs to market inferior or different products or services. This enables people with skill and enterprise to produce and market goods and services in fair conditions, thereby facilitating international trade.'*

37. It has been submitted by the Complainant through their Complaint that the *'Respondent has fraudulently adopted the Complainant's packaging including exact color in order to deceive the consumer. The Respondent is also using its alleged trade name as a trademark on its products in order to perpetuate fraud.'*
38. Furthermore, the Complainant has also made reference to the Respondent's act of *'using 'Tara Fertilizer' at the top of the bag in a trademark sense to give an impression to the Consumer that it is 'Tara SSP' of the Complainant.'*
39. It was felt pertinent by the Enquiry Committee to compare both the product bags of SSP and determine whether there was in fact a, *prima facie*, violation of Section 10 (1) of the Act in terms of Section 10 (2) (d) of the Act.
40. The Complainant's SSP Product Packaging is as follows:



41. It may be seen from the above image that the Complainant uses a distinct, bright orange color to market its SSP product bag. The bag contains the word 'Tara' (in

English) surrounded by Green color along with star emblem on top, which is also in green color. The same bag also contains the word Tara in Urdu in bright pink color. It may reasonably be assumed that it is the brand name 'Tara' along with the star emblem on top in green, which draws attention when one first looks at the bag in a cursory manner.

42. The following is the Respondent's SSP bag:



43. The Respondent also uses the same distinct, bright, orange color to market its SSP product and has, like the Complainant, chosen to use almost the same shade of green for writing the text on the bag. However, instead of 'Tara SSP' the Respondent's product is marketed as 'Watan SSP' with word 'Tara' mentioned at the top of the bag in Green color, which is the registered name of the Respondent's company i.e. Tara Fertilizer Pvt. Ltd, along with the star emblem also in Green color.
44. The Respondent's product bag does not have the white outside edges noticeable in the Complainant's product bag but both parties have chosen to mention the weight and other particulars of the product in black color on the bag.

45. From the above photographs it may be ascertained that both bags appear to share the same packaging color and are of the same material and feel. The Respondent has imitated the Complainant's trademark (Tara) on its bag, however, the Respondent has also exhibited its own company name twice on the bag, which is also Tara Fertilizer.
46. It has also been alleged in the Complaint that the Respondent has started placing a polythene sheet within the bag, a method claimed by the Complainant to be exclusive to them.
47. The Respondent is furthermore having its packaging bags made from the same supplier as the Complainant, namely Poly Pack (Pvt.) Limited. The Respondent's bags are evidently so deceptively similar to the Complainants' that the laborers working for the aforementioned supplier got confused and ended up sending the Respondent's bags to the Complainant. The Complainant took strong action to this and accordingly wrote a letter of caution to the aforementioned supplier on 20 November, 2012.
48. However, this does not detract from the observation that for an ordinary consumer of SSP, most likely an illiterate farmer, the two bags may appear similar and potentially deceptive.
49. In light of para 30 to 48 above, it is concluded that the purpose of using word Tara by the Respondent, on the packaging of the product was to take benefit of the goodwill attached to it and attract the consumers. Therefore, the act of using word Tara (Trademark of the Complainant) by the Respondent (Registered Company name of Respondent) on the packaging of its product is, *prima facie*, deceptive in nature. Therefore, the Respondent appears to be in violation of Section 10 (1) of the Act in terms of Section 10 (2) (d) of the Act which prohibits *fraudulent use of another's trademark, firm name, or product labeling or packaging*;

**II. WHETHER THE ALLEGATIONS LEVIED AGAINST THE RESPONDENT UNDER THE COMPLAINT CONSTITUTE A, PRIMA FACIE, VIOLATION OF SECTION 10 (1) OF THE ACT IN TERMS OF SECTION 10 (2) (A) OF THE ACT I.E. HARMING THE BUSINESS INTEREST OF ANOTHER UNDERTAKING**

50. The Complainant has, vide its Complaint, also alleged that the actions of the Respondent are adversely harming its business interests under clause (a) of subsection (2) of Section 10 of the Act.
51. It is submitted that the distribution of false/ misleading information is generally capable of harming the business interests of any party being subjected to it, alongside misleading the consumers.

52. The reputation earned by the Complainant's trademark Tara is emphatically established by the sales and revenue figures of the Tara Products in Pakistan. Year by year production and revenue figures of each aforementioned product is tabled below.

53. Production and Revenue Figures of the Tara Products:

<b>Year</b>	<b>Production (UREA) M.Ton</b>	<b>Production (SSP) M.Ton</b>	<b>Production (DAP) M.Ton</b>	<b>Revenue (Rs. Million)</b>	<b>SSP Revenue (Rs. Million)</b>
2006-2007	371,400	82,090	24,343.00	3,343,016,107	400.552
2007-2008	369,800	7,696	46,589.43	5,701,113,286	0.873
2008-2009	383,105	113,819	138,423.05	12,496,644,644	1546.574
2009-2010	369,933	78,137	123,604.70	11,498,673,160	1126.941
2010-2011	216,836	89,591	62.25	3,693,276,506	1962.737
2011-2012	156,645	31,733	-	4,379,867,759	688.513
2012-2013	-	51,465	-	-	842.156

54. The new management in the year 2006 and thereafter pursued an aggressive branding/ promotional strategy to establish the trademark Tara in the market. In this regard, details of year by year brand and promotional expenses (derived from the annual reports of the Complainant's Company) to establish the Complainant's trademark are as follows:

55. Branding/ Promotional Expenses:

<b>Year</b>	<b>Expenses (in Rs.)</b>
2006-2007	30,734,208
2007-2008	21,691,215
2009-2010	19,139,809
2010-2011	15,487,274
<b>Total</b>	<b>87,052,506</b>

56. The above figures seek to establish that the Tara Products manufactured by the Complainant and bearing the trademark have earned a substantial and enviable reputation in the market. The trademark Tara either, when used alone or in conjunction with any other word on the Tara Products, indicates and establishes to the consumers (and in particular the farmer community) that the same originates from and are the very goods manufactured and sold by the Complainant exclusively.

57. In order to strengthen its right in the trademark Tara, the Complainant has further applied for the registration of the trademark/ logo Tara as used alone and in conjunction with various other marks in its name. The official registration of the



trademark for Tara SSP is however currently pending.( Copy of the application is attached as Annex-1)

58. In this regard, we note that when an undertaking decides to start the business with a particular name, style or with a particular trademark or copyright, they are duty bound to ascertain and ensure that the same is not being used by any other undertaking. If such caution is not exercised before starting business activity and subsequent marketing campaigns are also launched, the entire responsibility as to the consequences shall rest on the undertaking, who uses the same or similar name and style, trademark or copyright deceptively that was already in the use of or was already owned by the other undertaking.
59. The Complainant through their Complaint submitted that the '*Respondent is engaged in misleading practices as it is passing off its bag as the bag of the Complainant. This in itself is sufficient to presume that it is resulting in harming the business interests of the Complainant.*'
60. Keeping in view the above, it appears that the Respondent through its packaging has infringed upon the rights of the Complainant, who is a prior user of the trademark TARA and who has invested considerable money and effort in establishing the brand TARA and created and established a rapport with the consumers i.e., the farmers regarding its products.
61. Therefore, we are of the view that the act of the Respondent which is capable of harming the business interest of Complainant constitutes a, *prima facie*, violation of Section 10 (1) of the Act in terms of Section 10 (2) (a) of the Act.

**III. WHETHER THE ALLEGATIONS LEVIED AGAINST THE RESPONDENT UNDER THE COMPLAINT CONSTITUTE A, *PRIMA FACIE*, VIOLATION OF SECTION 10 (1) OF THE ACT IN TERMS OF SECTION 10 (2) (B) OF THE ACT I.E. 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.**

62. The Complainant also further alleged that the use of the said mark without the Complainant's authority/ license is unlawful, illegal and an attempt to mislead and deceive the consumer.
63. The Honorable Commission has, in the case of Proctor and Gamble Pakistan (Pvt.) Limited (2010 CLD 1695<sup>3</sup>), noted that misleading information includes any

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<sup>3</sup> <http://www.cc.gov.pk/images/Downloads/Proctor-and-Gamble-Order-Finalized.pdf>

information that is capable of giving a wrong impression or idea, or is likely to lead to an error of conduct, thought or judgment, or which tends to misinform or misguide the consumer. It is furthermore an established view that it is not necessary that the deceptive information cause actual deception, but it is in fact sufficient that the misleading information tends to cause deception amongst the ordinary consumers.

64. The Honorable Commission has further held in its order In the Matter of M/s China Mobile Pak Limited and M/s Pakistan Telecom Mobile Limited<sup>4</sup>(hereinafter referred to as the ‘**Zong Order**’) that the term consumer, as referred to in Section 10 of the Act, has to be construed in the widest sense so as to refer to the ‘ordinary consumer,’ which is distinct from the concept of the ‘ordinary prudent man,’ as evolved under Contract Law. The Zong Order further holds that ‘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 “when looking at a deceptive commercial practice.”’
65. The Complainant had previously, on 14 November, 2012, through its legal counsel, served a legal notice upon the Respondent, demanding them to cease and desist from using the word Tara in a deceitful manner. The Respondent however chose not to respond to the legal notice. (Copy of the legal notice is attached as Annex-2)
66. It shall furthermore be noted that the Honorable Commission has vide its Order, dated 26 January, 2011, ‘In the Matter of the Acquisition of 79% Shares of Agritech Limited by Fauji Fertilizer Company Limited,’ observed that the Complainant’s product, Tara SSP, enjoys almost a 45% market share in Pakistan.
67. This Enquiry Report shall once again make reference to the DHL Order<sup>5</sup>, where in para 48, the Honorable Commission has made the following references:

*‘We also would like to refer to the judgments of Hoffmann-La Roche [1978] E.C.R. 1139, para.7, and Philips Electronics NV v Remington Consumer Products Ltd [2002] ECR I-0000; wherein it was held that “the essential function of a trademark is to guarantee the identity of origin of the marked goods or services to the consumer or end user by enabling him, without any possibility of confusion, to distinguish the goods or services from others which have another origin. For the trade mark to be able to fulfill its essential role in the system of undistorted competition, it must offer a guarantee that all the goods or services bearing it have been manufactured or supplied under the control of a single undertaking which is responsible for their quality”. It is also pertinent to highlight that in the judgments of Arsenal Football Club v. Matthew Reed [2003] RPC 9 and Loendersloot*

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<sup>4</sup> <http://www.cc.gov.pk/images/Downloads/ZONG%20-%20Order%20-%2029-09-09%20.pdf>

<sup>5</sup> [http://www.cc.gov.pk/images/Downloads/dhl\\_pakistan.pdf](http://www.cc.gov.pk/images/Downloads/dhl_pakistan.pdf)

*[1997] E.C.R. I-6227 it was observed that “for that guarantee of origin, which constitutes the essential function of a trade mark, to be ensured, the proprietor must be protected against competitors wishing to take unfair advantage of the status and reputation of the trade mark by selling products illegally bearing it.’*

68. Research on the World Wide Web indicates that no two competing products in the relevant product category are emulating the others product packaging and no other has opted to market its product with an orange color either (distinct to Tara Products).

69. Images of industry products are as follows;



70. It appears as though it is established practice in the fertilizer industry of Pakistan that a particular undertaking will chose a distinct color and design for its packaging. In this regard, Fauji Fertilizers Company markets its products using light peach/pink, Engro Fertilizers has chosen a light green for its product packaging and Jaffer Group uses a distinct style of white packaging with colored sides for each different product (as seen above).

71. It is hence submitted that the consumers of fertilizers, fungicides, herbicides, chemicals etc. are usually the farmer community. The majority of these comprise illiterate farmers, so much so, that the market is usually driven by the color of the bag. This is evident from the fact that all major manufacturers have specific colors for their various products, making it easier for the farmers to identify the respective products. Hence, it is not beyond plausibility that an ordinary farmer upon seeing

the Respondent's orange colored bag, may assume the Complainant as the product's rightful manufacturer.

72. In light of para 62 to 71 above, it is concluded that the packaging of the Respondent's product is capable of giving a wrong impression to the general public regarding the character, properties, suitability of use and quality of the product, in violation of Section 10 (1) of the Act in terms of Section 10 (2) (b) of the Act.

## **F. FINDINGS**

73. The Respondent's product, under the imitated trademark, is in total disregard to the proprietary rights vested in the Complainant in respect of the trade mark and trade dress, wherein trade dress means and includes *a product's physical appearance, including its size, color, design, and texture. In addition to a product's physical appearance, trade dress may also refer to the manner in which a product is packaged, wrapped, labeled, presented, promoted, or advertised, including the use of distinctive graphics, configurations, and marketing strategies*<sup>6</sup>.
74. In the matter, the Respondent's packaging strongly possesses the ability to mislead the consumers and may induce them to make transactional/ financials decisions based upon the duplication of the Complainant's trade mark and trade dress.
75. That the Respondent's actions are likely to cause even more damage due to the fact that the products channels of trade and probable customers of the Complainant and those of the Respondent are the same, in the light of which, the customers are, *prima facie*, at the risk of being deceived constantly.
76. That the Complainant's business interest is harmed as a result of the Respondent's infringement of the exclusive trade mark and trade dress. In the event, that the Respondent is allowed to carry on with its deceptive and unfair practices, the Complainant will suffer substantial business losses and suffer irremediate harm to its goodwill, reputation and exclusivity.
77. In view of the above it can easily be established that the Respondent, by using trademark and trade dress of another manufacturer, has enjoyed the goodwill and reputation of another entity. Therefore, the Respondent has, *prima facie*, entered into deceptive marketing practices, in violation of Section 10 (1) of the Act in terms of Section 10 (2) (a), (b) & (d) of the Act.

## **G. RECOMMENDATIONS**

78. It is deducible that misleading information always attracts consumers to purchase the products of low quality which provides undertakings a competitive edge over

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<sup>6</sup> <http://legal-dictionary.thefreedictionary.com/Trade+Dress>



the competitors. Thus, in order to protect public interest, the undertakings should be discouraged from selling their products in a deceptive manner and be directed to adopt such practices which are transparent and give consumers/customers true and correct information about their products. Under the circumstances, it is recommended that a show cause notice may be served upon the Respondent for violating the provisions of Section 10 (1) of the Act in terms of Section 10 (2) (a), (b) & (d) of the Act.

79. The deceptive marketing practices have a direct impact on the public at large. It is therefore, in the interest of the general public that the respective undertaking should be restrained from advertising their products/services in an unfair and misleading manner and instead be encouraged to resort to advertising practices which are transparent and give consumers/customers true and correct information.
80. *Prima facie* violations under the Act, in terms of the findings of this Enquiry Report, warrant initiation of proceedings against the Respondent under Section 30 of the Act.

Noman Laiq  
(Enquiry Officer)

Riaz Hussain  
(Enquiry Officer)

Urooj Azeem Awan  
(Enquiry Officer)